

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA**

Case No.:

DEMOCRATIC ALLIANCE

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

ARTHUR FRASER N.O.

Second Respondent

ARTHUR FRASER

Third Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Fourth Respondent

**DEPUTY MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES RESPONSIBLE
FOR CORRECTIONAL SERVICES**

Fifth Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE that the Applicant makes application to this Court on a date to be determined by the Registrar of the above Honourable Court for the following Orders:

1. The application is to be dealt with on an urgent basis in terms of Uniform Rule 6(12);
2. It is declared that the decision of the President on or about 17 April 2018 to appoint Arthur Fraser as the National Commissioner: Department of Correctional Services is inconsistent with the Constitution and invalid;
3. The appointment of Arthur Fraser as the National Commissioner: Department of Correctional Services on or about 17 April 2018 is reviewed and set aside;

4. It is recorded that the invalidity of the appointment of Mr Fraser will not on its own affect the validity of any of the decisions taken by him while in office as the National Commissioner: Department of Correctional Services; and
5. The costs of this application including the costs of two counsel are to be paid by the First and Second Respondents together jointly and severally with any person opposing the application.
6. Granting further and/or alternative relief.

TAKE NOTICE THAT the founding affidavit of **JAMES SELFE** annexed hereto and its annexures shall be used in support of this application.

TAKE FURTHER NOTICE THAT the applicant has appointed the undermentioned address of Minde Schapiro & Smith c/o **KLAGSBRUN EDELSTEIN, BOSMAN & DE VRIES** as its attorney of record and the address at which they will accept service of notices and other processes in these proceedings is 220 Lange Street, New Muckleneuk, Pretoria and agrees that service may take place electronically at the address elzanne@mindes.co.za; karin@mindes.co.za; venashan@kebd.co.za.

TAKE NOTICE FURTHER that if you wish to oppose this application you are required to:

1. Notify the applicant's attorneys in writing within 10 days that you intend to oppose this application and appoint an address within fifteen kilometres of the office of the Registrar at which you will accept notice and service of all process in these proceedings;

- 2 Deliver your answering affidavit, if any, together with any relevant documents within 15 days of giving such notice;
- 3 The applicant will be entitled to deliver its replying affidavit, if any, within 10 days of receipt of any answering affidavit and relevant documents.

TAKE NOTICE FURTHER that if no such Notice of Intention to Oppose is given, application will be made to this Honourable Court for an order in terms of the Notice of Motion on a date to be determined by the Registrar on the unopposed roll.

DATED at _____ on this _____ day of **MAY 2018**.

MINDE, SCHAPIRO & SMITH

Per: Elzanne Jonker

ATTORNEYS FOR APPLICANT

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**AND TO: PRESIDENT OF
REPUBLIC OF SOUTH AFRICA**

Per email: president@presidency.gov.za

Robert@presidency.gov.za

Union Buildings

Government Avenue

Pretoria Central

Pretoria

AND TO: ARTHUR FRASER N.O

Poyntons Building (West Block)

124 WF Nkomo Street

(Corner WF Nkomo & Sophie De Bruin Streets)

Pretoria

AND TO: ARTHUR FRASER

Poyntons Building (West Block)

124 WF Nkomo Street

(Corner WF Nkomo & Sophie De Bruin Streets)

Pretoria

AND TO: THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

SALU Building, 28th Floor, 316 Thabo Sehume Street

(c/o Thabo Sehume and Francis Baard Streets),

Pretoria

AND TO: THE DEPUTY MINISTER OF JUSTICE AND CORRECTIONAL SERVICES, RESPONSIBLE FOR CORRECTIONAL SERVICES

Poyntons Building (West Block)

124 WF Nkomo Street

(Corner WF Nkomo & Sophie De Bruin Streets)

Pretoria

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FOUNDING AFFIDAVIT

I, the undersigned

JAMES SELFE

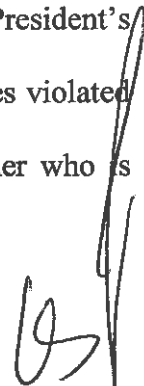
make oath and state that:

1. I am the chairperson of the Federal Executive of the applicant, the Democratic Alliance of South Africa ("DA"). I also represent the DA as a member of the National Assembly of the Parliament of the Republic of South Africa. In this role I am the Shadow Minister of Correctional Services.

2. I am duly authorised to depose to this affidavit on behalf of the DA.



3. The facts contained herein are to the best of my knowledge both true and correct unless otherwise stated or indicated by the context, and within my personal knowledge. Submissions of law are made on the advice of the Applicant's legal advisers.
4. The DA seeks a declarator on a semi-urgent basis that the decision of the First Respondent ("*President*") on or about 17 April 2018 to appoint the Second Respondent ("*Fraser*") as National Commissioner in the Department of Correctional Services is inconsistent with the Constitution and invalid;
5. The legal principles in this case have been clearly and succinctly set out by the Constitutional Court in Simelane (*Democratic Alliance v President of South African and Others* 2013 (1) SA 248 (CC)) in which it was held, in respect of the appointment of Mr Simelane as NDPP, that: "ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved: namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively".
6. There are, at the very least, *prima facie* indications of serious dishonesty concerning Mr Fraser, including allegations that he operated a secret and parallel intelligence service from his home whilst working at the Hawks (subsequently the State Security Agency), and utilized millions of rands of public funds for personal gain.
7. The DA accordingly asks this Court to grant an order declaring that the President's appointment of Mr Fraser as National Commissioner of Correctional Services violated the President's constitutional obligation to appoint a National Commissioner who is



sufficiently conscientious, has enough credibility to do this important job effectively and is of good character.

8. The National Commissioner of Correctional Services plays a vital role in overseeing South African prisons and correctional services, and ensuring a just, peaceful and safe society. He has wide powers (akin to a Director-General), including to control the Department; to detain persons in respect of whom there is a valid warrant; to make security classifications of inmates; to determine which inmates should be detained separately; to deal with disciplinary matters; providing accommodation for mother and child inmates; handling complaints by inmates; receiving case management reports in respect of inmates; granting inmates temporary leave; releasing inmates to the South African Police Services for the purpose of further investigation; make applications for changes of conditions; and refer inmates to the Parole Board for a consideration of parole, or the cancellation of parole. The National Commissioner is further empowered to issue orders which must be obeyed by all correctional officials and other persons to whom such orders apply in respect of the issues defined in section 134(2)(a) to (pp) of the Act. He is the Accounting Officer of the Department.

9. In the light of the important role played by the National Commissioner, and the damning and serious allegations against Mr Fraser, the President's appointment of Mr Fraser as National Commissioner in the Department of Correctional Services falls far short of the constitutional obligations on the President.

10. In what follows, the DA details:

10.1. The parties to the application;

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- 10.2. The impugned decision;
- 10.3. *Prima facie* indications of Mr Fraser's dishonesty;
- 10.4. The legal framework and the constitutional obligations of the President;
- 10.5. The semi-urgency of the application; and
- 10.6. The relief sought.

THE PARTIES

11. The Applicant is the **DEMOCRATIC ALLIANCE** ("*DA*");

11.1. The DA is a political party registered in terms of section 15 of the Electoral Commission Act 51 of 1996, which has its head office at the Thebe Hosken House, Mill Street, Cape Town.

11.2. The DA brings this application in its own interest, as the main opposition party in Parliament, and also in the public interest in accordance with sections 38(a) and 38(d) of the Constitution.

12. Given the effects on the public and the country as a whole, as I set out below, and the DA's contentions as to the irrationality and unconstitutionality of the decisions of the President at issue, the DA plainly has the necessary standing to bring this application.

13. The First Respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** ("*President*");

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- 13.1. The President is cited in his official capacity as the head of the National Executive in terms of section 83(a) of the Constitution.
- 13.2. Service will be effected on the President at 26 Edmond Street, Union Buildings, Pretoria. I will also ensure that the service will be effected electronically at the President's email address: presidentrsa@presidency.gov.za
14. The Second Respondent is **ARTHUR FRASER N.O.** ("*Mr Fraser*"), the newly-appointed National Commissioner in the Department of Correctional Services in his official capacity.
- 14.1. Service will be effected on Mr Fraser N.O. at his business address: Poyntons Building, 124 WF Nkomo Street (Corner WF Nkomo & Sophie De Bruyn Streets), Pretoria.
15. The Third Respondent is **ARTHUR FRASER** ("*Mr Fraser*"), the newly-appointed National Commissioner in the Department of Correctional Services in his personal capacity.
- 15.1. Service will be effected on Mr Fraser at his business address: Poyntons Building, 124 WF Nkomo Street (Corner WF Nkomo & Sophie De Bruyn Streets), Pretoria.
16. The Fourth Respondent is the **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** ("*Minister*"), the Minister with the ultimate responsibility over justice and correctional services in South Africa.
- 16.1. Service will be effected on the Minister at SALU Building, 28th Floor, 316 Thabo Sehume Street (Corner Thabo Sehume and Francis Baard Streets), Pretoria.

17. The Fifth Respondent is the **DEPUTY MINISTER OF JUSTICE AND CORRECTIONAL SERVICES, RESPONSIBLE FOR CORRECTIONAL SERVICES** ("*Deputy Minister*") the Deputy Minister responsible for overseeing the National Commissioner, and to whom the Commissioner reports.

17.1. Service will be effected on the Deputy Minister at 124 WF Nkomo Street (Corner WK Nkomo & Sophie De Bruin Streets), Pretoria.

18. No relief is sought against the Minister or the Deputy Minister, who are cited on account of the interest they may have in the appointment of the National Commissioner.

19. Should the Minister or Deputy Minister oppose the relief sought, the DA will seek costs from the Minister and / or Deputy Minister together with the President and Mr Fraser in both his personal and official capacities.

THE IMPUGNED DECISION

20. On 17 April 2018, the President announced that he had taken a decision to appoint the former Director-General of the State Security Agency, Mr Arthur Fraser to the Department of Correctional Services as the National Commissioner. A copy of the Notice recording this decision is annexed marked "JS1".

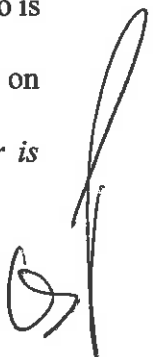
21. No reasons were provided by the President for the decision, and, despite the drastic nature of the decision and its consequences for the rule of law and democracy given the significant and well-founded suspicions widely held that Mr Fraser is not a suitable person to hold public office, the President has himself to date offered no public explanation for the decision.



22. The position was advertised in October 2017 but no suitable candidates applied and an extension of the closing period of the advertisement was allowed for. The Fifth Respondent, in an answer given to a question posed by a DA representative, at the Portfolio committee meeting on 19 April 2018, confirmed the above and advised that it was the President's decision about where best to utilise the former Director General of the SSA. The transcription of the meeting by the Parliamentary Monitoring Group is attached hereto, marked "JS2".
23. In the circumstances, the DA contends that the President's decision was irrational, unconstitutional, unlawful and invalid.

PRIMA FACIE INDICATIONS OF MR FRASER'S DISHONESTY

24. There are good grounds for suspecting (at least at a *prima facie* level) that Mr Fraser is not of good character, and is not fit to hold office as the National Commissioner in the Department of Correctional Services.
25. In this section of the affidavit, I rely *inter alia* on a number of newspaper articles and media reports which detail suspected misconduct and dishonesty by Mr Fraser. These articles are annexed to this affidavit to establish not necessarily the truth of their contents, but that there is at least at a *prima facie* level, reason to suspect that Mr Fraser is not of good character and is not fit to hold office as National Commissioner.
26. A summary of the allegations against Mr Fraser is collected in an article headed "Who is Arthur Fraser, and Why is He So Powerful" which appeared in the Huffington Post on 11 April 2018, annexed marked "JS3". It records that "*the name Arthur Fraser is*



attached to a list of allegations involving high-profile politicians, complex tales of dodgy spooks and their underhand tactics and looting on a grand scale.”

27. Mr Fraser (who has previously been labelled “*the spy who saved Zuma*”) was appointed by former President Zuma as Director General of the State Security Agency in 2016 – one of the most influential figures within the country’s intelligence networks.

Allegations of the “parallel investigating unit”

28. Mr Fraser’s alleged involvement in corrupt activities was first revealed in a City Press article penned by Jacques Pauw on 19 October 2014 entitled “Spies Plunder R1bn Slush Fund”, a copy of which is annexed marked “JS4”.
29. The article discloses that in 2010 a Report by the Inspector General of Intelligence had been forwarded to the Intelligence Minister, David Mahlobo, which revealed that hundreds of millions of rands were sunk into a slush fund intended to improve South Africa’s intelligence capabilities through the creation of the “Principal Agent Network”, a covert project set up in 2007 to strengthen the National Intelligence Agency’s capacity to collect intelligence, but much of the money was spent on luxury cars, properties and farms for spies and their families instead.
30. The Report reveals further that: “*the project, initiated when the SSA was still the NIA, brought at least 293 cars, many of them Mercedes-Benzes and BMWs*” and that more than R20 million was spent on “*warehousing*” the cars in warehouses allegedly owned and controlled by relatives of the SSA staff who worked on the project.



31. When the Principal Agent Network was launched in 2007, more than 70 intelligence officials were assigned to the project. Many of them, in turn, appointed family members, friends and contacts as “*informants*” and “*agents*” without following the formal vetting process.
32. Intelligence sources have labelled the Principal Agent Network “*a parallel intelligence organisation*” with its own funds, operatives, infrastructure and intelligence analysis capacity.
33. The report specifically points to Fraser’s involvement as the head of the Principal Agent Network: for example, the computer system for the Network was installed in Fraser’s house, but the intelligence and information gathered were never fed into the National Intelligence Agency / State Security Agency’s formal analysis and management structures, where information is traditionally evaluated.
34. At the time that he was running the Principal Agent Network, Mr Fraser was second in command at the National Intelligence Agency which later became the State Security Agency.
35. The Principal Agent Network operated from 2007 to 2010 when it was shut down, allegedly because it purportedly “*ran out of money*”.
36. Following receipt of the 2010 Report the Minister, Mr Cwele, referred the matter to the Hawks for further investigation and to the NPA for prosecution. Mr Cwele also briefed then Justice Minister, Jeff Radebe, as well as the Minister of Police, Nathi Mthethwa, and the Asset Forfeiture Unit. Despite this, the prosecution and search and seizure did not materialise.



37. The wastage and possible criminality in the Principal Agent Network was raised in Parliament's Joint Standing Committee on Intelligence in 2014 by the DA's Spokesperson on Intelligence, Dirk Stubbe, but the response was that the investigation was "ongoing".

The President's keepers

38. The issue of Mr Fraser's unlawful conducting of a parallel intelligence service was again raised centre stage in the recent publication by Jacques Pauw of the book "The President's Keepers", to which Mr Fraser has launched a legal challenge.
39. Pauw states the following, regarding the PAN programme set up by Mr Fraser:

"The PAN programme was the brainchild of Njenje's predecessor, the director general Manala Manzini, and his deputy and national operations director, Arthur Fraser. Manzini was eager to expand and enhance the NIA's covert collection capacity. He shared this with Fraser, who concocted the PAN programme.

Fraser suggested that PAN employ NIA members who would resign or take severance packages, former NIA members, members from other government departments who would resign, and new recruits from the private sector. They submitted their plan to the minister of intelligence, Ronnie Kasrils, who agreed with the concept of the network as it was traditionally understood. A principal agent network is intelligence jargon for spy handlers (the principals) who engage, manage and deploy spies (agents) to perform specific services or functions on behalf of the agency. There was nothing cutting-edge about Fraser's proposal and it should simply have meant the employment of more spies and handlers.

As it later turned out, he may have had something completely different in mind: a parallel and detached intelligence network that operated independently of the NIA. In doing so, Meiring and Engelke later found, Fraser may have committed treason."

40. As regards Mr Fraser's unlawful utilisation of public funds, Pauw reveals:

"After PAN had purchased 293 vehicles for their 72 agents, they needed warehouses to store them. They entered into an agreement with a private



company that belonged to Arthur Fraser's brother, Barry. PAN paid him R24 million for the rental of the warehouse. Some of cars had been unused for almost four years. There were other Fraser family members working for PAN. Arthur's son Lyle became the floor manager at the warehouse while his mother, Ms C.F.

Fraser, was also a PAN agent. Both Barry Fraser and Ms Fraser were board members of a community-based organisation that dealt with conflict resolution at schools. PAN contributed R10 million towards the organisation although it had nothing to do with national security."

41. Jacques Pauw's assessment of why Mr Fraser was never prosecuted for these crimes was the fact that he had "*probably saved Jacob Zuma from prosecution and therefore enabled the ANC leader to ascend to the highest office in the land*".

42. A copy of the relevant extracts from *The President's Keepers* are annexed marked "JS5".

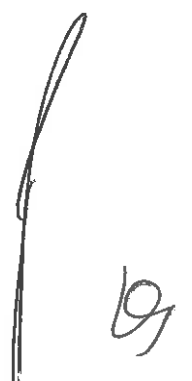
Recent allegations of interfering with the duties of the Inspector-General of Intelligence

43. Mr Fraser has denied and resisted the investigation of any wrongdoing relating to the Principal Agent Network.

44. In an urgent Pretoria High Court application launched in April 2018, the current Inspector-General of Intelligence, Mr Dintwe revealed how Mr Fraser seemingly grew more and more desperate in his efforts to stop the Inspector-General from doing his job by investigating the claims contained in "The President's Keeper" and set out above.

45. This culminated in Mr Fraser terminating Mr Dintwe's security clearance, allegedly on the grounds that he was a "*threat to security*" because he possessed "*classified*" documents. Mr Dintwe says this argument is "*irrational and unreasonable*".

46. In his affidavit in the urgent court application, Mr Dintwe stated:



“The Director General claims that my security clearance is being revoked because I am a threat to security. The reason why it is alleged that I am a threat to security is because I am supposedly in possession of classified information. By definition, my role is to be in possession of classified information. It is impossible for me to exercise my responsibilities unless I have access to all types of information, classified or not. The Director General cannot control the manner in which I exercise my functions by determining the classified nature of the information accessible to me.”

47. Mr Dintwe further alleged, regarding Mr Fraser:

“The facts illustrate gross abuse of public office in order to achieve improper ends. I have shown above that, to his knowledge, the Director General is the subject of investigation. He obviously knows that if he can revoke my security clearance, I will have no entitlement to access the necessary information. Therefore, the Director General is in effect attempting to block an investigation into himself.”

He adds:

“Incidentally, by revoking my security clearance, the Director-General is acutely aware that this is a ground upon which the President may revoke my appointment and terminate me from my position.”

48. In the interdict application, Mr Dintwe sought restoration of his security clearance, and an order directing Fraser to cooperate with his office’s investigation and to comply with a request for information. Mr Dintwe justified the urgency of the application on the following grounds:

“The extraordinary nature of the decision taken by the Director General — to prevent me from gaining access to my office and executing my constitutional and statutory responsibilities – requires the immediate intervention by this court. The decision by the Director General has implications not only for me as an individual, but for the proper functioning of the Office of the Inspector General of Intelligence (OIGI) and the broader public interest.

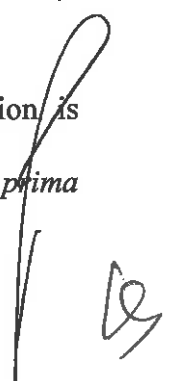
“On what I know, there is at least a prima facie case for Mr Fraser to answer. If, by his conduct, he is preventing the ventilation of that case through a statutorily created body, it is of extreme importance for a court to step in... My ability to fulfil my mandate and ensure a functional and independent OIGI and to investigate and report on complaints (most notably against Mr Fraser himself) has been prohibited with immediate effect based on an unlawful decision taken by a Director General in an untenably conflicted position.”



49. The interdict application was to be heard in the Pretoria High Court on 17 April 2018. The case was never argued.
50. The fact that there is a *prima facie* suspicion that Mr Fraser is attempting to exert this unlawful power over the Inspector-General – while being under investigation by the Inspector-General – gives rise to grave constitutional concerns, and renders Mr Fraser not fit and proper to hold office.
51. A copy of the Notice of Motion and Founding Affidavit in the April 2018 is annexed marked “JS6”. I also attach the following newspaper articles dealing with the issues:
- 51.1. “Court to hear interdict bid against state security boss Arthur Fraser”, 17 April 2018, Independent Online, as annexure “JS7”;
- 51.2. “Hands off the Inspector General of Intelligence! Fire Arthur Fraser: R2K”, 18 April 2018, Timeslive, as annexure “JS8”;
- 51.3. “The case that could blow the lid on SA's secret spy world”, 12 April 2018, Sunday Times, as annexure “JS9”.

Conclusion on the allegations against Fraser

52. It is emphasised that the DA does not purport to establish that any of the allegations against Mr Fraser are true: this is a question that will be for another court on another day.
53. For present purposes, and in order to establish that the President’s decision is unconstitutional, it is sufficient for the DA to demonstrate (as it has done) that at a *prima*

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facie level, there is a reasonable suspicion that MR Fraser has acted dishonestly and is not of good character.

54. I turn now to consider the relevant legal framework.

THE LEGAL FRAMEWORK

The President

55. The powers of the President and the National Executive are set out in Chapter 5 of the Constitution.

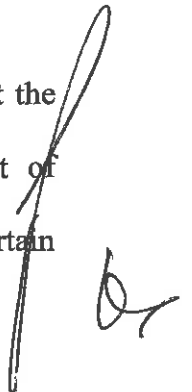
56. In terms of section 83(a), the President is the Head of State and the head of the National Executive. The executive authority is vested in the President (section 85(1)) and exercises executive authority together with the other members of Cabinet (section 85(2)).

57. The Constitution expressly imposes an obligation on the President in section 83(b) to uphold, defend and respect the Constitution.

58. The Constitution also requires that the President promote unity of the nation and must “*advance the Republic*” – section 83(c).

59. This requirement that the President must advance the Republic and its well-being has been held to have a bearing on the President’s conduct or statements that have wide-ranging implications for the Republic.

60. Although the Constitution read with the Public Service Act vests in the President the power to appoint and dismiss the National Commissioner in the Department of Correctional Services, like all other constitutional powers, this is subject to certain



constitutional constraints. In particular, it is a requirement of the law that all decisions must be both procedurally and substantially rational.

The limits of the exercise of public power

61. It is well-established that the exercise of every exercise of public power is subject to the principle of legality. The Constitution requires that the exercise of all public power must be rational, exercised for a legitimate government purpose and exercised on the correct facts.


62. This applies too to all decisions made by the President pursuant to his constitutional powers, including the decision to appoint Mr Fraser as National Commissioner: Department of Correctional Services.

63. The impugned decision by the President fails to comply with these requirements: on the Constitutional Court's judgment in Simelane, the President's conduct falls short of these constitutional obligations and does not relate rationally to the purpose of the appointment.

64. The DA contends that the President's decision falls short of the following constitutional obligations:

64.1. sections 83(b), which obliges the President to "*uphold, defend and respect the Constitution as the supreme law of the Republic*";

64.2. section 83(c), which obliges the President to "*promote the unity of the nation and that which will advance the public*";



64.3. section 84(2), which obliges the President to make any appointments that the Constitution or legislation requires the Presidents to make, other than as head of the national executive. In this instance, the President is required to appoint a National Commissioner of “*good character*” and has failed to do so;

64.4. section 85(2)(a), which obliges the President to implement national legislation;

64.5. section 85(2)(c), which obliges the President to coordinate the functions of state departments and administrators. In appointing Mr Fraser, the President has failed to coordinate the functions of the Department of Correctional Services in a constitutionally-compliant manner; and

64.6. Section 85(2)(e), in terms of which the President performs “*any other executive function*”.

65. The President’s appointment of Mr Fraser, in the circumstances set out above, constitutes a failure to comply with all of these constitutional obligations.

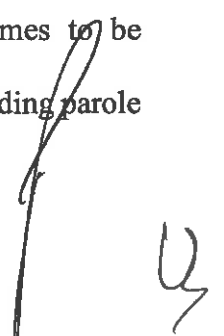
66. In the circumstances, the DA seeks an order declaring unlawful, reviewing and setting aside the decisions of the President to appoint Mr Fraser to the position of National Commissioner of Correctional Services.

67. The decision is all the more constitutionally repugnant given the important role played by the National Commissioner of Correctional Services in the constitutional democracy.

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The Role of the National Commissioner of Correctional services

68. The National Commissioner of Correctional Services occupies a pivotal role in the criminal justice system in South Africa.
69. The Commissioner is appointed in terms of the Public Services Act and is entitled to the privileges of a Head of Department which are conferred by the Public Service Act. (Section 3 of the Correctional Services Act read with Schedule 1 to the Public Services Act).
70. The Department of Correctional Services is “*under the control*” of the Commissioner in terms of section 3(4) of the Correctional Services Act. The Commissioner determines how many people are to be employed, how they are to be organised, organises the training of correctional officers, may award to correctional officials monetary or other awards, and is responsible for the appointment, remuneration, promotion, transfer, disciplining and dismissal of correctional officials.
71. In terms of section 6 of the Correctional Services Act, it is the National Commissioner who detains inmates at correctional services centres, and performs a preliminary security classification of each inmate on admission.
72. In addition, the National Commissioner makes important decisions about how and with whom inmates are to be accommodated (sections 7, 20 and 26); in respect of the contact between an inmate and his or her next of kin (section 13); the order in which an inmates’ sentences are to be served (section 39); the determination of programmes to be undertaken by sentenced offenders (section 41); making representations regarding parole

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(section 71), granting temporary leave (section 44) and disciplining both sentenced offenders and correctional services officials.

73. Ultimately the National Commissioner is empowered and obliged to conduct himself in a manner that has a direct effect on the right to dignity (section 10) and liberty (section 12) of thousands of individuals on a daily basis.

74. In terms of section 10 of the Public Service Act, no person may be appointed to a specified post (including the Commissioner for Correctional Services) unless he or she:

74.1. is a South African citizen;

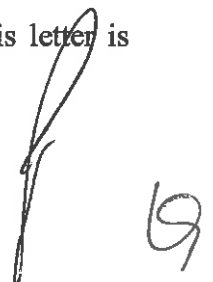
74.2. is of good character; and

74.3. insofar as his or her condition of health is concerned, complies with such requirements as may be prescribed.

75. On account of the serious allegations the Mr Fraser has acted dishonestly and contrary to the administration of justice, Mr Fraser could not be considered to “*be of good character*”. Accordingly, the President’s decision was irrational and fell short of the constitutional requirements, both procedurally and substantively.

THE DA’S DEMAND FOR AN EXPLANATION AND REASONS

76. On Wednesday 18 April 2018, Mmusi Maimane, the Leader of the DA, addressed a letter to the President concerning the President’s appointment of Mr Fraser as the National Commissioner of the Department of Correctional Services. A copy of this letter is annexed marked “JS10”.



77. The letter records that any such appointment by the President must meet the requirements of procedural and substantive fairness and, in that, in the DA's view, bearing in mind the serious allegations made against Mr Fraser, and in particular the notion that he has been running a separate parallel intelligence service from his home rather than through state structures, serious questions are raised concerning the lawful basis of his removal and new appointment. Mr Maimane further states that "*prima facie [Mr Fraser's] appointment as the National Commissioner of Correctional Services was irrational and unconstitutional and invalid for the same reasons of the former President's appointment of Adv Menzi Simelane as NDPP at the time*".

78. In the circumstances, the President was requested to furnish written answers by 16h00 on Thursday 19 April 2018 to the following questions:

78.1. What process was followed in the appointment of Mr Fraser;

78.2. When was the decision made;

78.3. Was Mr Fraser's allegedly unlawful conduct whilst at the State Security Agency taken into account in the decision to appoint him as the National Commissioner of Correctional Services; and

78.4. On what grounds can it be said that Mr Fraser's appointment serves the purpose of having him as National Commissioner in the sense that he has no known experience in this portfolio.

79. The letter concluded by indicating that the DA was considering approaching the Court on an urgent basis to consider the necessary relief concerning this appointment.

80. No response was received to Mr Maimane's letter.

THE DA'S APPLICATION TO THE CONSTITUTIONAL COURT UNDER THE EXCLUSIVE JURISDICTION PROVISIONS

81. On Monday 22 April 2018, following the President's failure to reply by 19 April 2018, the DA launched an urgent application to the Constitutional Court to declare that in taking the impugned decision, the President had failed to comply with his constitutional obligations, and also sought relief reviewing and setting aside the decision.

82. The DA approached the Constitutional Court directly on the basis that in terms of section 167(4)(e) of the Constitution, the Constitutional Court has the exclusive jurisdiction to determine that the President has failed to fulfil a constitutional obligation.

83. The Applicant sought directions from the Chief Justice regarding the truncation of time periods and sought the urgent hearing of the application, to be accommodated in that Court's second term schedule.

84. I annex a copy of the Notice of Motion issued in the application to the Constitutional Court marked "JS11".

85. On 2 May 2018 the Constitutional Court issued the following order (which was only sent to the parties on 11 May 2018) attached hereto, marked "JS12":

"The Constitutional Court has considered this urgent application for direct access. It has concluded that the application should be dismissed as it is not in the interests of justice to grant direct access and the application is not urgent. The Court has decided not to award costs".

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86. Accordingly, the Constitutional Court did not accept that the issues raised in this application (which are substantially similar to those before the Constitutional Court) were issues which should properly be dealt with by the Constitutional Court as a court of first and last instance.

87. In these circumstances, the DA has no option but to approach the High Court for relief.

SEMI-URGENCY

88. The grounds of urgency are the following:

88.1. The purported appointment of Mr Fraser to the position of National Commissioner of the Department of Correctional Services came to light on 17 April 2018;

88.2. Mr Fraser was appointed with immediate effect;

88.3. Questions were asked of the President on 18 April 2018, a date after the appointment. There was no response;

88.4. The application to the Constitutional Court was launched on 23 April 2018 - as expeditiously as possible once it was clear that the President would not respond to Mr Maimane's letter;

88.5. The Constitutional Court issued its order on 2 May 2018 but only sent it to the Applicant's attorneys on 11 May 2018; A copy of the email is attached, marked "JS13".

A handwritten signature, possibly 'LJ', is written in the bottom right corner of the page. It consists of a large, stylized letter 'L' with a vertical line extending downwards from its base, and a smaller 'J' or similar character to its right.

88.6. This application has been prepared as expeditiously as possible for launching on Monday 14 May 2018.

88.7. Mr Fraser remains in office and is exercising the extensive and far-reaching powers set out above.

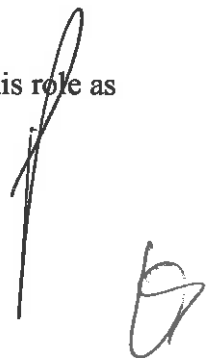
89. The DA submits that it is clear that it is not in the public interest for Mr Fraser to be the National Commissioner of the Department of Correctional Services and a decision on the question whether or not he was lawfully appointed to that position should be taken urgently in the interests of certainty and stability.

90. It is imperative that the relief sought in this application be determined as quickly as possible in order to minimise the imminent and irreparable harm to the Department of Correctional Services, to the public and to the interests of good governance, particularly in the light of the allegations against Mr Fraser. It is also in Mr Fraser's interests that application is determined quickly.

91. If Mr Fraser's appointment is vitiated by unconstitutionality, every day that he stays in office amounts to a violation of the rule of law and stands against the constitutional ideals of good governance.

92. If Mr Fraser's appointment is not vitiated by unconstitutionality, this too should be clarified by this Court, both in Mr Fraser's interests and in the broader public interest.

93. Given the important constitutional obligations that Mr Fraser will perform in his role as National Commissioner:

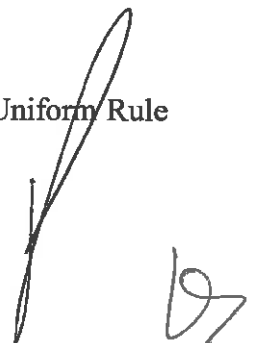
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- 93.1.1. if his appointment is valid, any suggestion of impropriety should be removed through such a pronouncement by the Court;
- 93.1.2. if his appointment is invalid, he should be removed from that position as quickly as possible in the public interest.
94. The matter is one of great public importance and the public have a right to know whether in appointing the National Commissioner, the President acted unconstitutionally.
95. This Court is not called upon to make any factual findings: the DA does not seek to prove that Mr Fraser has acted dishonestly, merely that he is suspected of dishonesty or unlawful conduct, and there is *prima facie* evidence that he is not of good character.
96. To the extent that Mr Fraser's appointment is set aside, the DA submits that it would appropriate that this Court make a declaration that invalidity of the appointment of Mr Fraser will not on its own affect the validity of any of the decisions taken by him while in office as the National Commissioner. This conforms with the relief granted by the Constitutional Court in Simelane and ensures that there is certainty and predictability in government. It also ensures that all decisions made by Fraser remain challengeable on any ground other than the circumstances that his appointment was invalid.

CONCLUSION

97. In the premises, the DA seeks orders that:

- 97.1. The application is to be dealt with on an urgent basis in terms of Uniform Rule 6(12);

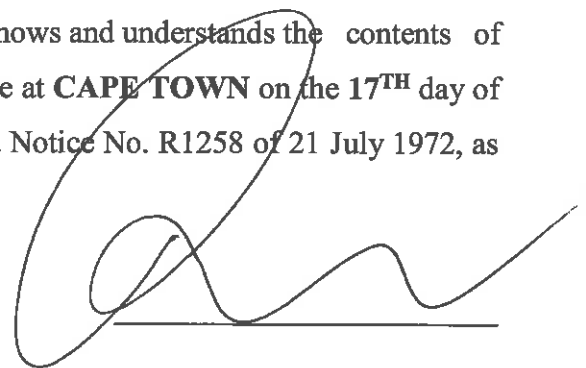
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- 97.2. It is declared that the decision of the President on or about 17 April 2018 to appoint Arthur Fraser as the National Commissioner: Department of Correctional Services is inconsistent with the Constitution and invalid;
- 97.3. The appointment of Arthur Fraser as the National Commissioner: Department of Correctional Services on or about 17 April 2018 is reviewed and set aside;
- 97.4. It is recorded that the invalidity of the appointment of Mr Fraser will not on its own affect the validity of any of the decisions taken by him while in office as the National Commissioner: Department of Correctional Services; and
- 97.5. The costs of this application including the costs of two counsel are to be paid by the First and Second Respondents together jointly and severally with any person opposing the application.



JAMES SELFE

I certify that the Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at **CAPE TOWN** on the 17TH day of **MAY 2018**, the Regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, having been complied with.



COMMISSIONER OF OATHS

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