ENQUIRY INTO THE FITNESS TO HOLD OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (SOUTH GAUTENG): ADVOCATE ANDREW CHAUKE IN TERMS OF SECTION 12 (6) OF THE NATIONAL PROSECUTING AUTHORITY ACT 32 OF 1998, HELD IN PRETORIA

In the application of:

SHAMILA BATOHI	Applicant
and	
MASENYANE ANDREW CHAUKE	First Respondent
THE EVIDENCE LEADERS N.O.	Second Respondent
THE NATIONAL PROSECUTING AUTHORITY	Third Respondent

RULING

PANEL:

Nkabinde J

Adv. Baloyi-Mere SC

Attorney Ramagaga

Introduction

[1] In the main and properly understood, the relief sought is a conditional declaratory order that the applicant has "*rights and obligations*" to participate in the Enquiry proceedings and therefore "*does not require the leave or consent of this Panel to consult with and receive advice from her appointed legal representative*". The advice, the applicant maintains, *"shall not ... seek to revise, tailor or change the evidence already given [by her] and subjected to cross-examination, nor address the evidence [she will give] if she resumes her*

evidence to the Enquiry." In the alternative, the applicant asks that, to the extent necessary, she be granted leave to consult and receive the said advice on the same condition. The leave sought is based on the professional ethical rule that governs consultation with a witness while such witness is under cross-examination.

[2] Ostensibly, the relief sought is aimed at enabling the applicant, first, to know her rights and obligations, second, to vindicate her fundamental **constitutional right** to legal representation and her common law rights as well as her right to administrative justice under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to procedural fairness and, thirdly, to obtain legal advice while she is under cross-examination. Fundamentally, the application raises a narrow issue, i.e. whether the applicant has a right to consult and obtain legal advice while she is still under cross-examination.

[3] The said professional ethical rule refers to clause 55.5 of the Code of Conduct for Legal Practitioners in terms of section 36(1) of the Legal Practice Act 28 of 2014. Notably, this clause is mirrored in Rule 4.2 of the General Council of the Bar's Uniform Rules of Professional Conduct.[1] Both the clause and the Rule govern consultation with a witness while such witness is under cross-examination. Collectively, they are referred to in this Ruling as the Professional Rule.[2] Clause 55.5 reads:

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[1] Rule 4.2 provides:

> *"4.2.2. It is improper for counsel to interview a witness who is under cross- examination, unless circumstances make such an interview necessary. Where such circumstances exist, counsel who desires to hold the interview must inform his opponent before doing so [...]*
> *4.2.4. In cases where circumstances render it necessary to interview a witness under cross-examination or before re-examination and the opponent objects, the court should be asked for permission. "*

> *"Once a legal practitioner has called a witness to testify, the legal practitioner shall not again interview that witness until after cross-examination and re-examination, if any, have been completed, unless circumstances arise that make such an interview necessary. When a proper case for such a necessary interview exists, the legal practitioner shall prior to any interview inform the opposing legal practitioner of such need and unless the opposing legal practitioner consents, no such interview shall be held unless the court or tribunal grants permission to do so."*

[4] In this matter, the Professional Rule binds not only the appointed legal representatives for the applicant but also herself as she is enrolled with the Legal Practice Council as a non-practising legal practitioner. Establishing a default position, the Professional Rule enjoins any witness under cross-examination not to consult with a legal representative unless an opposing party consents or a court or tribunal, exercising its discretion, grants or refuses permission to do so. Needless to say, the Professional Rule is inviolable. It is intended to protect the integrity of cross-examination which, *inter alia*, strives to test witness' credibility and uncover the truth.

[5] It bears mentioning that, although the application is replete with much reliance on the right to legal representation, the applicant has, in her own words, obtained authority to appoint legal representatives of her own choice and did appoint Harris Nupen Molebatsi Attorneys (HNM) as her attorneys of record. The firm was appointed as far back as about 9 February 2026. After the appointment, the Panel extended an invitation to HNM to attend the Enquiry proceedings. HNM has since attended at the Enquiry proceedings.

[6] The application is opposed only by the first respondent, Adv Chauke, who is the subject of the Enquiry.

Brief background

[7] The Enquiry was established in terms of s 12(6) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) into the fitness of the first respondent to hold office of Director of Public Prosecutions (DPP), South Gauteng. A team of Evidence Leaders was appointed by the Minister of Justice and Constitutional Development (the Minister). A senior and a junior Advocate, respectively, were appointed to represent the National Prosecuting Authority (NPA), the latter having (through the applicant who was, formerly, the National Director of Public Prosecutions (NDPP)) lodged a complaint to the President against the first respondent.

[8] The Enquiry hearings commenced on 17 November 2025. The applicant, the former NDPP, testified from 19 November until 15 December 2025. She walked away from the Enquiry whilst under cross examination, without prior notice to and leave of the Panel. She later, when called back by the Panel, explained that she was "not withdrawing [but was] not prepared to continue pending getting good legal advice."

[9] Interestingly, following the applicant's insistence to be allowed to appoint counsel of her choice, the current NDPP — Adv J L Mothibi — authorised the appointment of her preferred legal team. The appointment was preceded by a previous attempt by the NPA's legal team to consult with the applicant while she was under cross-examination.

[10] I pause to mention that the NPA legal team had initially been asked to represent the applicant when her request to the Solicitor General (and later an appeal to the Minister) to have legal representatives of her own choice was refused.

Curiously, the current NDPP overruled the Minister's decision and authorised the said appointment at the state's expense for the applicant who was merely a witness and under cross-examination at the time. Generally, this may result in an untenable precedent, more specifically, for witnesses who are advocates within the NPA.

[11] In the letter addressed to the Panel by the NPA legal team dated 9 January 2026, supposedly at the instance of the applicant, permission was sought to consult with the applicant while she was under cross-examination. According to the NPA it had anticipated that "given the nature of the issues that have arisen, consultation will cover aspects that [the applicant] is presently testifying on." Later, at the hearing of 26 January 2026, the NPA legal team placed on record that there may be a potential conflict of interest in their involvement as legal counsel for the applicant.

[12] On 12 February 2026 the first respondent's attorneys, Mkhabela Huntley Attorneys, addressed a letter to HNM objecting to the request for leave to consult while the applicant remained under cross examination and indicating that their consent had not been sought. They referred to the earlier correspondence dated 9 January 2026, in which the NPA legal team had made a request similar to that made by HNM and to their objection in the letter dated 15 January 2026 which, they stated, applies perforce to HNM's request. In that letter, the first respondent's Attorneys drew HNM's attention to the Professional Rule.

[13] On or about 9 February 2026, HNM wrote to the Chairperson and sought permission to consult with the applicant while still under cross-examination. On

17 February 2026, having been directed by the Panel to file a proper application, this application was launched.

This application

[14] The applicant explains the purpose of the application as follows:

> "8. ...[t]o obtain a ruling that will *enable me to consult with and take advise from my legal representative with regard to my participation in the Enquiry;*
>
> 9. ...[t]o ensure that my *constitutional right to legal representation is respected*, and to *enable my legal representatives to adhere to their ethical and professional duties in relation to my testimony* before the Panel;
>
> 10. In particular ... *to be provided with legal advice* as to—
>
> 10.1 *my obligation, if any, to continue giving evidence* before the Panel;
>
> 10.2 *in the event that I continue to give evidence, my obligations in relation to the giving of such evidence;* and
>
> 10.3 *my rights as a witness* before the Enquiry."

[15] The application is brought, so the applicant contends, out of an abundance of caution because – although in the law of evidence legal representatives may not provide advice to witnesses while under cross-examination – such rules of evidence are not strictly applicable to inquisitorial proceedings such as those of the Enquiry. This seems to suggest that the applicant and her legal representatives are, thus, not bound by the Professional Rules. The proposition, if my understanding of the statement is correct, is misconceived.

[16] Cognisant of the legal representatives' professional and ethical duties, the applicant contends that the consultation sought would be limited to the advice

concerning her legal rights and obligations in the Enquiry proceedings. The advice, the explanation continues, will ensure that any further evidence the applicant may give is not perceived as tainted. The converse may be true because the consultation and advice, if allowed, may taint the evidence tendered under oath.

[17] According to the applicant, the leave of the Panel is not strictly required. The leave of the Panel hereby sought, she explains, is to ensure that HNM comply strictly with their professional and ethical responsibilities. The applicant says that her Attorneys refrained from consulting with her without the permission of the Panel. It follows, strictly speaking, that the concern is that of HNM and not of the applicant who seeks the permission of the Panel in order to comply with the Professional Rule to consult with her and give her advice.[3] This explains the declaratory relief sought in para 1 of the notice of motion – that the applicant has "*rights and obligations*" to participate in the Enquiry proceedings and therefore "*does not require the leave or consent of this Panel to consult with and receive advice from her appointed legal representatives*."

[18] The applicant, correctly, maintains that the Professional Rule does not impose an absolute prohibition because it recognises the supervisory role of a court or tribunal. Furthermore, it is contended that the Professional Rule neither prohibits legal representation nor extinguishes a witness' entitlement to legal advice. Rather, so the contention goes, the Professional Rule ensures that consultation does not undermine fairness of cross-examination.

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[3] The applicant's posture, in this regard, is consistent with what she said when deciding to stop her testimony while under cross-examination on 15 December 2025, stating that she was not seeking permission. It is something that she decided she needed to do because it is about her and her integrity.

[19] It is further contended that the Professional Rule is not intended to deprive a witness of access to legal advice "where issues arise during testimony that implicate" a witness, for example, matters such as constitutional rights, privilege, procedural fairness or potential self-incrimination and where complex legal issues emerge unexpectedly during cross-examination. In argument, reference is made to instances where the applicant was questioned on matters that implicated her, for example, where the following questions and answers arose as per the transcript:

> "...
>
> *ADV NGCUKAITOBI SC: Yes. Now, institutionally, yourself, Advocate Mzinyathi and Advocate Elaine Zungu collectively failed to address the allegations of witness tampering, which are a crime, correct?*
>
> *ADV BATOHI: Yes, that is correct.*
>
> *ADV NGCUKAITOBI SC: Yes. All of you are responsible for defeating the ends of justice.*
>
> *ADV BATOHI: That is not correct.*
>
> *ADV NGCUKAITOBI SC: You personally acted in breach of your own oath of office.*
>
> *ADV BATOHI: That is not correct.*
>
> *ADV NGCUKAITOBI SC: Yes. Now, that is what I will argue in the end, that you violated the provisions of the NPA Act because you failed to address a crime brought to your attention. The matter then became a subject of discussion."*[4]

[20] The applicant explains further that HNM have undertaken that if permission to consult is granted, they will not influence, revise, repair or tailor the evidence

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[4] Transcript Day 17, Page 43.

already given nor pre-empt or neutralise evidence yet to be tested under cross-examination as that would constitute serious professional misconduct.

[21] The applicant has presented her case on the premise that the Enquiry is engaged in administrative action under PAJA and thus claims that she is entitled to fair administrative action.

[22] According to the applicant, the purpose of this application is to ensure that her *constitutional right to legal representation is respected.* She relies on the decision of the Supreme Court of Appeal (SCA) in *Hamata v Chairperson, Peninsula Technikon Disciplinary Committee*[5] that a refusal to grant leave to consult would have serious consequences and *"would materially and adversely affect [her] rights. It would or could impair [her] constitutional right to legal representation, hinder [her] ability to give evidence fully and accurately, potentially lead to harm to [her] reputation and professional standing, and potentially expose [her] to legal or administrative consequences."*

[23] At the risk of repetition, the real issue here is not whether the applicant is entitled to have legal representation. Rather, the issue is whether the applicant has a right to consult and be advised during the course of her cross-examination. The applicant has been allowed (at the instance of the current NDPP) to appoint legal representatives of her own choice, at the state's expense.

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[5] 2002 (5) SA 449 (SCA) at para 12.

Opposition

[24] The first respondent opposes the application on numerous grounds including, in the main, that the applicant intemperately walked out from the Enquiry without the permission of the Panel. It is contended the applicant remains in abscondment and, therefore, approaches the Panel with unclean hands. Furthermore, it is contended that it is HNM that seeks the advice/guidance of the Panel to discharge their ethical obligations, not the applicant who has remained defiant in her approach to the Enquiry. That is so because the applicant mentions that the application is brought because HNM refused to consult with her without the leave of the Panel – meaning that HNM restrained themselves from consulting with the applicant without the permission of the Panel.

[25] The first respondent contends that the application lacks merit because the applicant has breached the very Professional Rule that she seeks to rely upon. She expressly told the Panel that she does not seek its permission to leave while under cross-examination because she wanted to consult with legal counsel and obtain legal advice. The application, so the contention goes, should be dismissed principally because the applicant has, in the first place, breached the Professional Rule by failing to seek the consent of the first respondent and, secondly, that she has failed to establish facts demonstrating that consultation is, in those circumstances, justified.

[26] It is argued that *Hamata* and PAJA do not assist the applicant. Relying on the Constitutional Court decisions in *Walele v City of Cape Town*[6] and *Masetlha v*

[6] 2008 (6) SA 129 (CC) paras 27 and 28.

President of the Republic of South Africa,[7] the first respondent argues that a right to procedural fairness under section 33 of the Constitution, PAJA or the common law only arises if there is potential prejudice to rights or legitimate expectations. Reference is made to the Panel's ruling in the de-coupling application, that "*[a] claim for or entitlement to procedural fairness must be based on information that is correct and objectively verifiable and not merely on preventive action based on conjecture*". Therefore, the first respondent contends that the application should be dismissed.

Determination of the issues

[27] First for determination is whether the applicant has complied with the Professional Rule by seeking the consent of the first respondent because the first respondent argues that the requisite consent was not sought and obtained and that the application should therefore be dismissed. It is correct that the consent, as required by the Professional Rule, was not sought. The applicant not only being an admitted Advocate of the High Court, but also enrolled as a legal practitioner, breached the Professional Rule by not seeking the requisite consent.

[28] Speculatively, it is contended that the refusal to grant leave to consult and obtain advice would hinder the applicant's ability to give evidence fully and accurately, potentially harm her reputation and professional standing and expose her to legal or administrative consequences. The applicant has already tendered her evidence in chief and is under cross-examination, albeit partially. As correctly argued for the first respondent, the applicant is not without remedy

[7] 2008 (1) SA 566 (CC) para 187.

if her right to procedural fairness gets compromised should she elect to return to the Enquiry and continue her unfinished testimony under cross-examination. She may, herself, or through the Evidence Leader, remonstrate to questions put to her in cross-examination if she considers them objectionable.

[29] *Which Constitutional right?* On the reading of the papers, it is not clear precisely which entrenched right in the Constitution the applicant seeks to protect. The only right under the Bill of Rights that expressly confers *the right 'to choose, and to consult with a legal practitioner'* is the section 35 right in the context of a fair trial of every accused person. Section 35 of the Constitution deals with the rights of the arrested, detained and accused persons. To the extent that the applicant seeks to invoke such a right, she is not entitled to any such safeguards under section 35 of the Constitution. This is so because the applicant is not an accused in the context of that provision. On this ground alone, the application must fail.

[30] The applicant also relies on *Hamata*. *Hamata* is distinguishable and, as correctly argued for the first respondent, does not apply here. In that matter, Mr Hamata, having been charged for misconduct before an internal disciplinary committee, was denied legal representation of an Attorney. The hearing proceeded in his absence, because the disciplinary committee had taken the view that the internal rules prohibited it from exercising its discretion regarding the issues of legal representation. At the end of the hearing an adverse finding was made that he should be expelled. The internal appeal body reconsidered and endorsed the committee's decision. On review, the High Court dismissed the application. Hamata successfully appealed to the SCA. The Appeal Court upheld the appeal and set aside the decisions of the disciplinary committee, the

appeal bodies and the High Court. In doing so, the SCA restricted itself to a question regarding representation by an Attorney at the disciplinary proceedings.

[31] The SCA remarked that there is no general and absolute entitlement to legal representation in forums other than courts of law and that it could not be held that legal representation, whenever sought, was a *sine qua non* of any procedurally fair hearing. The Court did not, however, exclude the Committee's exercise of its residual discretion where fairness and circumstances may justify the exercise of the residual discretion favourably.

[32] *What facts or circumstances, if any, does the applicant rely upon*? The purpose of the application is, among other things, to enable the applicant to consult and take advice regarding her obligations and rights as a witness, if she continues to testify. The applicant has participated in the Enquiry from its inception until she walked out. She testified, notably, under oath (solemnly swearing to tell the truth), the violation of which could trigger an offence of perjury. She did so voluntarily and without seeking leave to consult with and taking any advice from anyone. As it is evident from the transcript,[8] when she was asked questions which seem to be understood to have probed answers implicating her, the applicant answered the questions without seeking any legal advice. There is no reason to believe that any further evidence, if the applicant elects to continue with her testimony, will not be proper as the oath is still binding on her conscience.

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[8] See para [17], above.

[33] Interestingly, the applicant does not take this Panel into her confidence by giving the details regarding the said obligations and rights in respect of which she wants to consult and be advised on. Accordingly, I shudder to imagine what the scope of the obligations and rights she seeks to consult and be advised on is! Merely alleging that the applicant has rights and obligations without more is not sufficient.

[34] The applicant refers to constitutional rights, privilege, procedural fairness or potential self-incrimination and where complex legal issues emerge unexpectedly during cross-examination. She contends that refusal to grant leave to consult would have serious consequences and would materially and adversely affect her rights, would or could impair her constitutional right to legal representation, hinder her ability to give evidence fully and accurately, potentially harm her reputation and professional standing, and potentially expose her to legal or administrative consequences. There is no factual basis for these averments.

[35] Furthermore, the applicant states that the said rights assume particular importance in the context of the ongoing Enquiry, given the significant public scrutiny, the seriousness of the issues under consideration and the potential consequences of any adverse findings. In the Replying Affidavit, she refers to the proceedings in the High Court in which the uMkhonto we Sizwe Party (MKP) relied on transcripts of her cross-examination in this Enquiry in support of its urgent application to interdict the payment of her pension. The proceedings initiated by the MKP in the High Court bear no relevance to this Enquiry in which the first respondent is the only subject.

[36] While it is correct that the applicant is neither the subject of the Enquiry nor a party in the Enquiry, she seems to anticipate some adverse findings being made against her but does not elaborate what adverse findings she refers to. It may well be that complex legal issues arose during cross-examination allegedly resulting in the applicant incriminating herself. But that does not give the applicant a free rein to consult and obtain advice, without more, while under cross-examination. In any event, the Enquiry is a fact-finding process. Its mandate does not entail resolving complex legal issues. The Enquiry is focused, only, on the first respondent's fitness to hold office.

[37] The applicant states that "obtaining the legal advice is her constitutional right". The said rights, it is contended, assume particular importance in the context of the ongoing Enquiry, given the significant public scrutiny, the seriousness of the issues under consideration and the potential consequences of any adverse findings. In the Replying Affidavit, mention is made that the applicant was subjected to adversarial cross-examination that may lead to administrative and legal consequences in her personal and professional capacities. The examples given include questions relating to the applicant's having perjured herself, defeating the ends of justice and failing to address crime brought to her attention. The said administrative legal consequences bear no relevance to the mandate of this Panel. Similarly, the alleged public sentiments concerning the applicant are irrelevant. It is not insignificant that the applicant held an important public office as the Head of the NPA, a constitutional entity which forms an integral part of the criminal justice system and whose work is central in the fight against crime. Therefore, the applicant, as the former head of the NPA, cannot escape public scrutiny. In any event, it is still not clear why the

applicant requires legal advice while testifying about the issues pertaining to the fitness of the first respondent to hold office. Besides, the applicant is the one who caused the President to initiate the Enquiry against the first respondent.

[38] *Does the application evince facts or circumstances that her procedural right to fairness has been violated?* The contention in this regard is based under the common law principle and the safeguards under PAJA – that proceedings before tribunals must be fairly conducted and that in appropriate cases a person should be afforded legal representation and cannot be prevented from obtaining legal advice.

[39] The SCA has pronounced in *Hamata*, and I can do no better than reciting the relevant passage, in this regard, that:

> "[PAJA] was enacted, as required by section 33(3) of the Constitution, to give effect to the right to administrative action that was lawful, reasonable and *procedurally fair* and to the right to be given written reasons *where rights had been adversely affected by administrative action.* [PAJA's] *section 3(2)(a) recognised and reaffirmed the common law position that a fair administrative procedure depended on the circumstances of each case.* A proper reading of [PAJA] revealed that there was no constitutional imperative to be discerned regarding legal representation in administrative proceedings, *other than flexibility to allow for legal representation but, even then, only in cases where it was truly required in order to attain procedural fairness."*

[40] There is no suggestion that the Panel has adopted any approach that has sacrificed the applicant's procedural fairness other than the applicant's mentioning of instances during cross-examination. For example, when it was put to the applicant that she has lied regarding the fact that she was aware that Major General Booysen was facing charges other than the racketeering

charges[9] or when it was put to her that she was complicit in defeating the ends of justice.[10]

[41] The principle in *Walele* and *Masetlha* regarding the procedural fairness and legitimate expectation is correct. Here, the applicant has failed to demonstrate that the procedure followed in the Enquiry was unfair and that her right, if any, to legitimate expectation has been triggered.

[42] It cannot, by any standard, be said that the manner of questioning during cross-examination constitutes adverse administrative action, that is procedurally unfair. Be that as it may, the applicant cannot use that as a basis for a claim to consult and obtain legal advice, as of right, while she is under cross-examination. Absent the facts or circumstances that *render the proceedings procedurally unfair and therefore triggering flexibility, the Panel's hands* are tied and the default position of disallowing consultation and obtaining advice will stand. This should be the end of the matter, but there is another matter which requires attention.

[43] The applicant also seeks to (a) have her interests and those of her erstwhile office adequately advanced and protected and (b) enable her to give her evidence "properly" if she continues to testify. It is unclear what giving evidence properly seeks to suggest! The applicant has testified, and I can assume that the tendered evidence was given properly because it was given under oath. She does not need to be advised in order for her to give her testimony properly. Furthermore, it is claimed that the relief sought will enable the applicant's legal representatives to adhere to their ethical and professional duties in relation to

[9] Transcript Day 17, page 39.
[10] Transcript Day 17, pages 57 to 58.

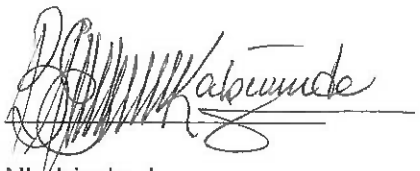
her testimony before the Panel. This proposition is unsound: Rhetorically, does this mean that the legal representatives who are bound by the Professional Rule require the approval of this Panel to do what is ethically correct? That cannot be! It bears emphasis that not only the legal representatives concerned, but also the applicant herself, are bound by the Professional Rules of Conduct.

Conclusion

[44] In my view, even though this Panel could exercise its discretion in pursuit to accommodate the applicant's requests, she has not proffered specific facts suggestive of her rights to procedural fairness being compromised that triggers flexibility. Moreover, there is no constitutional imperative that may be discerned from the papers to consult and obtain legal advice as regards the applicant's rights and obligations, particularly as the applicant's testimony under cross-examination remains incomplete. In the view I take of the matter and to avoid prolixity, it is not necessary to deal with other issues raised.

Order

[45] Accordingly, the application is dismissed.



Nkabinde J

Chairperson