

**IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE
OF CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR
INCLUDING ORGANS OF STATE**

AFFIDAVIT

I, the undersigned,

NHLANHLA SIBUSISO MKHWANAZI

do hereby make an oath and state the following in English:

1. I am an adult male of full legal capacity, a Lieutenant-General in the South African Police Services ("SAPS") currently appointed as the Divisional Commissioner: Operational Response Services situated at 459 Leyds Street, Sunnyside. I am also the former acting National Commissioner of the SAPS from the period 2011 to 2012.
2. The facts deposed to by me below are within my personal knowledge, unless otherwise stated or indicated by the context, and are, to the best of my belief, both true and correct.

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A. The purpose of this submission

3. The purpose of this submission to the Judicial Commission of Inquiry Into Allegations of State of Capture, Corruption and Fraud in the Public Sector Including Organs of State ("the Commission") is to give context to my utterances before the Portfolio Committee on Police at Parliament in 2012. I will also deal with the Lieutenant General Mdluli matter and the interference by Minister Nkosinathi Mthethwa ("Minister Mthethwa") and the Inspector General of Intelligence, Advocate Faith Radebe ("Advocate Radebe").

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B. Employment history in SAPS

4. My history in the SAPS includes various appointments and posts as indicated below:

- 1993 – 1998 Platoon Member: Public Order Police
- 1998 – 2005 Operator, Section Leader and a Unit Commander: Special Task Force
- 2005 – 2011 Section Head: Special Task Force
- 2011 – 2011 (May to October) Component Head: Specialised Operations
- 2011 – 2012 Acting National Commissioner
- 2012 – 2013 No post but still employed in SAPS
- 2013 – 2015 Divisional Commissioner: Facilities Management
- 2015 – 2018 Divisional Commissioner: Human Resource Development
- 2018 – 2019 Acting Provincial Commissioner: KwaZulu Natal

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- 2019 to date Divisional Commissioner: Operational Response Service
5. During October 2011, I was appointed by the former President Jacob Zuma, as the Acting National Commissioner of the SAPS.
6. My functions and job description as the National Commissioner entailed, *inter-alia*:
- Managing all Support related matters as per Program 1 "Administration"
 - Managing Visible policing as per Program 2 "Visible Policing"
 - Managing Crime Detection as per Program 3 "Crime Detection"
 - Managing Crime Intelligence as per Program 4 "Crime Intelligence"
 - Managing Protection and Security Service as per Program 5 "Protection and Security Service"
7. Whilst I occupied the post of National Commissioner, I was assisted by a group of Deputy National Commissioners, which comprised the following Lieutenant Generals (LtGen):
- Lieutenant General Anwa Dramat - National Head of the DPCI

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- Lieutenant General Godfrey Lebeya - Head of Crime Detection
- Lieutenant General Fani Masemola - Head of Visible Policing
- Lieutenant General Mgwenya - Chief Operations Officer
- Lieutenant General Stander - Human Resource Management
- General Mafume - Supply Chain Management

C. The Mdluli Matter

8. On taking up my new post in October 2011, I began assessing the health of the organisation, which included being briefed on matters pertaining to the suspension of some senior staff. One such person who came to my attention was Lieutenant General (LtGen) Richard Mdluli who at that stage had been appointed to the post of Divisional Commissioner of the Crime Intelligence ("CI") Division, a covert collection component of the SAPS.
9. By the time I had taken up the post of the Acting National Commissioner, LtGen Mdluli had already been suspended by my former colleague, National Commissioner General Bheki Cele on 29 April 2011. I made enquires as to the status of LtGen Mdluli's suspension and disciplinary charges that had been instituted against him, and I learnt that LtGen Mdluli had only been suspended in relation to his alleged involvement in a murder matter where the deceased was Mr Oupa Ramogibe. I had also learnt that LtGen Mdluli had been implicated

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In serious matters of corruption and fraud relating to the theft of funds from the CI- Secret Service Account ("SSA"), which is simply defined as a fund utilised to finance covert operations and to purchase equipment and resources for such operations. This fund is operated separately from the 'normal' police account which funded the day to day operations of the SAPS, and was consequently governed by a separate set of rules.

10. On establishing that LtGen Mdluli had not been suspended on the fraud and corruption charges, I issued instructions to LtGen Stander, the Deputy National Commissioner from Human Resources ("HR") to initiate steps to implement disciplinary charges against LtGenl Mdluli, in this regard.
11. During this period LtGen Lebeya, as the Deputy National Commissioner, Crime Detection, oversaw *inter alia* CI. LtGen Mdluli was a Divisional Commissioner, CI, and as such he fell under the command of LtGen Lebeya. LtGen Lebeya had been involved in some of the initial investigations into LtGen Mdluli's criminal and departmental transgressions. Although LtGen Lebeya would have been the ideal person to oversee further investigations in respect of the allegations against LtGen Mdluli, I however decide to shield LtGen Lebeya from the investigation. I did so because I had been present at a meeting with the former President Zuma at his official residence in Pretoria, when he (former President Zuma) remarked that he kept hearing of "Lebeya, Lebeya, Lebeya, who is this Lebeya". I later informed LtGen Lebeya of the former Presidents remarks.



12. As part of my briefing on this matter, I was advised that Major General Solly Lazarus ("**MajGen Lazarus**"), the Chief Financial Officer ("**CFO**") of the Secret Services Account ("**SSA**") of CI, had already been suspended and charged criminally for fraud and corruption.
13. I then decided to instruct LtGen Stander to appoint an outside person to assess the available evidence to determine whether it implicated LtGen Mdluli and then to advise me on the way forward. These events took place roughly towards the end of 2011. I attach marked "**NM1**" a copy of the report obtained by LtGen Stander pursuant to my instructions.
14. The author of the report concluded that disciplinary charges should be brought against LtGen Mdluli.
15. Pursuant to the aforesaid report, disciplinary charges were brought against LtGen Mdluli. I should emphasise that at that point in time, criminal charges had already been instituted against LtGen Mdluli and those investigations, which were being conducted by the DPCI, were already at an advanced stage.

D. The refusal of the National Prosecuting Authority ("NPA**") to institute criminal proceedings**

16. Advocate Laurence Mrwebi ("**Advocate Mrwebi**"), the Special Director in the Specialised Commercial Crime Unit ("**SCCU**"), a component within the NPA had written two internal memoranda instructing both the Director of Public Prosecutions North Gauteng as well as the Regional Head SCCU: Pretoria to

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withdraw the criminal charges against LtGen Mdluli on the fraud and corruption matters relating to the SSA as he insisted that the SAPS had no mandate to investigate crimes committed within CI relating to the SSA as this was the mandate of the Inspector General of Intelligence ("IGI"). I attach marked "NM2" and "NM3" copies of the memoranda, both dated 4 December 2011.

17. The first memorandum of 4 December 2011, which is titled *"CONSULTATIVE NOTE IN TERMS OF SECTION 24(3) OF THE NATIONAL PROSECUTING AUTHORITY ACT, 32 OF 1998 (NPA ACT) ON THE REPRESENTATIONS OF LT GENERAL MDLULI CASE NO 111/1137/2011"*, is from Advocate Mrwebi to Advocate Mzinyathi, the Director of Public Prosecutions North Gauteng. A copy of the memorandum was also addressed to Advocate Glyniss Brytenbach, the Regional Head: SCCU, Pretoria. I repeat salient extracts of the memorandum:

"INTRODUCTION

1.

As required by section 24(3) of the NPA Act I have consulted with the Director of Public Prosecutions (DPP) North Gauteng on the matter with the purpose of conveying my views on the matter. Essentially my views related to the process that was followed in dealing with the matter particularly in view of the fact that the matter fell squarely within the mandate of the Inspector-General in terms of the Intelligence Services Oversight Act, 40 of 1994. I noted that it is only the Inspector General who, by law, is authorised to have full access to the Crime Intelligence documents and information and thus who can give a complete view of

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the matter as the investigations can never be complete without access to such documents and information. In my view the process followed in this matter is possibly illegal as being in contravention of the said provisions of the Intelligence Services Oversight Act, 40 of 1994".

"18.

Mdluli and Barnard are members of the Crime Intelligence Division of the South African Police Service which is part of the intelligence structures of the country and as such their conduct and activities are subject to the laws, regulations, policies and procedures governing the intelligence community. Of importance for the present purpose is the Intelligence Services Oversight Act, 40 of 1994 (the Act). The Act in section 7 thereof establishes the office of the Inspector-General and defines its functions.

19.

In terms of section 7(7) (cA) of the Act, the Inspector-General in relation to the Services has a function;

"to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph (a), the commission of an offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member".

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It will be noted that, the offences for which Mdluli is charged fall squarely within the mandate of the Inspector-General as quoted above.

21.

Naturally there were practical and policy considerations why the Inspector - General should be the one charged with investigation in circumstances of the case. These generally include considerations of State security as well as the secrecy of the nature of the work of the intelligence community. the need to preserve such secrecy and the need to ensure controlled access to their information and documents which the ordinary police cannot have.

22.

Clearly any investigator who has any clue about the working methods of the intelligence community must have realised that any investigation that had to do with procedures and policies of the intelligence community would not be complete unless there is full access to the necessary information and documentation in their possession. Only the Inspector-General would have such access. Any investigation of the kind as in the present case would be futile without the involvement of the Inspector-General, as the transactions which Mdluli is charged with can only be explained in terms of the internal applicable procedures, policies, processes and systems which the ordinary investigator has no access to. One may ask why the police failed to execute the search warrants.

27.

Accordingly, and based on the above. prosecution of the matter cannot continue. The investigator must advise these "certain members" of the

Crime Intelligence to refer their complaint to the Inspector-General for consideration and any subsequent steps will be guided by what the Inspector-General advises."

18. The second memorandum of 4 December 2011 titled "*DECISION REGARDING THE REPRESENTATIONS OF LT-GENERAL MDLUU CASE NO 111/137/1*", was from Advocate Mrwebi and was addressed to Advocate Glynnis Breytenbach in her capacity as the Regional Head: SSCU: Pretoria (which was copied to Advocate S Mzinyathi, Director of Public Prosecutions; North Gauteng). I repeat salient extracts of the memorandum below:

"The abovementioned matter refers.

I refer to the attached consultative note in terms of section 24 (3) of the National Prosecuting Authority Act 32 of 1998 to the Director of Public Prosecutions, North Gauteng and which was copied to your office.

For reasons stated in the said note, the charges against Lt-General Mdluli and Colonel Barnard must be withdrawn immediately.

This office must be advised of the results of the proceedings for purposes

E. The role of the Inspector General of Intelligence ("IGI")

19. Because the matter was related to CI and the covert environment, and because of the decision expressed by Advocate Mrwebi, I decided to write to the ("IGI"), Advocate Radebe, for her opinion on the matter. Although my file copy of the letter is undated and unsigned, I confirm that correctness of the contents and

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that I in fact signed and dated the original letter. I attach a copy of my letter marked "NM4".

20. I attached a copy of the entire criminal case docket to my letter and requested the IGI to make a finding in respect of the institution of disciplinary action against both MajGen Lazarus and LtGen Mdluli and, further, in respect of the institution of criminal charges against LtGen Mdluli. I purposely requested these decisions in light of the decisions on Advocate Mrwebi.

F. The IGI opinion

21. On 6 March 2012 the IGI reverted to me by means of a letter, to which an opinion was attached. Extracts from the opinion report are quoted *verbatim*, and have therefore not been corrected grammatically. I attach marked "NM5" a copy of the letter and the opinion of the IGI.
22. In her letter Advocate Radebe indicated that she was responding to my letter dated 22 February 2012. She is referring to the letter attached hereto as annexure "NM4".
23. Sallent extracts from her opinion are as follows:

**"REPORT ON INTERNAL DISCIPLINARY CHARGES AGAINST
LIEUTENANT GENERAL MDLULI AND MAJOR GENERAL
LAZARUS"**

"FACTUAL BACKGROUND

The Inspector-General (IGI) received a letter dated the 22 February 2012 from the Acting National Commissioner requesting an opinion on the contents of the arguments raised by the NPA in support of the withdrawal of the criminal charges against Lt Gen Mdluli and an opinion on the disciplinary charges leveled against Lt Gen Mdluli and Maj Gen Lazarus. The IGI requested documentation to enable the submission of the opinion which was delivered on the 29 February 2012.

A decision has been taken by the IGI that this report will be confined to the disciplinary charges in respect of the abovementioned officials and that the requested opinion relating to the criminal charges will follow at a later stage.

MANDATE OF THE INSPECTOR-GENERAL OF INTELLIGENCE

The Inspector-General of Intelligence (IGI) is appointed under the provisions of the Constitution of the Republic of South Africa, 1996 and the Intelligence Services Oversight Act, 1994 (Act 40 of 1994) (hereinafter referred to as the Oversight Act).

The IGI has the oversight responsibility over the South African Intelligence Services which include the State Security Agency (domestic and foreign branches), the Intelligence Division of the South African Defence Force (DI), and the Crime Intelligence Division of the South African Police Services.

The scope of responsibilities of the IGI have been outlined in the

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Oversight Act and includes an integrated compliance-based monitoring responsibility and a proactive based review function, both of which are together seen as the core functions of the IGI. They serve to provide assurance to the Government and the people of SA that the intelligence services conduct themselves within the framework of the Constitution, the rule of law and due process. The assurance embraces in particular, probity and respect for human rights, and in general that the Services carry out their activities in an operationally effective manner in the interest of state security. As stated at the Stockholm International Symposium 'supervision is not only about legality in its strict sense. The balance between security and integrity must also take into account principles of good administrative decision making in democratic states, such as principles of proportionality, access to justice and fair procedures'. Hence in overseeing the activities of the intelligence services due regard must be placed on issues that involve conduct to ensure that such conduct is pursued with integrity and in an ethical manner. Intelligence oversight is directed at the lawful conduct of the Services. Whilst the IGI has the operational oversight mandate, the Auditor General of SA has the financial oversight mandate over the Services. This operational mandate does not include a criminal mandate and as such oversight is conducted in a manner to ensure that the services act within the parameters of the Constitution and conduct themselves in a manner that is

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beyond reproach.

The fundamental reason for the establishment and continued existence of the Office of the Inspector-General is to ensure that the security of the State is protected and information in the possession of the Services is handled in a manner that does not prejudice the interests of the State. The mandate of the IGI is set out in the Oversight Act which includes investigations of corruption. This is catered for by way of the complaints function allowing for the IGI to investigate complaints of corruption involving intelligence members. Such an enquiry is conducted from an oversight perspective and not one intended for purposes of a criminal investigation i.e. one that is court driven. Evidence obtained during such investigation remains the property of the IGI and cannot be handed over to other State entities. The investigation ordinarily culminates into a report containing findings and recommendation which may include a recommendation of criminal prosecution.

The OIGI was established to perform this oversight function over the Intelligence Services. Had this not been the intention of the legislature in establishing the OIGI then matters of this nature would squarely fall within the mandates of other Chapter 9 institutions.

PROCEDURAL ASPECTS

"Turning to the matter at hand one has to trace the chronological order of the actions taken against Mdluli. In summary he was charged with a murder that occurred in 1999. During the investigation of this murder charge other information came to light which led to the registering of a docket Silverton CAS 155/07/2011 on charges of fraud, theft and corruption involving motor vehicles. Search warrants were obtained for 2 covert premises which were executed on more than one occasion during early September 2011. Documents were seized under this warrant and members of the Crime Intelligence Division were interviewed. The search warrants were intended to sustain a criminal prosecution of fraud but other alleged criminal acts were discovered.

Mdluli was arrested on the 21 September 2011 on charges of fraud, theft and corruption involving the motor vehicles and the case was adjourned to the 14 December 2011. On this day the charges were withdrawn. The murder matter was withdrawn on the 7 February 2012 however media reports as early as 1 February 2012 suggested that the charges were to be withdrawn and, on the 3 February 2012, disciplinary charges were instituted. The timing of the events becomes vital in our determination as it clearly suggests an ulterior motive and a concerted effort to ensure that Mdluli does not return to his position. This behaviour is tantamount to conduct that is inconsistent with the Constitution and as such must be invalid.

This matter will be expanded on later in this report".

"However what is curious is the fact that many of the officials who provided affidavits are implicated in the charges against Mdluli yet to our knowledge, apart from Lazarus, none of the other officials have been charged internally. In respect of the appointments it is clear that those implicated were complicit in the process yet they remain free from internal processes. The question is why? Once again conduct comes into question for which the only conclusion that can be reached is that this too points to another attempt by the investigators to ensure that action is only directed at Mdluli to guarantee his non-return.

As far as fairness of the process is concerned, the Constitutional court has been decisive in ruling that fairness is tested from the inception of an investigation which if unfair could render any subsequent process ultra vires. Furthermore fairness is an integral component of Just Administrative Action enshrined as a constitutional right in section 33 of the Constitution. This has applicability here. Procedural fairness must exist in any administrative action such as a disciplinary matter as it is an intended consequence of materially and adversely affecting the rights of a person (section 3 of the Promotion of Administrative Justice Act 3 of 2000. The facts in this matter reveal procedural unfairness which is manifested through the conduct of the investigators. As such the institution of the disciplinary matter cannot be sustained as it is inconsistent with the Constitution.

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Insofar as Lazarus is concerned we hold the view that the disciplinary charges leveled at him complies with the internal regulatory framework of SAPS and thus can find no unlawful conduct or procedural unfairness".

MERITS OF THE CHARGES

"In respect of Mdluli we will not deal with the individual charges as there is a clear splitting of charges and will confine our response to the alleged unauthorized overseas trips and the irregular appointments. However at the outset it must be borne in mind that we are unaware of the defence of Mdluli save for what it set out in his response to the disciplinary charges, a copy of which is at hand. In addition we have not interviewed him and will not advance a defence for him or assume the role of his legal representative. As such our response will address factors we are mandated to address as provided for in the Oversight Act. In respect of the trip to Singapore, we are aware that the Auditor-General (AG) queried certain expenses related to this trip, in particular the reason for the inclusion of Ms Lyons, a non employee of SAPS on the trip. It would also appear that the trip to China in which Mdluli was accompanied by his former wife, was queried by the AG. Management of SAPS responded and the AG accepted the response provided in respect of the purpose for the inclusion of Ms Lyons and the role she was to play in the

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Singapore trip. In addition the AG accepted the responses pertaining to the China Trip. This is a vital piece of evidence in dealing with these charges. It is the AG who has the final financial oversight role over the Intelligence Services and the Secret Services Account. Their mandate is unambiguously set out in the Oversight Act and the Public Audit Act wherein extensive powers relating to financial mismanagement are provided to this oversight body. We are therefore at pains to comprehend the rationale behind the decision to include these charges in the disciplinary matter against Mdluli subsequent to the findings of the AG. This inclusion is disturbing as it serves to undermine the office of the AG and tends to place their integrity into question.

The SAPS Secret Services Account: Policy and Delegation Document provides for delegation of power to the Divisional Commissioner. These powers are far reaching and include discretionary power. Express provision by way of section 53 provides for Divisional Commissioner to authorize the purchase of airplane tickets for international flights. Even more important are the provisions of section 71 which grants the Divisional Commissioner the power to approve and authorize expenditure not mentioned in the Delegation document. This is an extremely wide power which would include a vast range of activities and operations including overseas travel. So whilst it is alleged that Mdluli contravened the National Instruction 5/2005 by not obtaining approval in accordance with its prescripts, it can

equally be argued that the delegation of powers vested in him the power to authorize expenditure related thereto.

If this argument is accepted then it may be said that he was authorized to approve of the trip to China and was equally authorised to include Lyons in the trip to Singapore as he held the view that she has the necessary skills for this undertaking. In addition we hold the version supplied by both Mdluli and Lazarus in their responses is reasonable and such should be accepted.

In respect of the appointments it is common cause that 250 posts were filled which included the family of Mdluli and his current wife. It is also common cause that the family members of Mdluli were already employed by SAPS and applied for the posts in line with the requisite prescripts. Whilst mindful of the SAPS Employment Regulations, 2008 barring the favouring of relatives in work related activities, we hold the view that had there been only 4 posts advertised which were filled by the aforementioned members; the charges related thereto would hold some merit and could be sustained. However 4 amongst 250 is negligible and the motive behind for the inclusion of these charges must be questioned.

However we do hold the view that related charges on this issue of appointments can be out to Lazarus as he was responsible for the appointments".

"FINDINGS

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- *In respect of the charges in totality the conduct and motives of the investigators must be considered. As explained above the failure of successful prosecution on the criminal charges led to a concerted effort to institute disciplinary charges against Mdluli. The conduct itself is inconsistent with the Constitution as it is intended to deprive Mdluli of his constitutional right to fair administrative process. As such this conduct must be declared inconsistent with the Constitution and hence invalid. It is therefore our finding that the entire process of the institution of the disciplinary charges against Mdluli is ultra vires and must be declared null and void;*
- *Should this approach not be accepted we find that the version supplied by Mdluli in his response read together with the version of Lazarus in respect of the trips and the first charge of the appointments is reasonably possibly true which would render the disciplinary charges with little prospects of success;*
- *In respect of the Lazarus we find that the charges relating to the trips should be withdrawn based on the reasons advanced above. However all other charges contained in his charge sheet save for the one related to the appointment of the family of Mdluli must be instituted against Lazarus as he has a case to answer;*

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- *As far as the position of Lazarus is concerned it is clear that in terms of paragraph of Chapter 1 of the SAPS Secret Services Account: Policy and Delegation Document the responsibility of the CFO (Lazarus) is to assist the accounting officer who is the National Commissioner. To hold any other position or to perform other duties and responsibilities is a violation of this policy document. We have found in our Certificate 2010 that Lazarus was designated the title of Head Operational Support with responsibilities of the role of CFO and Support to Covert Operations. The latter entailed operational duties. This is an untenable situation and cannot be allowed to continue.*

RECOMMENDATIONS

- *It recommended that the disciplinary matter against Mdiuli be immediately withdrawn and he should be required to report for duty immediately;*
- *In respect of Lazarus we recommend that disciplinary charges proceed against him in respect of the following: rental of the safe house (charge 1) the trip to Mauritius (charge 2), domestic travel for the members of his family (charge 4), submission of a false statement (charge 5) and the alternative charge 7;*
- *It is further recommended that Lazarus be immediately*

removed from his current positions and roles and be placed in a position where he has no dealings whatsoever with the Secret Service Account."

24. During this period, I met with LtGen Mdluli. I informed him that I had written to the IGI and had received a response from her regarding the disciplinary matter against him but was awaiting her response regarding the criminal case against him. I gave the same advice to Minister Mthethwa.
25. I disagreed with the IGI's view that LtGen Mdluli should return to work. She had not yet read the criminal case docket or expressed an opinion thereon and I felt that she ought first to do so before he should be reinstated. I telephoned Advocate Radebe to inform her that I would not be lifting LtGen Mdluli's suspension until she had perused the criminal case docket, as this might influence her initial decision regarding the disciplinary matter against him. I was also aware that Advocate Jay Govender ("Advocate Govender") from the IGI was an experienced Advocate and a former prosecutor so I had faith that she would assist the IGI in making an informed decision on the status of the criminal case.
26. A few days later I received a call from Advocate Radebe imploring me to return the letter and the opinion she had given me regarding the disciplinary case against LtGen Mdluli. She explained that after reading the criminal case docket, she wished to alter her original decision on this matter. She acknowledged that the reasons supplied by her in her letter of 6 March 2012 (annexure "NM5"

hereto) conflicted with the findings she had come to after reading the criminal docket. She requested me to return the letter and the accompanying opinion to her office and that she, Advocate Govender and I could discuss the issue.

27. On 19 March 2012 I met with Advocate Radebe and Advocate Govender at the offices of the IGI. We discussed the matter. Advocate Radebe informed me that "they" had perused the criminal case docket. She remarked that the investigating officer had conducted a thorough investigation and that the case docket contained ample evidence to support criminal charges against LtGen Mdluli and others. She also expressed the view that the SAPS was competent to investigate crimes committed at CI and that applied particularly to the matter relating to the SSA.
28. I should point out that CI had appointed MajGen Mark Hankel ("**General Mark Hankel**"), who was from within the CI environment, to act as co-ordinator to ensure that only documentation required to conduct the criminal investigation was handed over to the investigating officer, Colonel Kobus Roelofse ("**Colonel Roelofse**"). Advocate Radebe noted that the appointment of General Mark Henkel as co-ordinator minimised the possibility of the compromise of CI operations and that the concern raised by Advocate Mrwebi in this regard was unfounded. Advocate Radebe then said that the NPA should continue with the criminal charges and that the SAPS should continue with implementing the disciplinary action against General Mdluli.

29. During the meeting with Advocate I handed the previous letter dated 6 March 2012 to her. She took it and instructed Advocate Govender to draft an appropriate reply to my original request, to support her new findings. Advocate Govender left the room and went to her office where she drafted a letter. She returned to where we were seated and handed the new letter to Advocate Radebe who read through the letter and thereafter agreed with the contents and signed the letter.
30. The letter handed to me on 19 March 2012 by the IGI was headed:
"SILVERTON CAS 155/07/2011: INVESTIGATION BY THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION: LIEUTENANT GENERAL RN MDLULI: CRIME INTELLIGENCE DIVISION OF THE SOUTH AFRICAN POLICE SERVICE". I attach marked "NM6" a copy of this letter.
31. I repeat the salient portions of this letter:
- "1. We refer to your letter of the 22 February 2012 wherein you requested an opinion on the reasons advanced by the National Prosecuting Authority for the withdrawal of the criminal charges against Lt General Mdluli.
2. In response to the Memorandum of Adv Mrwebi of the 4 December 2011 we advise as follows:
- 2.1 The Inspector- General of Intelligence (IGI) derives her mandate from the Constitution of the Republic of South Africa, 1996 and the Intelligence Services Oversight Act, 1994 (Act 40 of 1994)

which provides for the monitoring of the intelligence and counter-intelligence activities of the Intelligence Services;

2.2 *Any investigation conducted by the Inspector-General is for the purposes of intelligence oversight which must result in a report containing findings and recommendations;*

2.3 *The mandate of the IGI does not extend to criminal investigations which are court driven and neither can IGI assist the police in conducting criminal investigations. The mandate of criminal investigations rests solely with the Police;*

As such we are of the opinion that the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that this matter be referred back to the NPA for the institution of the criminal charges."

32. Acting upon this letter from the IGI, I later telephoned LtGen Mdluli to inform him that I would continue with the criminal and department charges against him. I thereafter called LtGen Stander and informed her to proceed with the departmental charges, and informed LtGen Dramat to return the case docket to the NPA and request them to reinstitute the charges against LtGen Mdluli.
33. Approximately one week later I was travelling by road to KwaZulu Natal. In the vicinity of Villiers, I received a call on my mobile telephone from Advocate Radebe. She was distraught. She informed me that she had made "a wrong" decision in the opinion expressed by her in her letter of 19 March 2012 and she feared that in doing so it may cost her her career. She stated that she should

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not have suggested that LtGen Mdluli be charged and that she was "*in trouble*" for saying so. She implored me to return the letter dated 19 March 2012 to her as she had to withdraw her remarks. I stated that I could not do so as she had, together with Advocate Govender, read the docket and reached a decision and thereafter and in my presence instructed Advocate Govender to draft the letter. I noted that she had read the draft letter, agreed with its contents and had only then signed the letter before handing it to me. In these circumstances, I said, I was satisfied that her letter accurately expressed her opinion and that I was not prepared to return the letter to her.

34. I also informed Advocate Radebe that I had already sent the letter to LtGen Stander with instructions to proceed with the departmental charges and to LtGen Dramat with instructions to return the case docket to the NPA requesting that the charges be reinstituted.

G. Enlightening the NPA as to the decision of the IGI

35. On 23 March 2012, LtGen Dramat addressed a letter to Advocate Nomgcobo Jiba, who was at the time the Acting National Director of Public Prosecutions. The letter was headed "*SILVERTON CAS 155/07/2011: INVESTIGATION BY THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION: LIEUTENANT GENERAL RN MDLULI: CRIME INTELLIGENCE DIVISION OF THE SOUTH AFRICA POLICE SERVICE*". The letter was copied to the Special Commercial Crimes Unit. I attach marked "NM7" a copy of LtGen Dramat's letter.

36. I repeat the salient portions of that letter:

"A.1. With reference to the memorandum of Adv Mrwebi regarding the ongoing investigation by the Directorate for Priority Crime investigation (DPCI) into Silverton CAS 155/07/2011 concerning Lieutenant-General RN Mdluli, Division Crime Intelligence.

2. Attached is the response received from the Office of the Inspector General of Intelligence and a copy of the criminal investigation docket, Silverton CAS 155/07/2011 for your decision".

37. Advocate Mrwebi later responded to this letter in which he indicated that he had already taken a decision on this matter and that his decision was final. I attach a copy of this latter marked "NM8".

38. After receipt of Advocate Mrwebi's letter, LtGen Dramat informed me of the response of Advocate Mrwebi. We discussed the matter and neither of us was happy with Advocate Mrwebi's response. I accordingly telephoned Advocate Jiba to request that she personally respond to LtGen Dramat's letter as she was the Acting NDPP, and not Advocate Mrwebi. She explained that she was in China and that I should address all correspondence regarding the matter to Advocate Mrwebi.

39. On 23 April 2012, LtGen Dramat authored a further letter under the heading:
"SILVERTON CAS 155/07/2011: INVESTIGATION AGAINST LIEUTENANT

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GENERAL RN MDLULI" which he sent to Advocate Jiba. I attach a copy of this latter marked "NM9".

40. In the letter LtGen Dramat stated:

"You will recall that I have submitted a request, dated 23 March 2012, with the relevant case docket to you, as addressee A, in your capacity as Acting Director of Public Prosecutions, for your decision. This was following the response from the Inspector General of Intelligence on the initial decision of the Special Director, Advocate Mwrebi, to have the charges against Lieutenant General Mdluli and Col Barnard withdrawn. Thereafter I received a response, again from Advocate Mwrebi, that the matter is finalized and that he abides by his decision. In the circumstances I will appreciate a decision on the matter by you, as the ultimate authority in respect of the consideration of a prosecution".

41. There was no response from Advocate Jiba.

H. Interference by Minister of Police

42. A few days after my conversation with Advocate Radebe, I chaired the Management meeting at Wachthuis (Police Headquarters). In attendance were the Deputy National Commissioners. During the meeting, I was requested to take a call from Minister Mthethwa. Minister Mthethwa instructed me to immediately come to his residence in Waterkloof to meet with him. Minister Mthethwa did not give any reasons as to why I had to meet with him. I returned

to my meeting where I informed the members present that the call was from Minister Mthethwa who had requested that I immediately attend a meeting with him at his residence. I excused myself from the meeting and proceeded to Minister Mthethwa's residence at Waterkloof.

43. On my arrival at Minister Mthethwa's house, I noted that only he and the IGI, Advocate Radebe, were present. I was surprised to see the IGI there. Minister Mthethwa greeted me with these words, or similar, "*General, the IGI told me you gave instructions to the her to say that Mdluli must be charged and told her what to draft in the letter*". I was taken aback as this was in total contradiction to what had indeed transpired. I informed the Minister that I could not instruct the IGI to write a letter or what to put in her letter, as she heads an independent body that reports directly to Parliament. To my surprise, Advocate Radebe stated I had instructed her to write the letter and how the letter should be worded.
44. Since this was completely false and obviously so (nobody could honestly believe that I had somehow persuaded the IGI, an admitted advocate, assisted by another admitted advocate and experienced prosecutor, to express a legal opinion with which she did not agree) I started to become annoyed and suggested that the three of us go to the IGI's office to view the video footage on the surveillance cameras of the meeting between Advocate's Radebe, Advocate Govender and me. I assumed that, being the IGI, they would have surveillance cameras everywhere. I stated that any person viewing the video footage would see that Advocate Govender left the room alone and returned



later with the letter which Advocate Radebe signed. A viewer of the footage would also note that during the period of Advocate Govender's absence Advocate Radebe and I had remained in the office where the meeting had been conducted and that I was not in a position to influence the drafting of the letter. I also suggested that if we considered Advocate Govender's computer, it would be found that the letter had been drafted by her on her computer.

45. Minister Mthethwa rebuffed my proposal and persisted with his view that since I had instructed the IGI to write the letter, the letter was flawed. Minister Mthethwa then told me that I had to uplift the suspension of LtGen Mdluli.
46. The conversation became heated and I reminded Minister Mthethwa that his role as Minister of Police was an executive role and that he could not interfere with administrative duties within the SAPS. I furthermore informed him that he did not have the authority to instruct me to uplift LtGen Mdluli's suspension. I told Minister Mthethwa that his instruction was illegal and that if he wanted me to uplift LtGen Mdluli's suspension, he should put it in writing.
47. He reiterated that by me telling the IGI to state in the letter that criminal and disciplinary charges should be instituted against LtGen Mdluli, the process was now flawed. I told Minister Mthethwa that if I had been appointed merely as a puppet, I was not prepared to continue in that post. He told me that I should go to former President Zuma who had appointed me and that I should tell him that.

48. The argument could not be resolved. I said that if the IGI were to return the first letter (dated 6 March 2012) together with her opinion reflecting her initial findings, I would return her second letter dated 19 March 2012. Minister Mthethwa told Advocate Radebe that she should then hand me back the first letter as requested and that LtGen Mdluli's suspension would then be uplifted.
49. Advocate Radebe and I then drove to the IGI offices. She retrieved the original letter of 6 March 2012. I observed that on that letter she had inscribed the words "*Copy for filing 06/03/2012*" in manuscript on the top right corner of both the letter and the opinion. This was proof to me that she had in fact retained the document and filed it in the IGI archives. It is apparent that she was comfortable with compiling a further letter (that of 12 March 2012) which contradicted the first letter (that of 6 March 2012) because at the time of compiling the second letter, she did not consider that she was compelled to do so and did not consider that she was in any way acting improperly.
50. I, in turn, returned the original of her letter dated 12 March 2012. I did, however, retain a copy of the letter of 12 March 2012 in the file in my office. It is a copy of that copy that I have attached to this affidavit.

I. My address to the Deputy National Commissioners

51. I was unhappy with the chain of events, and on my way back to the management meeting I called LtGen Stander and informed her to take the necessary steps to ensure the upliftment of LtGen Mdluli's suspension. I

returned to the Management meeting where I found the meeting still in progress.

52. I was still annoyed with what had transpired at the Minister's residence and I informed those present at the meeting that I had been instructed by Minister Mthethwa to uplift LtGen Mdluli's suspension. I knew that this action would cause serious harm to the image of the SAPS as an organisation charged with the responsibility of upholding and enforcing the law. I therefore directed that we should redraft the charges in order to suspend LtGen Mdluli again.
53. On 25 May 2012 I authored a letter to Messrs Maluleke Serefi Makume Malata Inc. who at that stage represented LtGen Mdluli. This letter was in response to their email dated 24 May 2012, wherein they claimed that LtGen Mdluli only became aware of his suspension through the media. I drew their attention to the fact that Lieutenant General Masemola had personally served the Notice of Intended Suspension on LtGen Mdluli on 15 May 2012 and confirmed that I had decided to suspend LtGen Mdluli with effect from 26 May 2012. On the same date I signed a Notice of Suspension in Terms of Regulation 13(1) of the South African Police Service Discipline Regulations, 2006, in respect of LtGen Mdluli. I attach marked "NM10" a copy of my letter. I also attach, marked "NM11", a copy of the Notice of Suspension dated 25 May 2013.

J. Meeting with former President Jacob Zuma

54. At the beginning of June and on my request, I met with former President Zuma where I related the chain of events with regards to the IGI, our subsequent

meeting at the Minister's residence and what had transpired during the meeting at Minister Mthethwa's house. I also informed the former President of the instruction of Minister Mthethwa to uplift LtGen Mdluli's suspension. The former President acknowledged my presentation but did not say anything further. I found his silence odd. I then told him that I was not prepared to work under these circumstances, and that he should instead replace me. Former President Zuma requested that I remain as the Acting National Commissioner for a few more weeks to enable him to appoint a suitable candidate. About one week later, Ms Rhiya Phiyega ("**General Phiyega**") was appointed as the National Commissioner of SAPS.

55. After meeting with former President Zuma and before General Phiyega was appointed, I called my Deputy National Commissioners to a meeting. The Chief Financial Officer ("**CFO**") LtGen Stefan Schutte ("**General Schutte**") was also present. I told them about my meeting with former President Zuma and that I had asked him to appoint someone to replace me. I also informed them that Minister Mthethwa was unhappy that I was working with Deputy National Commissioners who had been appointed by General Bheki Cele. I advised them that once the new National Commissioner was appointed she or he (at that stage I did not know who the President had in mind) would probably not want to work with them and would choose her or his own 'team'. I warned them that they should prepare to exit the SAPS in terms of Section 35 of the SAPS Act. That section reads as follows:

"Discharge of members on account of redundancy, interest of Service or appointment to public office

35. *The National Commissioner may, subject to the provisions of the Government Service Pension Act, 1973 (Act No. 57 of 1973), discharge a member -*

(a) because of the abolition of his or her post, or the reduction in the numerical strength, the reorganisation or the readjustment of the Service;

(b) if, for reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the Service, or will otherwise be in the interest of the Service; or

(c) if the President or a Premier appoints him or her in the public interest under any law to an office to which this Act or the Public Service Commission Act, 1984 (Act No. 65 of 1984), does not apply".

56. This section has been widely and notoriously utilised in the police to give golden handshakes to police officers who no longer fit into the plans of the National Commissioner, or where friends are to be promoted. The post would be declared "redundant", and since the person occupying the post no longer had a post, the incumbent would be retired, often at great cost to the state. The state would even settle the outstanding contributions of the incumbent with the Government Employees Pension Fund, up to retirement age. Once the former incumbent had been removed in this manner the post would be advertised. The

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"new" post would then be given a different name and a slightly different job description. These "new" positions were simply the old positions, designed to provide credence to an unlawful retirement.

57. The National Commissioner is entitled to retire any police officer at any time, as there are no real control measures in place to inhibit his or her decision.
58. The irony is that the National Commissioner utilised section 35 of the SAPS Act as a mechanism to retire LtGen Mdluli and provide him with a golden handshake, as well. This was despite his involvement in numerous criminal activities, as outlined above. In fact, at the time of LtGen Mdluli's retirement, the High Court had already made an order setting aside the decision to withdraw the criminal charges against Lt General Mdluli.
59. Since I had no post to return to after my promotion to Acting National Commissioner, I asked LtGen Schutte to calculate what my retirement package would be if I would be forced to retire.

K. Appointment of General Phiyega as National Commissioner of Police

60. On 12 June 2012 General Phiyega was appointed as the National Commissioner by the former President Jacob Zuma. Shortly thereafter, true to my prediction, she proceeded to "got rid of" Deputy National Commissioners despite them all being top professionals within their fields of expertise. The fate of the Deputy National Commissioners during her term in office is detailed below:

- LtGen Godfrey Lebeya – was offered an unfair retirement package which he successfully challenged in court. He has since been reappointed as the National Head DPCI (the Hawks).
- LtGen Anwa Dramat – was subjected to suspension and eventually offered a Section 35 package. He has since retired.
- LtGen Fani Masemola – was moved to a lower authority post as the Provincial Commissioner Limpopo. After General Phiyega left he returned to his old post as a Deputy National Commissioner: Policing.
- LtGen Mgwenya – was moved to a lower authority post as the Head of Registry (SAPS Archives). After General Phiyega left she returned to a post of a Deputy National Commissioner and was appointed at Human Resource Management.
- LtGen Mofomme – suffered the same fate as LtGen Lebeya and was retired.
- LtGen Stander – she remained on her post but retired shortly thereafter.
- LtGen Schutte – he was removed from his post as CFO and replaced by LtGen Avhashoni Ramikosi ("**LtGen Ramikosi**") an outside chartered accountant who had no work experience on public finance management or police background. LtGen Ramikosi has since been charged as one

of the masterminds behind the VBS corruption saga, and has resigned from the police.

61. Despite me suggesting to General Phiyega that a suitable candidate to oversee CI would be LtGen Masemola, General Phiyega refused to listen to reason and appointed MajGen Chris Ngcobo ("**General Ngcobo**") to one of the crucial divisions within the SAPS, as the Acting Divisional Commissioner at CI. This was despite the fact that MajGen Ngcobo was previously from the VIP Protection Unit and in my view, he had no, or limited operational experience within the covert environment. When I asked General Phiyega about this appointment she told me not to worry about it. MajGen Ngcobo was later discharged when it was established that he either did not have a Senior School Certificate, or had falsified one.
62. General Phiyega and MajGen Ngcobo later became embroiled in a conflict. When MajGen Ngcobo was suspended, General Phiyega appointed LtGen Bongi Zulu ("**General Zulu**") to head CI. Once again this was an irrational decision since LtGen Zulu had never been a career policewoman, but was a former researcher with a Human Resource background. She had no operational experience in any capacity and no experience in the covert environment. My protestations against this appointment, were disregarded by General Phiyega.
63. After General Phiyega took office, I was not offered any post and after hanging around the office for several weeks, General Phiyega told me to go back to my home in KwaZulu Natal and that she would call for me when she needed me. I

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did as I was told and for two years, at great cost to the State, I, with my vast experience and expertise, and being a former acting National Commissioner of the SAPS, remained at home. I was still a member of SAPS. I still received my monthly salary which included all benefits and salary increases, GEPF, medical, vehicle and housing allowances.

64. General Phiyega would contact me from time to time (usually two to three days per month) to attend meetings on her behalf. When doing so I would fly or drive to the place where I needed to discharge my duties. I would be accommodated in hotels and catered for by the state. Thereafter I would return to my home to await my next assignment.
65. Late In 2013 General Phiyega appointed me as Head of Facilities where I oversaw buildings construction, maintenance and procurement, this despite my vast operational experience and number of vacant operational post, I was overlooked for any of the senior positions that were in keeping with my experience.
66. On 14 October 2015 former President Zuma suspended General Phiyega . Subsequent to her suspension an investigation by a "reference group" appointed by police minister Nkosinathi Nhleko found General Phiyega to have committed perjury and ignoring internal processes when demoting, suspending and removing several senior officials.

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L. My appearance before Parliament

67. On the 17th, 18th and 19th April 2012 the SAPS management appeared before the Portfolio Committee on Police at Parliament to table the Strategic Plan, Annual Performance Plan as well as the Budget for 2012/2013 financial year. The procedure demands that the Accounting officer (in this case myself as the SAPS Acting National Commissioner) has to undertake such briefings.
68. As part of the discussion regarding the performance targets for Detectives, I explained to the Committee that once a case has been registered and the matter had been fully investigated to obtain all relevant information to secure an arrest, the matter would be taken out of the police's hands and the NPA with its National Prosecuting Services would take over. From then onwards it is largely the responsibility of the courts to secure the convictions and sentencing of criminals. For various reasons well investigated cases can fail at court and criminals be acquitted, despite the evidence supporting elements of the crime and the charges being proven. It was, therefore, I explained, difficult for police to gauge performance, as performance was based on the conviction of an accused.
69. I concluded with the remarks, "*other powers decided on convictions, not just the SAPS*". Here I was referring to where the matters were taken out of the control of the police.

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70. When making these remarks I was also tempted to quote the example of LtGen Mdluli, but for some or other reason I refrained from doing so. Here I wanted to show how despite a criminal case being well investigated, and more than sufficient evidence obtained to ensure a conviction, one person at the NPA, Advocate Mrwebi, chose to ignore the evidence and for some obscure reason tried everything in his power, including the abuse of his position, to ensure that the criminal matter against LtGen Mdluli did not proceed. This despite the IGI giving assurance that the matter should proceed to trial.
71. The conduct of the IGI when dealing with the DPCI request for clarity on whether the SAPS could investigate CI and the Interpretation by Advocate Mrwebi of the NPA, was disturbing. This was exacerbated by the shenanigans associated with the IGI and her responses with an opinion to withdraw the charges against LtGen Mdluli, followed by her withdrawing this opinion and insisting that he be charged, only to shortly thereafter revert to her original opinion to withdraw the charges.
72. The involvement of the Minister of Police took the matter to a new level of interference and is a distinct example of elements within the law enforcement arena exerting undue influence to ensure that LtGen Mdluli did not then stand trial.
73. I attach marked "NM12" an extract taken from Hansard dated 17 April 2012 regarding my appearance before the Parliamentary Portfolio Committee. My quotation is on the 11th page of the document and I have highlighted it in yellow.

M. The Freedom Under Law ("FUL") court application

74. I was also totally oblivious to what has transpired regarding the court action brought about by FUL in challenging the Mdluli re-appointment. During this period that this matter was in court, I was relaxing at home and had no idea what was transpiring. Although General Phiyega had my number, she never once contacted me to seek advice on how to answer the question directed to what made me decide to withdraw LtGen Mdluli's disciplinary proceedings and to uplift his suspension. Moreover, neither she, nor anyone else, ever requested an affidavit from me in this regard.
75. It was only when I received a request for information from the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("the Commission") dated 12 November 2019 did I first become aware of the FUL application on what I had meant in my address to the Portfolio Committee on 19 April 2012 and the related evidence placed before the High Court during the FUL application.
76. I have now had the opportunity to peruse the Judgement handed down by Judge JR Murphy in the FUL application under Case No: 26912/12. My attention has been drawn to the sub-heading, "The withdrawal of the disciplinary proceedings and the reinstatement of Mdluli".
77. On paragraph 209 of the judgement, the Judge makes a reference to the answering affidavit that was made by General Phiyega in response to the averments of a founding affidavit when she said:

"General Mkhwanazi was quoted out of context. As I understood and this is what he later clarified was that his response was in relation to the issue of the withdrawal of charges, which falls within the domain of the NPA, which invariably in his view affected the purpose of the continued suspension and disciplinary charges then. General Mkhwanazi never obtain instructions from above. His confirmatory affidavit will be obtained in this regard. Should time permit, I will ensure that the copy of Hansard being the minutes or the transcription of the parliamentary portfolio committee meetings is obtained and filed as a copy which will clarify the issue".

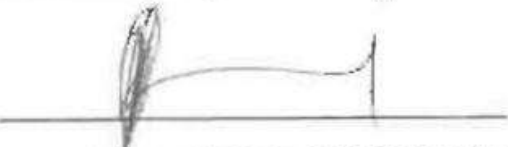
78. I attach marked "NM13" copies of the relevant pages of the Judgement comprising pages 47,48,49,50 and 51.
79. My response to these findings has already been dealt with under the headings: My appearance before Parliament and General Phiyega's response to Parliament.
80. It must however be mentioned that paragraph 47 of General Phiyega's answering affidavit was false and amounts to perjury. She had never discussed this issue with me and had not advised me of the court proceedings. She clearly had no intention of obtaining a confirmatory affidavit from me and had no intention of doing so.

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81. On 18 July 2019, in response to a Request for Information received from the Commission, a report was prepared and signed off by Major General KC Moloko and LtGen Ntshiea. A copy of the report is attached marked "NM14". I confirm the correctness of the report where it relates to me.
82. Furthermore, it is noteworthy that despite the serious criminal and disciplinary charges facing LtGen Mdluli, he was allowed to delay both the criminal and disciplinary matters until he was ultimately offered a retirement package in terms of Section 35(b), and in doing so evaded his disciplinary hearing. Section 35(b) reads:

"35. The National Commissioner may, subject to the provisions of the Government Service Pension Act, 1973 (Act No. 57 of 1973), discharge a member –

(b) If, for reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the Service, or will otherwise be in the interest of the Service;


NHLANHLA SIBUSISO MKHWANAZI

I certify that the deponent has acknowledged that he knows and understands the contents of this declaration, which was sworn to before me and the deponent's