IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13745/2019

[*Reportable*]

In the matter between:

NOMGCOBO JIBA	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SPEAKER OF PARLIAMENT	Second Respondent
MINISTER OF JUSTICE	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
JUSTICE MOKGORO N.O.	Fifth Respondent
KGOMOTSO MOROKA N.O.	Sixth Respondent
THENJIWE VILAKAZI N.O.	Seventh Respondent

JUDGMENT: 18 OCTOBER 2019

Henney, J

Introduction and background

[1] These proceedings are concerned with the removal of one of the Deputy

National Director of Public Prosecutions ("DNDPP") of South Africa and in particular, the removal of the Applicant as the DNDPP by the President of the Republic of South Africa ("the President"). The process which led to the removal of the Applicant as DNDPP started on 1 August 2018 when the President, informed the Applicant by means of a notice[1] of intention to suspend and the institution of the enquiry in terms of section 12(6) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) of his intention to do so.

In these proceedings before this Court, the Applicant was represented by Adv M Sikhakhane SC and Adv T Masuku SC. The First Respondent was represented by Adv H Barnes, Adv T Babuda and Adv S Kazee. The Second Respondent was represented by Adv K Pillay SC. The Third Respondent was represented by Adv L Montsho SC and Adv K Saller and Adv M Ngunela. The Fourth Respondent was represented by Adv S P Rosenberg SC, Adv N Mayosi and Adv J Bleazard. No appearance was made for the other respondents because no relief was sought in these proceedings.

[2] In his notice to the Applicant on which he bases his decision, the President states the following: "*I refer you to the judgments in the High Court of Freedom under Law v NDPP and others 2018 (1) SACR 436 (GP) the split decision by the Supreme Court of appeal in Jiba and Another v General Council of the Bar of South Africa and another, Mrwebi v General Council of the bar of South Africa (141/17; 180/17) [2018] ZASCA 103 (10 July 2018).*

These judgments in turn referred to the previous judgments of Booysen v Acting

[1] NJ1 page 172 of the record

National Director of Public Prosecutions and others [2014] 2 ALL SA 319 (KZD). As you are aware section 9 (1) of the National Prosecuting Authority Act provides that a Deputy Director of Public Prosecutions must-

"(a) possess legal qualifications that would entitle him or her to practice in all court in the Republic; and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with responsibilities of the office concerned."

I cannot underscore the importance of the public's trust in the National Prosecuting Authority and its most senior management. It is a Constitutional institution that is central to the proper administration of justice. Doubts about the fitness and integrity of anyone in so senior position as you help jeopardises this trust and the ability of the NPA as a whole. The allegations made in these various judgments had been in the public domain for many years now, and despite the litigation at issue not reaching the conclusion the pronouncements by these various members of the judiciary have negatively tainted the image of the NPA and will continue to do so until fully ventilated and addressed.

Under the circumstances I think it appropriate to institute an inquiry in terms of section 12 (6) of the Act as well as pressing you on suspension, on full pay, pending finalisation of the inquiry. The inquiry will examine your fitness to hold office as Deputy National Director of Public Prosecutions having regard to the various judgments cited above and your conduct in these matters.

I hereby afford you an opportunity to make submissions to my office why I should not suspend you pending this inquiry, by 10 August 2018 at the latest."

[3] In response to this invitation to make representations the Applicant, on 10 August 2018, made a 78 page submission to the President wherein she stated that; on the basis of these submissions it is clear that any enquiry under section 12 (6) of the NPA Act is undesirable and it would be contrary to the Constitution for the President to establish such an enquiry at that stage or even suspend her pending that enquiry.[2]

[4] The President gave his response to these submissions in a letter[3] dated 24 October 2018 which can be summarised as follows:

i) that he has decided on the basis of the numerous factual and legal issues raised in the various court judgments in which adverse findings were made against the Applicant and her submissions made in response thereof ought best to be dealt with by an enquiry established in terms of section 12 (6) of the NPA Act;

ii) that he has furthermore decided it is in the interests of the image and integrity of the NPA that the Applicant be suspended pending the finalisation of the enquiry which suspension, in terms of the court order in *Corruption Watch NPC and Others v President of the Republic of South Africa and others; Nxasana v Corruption Watch and others (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018), will last a maximum of six (6) months;*

iii) That he has made his decisions based on the fact that regardless of the Constitutional Court's decision in the *GCB* appeal of the SCA judgment on her fitness to be an advocate, the question remains whether or not she is fit to hold senior positions in the NPA. He further said that it is a question that requires an

[2] NJ2 page 174-251 of the record.
[3] NJ3 page 257 of the record.

answer urgently in order for the NPA to do its work with the public's full confidence in his leadership.

iv) He furthermore stated that he fully appreciates that should the General Council of the Bar (*GCB)* succeed in its appeal this question would be moot, but believes that it would serve the Applicant and the NPA as a whole to have conclusive findings on her fitness to hold this position in a matter of months. He further stated that he has no way of knowing when the Constitutional Court might make its decision.

v) That he has also taken into account the serious nature of the allegations that she is unfit to be in so high an office where the work of our criminal justice system is central to the critical pressing matter of all prosecutions, especially prosecution of corruption cases and safeguard of our public purse;

vi) That she holds a senior position with influence over a large swathe of the NPA and therefore it is in the interests of the NPA's image as a whole that he considered it.

vii) She was further informed that the enquiry will investigate whether or not she is guilty of misconduct in the manner in which she dealt with the *Mdluli* case, especially in relation to her attitude towards the courts from a position as a senior leader in the NPA. She was further informed that the enquiry will consider whether or not her actions in this case evince any form of incompetence or incapacity. And whether seen as a whole, her actions were indeed the proper exercise of a prosecutorial discretion or more indications of whether she is not being fit and proper to hold these positions. Including whether she brought the NPA into disrepute.

[5] On 9 November 2018 the President, by Presidency Notice 699 of 2018, published the terms of reference of this enquiry, to be held under the

chairpersonship of *Madam Justice Yvonne Mokgoro*.[4] This enquiry was concluded and on 4 April 2019 the President invited the Applicant to give reasons why he should not implement the recommendations of the enquiry report that she should be removed from office. And she was requested to send any written submissions to the office of the President by close of business on Tuesday, 16 April 2019[5].

[6] On 18 April 2019, the Applicant submitted her report through her attorney to the office of the President, wherein she requested that the President should not accept and implement the findings and recommendations of the enquiry report for her removal from office as DNDPP and that he should reinstate her back into her position. She further requested that in the event that the President is not persuaded to accept her request not to be removed from office that the President transfer her within the public service to an appropriate post commensurate with her position of DNDPP.

[7] The President, in a letter dated 25 April 2019[6], informed the Applicant that he has decided to remove her from office in terms of section 12 (6) (b) of the NPA Act. In this letter, the President informed the Applicant that the findings against her, based on the evidence before the panel, are of a very serious nature and that the submissions she made do not offer any response or reason not to accept the panel's conclusion on the following matters:

a) That the panel found that she lied to him. The panel made the finding after noting that the Applicant in her submissions of 10 August 2018 indicated that she appointed prosecutors from outside KZN, in the *Booysen* matter, on request of the

[4] NJ4 page 259 of the record.
[5] NJ5 page 271.
[6] NJ 7 page 313 and on 314

Acting DPP of KZN. However that in a statement under oath before the Panel she said that this was not the case.

b) That the panel concluded that she acted under external pressure in making decisions on the charges against General Booysen on the basis of what was said to her by IPID officials.

c) That the panel determined that she failed to review or consider the representations made to review the decision by Advocate Mrwebi to withdraw the charges against Mr Mdluli.

d) That the panel found that she brought the NPA into disrepute; and

e) That the panel concluded that she lacked the necessary conscientiousness and independence required for her position.

[8] She was further informed that her removal as DNDPP takes effect immediately, as of 26 April 2019 and informed that section 12 (6) (b) of the NPA Act makes it plain that Parliament is not asked to confirm any decision he makes but to consider whether after removal, she ought to be restored to her position. And that until Parliament take such a resolution, his decision to remove her stands. As a consequence of this, the National Prosecuting Authority ("the NPA") in a letter dated 3 April 2019[7] informed the Applicant that pursuant to her dismissal by the President which took effect on 26 April 2019, the National Prosecuting Authority has terminated her employment and service as Deputy National Director of Public Prosecutions.

[9] Based on these events as set out above and aggrieved by her removal from office, the Applicant launched this application by way of notice of motion on an

[7] NJ 8 base 316.

urgent basis by means of interim relief as set out in Part A, ("these proceedings") pending the hearing and final determination of Part B of the application. In these proceedings, the Applicant only seeks relief against the President and the fourth respondent, the National Director of Public Prosecutions ("the NPA"). The second respondent, the Speaker of the National Assembly ("the Speaker"), does not oppose the application and abides with the decision of this court in these proceedings. The third respondent, the Minister of Justice ("the Minister") together with the President and the NPA opposes this application. During the course of the judgment, I will at some stages refer to them collectively as the opposing respondents.

The Relief the Applicant seeks in these proceedings

[10] In these proceedings the Applicant seeks the following relief pending the final determination of Part B, of this application:

a) That it be declared that the decision of the President and the NPA to remove her from office as a DNDPP with effect from 26 April is in violation of the Constitution and unlawful;

b) That it be declared that the implementation of that decision by the President and the NPA on 25 April 2019 including the termination of her salary and associated employment benefits as a DNDPP is in violation of the Constitution and unlawful;

c) *That the President and the NPA are ordered to reinstate the Applicant to her position as DNDPP with all associated employment* benefits with immediate effect;

d) That the President and NPA are interdicted and prohibited from filling the position from which the Applicant has been removed as a DNDPP pending the completion of the parliamentary process envisaged in section 12 of the NPA Act;

e) That pending the outcome of the application for orders in terms of part B, the parliamentary process in terms of section 12 be stayed.

[11] The relief the Applicant is seeking in Part B of this notice of motion, deals with the constitutionality of section 12 (6) of the NPA Act. In that the President violated the Constitution and acted unlawfully when he instituted an enquiry in terms of section 12 of the NPA Act. Alternatively, that the terms of reference and institution of the *Mokgoro Inquiry* be reviewed and set aside on the basis that they amounted to an unconstitutional investigation into binding court judgments and orders and or violated the principle of prosecutorial independence.

[12] Furthermore, that the findings of the *Mokgoro Inquiry* into the fitness of the Applicant to hold office be set aside on the basis that they were irrational and inconsistent with proven facts and violated the principle of prosecutorial independence. And that the President's decision to accept the recommendations of the *Mokgoro Inquiry*, was unreasonable, irrational and unlawful in that it amounted to a violation of the principle of prosecutorial independence.

[13] Furthermore that the President's decision to ban the Applicant from assuming any position in the public service on account of the recommendation of the *Mokgoro Inquiry* was unconstitutional, irrational and unreasonable. Lastly, that the report of the *Mokgoro Inquiry* into the Applicant's fitness to hold office in the DNDPP be declared unlawful and therefore a nullity.

Applicant's Case

[14] The Applicant's challenge against the decision of the President to remove her from office is based on two fundamental grounds. Firstly, that the President acted in violation of an order granted by the court in *Freedom Under Law v National Director of Public Prosecutions and Others 2018 (1) SACR 436 (GP) ("the FUL matter")*, where *Mothle* and *Tlhapi JJ* (concurring) and *Wright J* (dissenting) in proceedings where the previous President of this country were directed to institute disciplinary proceedings against the Applicant and Mr Mrwebi, issued the following order in paragraph 108.3 "... *The President is directed to institute disciplinary enquiries against Jiba and Mrwebi into their fitness to hold office in the National Prosecuting Authority, and suspend them pending the outcome of those enquiries. It is further ordered that the implementation of this specific order be suspended pending the outcome of the outcome of the appeal of the General Council of the Bar judgment.*

[15] The court in the *FUL* matter deemed it necessary to issue such an order after the court in the case *of General Council of the Bar of South Africa v Jiba and Others 2017 (1) SACR 47 (GP) (2017 (2) SA 122; [2016] 4All SA ("the GCB matter),* ordered that the Applicant and Mrwebi be struck from the roll of advocates and when it gave judgment in the *FUL* matter there was still an appeal by the Applicant pending in the SCA regarding the *GCB* matter.

[16] The reasoning why the court in the *FUL* matter came to such a conclusion[8] was due to the fact that in the *GCB* matter in the court a quo a distinction was drawn between fitness required to be an advocate and fitness required to be an official in

[8] See paragraph 97 -99

the NPA. On the basis that the court in the *GCB* judgment examined the requirements of the Admission of Advocates Act on the one hand and the NPA Act on the other hand. And the court in the *GCB* judgment concluded that while the one may have an impact on the other, the two are capable of being delinked. The removal of the Applicant and Mrwebi from the roll of advocates, will certainly impact on their fitness to hold office as employees of the NPA. It concluded, however that an advocate in good standing may not necessarily be fit and proper to hold office in the NPA.

[17] The court in the *FUL* matter came to the conclusion that upon completion of the prosecution of the appeal processes in the *GCB* matter it transpired that the Applicant and Mrwebi remain struck from the roll of advocates by operation of law and cease to be officials in their respective capacities in the NPA. If the appeal in the *GCB* matter should however be successful they may be declared to be advocates in good standing in which case the question of the standing and fitness to continue as officials in the NPA will have to be addressed.

[18] The appeal process in the *GCB* matter, the court held that it may have an impact on the remedy sought in the application in the *FUL* matter. And to direct the President then to suspend and hold enquiries against Jiba and Mrwebi forthwith might result in an exercise running parallel with the appeal process with the risk of a waste of resources in the event the appeal process fails.

[19] Subsequently the SCA on 10 July 2018 in the matter of *Jiba and Another v General Council of the Bar of South Africa and another 2019 (1) SA 130 (SCA)*

overruled the earlier decision in the *GCB* matter that the Applicant be struck from the roll of advocates. The Applicant was then reinstated as a consequence of this decision by the SCA onto the roll of advocates. The *GCB* then took this decision on appeal to the Constitutional Court. This appeal was heard on 14 March 2019 and judgment was given on 27 June 2019.

[20] The Constitutional Court in *General Council of the Bar v Jiba and Others [2019] ZACC 23* concluded, that the main thrust of the appeal by the *GCB* was whether there was an erroneous application of the three stage test by the majority of the court in the SCA, in determining whether the Applicant (Jiba) and others are fit and proper persons to be on the roll of advocates and that was a question of fact which does not raise a constitutional issue to establish whether the constitutional court has jurisdiction to hear the appeal.[9]

[21] The court therefore concluded that it did not have jurisdiction to hear the appeal on the question whether the Applicant and Mrwebi as decided by the majority in the SCA, were fit and proper persons to remain on the roll of advocates. The Applicant therefore, in this matter submits that the President when he made his decision on 1 August 2018, to start the process to suspend and remove her from office, was in violation of the order in the *FUL* judgment, because the appeal process after the SCA upheld her appeal that she must not be removed from the roll of advocates, was not concluded. It was only concluded on 27 June 2019 when the Constitutional court finally pronounced on her fitness to be an admitted advocate.

[9] see paragraph 48 -50 of the judgement of Jafta J.

[22] She contends therefore that the President could not have suspended her, nor could he have instituted an enquiry and nor could he have on the recommendations of the *Mokgoro Inquiry* have removed her from office, before this date. According to the Applicant, the whole process was therefore unlawful and unconstitutional and should be set aside.

[23] The second ground upon which the Applicant basis her application in these proceedings is that the President as well as the NPA in coming to the conclusion that she be removed from office based their decision on the wrong interpretation of section 12 (6) of the NPA Act. And to provide a better context and follow the arguments in a more discernible way it would be best at this stage to look at the provisions of this section. The relevant provisions of the Act which is sections 12 (5) to (8) as amended by the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and others; Nxasana v Corruption Watch NPC and others 2018 (10) BCLR1179(CC) they provide as follows:*

(5) The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).

(6)3(a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

(i) for misconduct;

(ii) on account of continued ill-health;

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

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

(b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

(7) The President shall also remove the National Director or a Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a), is presented to the President.

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

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

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

(b) The request in terms of paragraph (a) (ii) shall be addressed to the President at

least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

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

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

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

[24] The Applicant in this regard, submits that this section properly interpreted, requires the President to await the outcome of the parliamentary process before removing the Applicant. And the removal of her by the President would have been premature and unlawful. His decision to have her removed would have to be set aside together with its consequences. The President, the Minister and the NPA have totally misconstrued section 12 (6) of the NPA Act. The opposing respondents' contention that the parliamentary process is simply to check whether the President's removal could be reversed is untenable. And their contention that Parliament in effect must only deliberate on an existing removable is also untenable. This would entail two processes. According to the Applicant, the respondents are wrong on a plain reading of the subsection and the interpretation is untenable because it undermines the independence of the NPA and therefore unconstitutional.

[25] She further submitted that subsection (6) does not stand alone and it clearly states that the removal is subject to other provisions of the entire subsection. She contends that there is another reason that the interpretation is untenable because it undermines the independence of the NPA and is irrational. If the interpretation is to be followed it means that the President can simply remove the NDPP and the DNDPP on the basis of the grounds listed in section 12 (6) (a) (i)-(v) and debate the merits of it at a later stage. According to her if this were the case it would be would be open to abuse by the President and it would seek to advance a state of affairs where the President can exercise the power to remove untrammelled and debate the merits later. In this regard, the Applicant relies on the case of *Corruption Watch NPC (supra)* which dealt with an interpretation of section 12 (6) of the NPA Act, which prior to the amendment, gave the President the power to suspend the NDPP, without pay for an indefinite period which the court found to be unconstitutional.[10]

[26] According to the Applicant, her simple removal can mean that the NDPP or DNDPP would be removed by the President and the debate about restoration can go on for years and during these years the Applicant would be left without an income and severely prejudiced.

[27] The Applicant submits that it may very well be argued that the President's decision to remove her can be checked by Parliament but by the time that process happens, it could be too late. The Applicant further submits that even if she is wrong

[10] this section was subsequently amended with the inclusion with the inclusion of s. 12 (6) *(a*A*)* will be inserted, as follows: 'The period from the time the President suspends the National Director or a Deputy National Director to the time she or he decides whether or not to remove the National Director or Deputy National Director shall not exceed six months.'; and *(b)* s. 12 (6) *(e)* will read as follows (with insertions and deletions reflected within square brackets): 'The National Director or Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension of her or his full salary.'

on this point she submits that the President would not be entitled to remove her since her removal is not rational and not in good faith.

The Respondents submissions (President, Minister, NPA)

[28] All the opposing respondents (the President, Minister and NPA) characterises the relief sought by the applicant in respect of prayers 1 and 2 as final interdictory relief in the guise of interim relief pending the finalisation of Part B. This they alleged in their respective answering affidavits. The applicant it seems upon realising this does not dispute it. It is clear that in both these prayers a declaratory order is sought. In prayer 1, such an order is sought on the basis that the President and the NPA when they removed the applicant from office, violated the Constitution and acted unlawfully. And in prayer 2 that the implementation of the decision by the President and the NPA on 25 April 2019 including the termination of the salary and associated employment, the applicant seeks that such conduct also be declared in violation of the constitution and unlawful.

[29] In *V&A Waterfront Properties (Pty) Ltd and another v Helicopter and Marine Service (Pty) Ltd and others [2004] 2 All SA 664 (C)* the following was said by this court in dealing with this issue, especially where the court dealt with the question whether relief sought under the guise of an interim interdict can be regarded as such or whether if regard is to be had to the content of the relief sought such relief would be final in effect:

"***Interim or final interdict***

[9] A useful starting point is to determine whether the interdict sought by the applicants is interim or final."

The court further goes on to say:

"Moreover, the fact that the order sought may well only operate temporarily, does not convert it into an interim interdict. Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C) at 530. The right which I am called upon to determine is the claimed right of the applicants to insist that the second grounding order be obeyed by the respondents for so long as it stands. My decision on that question will finally determine such right; it will not preserve or restore the status quo pending the final determination of some other rights between the applicants and the respondents.

[10] It appears to me accordingly that the interdict sought by the applicants, though interim in form, is final in substance. See Law of South Africa (ed Joubert), Vol 11 (first re-issue) from paragraph 307; Harms: Civil Procedure in the Supreme Court at 500; Masuku v Minister van Justisie en andere 1990 (1) SA 832 (A) at 841C.

[11] The requisites for the granting of a final interdict are well settled. They are: (i) a clear or definite right, (ii) "injury" actually committed or reasonably apprehended; (iii) no adequate alternative remedy."

In *National Gambling Board v Premier, Kwazulu-Natal and others 2002 (2) SA 715 (CC)*, the Constitutional Court, where *Du Plessis AJ* made the following remarks about these two types proceedings:

"[*49] An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.*

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main

dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute.

[50] Whether a High Court will have jurisdiction to grant interim relief pending a matter exclusively within this Court's jurisdiction does not depend on the form or effect of the interim relief. It depends on the proper interpretation of the relevant provision and on the substance of the order: does it involve a final determination of the rights of the parties or does it affect such final determination? If it does not, the High Court will, depending on the provision that grants exclusive jurisdiction, have jurisdiction to grant interim relief." (Footnotes omitted)

[30] Furthermore in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and others 1986 (2) SA 663 (A)* the erstwhile Appellate division said the following regard at 681C-G.

"According to Van der Linde Institutes 2.1.4.7, an applicant for an interdict who is unable to prove a clear right may obtain interim relief in order to enable him to establish his right "in een volledige Regsgeding". The author therefore envisages a later and final determination of the existence of the right in question. Hence, as is stated in Joubert: The Law of South Africa vol 11 at 297, an interim interdict does not involve a final determination of the rights of the parties and does not affect such a determination. In short, an interim interdict serves to adjust the applicant's interests until the merits of the matter are finally resolved. That final decision has to be arrived

at by a court of law or, conceivably, another body or person such as an arbitrator. Consequently a temporary injunction does not necessarily constitute interim relief in the above sense: if an applicant seeks an interdict which is to be operative for a fixed or determinable period, it may still be final in its nature and effect: Fourie v Uys 1957 (2) SA 125 (C) at 126; Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C) at 530."

[31] The applicant's counsel also conceded that should the court grant such declaratory orders, it will be the end of the matter and there would be no need for any further hearing in Part B. The applicant's counsel did not attempt to explain, why declaratory orders were sought which were final in effect during these proceedings for interim relief. They only said that the court could and must grant such relief. I agree with the opposing respondents, that if such relief is being sought, a case must be made out for final relief and the requirements have to be complied with.

The permissibility of raising an issue for consideration to be dealt with in the review proceedings

[32] Before dealing with the question whether the applicant has satisfied the requirements for a final or interim interdict it is appropriate firstly to deal with the complaint by the opposing respondents that the applicant has in her replying affidavit, which is not disputed by the applicant, introduced a new basis for her relief in these proceedings which is that the President acted in violation of an order granted by the court in *Freedom Under Law v National Director of Public Prosecutions and Others 2018 (1) SACR 436 (GP) ("the FUL matter")*, where *Mothle* and *Tlhapi JJ* (concurring) and *Wright J* (dissenting) in proceedings not to proceed

with an enquiry into a fitness to hold office until the appeal process in the GCB matter has been finalized.

[33] All the opposing respondents submit that this is plainly impermissible because the applicant is bound by her pleaded case in the founding affidavit and she may not make out a new case in reply. The opposing respondents also submit that the applicant in these proceedings relies on the contentions in support of Part B of her application to found the relief sought in these proceedings. They contend that she must stand or fall on her pleaded case in the founding affidavit for the relief sought in prayers 1 and 2. Which is the removal from office prior to the conclusion of the parliamentary process, violated section 12 (6) of the NPA Act was therefore unlawful.

[34] The Minister in particular, submits that it is unfair of the applicant to expect of this court to grant an urgent determination of far-reaching final relief on the basis of some 1600 pages without the benefit of a final rule 53 record of the President's reasons. And that the applicant failed in terms of rule 6 (12) of the Uniform rules of this court, which allows that in urgent applications the court may dispose of the matter in a manner it seems meet. It requires however that an applicant for urgent relief … *"Shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that it could not be afforded substance that address at a hearing in due course."*

[35] The opposing respondents' also argued that only the second ground upon which the applicant basis her application in these proceedings, was pleaded in her founding affidavit may only be relied upon by the applicant. The President submits

that where the applicant does not limit the relief claimed in prayers 1 and 2 to the ground pleaded, which is whether she could have been removed by the President and the NPA before the parliamentary process had been concluded, she cannot also rely on the contentions in support of relief sought in Part B of the application to grant relief sought in prayers 1 and 2 of Part A in these proceedings. Where the *applicant* states in her heads of argument that … *"Assuming that we are wrong on this point [the interpretation of section 12 (6)], we submit that the President would not be entitled to remove the applicant in this matter since applicant's removal is not rational cannot in good faith. That cannot be disputed."*

[36] The President submits that these contentions can most certainly be disputed and have not been answered by him or the other opposing respondents because it forms, part of Part B of the application. And that the applicant may not permissibly rely on contentions made pursuant to Part B of the application to justify the relief she seeks in Part A.

[37] None of these submissions made by any of the opposing respondents either individually or collectively are disputed by the applicant, and I agree with them that this is clearly impermissible. They were called upon by the applicant to answer to the allegation that it was wrong for the President and the NPA to remove her from office before the conclusion of the parliamentary process, which according to the applicant was based on a wrong interpretation of the provisions of section 12 (6).

[38] It is for these reasons that *Froneman J* albeit in the context of the appealability of interim orders, but the principle remains the same, held, that there

should not be a conflation of the relief a party is seeking during the interim procedure with the relief a party would be seeking in the final order, in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)* ("*the OUTA judgment")* at paragraph 77 - 78 said the following;

"[77] This court has held that the 'interests of justice' test to determine whether direct appeals to this court should be granted is not dependent on the jurisdictional requirement of a 'judgment or order' within the meaning of s 20(1) of the Supreme Court Act. It has, at the same time, acknowledged that the policy considerations underlying the non-appealability of temporary orders remain relevant to the interests-of-justice inquiry under s 167(6)(b) of the Constitution read with rule 19 of this court's rules.

[78] It is as well to restate those considerations. If the grant of a temporary interdict were generally appealable the normal effect of granting leave to appeal would be that the temporary order would be stayed. That stay would destroy the main object of a temporary interdict — to maintain the status quo until the main case is finalised. The stay in turn may lead to an application for leave to execute, to put the order into operation again . In this inquiry, the court of first instance would have to determine harm and the balance of convenience on possibly incomplete information and later be asked to make findings that would contradict the effect of its original findings." (Footnotes omitted) (emphasis added)

[39] This followed on what *Moseneke DCJ* earlier on said in the judgment where he emphasised the difference in approach a court should be mindful of in the interim and final review processes:

"[31] Having granted leave to appeal, we must now decide the merits of the appeal. To do that, I need not determine the cogency of the review grounds. It would not be appropriate to usurp the pending function of the review court and thereby anticipate its decision. I have kept in mind that the rule 53 procedure might result in the lodging of a supplemented case record which would not be before an appellate court and which may entail new matters or disputes of fact which will best be dealt with by the review court itself. I nonetheless proceed to describe the subject-matter of the review for the restricted purpose of probing whether the high court was right in granting the interim interdict". (footnotes omitted) (emphasis added)

[40] Similarly in *Cronshaw and Another v Coin Security Group (Pty) Ltd 1996 (3) SA 686 (A) at 691 E-F,* a decision to which the Constitutional Court referred to in the above quoted judgment the following was said also in the context of the appealability of interim interdicts, but just as stated in the OUTA it emphasised the separate nature of the further proceedings dealing with the merits that follows upon the granting of an interim interdict.

"The court of first instance would then be required to reach a decision, on imperfect information, a second time, all with regard to the interim situation. If it be postulated that leave to appeal can and has been granted, the appeal court would have to reconsider that situation without being in a position to reach a final decision. From a practical point of view it seems preferable that the merits of the interdict be left for final determination at the trial, and that the interim relief, to which the balance of convenience is relevant, be considered once only."

[41] The initial case was not based, on the question whether the President's decision to institute the *Mokgoro* Inquiry into her fitness to hold office, was unlawful and unconstitutional because it was not in compliance with the court order in the *FUL* matter, not to proceed with such an enquiry until the appeal process in the *GCB* matter has been finalized. This was clearly understood only to be a matter to be dealt with in Part B or the final review application if one should have regard to what the applicant says in her founding affidavit at paragraph 40-41. To which the President replied at paragraph 66 and more particularly under the heading *"Adv Jiba's key arguments in support of the part B relief against the President."*

[42] It is also not disputed that the relief that the applicant is seeking, is far-reaching because it entails an order declaring the President's conduct to be declared unlawful and unconstitutional, and the reversal of the President's decision in the form of a declaratory order, instead of an order setting aside the actions of the President. The relief based on this ground is being sought rather belatedly in the replying stage of what initially was an application for interim relief. And it is not being sought on the basis that all the information had properly been placed before this court.

[43] Furthermore, without the benefit of the opposing respondents having been given a proper chance to answer especially to the allegation of a grave and serious violation of the Constitution by the President in that he disrespected the judicial authority of the courts, in terms of the provisions of section 165 of the Constitution, by failing to comply with a court order. In circumstances where it was not initially asked to meet in the applicant's founding papers. And as pointed out above, in the cases cited, there are sound and justifiable reasons why there is a difference

between the relief sought during the interim phase, and the relief that would be sought in the final review.

[44] The “new” relief, upon which the applicant basis her first ground is furthermore certainly not relief even though it was initially crafted in the form of an interim order requiring the court to restore or preserving the status quo pending the final determination of the applicant’s rights, it is undoubtedly relief of a final nature. What the applicant is further asking is drastic relief to resolve one of the disputes in the main application, which she did not ask for in her founding papers.

[45] It is trite that an applicant in motion proceedings is bound by what has been stated in his or her founding papers. Which a respondent is called upon to answer to and the issues to be adjudicated upon is to be found in the founding and answering papers. This principle was firmly laid down in the case of *Administrator*, *Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (A)* where the majority of the court at page 196 paragraph B-D said the following: … “*It was not for the appellants to show that the respondents were given a proper hearing; they were called upon only to meet the specific allegations put forward by the respondents in support of the relief claimed. The appellants were required to answer a case founded on the allegation of fact that the respondents were not given a hearing; they were not called upon in any other way to raise a valid defence to the relief sought. In particular, for instance, the question whether the hearing given was unduly limited in its scope was not an issue to which the appellants' deponents were required to address their minds.”*

[46] Similarly in *Molusi & Others v Voges NO & Others 2016 (3) SA 370 (CC)* the Constitutional Court held at paragraph 27:

"It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in Sunker [Naidoo & Another v Sunker & Others [2011] ZASCA 216]:

"If an issue is not cognizable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties… should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts]… must ... formulate his case sufficiently clearly as to indicate what he is relying on."

[47] It would therefore be unfair and not be in the interests of justice for the court to grant such drastic relief against the President and the NPA under circumstances where they have not been asked in these proceedings to answer to, which they were made to believe would not be the same relief that the applicant would be seeking in Part B. It would clearly be an ambush and not in conformity with the *audi alteram partem* rule, to grant such relief. The applicant therefore in my view, is not entitled to interdictory relief, at least at this stage, based on this ground.

<u>The Proper Interpretation of Section 12(6) of the NPA Act</u>

[48] This brings me to the second ground upon which the applicant relies, which is that the removal from office prior to the conclusion of the parliamentary process, in terms of section 12 (6) of the NPA Act was unconstitutional and unlawful. As pointed out above it seems that this relief although framed as interim relief it seems to be

relief of a final nature, as conceded by the applicant.

[49] The applicant therefore has to show that she has a: a) clear or definite right; b) an injury or harm has actually been committed or reasonably apprehended; c) no adequate alternative remedy. This is clearly interdictory relief which would intrude upon the exercise of the constitutional functions of the executive as well of as the legislative arm of government. Whilst the Speaker of the National Assembly did not oppose the application in these proceedings the consequences of an order in favour of the applicant would impede or prevent the National Assembly from exercising its functions in terms of section 55 (2) (a) and (b) of the Constitution, which provides that the National Assembly must provide mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of the National Executive Authority, including the implementation of legislation and any organ of state.

[50] More particularly, in this case, the oversight function the National Assembly has to perform after the removal of a NDPP or DNDPP in terms of section 12(6) (c) of the NPA Act. In respect of the President, the applicant seeks a review of the powers of the President in the execution of his constitutional duties in terms of section 84 (1) of the Constitution and more especially, in terms of section 12 of the NPA Act regarding his functions in respect of the National Prosecuting Authority. In terms of section 84 (1) of the Constitution … "*(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of state and head of the national executive"*

[51] The appointment and the removal of the NDPP and or DNDPP, are clearly a constitutional function entrusted to the President in terms of section 84 (1) read with section 179 of the constitution and section 12 of the NPA Act. In this regard *Binns-Ward J* recently in the decision *of Mohlaloga v Speaker of the National Assembly of the Republic of South Africa [2019] ZAWCHC 31* (26 March 2019) albeit in the context of granting interim relief to restrain Parliament from exercising a function and after relying on the decision of *Ncgobo J* in *Doctors for Life International v Speaker of the National Assembly and Others [2006] ZACC 11, 2006 (6) SA 416 (CC) 2006 (12) BCLR 1399 (CC)* said the following, "... *Considerations of comity between the three arms of the state militate against a too ready willingness by the courts to intervene in such situations in the ordinary course"*.

In *Doctors for Life International, Ncgobo J*, said the following in this regard:

"68. Courts in other jurisdictions, notably in the Commonwealth jurisdictions, have confronted this question. Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a "settled practice" or general rule of jurisdiction that governs judicial intervention in the legislative process."

And at "*para [70] The primary duty of the courts in this country is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice." And if in the process of performing their constitutional duty, Courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are*

required to accord to other branches of government as required by the principle of separation of powers, on the other hand."

[52] The applicant submitted that the opposing respondents' interpretation of section 12 (6) to the effect that the President may remove the Applicant without the parliamentary process having been concluded is flawed. And that such interpretation is not in compliance with section 39 (2) of the Constitution which provides that a court … (2) "*When interpreting any legislation… must promote the spirit, purport and objects of the Bill of Rights".* It violates her right to dignity, freedom and fair labour practices in that she is unable to earn an income to provide for herself and her family. The opposing respondents on the other hand submitted that the interpretation accorded to the legislation by the President and the NPA, is a proper one and gives the President the powers after a proper enquiry has been held to remove the applicant from office.

[53] The rules of statutory interpretation have been clearly laid down by our courts and especially in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*[11] which can be summarised as follows; that the words in the statute must be read in the light of the ordinary rules of grammar and

[11] paragraphs 18 -23 see also Cool Ideas 1186 CC v Hubbard and another 2014 (4) SA 474 (CC) at para 28.

[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to the legislature. The proper approach is to consider, from the outset, the context and the language, together with neither predominating over the other. That is it must also be construed consistently with the constitution in so far as the language of the statute permits, and the interpretation that best or better promote the rights in the Bill of Rights must be preferred.[12]

[54] In coming back to the language and construction of section 12 (6) of the NPA Act, it is clear from the wording and the manner in which the entire section has been constructed, that it envisages two distinct and separate procedures when an NDPP or DNDPP is removed from office. The wording in my view, is clear. In terms of section 12 (5) it is stated that the NDPP or a DNDPP, shall not be suspended or removed from office except in accordance with the provisions of sub sections (6), (7) and (8). In terms of subsection (6) (a) the function to suspend or remove clearly resides with the President and no one else.

[55] This section does not give the power to suspend or remove to any other institution or entity other than the President. The President is charged with the exclusive power to suspend or remove the NDPP or DNDPP. In this particular case we are dealing with the exclusive power to remove by the President. In terms of subsection 6 (b) such a removal by the President, the reasons therefore and representations by the NDPP or DNDPP (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is in session or, if Parliament is not in session, within 14 days after the commencement of the next

[12] See Saidi and Others v Minister of home affairs and others 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) at para 38; Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai motor Distributors (Pty) Ltd v Smit No 2001 (1) SA 545 (CC) at paras 22-24.

ensuing session.

[56] The Act does not give Parliament such powers and it does not state that the removal is conditional upon the approval of Parliament. If the intention of the Act was to only have the removal take effect after Parliament had considered or confirmed it, and Parliament had to be involved in the decision to effect the removal of the NDPP or DNDPP, why does the Act then require that the removal, the reasons therefore and representations (if any) by the NDPP or DNDPP be communicated to it within 14 days after such removal. If no removal, cannot take effect until Parliament has considered it. What purpose would it then serve to communicate such removal to Parliament, if the President does not have the exclusive power to remove the incumbent.

[57] It is only after the removal by the President comes into operation or takes effect, that Parliament plays a role. The President's function to remove is then completed and he plays no further role. And it is only in the case where Parliament in terms of subsection 6 (d), after it exercised its functions in terms of subsection 6 (c), recommends the restoration to office of the in NDPP or DNDPP, that the President once again plays a role where he is obliged to restore the NDPP or DNDPP to his or her office.

[58] The President does not play any role in terms of the subsection in the consideration whether or not the NDPP or DNDPP, should be restored to his or her office. The wording is clear, Parliament's function is not to remove but to restore. Parliament plays no role in the removal of the NDPP or DNDPP. Parliament acts

independently in terms of its oversight function over the President in terms of section 55 (2) (b) of the Constitution, when it considers whether to restore the NDPP or DNDPP in terms of subsection 6 (c) and (d). Such an independent oversight function is also envisaged in subsection 7 of the NPA Act which states that … "*The President shall <u>also remove</u> the National Director or Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a), is presented to the President."*

[59] With this particular provision, once again, the NPA Act confirms that the exclusive power to remove resides with the President, with the words which is underlined and states that the President shall ***<u>also remove</u>***. This is a further clear indication that Parliament has no power to remove, because if it had the power to remove, the NPA Act would also have expressly given Parliament the power to remove under circumstances where an address from each of the respective Houses of Parliament in the same session praying for such a removal on any of the grounds referred to in subsection (6) (a), is presented to the President, and in circumstances as envisaged in the subsection where Parliament initiates the process of removal. Such powers of removal are deferred to the President and falls within the exclusive preserve of the President.

[60] Even though both houses of Parliament have concluded that the NDPP or DNDPP should be removed from office. In fact, the NPA Act by using the words ***shall also remove*** distinguishes between the President's powers to remove in terms of sub section (6) (a), which gives the power of the President to remove after an

enquiry has been held into the fitness of the NDPP or DNDPP to hold office where upon such removal may take place on the grounds of misconduct, on account of ill health, on account of incapacity to carry out his or her duties of office efficiently and on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

[61] In terms of this subsection such removal can only take place after an enquiry had been held whereas in terms of subsection (7) the power *also to remove* shall occur if an address from each of the respective Houses of Parliament in the same session praying for such a removal is presented to the President on the grounds mentioned in the previous paragraph. In terms of subsection (7) the NPA Act does not require that an enquiry must take place prior to such a removal, but simply an address from both Houses of Parliament praying for such a removal to take place.

[62] To give an interpretation which the applicant wants this court to give to this section would not be a contextual purposive reading of the section, which would remain faithful to the actual wording of the statute.[13] In my view, the manner in which the section was constructed, which was further amplified in *Corruption Watch* by the Constitutional Court is to give effect and to protect the independence of the NPA. Subsection (5) emphatically states that the NDPP or a DNDPP shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8). And these subsections, do not under any circumstances, give Parliament the power to remove.

[13] see Bertie Van Zyl (Pty) Ltd and another v Minister for Safety and Security and others 2010 (2) SA 181 (CC); 2009 (10) 978 (CC) at para 22.

[63] The provisions of subsection (6), (7) and (8) are peremptory and protects the NDPP or the DNDPP from arbitrary removal by the President. The Act prescribes that proper due process be followed, which in my view, was complied with in this case. It was done in a manner to protect the independence of the NPA, if regard is to be had to the facts and circumstances of this case as set out earlier in this judgment. These facts are: The applicant throughout was invited to make representations firstly, as to whether she should be suspended based on the reasons afforded to her by the President; Secondly, whether the President should institute an enquiry, based on the reasons he once again afforded to her. She was invited to persuade the President not to institute such an enquiry; Thirdly, when the President nonetheless decided to institute the enquiry, he gave his reasons for his decision; Fourthly, after the conclusion of the enquiry, the full report and the record of the enquiry was presented to the applicant with the findings on which the report was based; Fifthly, she was once again invited to make representations to the President as to why the recommendations of the panel, which was that she had to be removed from office, should not be implemented.

[64] It was only after all these processes were completed, that the President made his decision to remove her from office. It would not be appropriate at this stage to express any view about the merits of the *Mokgoro* Inquiry, because it did not form part of these proceedings, but it is part of the proceedings in Part B. In these proceedings this court is only concerned with the conduct and the actions of the President and the NPA, which the applicant seeks to impugn. In my view, therefore, the applicant has failed to make out a case that she has a clear right, which would favour an interpretation that the President and the NPA acted unconstitutionally and

unlawfully when the President removed her from office before the parliamentary process has been completed. Put differently, the applicant failed to show that she had a clear right not to be removed by the President and the NPA prior to the conclusion of the parliamentary process. Given the conclusion I come to, there is no need for me to make a decision as to whether the applicant has suffered actual harm or that harm is reasonably apprehended.

[65] With regard to the third requirement for interdictory relief, even though there is no need for me to make a decision as to whether the applicant has no adequate alternative remedy, it is nonetheless clear that the applicant in terms of subsection (6) (b) has the right to make representations to Parliament to consider whether should she should be restored to office or not. She therefore has an adequate alternative remedy. I am therefore satisfied that the applicant has not made out a case for the relief she seeks in prayers 1 and 2.

[66] In respect of prayers 3 - 5, the applicant is essentially seeking interim relief pending the outcome of the review in Part B. In prayer 3, the relief she seeks is that that the President and the NPA be ordered to reinstate her to her position as DNDPP with all associated benefits. Given my finding above that she has not established such right, it is only Parliament that can reinstate or restore her into a position as DNDPP, and not the President or the NPA, such relief in my view is not competent. In prayer 4 she is seeking an interdict preventing the President and the NPA from filling the position from which she had been removed as DNDPP, pending the completion of the parliamentary process envisaged in section 12 of the NPA Act.

[67] In my view, having regard to the manner in which section 12 (6) of the NPA Act operates and finds application as discussed above, which means that the applicant's removal takes effect immediately upon pronouncement there off by the President, the applicant has no right to forestall the operation of the procedure as set out in the subsection, which means that such a removal from office remains in operation unless the applicant is restored back into her position by Parliament.

[68] What the applicant seeks to do by requesting this relief is to forestall the operation and proper function of the process prescribed by the NPA Act which permits her removal. In these proceedings she does not contend that the provision in subsection (6) that permits her removal by the President is unconstitutional. Her complaint was that the removal by the President prior to the completion of the parliamentary process was unlawful and unconstitutional. In this regard this court in a similar matter in *Mohlaloga* (*supra*) which dealt with the removal of the Chairperson of ICASA, an independent regulatory where he wanted to interdict Parliament from considering whether he should be removed from office, the court at para [20] said the following *"… The applicant had no right to pre-emptive protection against the operation of the Act according to its tenor. He was not entitled to ask the court to make the finding provided for in s 8(2)(a) of the ICASA Act, when the legislation has allocated that responsibility to the National Assembly"*.

[69] Similarly, in this particular case as said earlier, the applicant has no right to such pre-emptive protection where the NPA Act specifically prescribes that she may be removed by the President and may only be restored to her position by Parliament. In my view, the applicant also failed to make out a case that she is entitled to the

relief and prayer 4. In prayer 5, she seeks relief that pending the outcome of the application for orders in terms of Part B, that the parliamentary process in terms of section 12 be stayed. If this relief is to be granted, it would effectively be interdicting Parliament, from conducting its oversight function in respect of the President's removal by staying the parliamentary process pending the review.

[70] This court in *Mohlaloga* as referred to earlier, said the following at;

"[15] Proceedings in which a litigant prays for interim interdictory relief that would impinge on the functions of Parliament were it to be granted call out for judicial circumspection; cf. National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012(6) SA 223 (CC) and International Trade Administration Commission v SCAW SA (Pty) Ltd ***2012 (4) SA 618*** *(CC). Those cases involved applications for interdictory relief that would impinge on the functions of the executive, but the pertinent principles, which are grounded in judicial respect for the separation of powers, apply equally when the relief would entail encroaching on the domain of the legislative arm of the state."*

And at [18] the court goes onto say that in cases like these "*A very compelling case would need to be made out for a court, exceptionally, to pre-empt decisions falling within the competence of Parliament. Considerations of comity between the three arms of the state militate against a too ready willingness by the courts to intervene in such situations in the ordinary course. The principled approach in such circumstances was summed up by Ngcobo J in Doctors for Life International v Speaker of the National Assembly and Others* ***[2006] ZACC 11***, ***2006 (6) SA 416*** *(CC),* ***2006 (12) BCLR 1399*** *(CC) at paras 68-70* as referred to earlier in this judgment.

[71] In my view, the applicant has failed to make out a compelling case for this court, exceptionally to pre-empt decisions falling within the competence of Parliament. I agree with the NPA that this interdict would impose on the Executive and Legislative branches as well as the NPA, a senior manager after the President concluded, based on the recommendations of a panel holding an enquiry into her fitness to hold office, has declared that he has no confidence in.

[72] This court would intrude upon the oversight function of Parliament which it generally has in terms of Section 55 of the Constitution and has expressly been given in terms of section 12 (6) (c) and (d) of the NPA Act to give effect to protecting the independence of the NPA. This oversight function requires Parliament to deal with an inquiry for restoration of the applicant in an expeditious manner. This process clearly seeks to protect the Applicant and further seeks to protect the independence of the NPA contrary to what the Applicant alleges. And it is based on the doctrine of separation of powers. It further requires that the inquiry into her restoration is not unduly delayed. The Act requires Parliament to act expeditiously. And it seems that at the time when these proceedings were instituted, Parliament had already started with the process as set out in sec 12 (6) (c) by having invited the Applicant to make representations. The subsection states:

*"(c) Parliament shall, within **30 days** after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended."*

Mindful of this onerous obligation placed on Parliament, the Speaker says in her explanatory affidavit[14].

"7.3. Third, Parliament is obliged within 30 days of having received the message (through it being tabled in Parliament), to pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended. The following aspects of this provision warrant reference:

7.3.1. There is no discretion afforded to Parliament as to: (a) whether it ought to pass a resolution in the terms provided for; or (b) the timing of that resolution, unless the 30 day period is not reasonably possible.

7.3.2. Instead, it is peremptory for the resolution to be taken by Parliament within 30 days of Parliament having received the message. The only exception to this is if "it is not reasonably possible". The question of whether it is reasonably possible or not relates to whether the Parliamentary programme can accommodate the resolution within 30 days or not. It does not allow for a deferral of the resolution on the basis that the affected party contends that it ought to be deferred for other reasons (as is the case in the present instance).

7.3.3. In the event that the 30-day timeframe cannot be met, the resolution must be passed as soon thereafter as is possible."

[14] See record page 1535.

It seems from this that the Speaker accepts that there is an obligation on Parliament to deal with the issue in a speedy and expeditious manner, and fully appreciates the importance of Parliament's oversight role given to it in terms of Section 12(6) (c) of the NPA Act which is firmly rooted in the Constitution.

It would therefore be an unwarranted and unjustifiable invasion of the separation of powers in circumstances where the applicant has not made out a compelling case. This court cannot usurp the functions and duties of Parliament. In respect of prayer 5, the applicant in my view, has failed to make out a case for the relief it is seeking.

[73] In the result therefore, I make the following order:

> "*The application is dismissed with costs, such costs to include the costs of three counsel for the First, Third and Fourth Respondents*."

R.C.A. HENNEY

Judge of the High Court