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CONSTITUTIONAL MATTERS AND ARGUABLE POINTS OF LAW: REFLECTIONS ON THE GENERAL COUNCIL OF THE BAR, JIBA AND MRWEBI JURISPRUDENCE

SUMMARY

Over the past few years, the series of cases implicating Advocates Jiba and Mrwebi, two erstwhile senior members of the office of the National Director of Public Prosecutions (NDPP), have received extensive media coverage. The advocates are alleged to have been politically influenced in the exercise of their public power. In mid-2019, the Constitutional Court's ruling in *General Council of the Bar of South Africa v Jiba and others* 2019 8 BCLR 919 (CC), namely that the General Council of the Bar (GCB) had failed to show why the matter fell within the jurisdiction of the Constitutional Court for its consideration, disappointed many. This meant that the Supreme Court of Appeal's (SCA) majority judgment – which had overturned the Gauteng High Court's decision that Jiba and Mrwebi were to be removed from the roll of advocates – stood, pending a parliamentary process following upon the findings of the Mogoro Commission of Inquiry into their fitness as advocates. Reflecting on the jurisprudence involving the GCB, Jiba and Mrwebi, this contribution first explores the manner in which the Constitutional Court inquired into whether a constitutional issue, or, more specifically, "an arguable point of law of general public importance" that triggers the jurisdiction of the Constitutional Court, was raised. Secondly, it examines the circumstances in which a court of appeal may interfere with the exercise of a discretion by a court *a quo*. Finally, with reference to certain *dicta* in the Constitutional Court judgment, the contribution also reflects on how the applicant's case could have been formulated differently, in order to have persuaded the Constitutional Court to grant the application for leave to appeal to it as sought by the GCB. Examining the details of the various judgments, the article concludes that the injudicious manner in which the majority judgment in the Supreme Court of Appeal interfered with the High Court's exercise of a discretion could, in fact, have been considered to have raised "an arguable point of law" that triggered the Constitutional Court's jurisdiction, thus permitting the matter to be adjudicated and finally disposed of by our highest court. Moreover, the author argues that the inherent controversy of the matter, involving the erosion of the South African administration of justice and rule of law, was of sufficient public interest for the South African apex court to indeed consider

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it, because it offered the Constitutional Court the opportunity to develop the common-law "fit-and-proper standard" for legal practitioners, particularly those in high-ranking public judicial office. Unfortunately, this is now an opportunity missed.

1. INTRODUCTION

Since 1 April 2001, South Africa has had no fewer than ten national directors of public prosecutions in permanent and acting capacities.[1] This significant turnover is linked to political interference in the office of the National Prosecuting Authority (NPA),[2] and is viewed as weakening the rule of law in South Africa, with obvious negative consequences.[3]

This contribution is prompted by the jurisprudence that emanated from the General Council of the Bar's motion against Advocates Nomgcobo Jiba and Lawrence Sithembiso Mrwebi, previously two senior members of the office of the National Director of Public Prosecutions (NDPP), to remove their names from the roll of advocates on the ground that they were not fit and proper to practise as such. It was alleged that they were politically influenced in certain decisions taken in the exercise of their public power. Among others, these decisions included charging former KwaZulu-Natal Hawks boss Johan Booysen and withdrawing charges against controversial former crime intelligence boss Richard Mdluli. By the time the Constitutional Court delivered its judgment on 27 June 2019,[4] a number of other judgments, not dealing with a motion to remove Ms Jiba's and Mr Mrwebi's names from the roll of advocates, but dealing with various contexts, in which their professional conduct had indeed been deplored, had been handed down, thereby confirming their unfitness to practise law.[5] These judgments, and the contexts within which allegations against the advocates had been made and scrutinised, formed the factual basis, upon which the motion for removal of their names from the roll was subsequently decided in the case law discussed

1 RSA Presidency "Enquiry in terms of section 12(6) of the *National Prosecuting Authority Act* 32/1998 abridged version", http://www.thepresidency.gov.za/sites/default/files/Section%2012%286%29%20Enquiry%20report%20-%20abridged%20version.pdf (accessed on 12 August 2019).

2 See, for example, Grootes "Bulelani Ngcuka strikes back: Too little too late", https://www.dailymaverick.co.za/article/2014-10-06-bulelani-ngcuka-strikes-back-too-little-too-late/ (accessed on 27 August 2019); Quintal "SAA hires Vusi Pikoli to clean up its mess", https://www.businesslive.co.za/bd/national/2019-01-15-vusi-pikoli-to-head-up-risk-and-compliance-at-ailing-saa/ (accessed on 27 August 2019); Pather "NPA insider tells NDPP panel Abrahams refused to tackle interference", https://mg.co.za/article/2018-11-15-npa-insider-tells-ndpp-panel-abrahams-refused-to-tackle-interference (accessed on 27 August 2019).

3 See generally Burger 2016. https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa (accessed on 20 August 2020).

4 *General Council of the Bar of South Africa v Jiba* 2019 8 BCLR 919 (CC).

5 *National Director of Public Prosecutions v Freedom Under the Law* 2014 1 SA 254 (GNP); *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA); *Booysen v Acting National Director of Public Prosecutions* [2014] 2 All SA 319 (KZD); *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA); *Freedom Under Law v National Director of Public Prosecutions* 2018 1 SACR 436 (GP).

in this article. The Constitutional Court judgment under discussion was, therefore, preceded by the judgments in the Gauteng Division of the High Court (Pretoria)[6] and the Supreme Court of Appeal (SCA). The dissenting judgments of the SCA are discussed in greater detail below. Suffice to say that the majority and minority judgments were diametrically opposed to one another, both as far as the conduct of Ms Jiba was concerned, as well as the appropriate remedial action to follow in the case of Mr Mrwebi. In addition, preceding the Constitutional Court ruling on leave to appeal, the Mokgoro Commission made its recommendations upon finding that the two advocates were "not fit and proper to hold their respective offices".[7] This series of cases implicating Advocates Jiba and Mrwebi sparked substantial public interest and received extensive media coverage.

At the time of writing, the matter was scheduled to serve before Parliament's Portfolio Committee on Justice and Correctional Services after President Cyril Ramaphosa, acting on the Mokgoro Commission's recommendations, had dismissed the two advocates from their posts at the NPA.[8] On 21 August 2019, Parliament released a statement announcing that it had agreed with the parties concerned not to proceed with the parliamentary process, pending the determination of Ms Jiba's application to have her removal from office set aside.[9] There has also been talk of Ms Jiba taking the Mokgoro Commission's report on judicial review.[10]

In this contribution, I will begin by revisiting the question as to when a matter "is a constitutional matter" or, in the alternative, at least "raises an arguable point of law of general public importance which ought to be considered"[11] by the Constitutional Court. I will then explore the circumstances in which a court of appeal may interfere with the exercise of a discretion by a court *a quo.* Finally, in light of a number of *dicta* in the Constitutional Court's judgment, I will consider how the applicant's case could have been formulated differently to, if necessary, have triggered the jurisdiction of the Constitutional Court, in order to have the matter resolved by our highest court.

6 *General Council of the Bar of South Africa v Jiba and others* 2017 2 SA 122 (GP).

7 RSA Presidency "Enquiry in terms of section 12(6) of the *National Prosecuting Authority Act* 32 of 1998 abridged version", http://www.thepresidency.gov.za/sites/default/files/Section%2012%286%29%20Enquiry%20report%20-%20abridged%20version.pdf (accessed on 12 August 2019).

8 Bateman "Ramaphosa fires Jiba, Mrwebi", https://ewn.co.za/2019/04/26/ramaphosa-fires-jiba-mrwebi (accessed on 19 August 2019).

9 Parliament of South Africa "Justice and Correctional Services Committee notes court order on Adv Jiba interdict", https://www.parliament.gov.za/press-releases/justice-and-correctional-services-committee-notes-court-order-adv-jiba-interdict (accessed on 27 August 2019).

10 SABC News Online "Jiba to take Mokgoro Report for judicial review", https://www.sabcnews.com/sabcnews/jiba (accessed on 27 August 2019).

11 *Constitution of the Republic of South Africa* 1996:sec. 167(3).

2. CONSTITUTIONAL COURT JURISDICTION AND LEAVE TO APPEAL

The *Constitution Seventeenth Amendment Act* 2012 introduced amendments to the jurisdiction of the Constitutional Court. The applicable provision in the *Constitution of the Republic of South Africa* 1996 (hereafter, the *Constitution*) now reads as follows:

167 (3) The Constitutional Court -

a. is the highest court of the Republic; and

b. may decide -

- constitutional matters; and
- any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

a. makes the final decision whether a matter is within its jurisdiction.

Paulsen and Another v Slip Knot Investments,[12] was the first case in which the Constitutional Court interpreted the changes occasioned by the *Constitution Seventeenth Amendment Act*. It is opportune to refer to this judgment at the outset in as far as it interpreted the phrase "an arguable point of law of general public importance which ought to be considered by the court". In this regard, three cardinal principles may be distilled:

- The first principle, which forms an underlying theme of this article, is the importance of precise drafting in constitutional litigation. The court remarked that "it would serve a litigant well to identify in clear language what it is that makes the point of law one of general public importance".[13]
- Secondly, a matter of general public importance "must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public".[14]
- Thirdly, the requirement of an arguable point of law is bifurcated. It must (i) be a point of law and (ii) be arguable.[15] It does not include factual questions.

In my view, the differentiation between questions of fact and of law is more intricate than it appears to be at first glance. In the *Jiba* matter, the Constitutional Court relied substantially on the fact that the controversy at hand involved factual findings only. The difficulty, in my view, regarding the differentiation between a question of fact and one of law is this: if an incomplete consideration *of the facts* leads the higher court to interfere with the exercise

12 *Paulsen and Another v Slip Knot Investments* 2015 3 SA 479 (CC).
13 *Paulsen and Another v Slip Knot Investments*:par. 26.
14 *Paulsen and Another v Slip Knot Investments*:par. 26.
15 *Paulsen and Another v Slip Knot Investments*:par. 20.

of the discretion of the court of first instance (which I argue happened *in casu*) that must surely constitute "an arguable point of law".

Du Plessis *et al*,[16] writing before the promulgation of the *Constitution Seventeenth Amendment Act*, correctly predicted that an interpretation of this *Act* may lead to a situation where "certain issues that are connected to constitutional matters are factual in nature and would thus not fall within the meaning of 'an arguable point of law' as is contemplated in sub-para (ii)". As will become clearer from the arguments that follow, this is precisely what happened *in casu.*

According to Rautenbach and Heleba,[17] one of the factors that prompted the promulgation of the *Constitution Seventeenth Amendment Act* was the Constitutional Court's own concern – expressed in its judgment in *Mankayi v Anglogold Ashanti*[18] – regarding the untenable distinction between constitutional and non-constitutional matters. In that case, Froneman J remarked as follows:

> There is an impossible tension between asserting the fundamental supremacy of the Constitution as the plenary source of all law, and nevertheless attempting to conceive of an area of the law that operates independently of the Constitution. The perceived necessity for the attempt to do so arises from the provisions in the Constitution that provide that this Court "is the highest court in all constitutional matters" [s 167(3)(a)] and that the Supreme Court of Appeal "is the highest court of appeal except in constitutional matters" [s 168(3)].

Rautenbach and Heleba[19] opine that the meaning of the concept "constitutional matters" could be approached from "at least two different angles". The first is to include "all matters to which the Constitution applies", which was the approach followed by the courts in the past and which resulted in an expansive interpretation of this concept. In my view, this approach is preferable in terms of realising greater access to justice, in general, while simultaneously expanding our South African constitutional jurisprudence.[20] This state of affairs, the authors noted, "was clearly heading in the direction of an outcome in which the Constitutional Court would rather sooner than later have become the apex court in all matters".[21] The second angle is to regard as constitutional matters all disputes that require the application of the provisions of the *Constitution* in order to be resolved.[22] Ironically, this more restrictive angle appears to be the approach adopted by the Constitutional Court in the *Jiba* judgment that will now be discussed.

In dismissing the General Council of the Bar's application for leave to appeal, the Constitutional Court ruled that the applicant needed to

16 Du Plessis *et al* 2013:33.
17 Rautenbach & Heleba 2013:406 *et seq*.
18 *Mankayi v Anglogold Ashanti Ltd* 2011 5 BLLR 453 (CC):par. 24.
19 Rautenbach & Heleba 2013:406 *et seq*.
20 For a general discussion of the importance of greater access to justice and the ability of the courts to remedy constitutional violations, see Fowkes 2011.
21 Rautenbach & Heleba 2013:406 *et seq*.
22 Rautenbach & Heleba 2013:407.

demonstrate that the matter fell within the court's jurisdiction.[23] To establish this, the court had to be persuaded by the provisions of sec. 167(3) of the *Constitution* that either a "constitutional matter" or "an arguable point of law of public importance" was being raised, which, in the case of the latter, "ought to be considered by the court". In addition to establishing that it had jurisdiction, so the court found, it had to be "in the interests of justice" for the application for leave to appeal to be granted.[24]

The court correctly indicated that the latter inquiry involved the weighing up of a number of factors[25] that had traditionally been considered applicable for a court to grant leave to appeal. These factors, which are now contained in sec. 17 of the *Superior Courts Act*,[26] include a reasonable prospect of success, or "some other compelling reason" as to why an appeal should be heard. Such a compelling reason may arise when different courts issue diverging judgments on the matter under consideration. Other grounds for leave to appeal under this provision are present where the decision under appeal does not resort under sec. 16(2)(a) of the *Act*,[27] and where the decision under appeal does not dispose of all the issues in the case, thus permitting the appeal to lead to a "just and prompt resolution of the real issues between the parties".[28]

Based on the reasonable prospects of success, and because of the conflicting judgments *in casu*, the Constitutional Court in the *Jiba* matter admitted that this would "impel" the granting of leave to appeal.[29] However, the court reasoned, this was conditional on the applicant first establishing that the court indeed had jurisdiction. It proceeded to conduct this investigation along the following lines, as indicated by the sub-headings that follow.[30]

2.1 The jurisdiction principle in the *Gcaba* case

According to the court, a "proper approach" to the jurisdiction inquiry was to examine the pleadings, in order to determine the nature of the claim. The nature of the claim needed to reveal that the applicant was advancing either a constitutional issue or an arguable point of law of general public interest.[31] These remarks by the court may, of course, imply that, in a case where a constitutional point is not readily discernible, or which raises a point that requires

23 *General Council of the Bar of South Africa v Jiba and others* 2019 8 BCLR 919 (CC). Hereafter referred to as "*Jiba* Constitutional Court judgment".
24 *Jiba* Constitutional Court judgment:par. 35.
25 *Jiba* Constitutional Court judgment:par. 36.
26 *Superior Courts Act* 10/2013.
27 *Superior Courts Act*:sec. 16(2)(a) provides: "(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."
28 *Superior Courts Act*:sec. 17(1)(c).
29 *Jiba* Constitutional Court judgment:par. 37.
30 *Jiba* Constitutional Court judgment:par. 37.
31 *Jiba* Constitutional Court judgment:par. 38.

an indirect application of the *Bill of Rights*,[32] *Constitution*-focused drafting may be required from applicants to persuade the court to entertain the matter.

First, however, Jafta J referred to the rule cited by Van der Westhuizen J in *Gcaba v Minister for Safety and Security*:[33]

> Jurisdiction is determined on the basis of the pleadings … and not the substantive merits … In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.

As a matter of interest, it is trite law that, generally, the mere claim that the court has jurisdiction must have merit. The opponent may question the veracity of the claim. In the general course of litigation, this is raised by the opponent, and not by the court of its own accord. However, in applications for leave to appeal appearing before the Constitutional Court, sec. 167(3)(c) of the *Constitution* states that the court will determine whether or not the matter falls within its jurisdiction. In my view, that applies irrespective of whether the opponent objects to jurisdiction. Secondly, it must be observed, at this point of the discussion, that the question of jurisdiction is intrinsically linked to the applicant's standing. In the case under discussion, the GCB's motion ought to have cited itself as acting on behalf of the legal profession, and also in the public's interest as provided for in sec. 38(d) of the *Constitution*.[34] I will elaborate on this argument later.

2.2 In search of a "constitutional matter": Scrutinising the applicant's *causa*

Taking his cue from the jurisdiction principle elucidated in *Gcaba,* Jafta J examined the applicant's pleadings and concluded that none of the matters brought by the applicant raised a constitutional issue.[35] The court summarised the applicant's *causa* as follows:

- The application had been brought by the GCB in terms of secs. 7(1) and 7(2) of the *Admission of Advocates Act* (hereafter, the *Admission Act*)[36] and it sought the striking of the names of the respondents from the roll of advocates or, alternatively, the suspension of the respondents from practice by the court for a period determined by the court.[37]

32 Currie & De Waal 2013:91.
33 *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC):par. 75.
34 Swanepoel 2015:318 *et seq*.
35 *Jiba* Constitutional Court judgment:par. 44.
36 *Admission of Advocates Act* 74/1964.
37 *Jiba* Constitutional Court judgment:par. 40. The *Admission of Advocates Act* 74/1964 has since been repealed and replaced with the *Legal Practice Act* 28/2014.

- The factual basis for asking the court for the scrapping or suspension order was the respondents' conduct (as referred to in the introduction to this article).
- In its founding affidavit, the GCB had concluded with the statement that:

> [N]one of the respondents is a fit and proper person to continue practising as an advocate, as contemplated by section 7(1)(d) of the Admission of Advocates Act. All three of the respondents [Jiba, Mrwebi and their colleague Mzinyathi], to varying degrees, have shown themselves to be incapable of acting in accordance with the duties of an advocate.

None of the aforesaid, Jafta J held, raised a constitutional issue, and the application of sec. 7 of the *Admission Act* did not "of itself alone raise a constitutional issue" either.[38]

Then, however, the court's reasoning took a confusing turn. Jafta J stated that the applicant did not require sec. 7 to be construed in terms of sec. 39(2) of the *Constitution*, which was only triggered "if the legislation under interpretation implicates a right in the Bill of Rights". Yet, in an "appropriate case", sec. 7 of the *Admission Act* might indeed raise a constitutional issue, he said,[39] although he refrained from stating what an "appropriate case" would be. Next, the court's line of reasoning became even more difficult to follow when Jafta J observed that the provisions of sec. 7 were intended to deal with misconduct by an advocate that rendered the person unfit for practice, and that the purpose of the provisions was to "protect the public" and to "preserve the legitimacy of the administration of justice and its proper functioning".[40] Quite clearly, these concerns relate directly to the *Constitution*, and the court, therefore, contradicts itself. There can be little doubt that the inherent controversy of the matter at hand was of profound public interest. The administration of justice is, after all, one of the most important pillars of the rule of law. Senior members of the office of the NDPP such as Jiba and Mrwebi were expected to play a pivotal role in preserving the rule of law, and to act objectively and without any prejudice. Was the court, therefore, suggesting that, if the applicant had formulated its *causa* differently so as to demonstrate a constitutional matter (in other words, indeed affirming that it may theoretically have been possible to do so), the outcome of the judgment may have differed?

The issue was obfuscated even further when Jafta J next referred to the applicant's jurisdictional clause in its founding affidavit, in which it stated that the High Court had jurisdiction because the respondents "practise as advocates in the area of jurisdiction of this Honourable Court". In my view, this would be a routine averment in a matter of this nature. It is unclear why the court felt the need to refer to this paragraph of the founding affidavit, but

38 *Jiba* Constitutional Court judgment:par. 44.

39 *Constitution*:sec. 39(2) requires that when interpreting any legislation and developing common or customary law, a court, tribunal or forum "must promote the spirit, purport and objects of the Bill of Rights"

40 *Jiba* Constitutional Court judgment:par. 45.

seemingly it did so in support of its argument that no constitutional issue had been raised.

2.3 The search for a "constitutional matter" continues: The substantive law issue

The substantive law issue, in this case, was the established three-stage test employed by the South African courts to determine whether an advocate (or attorney) is a fit and proper person to practise as such. The court pointed out that both the High Court and the SCA had been in agreement on the applicability of the test, but that they differed in their assessment of the facts before them, which disparity did not raise a constitutional issue.[41] While the applicant's objectives in bringing the application ("to protect the public and preserve the proper functioning of the administration of justice") were important, these did not raise a constitutional issue either.[42] The court continued as follows:[43]

> The apparently incorrect determination of facts by the majority in the Supreme Court of Appeal and the erroneous application of the three-stage test to those facts also do not raise a constitutional issue. This is because the standard is well established and the determination of the facts, whether right or wrong, does not amount to a constitutional issue.

In a similar vein to his suggestion regarding jurisdiction (as set out in 2.2 above), Jafta J then referred to a *dictum* by Mhlantha J in the matter of *Mbatha v University of Zululand*[44] evidently to suggest that the issue *in casu* might have taken a different turn had the applicant averred that the three-stage test needed "to be further explored due to contextual factors".[45] (I agree with this statement, as explained later.) But, the court said, if the issue at stake was the determination of facts alone, it failed to raise a constitutional issue and, thus, to trigger the jurisdiction of the Constitutional Court. The court then shifted its focus to the fact that, while the applicant had failed to mention this in both the High Court and the SCA, it now claimed that the case did, in fact, raise constitutional issues *and* "an arguable point of law of general public importance".[46] This submission by the applicant was premised on the assertion that the matter required "the interpretation and application of the NPA [National Prosecution Authority] Act[47] which is legislation contemplated in section 179 of the Constitution".[48] Yet, in the court's view, this matter did not involve the interpretation and application of the *National Prosecution Authority Act* (hereafter, the *NPA Act*).

Aside from the fact that the GCB only raised the constitutional issue upon applying to the Constitutional Court, and that (with the benefit of hindsight) it

41 *Jiba* Constitutional Court judgment:par. 47.
42 *Jiba* Constitutional Court judgment:par. 48.
43 *Jiba* Constitutional Court judgment:par. 49.
44 *Mbatha v University of Zululand* 2014 2 BCLR (CC).
45 *Jiba* Constitutional Court judgment:par. 49.
46 *Jiba* Constitutional Court judgment:par. 51.
47 *National Prosecution Authority Act* 32/1998.
48 *Jiba* Constitutional Court judgment:par. 51.

could have formulated its *causa* differently so as to facilitate eventual leave to appeal to the Constitutional Court if necessary, I cannot agree with the court's abrupt finding that "the *NPA Act* finds no application in the present matter".[49] Granted, this *Act* regulates neither the admission of advocates nor the removal of their names from the roll. The sole statute that regulated this at the time was the *Admission Act*, which, as the court also highlighted, was "not legislation envisaged in the Constitution". That, however, did not automatically render the *Constitution* and the *NPA Act* (having indisputably emanated from the *Constitution*) irrelevant or without application to this inquiry. This is because, at the time of the GCB's application to the Constitutional Court, the *Admission Act* was the only law that could be used as a vehicle of redress where advocates in the office of the NDPP were allegedly acting contrary not only to the common-law requirements for professional conduct, but also to the *NPA Act*, the latter having been derived directly from the provisions of sec. 179 of the *Constitution*. (It may be noted that the *Admission Act* has since been repealed by the *Legal Practice Act*,[50] a cursory reading of which clearly reveals that it was contemplated by the *Constitution*.)

It is also significant that the High Court dealt with the "fit-and-proper person standard" in light of the prosecutorial code of conduct, which emanated directly from the powers granted to the NDPP by the *NPA Act*.[51] The requirements for meeting the fit-and-proper standard for advocates in South Africa, which the courts have developed and applied over an extended period of time, were never intended to cater for the specific injunctions of the *Bill of Rights* and the *NPA Act*. That does not mean, however, that the fit-and-proper standard should not be applied and developed in context of the *Constitution*, particularly in service of its founding provisions. Arguably, advocates practising in the NPA's employ have an even higher standard of professional conduct expected of them than of their ordinary peers, due to the centrality of their position in the national administration of justice. That is why the preamble to the *NPA Act* contains a reference to sec. 179(4) of the *Constitution*, thereby confirming that "the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice".

Nevertheless, even if the GCB succeeded in persuading the court that the respondents' conduct was an issue requiring constitutional injunction and, therefore, was a constitutional matter, the ultimate issue would still have revolved around a factual inquiry into the respondents' conduct – something which, the Constitutional Court made clear, did *not* amount to a constitutional issue. In my view, such a factual inquiry should not have prevented the apex court's jurisdiction from being triggered. After all, in terms of sec. 167(3)(b)(i) of the *Constitution*, that court may decide a "constitutional issue", which is done on the basis – and within the parameters – of a given set of facts, thereby implying that the "issue" will be informed by the facts and, by necessary implication, will involve one or more factual findings.

49 *Jiba* Constitutional Court judgment:par. 52 (italics added).
50 *Legal Practice Act* 28/2014.
51 *General Council of the Bar of South Africa v Jiba* 2017 2 SA 122 (GP):paras. 10-20.

Sec. 167(3)(b)(ii) of the *Constitution*, on the other hand, provides for "any other" (hence "non-constitutional") matter to be decided. Such a matter must raise "an arguable point of law of general public importance which ought to be considered by" the Constitutional Court. This is what the court turned to next.

2.4 In search of "an arguable point of law of general public importance": Taking another look at the substantive law issue

The applicant submitted that an arguable point of law of general public importance had arisen, namely "the legal question of the standard of conduct to which advocates, including state advocates, should be held if they are to remain on the roll of advocates, or conversely, what form of misconduct is sufficient to justify removal from that roll".[52] This submission relied on two arguments. The first was that, as in the matter of *General Council of the Bar of South Africa v Geach*,[53] the SCA was "sharply divided" on the appropriate standard to apply in matters that involved dishonesty by legal practitioners. The second involved divergence on the degree of deference that a court of appeal was expected to show "to the discretion exercised by the court of first instance".[54]

The court rejected these contentions, holding that the cause of action was limited to the determination of whether the respondents were fit and proper to practise as advocates, for which there was "a well-established test".[55] The High Court judgment, as well as the majority and minority judgments of the SCA, were *ad idem* regarding the applicability of this test. The two courts did *not* agree on the assessment of the facts. Jafta J then stated:

> It may well be that the majority in the Supreme Court of Appeal here has erroneously interfered with the discretion of the High Court. However, this does not raise an arguable point of law of general public importance. As outlined above, the error here lies in the factual assessment. A decision that is based on wrong facts does not amount to an arguable point in law. The enquiry that is undertaken to correct it remains factual.[56]

It is noteworthy that the court conceded that the majority judgment of the SCA *might have* erroneously interfered with the discretion of the court of first instance. Whether this is so would, of course, fall to be decided on the basis of the facts. If, on an interpretation of the facts, it appears that the discretion was exercised in an injudicious manner, I would argue that an arguable point of law is indeed raised. Such an arguable point of law would – on the basis of established law regarding interference with a lower court's discretion – involve an inquiry into whether the discretion was exercised (a) capriciously,

52 *Jiba* Constitutional Court judgment:par. 54.
53 *General Council of the Bar of South Africa v Geach* 2013 2 SA 52 (SCA).
54 *Jiba* Constitutional Court judgment:par. 54.
55 *Jiba* Constitutional Court judgment:paras. 55, 56.
56 *Jiba* Constitutional Court judgment:par. 58.

(b) based on an incorrect principle, (c) with bias, or (d) without valid reasons for exercising the discretion in that manner.[57]

Against this backdrop, the circumstances, in which a court of appeal may interfere with the exercise of a discretion by a court *a quo*, will now be discussed. This will be done by drawing on both the majority and minority *Jiba* judgments in the SCA.

3. INTERFERENCE BY A COURT OF APPEAL WITH A DISCRETION EXERCISED BY A COURT *A QUO*

3.1 The Supreme Court of Appeal's majority judgment

With regard to Mr Mrwebi, the SCA was satisfied that misconduct had been established and that the court *a quo* had exercised "its discretion judicially when it concluded that he is not a fit and proper person to practise as an advocate".[58] However, the court found that the sanction proposed by the court *a quo* had been misguided, and that Mrwebi should only have been suspended, as "he did not personally benefit from his misconduct nor did he prejudice any client".[59] This statement is, of course, contestable. It is quite conceivable that conduct may be unprofessional without being of any "benefit" to the practitioner or prejudicing any client.

In terms of Ms Jiba, though, the majority judgment – delivered by Shongwe ADP (with Seriti and Mocumie JJA concurring) – found that the GCB had not, on a preponderance of probabilities, established any misconduct on her part, and that it was, therefore, unnecessary "to consider the *discretion* of the court on the question whether or not she is a fit and proper person to remain on the roll of advocates".[60]

The court referred to *Malan v Law Society of the Northern Provinces*[61] (hereafter, the *Malan* judgment) to ascertain the guidelines courts ought to follow in applications of this nature. *In casu*, Harms ADP (as he was at the time) relied on *Jasat v Natal Law Society*[62] to revisit and succinctly explain these guidelines. The gist of that explanation clarifies the exact nature of the three-stage fit-and-proper standard, particularly with regard to the exercise of a "discretion":

- The first leg of the test requires the court to establish, on a preponderance of probabilities, *whether the alleged offending conduct was indeed committed*, which is a factual inquiry.[63]

57 *Jiba and others v General Council of the Bar of South Africa* 2019 1 SA 130 (SCA):par. 34. Hereafter referred to as "*Jiba* Supreme Court of Appeal judgment".
58 *Jiba* Supreme Court of Appeal judgment:par. 29.
59 *Jiba* Supreme Court of Appeal judgment:par. 29.
60 *Jiba* Supreme Court of Appeal judgment:par. 29.
61 *Malan v Law Society of the Northern Provinces* 2009 1 SA 216 (SCA).
62 *Jasat v Natal Law Society* 2000 3 SA 44 (SCA).
63 *Malan v Law Society of the Northern Provinces*:par. 4.

- In respect of the second leg, the court must consider whether, *in the court's discretion*, the conduct was contrary to what is expected from a legal practitioner. If the conduct is indeed found to have been contrary to such expectations, this would lead to a finding that the practitioner is not fit and proper to practise law. Depending on whether the court finds the offending conduct to have been either unprofessional, dishonourable or unworthy – which is a typifying or value-driven judgment – different disciplinary measures may follow in the third leg.
- During the third leg, the court again exercises a *discretion* in deciding whether the offending conduct warrants *either a removal from the roll or a suspension from practice*.[64] Suspension from practice may be imposed with or without conditions. (An appropriate condition may, for example, be that the practitioner attends a practice management course.) The course adopted by the court at this stage would depend on the nature of the conduct, the extent to which the conduct reflects on the person's character or his or her worthiness to remain a member of "an honourable profession", the likelihood of a repetition of the offending conduct, and "the need to protect the public".[65] Since this is, in essence, a question of degree, Harms ADP laid down the following further guidelines.[66]

3.1.1 Removal does not follow as a matter of course

The *Attorneys Act*[67] contemplates removal *or suspension*. If a court believes that a practitioner may be fit and proper again after a period of suspension, it will not normally remove him or her from the roll. If the practitioner's name is indeed removed from the roll, he or she may in future apply for readmission. In such a case, however, a court will need to be persuaded of the person's "completely reformed character", considering the seriousness of the conduct that led to the removal in the first place. Reformation and rehabilitation will have to be shown to be of a "permanent nature".[68]

3.1.2 Precedents have limited value

Harms ADP stated that the exercise of "this discretion"[69] (presumably the penalty discretion) "is not bound by rules, and precedents consequently have a limited value". Precedents only serve to indicate how previous courts have exercised their discretion. Thus, by definition, exercising a discretion precludes following precedent; being bound to follow a precedent would mean "that the court has no real discretion".

64 *Malan v Law Society of the Northern Provinces*:par. 4. In par. 13 of *Malan v Law Society of the Northern Provinces*, Harms ADP described the discretion of the court in both the second and third leg of the inquiry as being "in the nature of a value judgment".
65 *Malan v Law Society of the Northern Provinces*:par. 6.
66 *Malan v Law Society of the Northern Provinces*:paras. 8-13.
67 *Attorneys Act* 53/1979.
68 *Malan v Law Society of the Northern Provinces*:par. 8.
69 *Malan v Law Society of the Northern Provinces*:par. 9.

3.1.3 A finding of dishonesty during the first leg of the inquiry

Unless dishonesty is found in the first leg, there ought to be no removal from the roll. Where a court does find dishonesty, "the circumstances must be exceptional before a court will order a suspension instead of a removal".[70] Yet where dishonesty is not established, the court must exercise a discretion "within the parameters of the facts of the case without preordained limitations".[71] That said, however, Harms ADP rejected the notion of addressing misconduct not involving dishonesty "with kid gloves".[72] In doing so, he differed from the judgment in *Law Society of the Cape of Good Hope v King*,[73] which proposed that a finding of no dishonesty would *necessarily* be met with suspension and not removal. Harms ADP's reason for favouring a more conservative approach was simple, namely "to stem an erosion of professional ethical values".[74]

3.1.4 Interference with the decisions of the court of first instance in relation to the factual inquiry

The general limitation on a court of appeal's power to interfere with the factual findings of a court *a quo* has "limited, if any, application if the court of first instance decided the case … in application proceedings".[75] This is because deciding such a matter "on paper" entails that the court of appeal is in as good a position as the court *a quo* to adjudicate the facts.

3.1.5 Interference with the discretion of the court *a quo* in the second and third legs of the inquiry

Harms ADP's judgment confirmed that both of these discretions are exercised in the nature of a value judgment:

> In principle, a court of appeal is entitled to substitute its value judgment for that of the court of first instance if it disagrees. However, this court has held consistently that the discretion involved is a strict discretion, which means that a court of appeal may only interfere if the discretion was not exercised judicially.76

The findings in the *Jiba* cases will now be considered against this backdrop.

3.2 The injudicious interference with the discretion exercised by the High Court relating to Ms Jiba

Returning to Ms Jiba and the SCA's majority judgment, there can be little doubt that Jiba's conduct caused significant damage to the South African

70 *Malan v Law Society of the Northern Provinces*:par. 10.
71 *Malan v Law Society of the Northern Provinces*:par. 10.
72 *Malan v Law Society of the Northern Provinces*:par. 11.
73 *Law Society of the Cape of Good Hope v King* 1995 2 SA 887 (C).
74 *Malan v Law Society of the Northern Provinces*:par. 11.
75 *Malan v Law Society of the Northern Provinces*:par. 12.
76 *Malan v Law Society of the Northern Provinces*:par. 13.

administration of justice, with far-reaching consequences. In the paragraphs below, I highlight matters relating to Ms Jiba's alleged misconduct that the SCA in its majority judgment either failed to or did not consider adequately. This, I argue, resulted in the court exercising its discretion to usurp the discretion of the High Court, without having substantial reasons for doing so. However, before delving into the SCA's handling of the *Jiba* matter, it is necessary to set out some of the principles that govern appeals on facts as well as in discretionary matters, which I believe, are applicable to the case under discussion.[77] As far as an appeal on facts is concerned, the following principles are important:

- If there is no misdirection on the facts found to have been made by the judge in the court below, the presumption is that the factual conclusion is correct.
- In a case such as the former, if the court of appeal is merely left in doubt as to the correctness of the conclusion, it will uphold the court a quo's decision.
- A court of appeal should "not seek anxiously to discover reasons adverse to the conclusions of the trial judge".
- As far as principles governing appeals in discretionary matters are concerned, "generally an appeal court may interfere with a lower court's exercise of discretionary power only if that power was not properly exercised".[78] Discretionary power is regarded as not having been exercised in a judicial manner if it was applied capriciously, if the court was moved by a wrong principle of law or an erroneous appreciation of the facts, if its judgment was biased, and if the court *a quo* did not act on substantial reasons.[79]

In dealing with the complaint against Ms Jiba, the majority's finding that her failure to file a complete rule 53 record, despite a court order to do so, had to be excused or even ascribed to her legal representatives, is untenable.[80] In this regard, Van der Merwe JA[81] correctly stated in his minority judgment that the fact that Jiba had been cited in her official capacity "was all the more reason for her to conduct the litigation with the utmost trustworthiness and integrity". Moreover, the fact that Ms Jiba, in failing to comply with the order to file a complete rule 53 record, received no benefit nor acted dishonestly[82] does not translate to an acquittal of professional misconduct. In my view, to equate Jiba's conduct in this regard to the fact that legal practitioners routinely receive court condonation for non-compliance with court rules[83] disregards the fact that she was in contempt of a court order.

The SCA's lack of proper contemplation of Ms Jiba's conduct becomes even more glaringly obvious if one compares the majority judgment with the

77 Pete *et al* 2017:345-347.
78 Pete *et al* 2017:346.
79 Pete *et al* 2017:346.
80 *Jiba* Supreme Court of Appeal judgment:par. 15.
81 *Jiba* Supreme Court of Appeal judgment:par. 55.
82 *Jiba* Supreme Court of Appeal judgment:par. 15.
83 *Jiba* Supreme Court of Appeal judgment:par. 15.

detailed and meticulous way in which the High Court dealt with the complaints against the advocates.[84] Some of the aspects arising from the record, particularly with regard to Ms Jiba's conduct and the so-called "*Richard Mdluli* case",[85] which the SCA failed to consider sufficiently (or at all), were:

- Ms Jiba's contempt of a court order to file a full and complete rule 53 record;[86]
- the manner in which Ms Jiba dealt with, and responded to charges of being unhelpful to the court, thereby having violated her duties as an officer of the court;[87]
- Ms Jiba's failure to comply with a directive of the deputy judge president of the court, in terms of which she was required to file an answering affidavit by a certain date;[88]
- Ms Jiba's failure to heed the advice of two members of her legal team. (This aspect is particularly relevant in light of the court's observation that Jiba's position in relation to her legal team was akin to that of a client-attorney relationship.[89] In such a relationship, a client would ordinarily heed the attorney's advice. If not, it may constitute grounds for the attorney to withdraw from the client's mandate lawfully. In fact, that is precisely what happened with a number of Ms Jiba's legal teams. They terminated their client mandates, as she had failed to heed their advice);
- Ms Jiba's failure to disclose the Breytenbach memo (that had requested her to review the decision by Mr Mrwebi not to proceed with prosecuting Mr Richard Mdluli), and her inadequate explanation for doing so,[90] and
- Ms Jiba's failure to consider the contradictions in Mr Mrwebi's evidence in respect of the execution of her duties.

For these reasons, the manner in which the SCA interfered with the discretion exercised by the High Court was, in my view, injudicious. This in and of itself raised an arguable point of law which ought to have triggered the Constitutional Court's jurisdiction to grant the applicant (GCB) leave to appeal. As stated

84 For a summary of the High Court judgment, see Hurter 2017:80.

85 *National Director of Public Prosecutions v Freedom Under the Law* 2014 1 SA 254 (GNP); *National Director of Public Prosecutions v Freedom Under the Law* 2014 4 SA 298 (SCA). With regard to the complaints against Advocates Jiba and Mrwebi emanating from the *Booysen* and "Zuma spy tapes" cases (*Booysen v Acting National Director of Public Prosecutions* [2014] 2 All SA 319 (KZD) and *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA)), the High Court accepted the explanations given, and found the evidence insufficient to sustain the charges of unfitness and impropriety. It was based on the evidence emanating from the *Mdluli* case that the High Court found the subjects unfit to practise and ruled that they were to be removed from the roll of advocates.

86 *General Council of the Bar of South Africa v Jiba* 2017 2 SA 122 (GP):par. 110. Hereafter referred to as the "*Jiba* High Court judgment".

87 *Jiba* High Court judgment:par. 118.

88 *Jiba* High Court judgment:par. 119.

89 *Jiba* Supreme Court of Appeal judgment:par. 15.

90 *Jiba* High Court judgment:par. 136.

earlier, even the Constitutional Court itself alluded to the possibility that the SCA's majority judgment *may have* constituted an injudicious interference with the discretion exercised by the lower court.

3.3 The minority judgment in the SCA

Van der Merwe JA's minority judgment (Leach JA concurring) commenced by referring to the *dictum* in *Geach* that an advocate is required to be of "complete honesty, reliability and integrity". It goes without saying, he continued, that these attributes were especially required of an advocate "who holds high public office in the administration of justice"[91] – thereby stressing an important point regarding the "fit-and-proper standard" alluded to earlier in this contribution.

Justice Van der Merwe then referred to the three-stage test used to determine whether an advocate had failed to meet the requisite "standards".[92] These involved the establishment of the facts of the offending conduct; the inquiry into the established facts to determine whether the advocate was fit and proper to continue practising, and, if not, the exercise of a discretion by the court on whether suspension from the profession or removal from the roll was appropriate. This latter discretionary exercise of discretion could only be interfered with on appeal if the court *a quo* had acted "capriciously, or on a wrong principle, or if it failed to bring an unbiased judgment to bear on the issues or did not have substantial reasons".[93]

At this point, another brief reference to the exercise of discretion by the High Court in the *Jiba* case seems warranted. It should be noted, as explained earlier, that the "discretion" of the court *a quo*, in this instance, was twofold. First, to decide on account of the facts whether the conduct made the legal practitioner unfit for practice and, secondly, to decide on an appropriate sanction. To exercise such a discretion judiciously, the facts of each case obviously need to be taken into account. The judgment in *Kekana v Society of Advocates of SA*[94] illustrates not only this point, but also the fact that the interpretation of the three-legged standard by our courts is not as settled as the Constitutional Court suggested in the *Jiba* matter. For instance, contrary to the clear exposition of guidelines provided by Harms ADP in the *Malan* judgment (discussed earlier), the court in *Kekana* did not regard the second leg of the inquiry as the exercise of "a discretion" by the court.[95]

Van der Merwe JA[96] then proceeded to consider, and use as evidence of unprofessional conduct, conduct beyond only that which appeared from the *Richard Mdluli* case. This was despite the arguments by Ms Jiba's counsel that, in the absence of a cross-appeal, the GCB could not rely on any conduct

91 *Jiba* Supreme Court of Appeal judgment:par. 33.
92 *Jiba* Supreme Court of Appeal judgment:par. 34.
93 *Jiba* Supreme Court of Appeal judgment:par. 34.
94 *Kekana v Society of Advocates of SA* 1998 4 SA 649 (SCA).
95 *Kekana v Society of Advocates of SA*:paras. 2-3.
96 *Jiba* Supreme Court of Appeal judgment:par. 40.

except that in the *Mdluli* matter.[97] While I will not go into the court's exposition and motivation of the facts, I do believe that it more than adequately justified the minority's dismissal of the appeal. After all, the allegations of unfit and improper conduct against Jiba and Mrwebi are well recorded in the public domain and in the case law to which I have referred.

4. WITH THE WISDOM OF HINDSIGHT

In 2.1, 2.2 and 2.3 above, I referred to the Constitutional Court's suggestion that, had the matter been drafted differently, the issue *in casu* might have taken a different turn. In particular, the court raised the possibility that the applicant might have approached the court asking for the three-stage test "to be further explored due to contextual factors".[98]

With the wisdom of hindsight, the applicant could well have acted both in its capacity of *custos morum* of the legal profession (as it did), as well as "in the public interest" in terms of sec. 38(d) of the *Constitution*.[99] With reference to rights that could be the subject of a public interest action, I have made the following observation elsewhere:[100]

> Soon after the advent of the South African constitutional dispensation, the ambit of those rights that may be threatened or infringed in terms of section 38 (section 7(4) of the interim Constitution) was extended to include all constitutional rights, and not only those contained in the Bill of Rights. Constitutional Court President Chaskalson, when interpreting the then section 7(4) (today's section 38) of the Constitution with reference to section 98(2) (today's section 172) in *Ferreira v Levin*, found that the provisions of section 7(4) did not limit standing in constitutional challenges to only those rights set out in the then chapter 3 (today's chapter 2) of the Constitution. This finding was subsequently applied by the Supreme Court of Appeal in the context of class actions in the *Children's Resource Centre Trust* judgment [2013 2 SA 213 SCA: par. 21] which held that class actions could be instituted with regard to rights beyond those contained in the Constitution.

I repeat these observations because, *in casu*, the impugned conduct of Jiba and Mrwebi, as NDPP employees, was in breach of one of the founding provisions in Chapter 1 of the *Constitution*, namely the observance of the supremacy of the *Constitution* and the rule of law.

Moreover, to my mind, the applicant could, in setting out its *causa*, have relied on sec. 39(2) of the *Constitution* by requiring the court to interpret sec. 7 of the *Admission Act* or to develop the common-law "fit-and-proper standard" so as to comply with the spirit, purport and objects of the *Bill of Rights*. This, in turn, would inevitably have led to a demonstration of the direct applicability of sec. 179(4) of the *Constitution* as well the *NPA Act* to the

97 *Jiba* Supreme Court of Appeal judgment: par. 40.
98 *Jiba* Constitutional Court judgment:par. 49.
99 For a discussion of the judicial guidelines, which have been provided in South-African public interest actions, see Swanepoel 2016:29 *et seq*.
100 Swanepoel 2016:40 (footnotes in original omitted).

matter. Indeed, in my view, the need to develop the fit-and-proper standard in relation to state advocates was, in fact, underlined when the SCA, in its majority judgment,[101] stated:

> Perhaps one may infer some form of incompetence with regard to her duties, which may be a ground to remove her from being the DNDPP but not sufficient enough to be removed from the roll of advocates.

5. CONCLUSION

The allegations of impropriety against Advocates Jiba and Mrwebi were made on numerous factual bases, which I have refrained from setting out in detail in this contribution. While it is still comprehensible for different courts to deliver different judgments, it is difficult to conceive how a single court could have such diverging views on factual findings as we saw in the majority and minority judgments of the SCA. This extent of divergence of opinion in our courts, particularly on the grounds that I indicated, is an unfortunate reflection of our judiciary.

This contribution revealed that the Constitutional Court's refusal to grant the GCB leave to appeal is difficult to grasp, given the evident and enormous public interest in the matter. I further demonstrated that the manner in which the majority judgment in the SCA interfered with the High Court's exercise of its discretion was injudicious. On another day, and in other circumstances, this may very well have raised "an arguable point of law", triggering the jurisdiction of the Constitutional Court, as indeed the Constitutional Court itself suggested.

I am convinced that the case was of sufficient public interest and importance for the South African apex court to have considered and finally resolved it. The essential basis of the complaints against the practitioners concerned was their failure to exercise their prosecutorial authority to prosecute (in the case of former Lieutenant-General Mdluli and former President Jacob Zuma) and not to prosecute (in the case of Booysen). The standard of conduct required from the respondents was no different from that expected from any other legal practitioner. However, the case afforded our courts the opportunity to develop the common-law "fit-and-proper standard" for legal practitioners in line with constitutional values and, importantly, specifically as it pertains to practitioners in high-ranking public judicial office. Had the Constitutional Court agreed to consider the matter, the South African public could potentially have been spared the possibility of Ms Jiba now taking the Mokgoro Commission's report on review, as reported in the media.

In the final analysis, the Constitutional Court's *Jiba* judgment evinces an opportunity lost on two important counts. The first is the more general issue of convincingly cementing our constitutional jurisprudence in respect of the Constitutional Court's broadened jurisdiction since 2013. Secondly, the court failed to address and develop the more specific issue of ascertaining whether legal practitioners are fit and proper to practise law in the context of upholding and further entrenching the rule of law as a founding value of our constitutional democracy.

101 *Jiba* Supreme Court of Appeal judgment:par. 18.

BIBLIOGRAPHY

BATEMAN B
2019. Ramaphosa fires Jiba, Mrwebi. *Eyewitness News*. https://ewn.co.za/2019/04/26/ramaphosa-fires-jiba-mrwebi (accessed on 19 August 2019).

BURGER J
2016. Political interference weakening the rule of law in SA. Institute for Security Studies. https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa (accessed on 12 August 2020).

CURRIE I & DE WAAL J
2013. *The Bill of Rights Handbook.* 6th edition. Cape Town: Juta.

DU PLESSIS M, PENFOLD G & BRICKHILL J
2013. *Constitutional litigation*. 1st edition. Cape Town: Juta.

FOWKES J
2011. How to open the doors of the court-lessons on access to justice from Indian PIL. *South African Journal on Human Rights* 2011(27):434-465. https://doi.org/10.1080/19962126.2011.11865024

GROOTES S
2014. Bulelani Ngcuka strikes back: Too little, too late. *Daily Maverick*. https://www.dailymaverick.co.za/article/2014-10-06-bulelani-ngcuka-strikes-back-too-little-too-late/ (accessed on 27 August 2019).

HURTER E
2017 Case law. *Advocate*. *Jutastat e-publications* 2017:80.

PARLIAMENT OF SOUTH AFRICA
2019. Justice and Correctional Services Committee notes court order on Adv Jiba interdict. https://www.parliament.gov.za/press-releases/justice-and-correctional-services-committee-notes-court-order-adv-jiba-interdict (accessed on 27 August 2019).

PATHER R
2018. NPA insider tells NDPP panel Abrahams refused to tackle interference. *Mail & Guardian.* https://mg.co.za/article/2018-11-15-npa-insider-tells-ndpp-panel-abrahams-refused-to-tackle-interference (accessed on 27 August 2019).

PETE S, HULME D,DU PLESSIS M,PALMER R,SIBANDA O, & PALMER T
2017 *Civil procedure: A practical guide*. 3rd edition. Cape Town: Oxford University Press Southern Africa.

QUINTAL G
2019. SAA hires Vusi Pikoli to clean up its mess. *Business Day*. https://www.businesslive.co.za/bd/national/2019-01-15-vusi-pikoli-to-head-up-risk-and-compliance-at-ailing-saa/ (accessed on 27 August 2019).

RAUTENBACH IM & HELEBA S
2013. The jurisdiction of the constitutional court in non-constitutional matters in terms of the *Constitution Seventeenth Amendment Act* of 2012. *Tydskrif vir die Suid-Afrikaanse Reg* 2013(3):405-418.

RSA PRESIDENCY
2019. Enquiry in terms of section 12(6) of the *National Prosecuting Authority Act* 32 of 1998 (Abridged version). http://www.thepresidency.gov.za/sites/default/files/Section%2012%286%29%20Enquiry%20report%20-%20abridged%20version.pdf (accessed on 12 August 2019).

SABC NEWS ONLINE

2019. Jiba to take Mokgoro Report for judicial review. https://www.sabcnews.com/sabcnews/jiba-to-take-mokgoro-report-for-judicial-review/ (accessed on 27 August 2019).

SWANEPOEL CF

2015. Die uitlegsverbreding van die gemeenregtelike vereistes vir *locus standi in iudicio* in publiekregtelike en eiebelang grondwetlike aksies: 'n Noodwendige ontwikkeling deur die Suid-Afrikaanse howe. *LitNet Akademies* 2015(1). https://www.litnet.co.za/wp-content/uploads/2015/06/LitNet_Akademies_121_318-332Swanepoel.pdf (accessed on 15 August 2020).

2016. The public-interest action in South Africa: The transformative injunction of the South African Constitution. *Journal for Juridical Science* 2016(2):29-46. https://doi.org/10.18820/24150517/JJS41.v2.3