IN THE SUPREME COURT APPEAL OF SOUTH AFRICA
(BLOEMFONTEIN)

APPEAL CASE NO

GP CASE NO 6175/19

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
ROBERT McBRIDE	First Respondent
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	Second Respondent
MINISTER OF POLICE	Third Respondent
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Fourth Respondent

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the applicant hereby makes application to the above Honourable Court, in terms of section 17 of the Superior Courts Act, 2013, for an order in the following terms:

1. that the applicant is granted leave to appeal to the above Honourable Court, alternatively, the full court of the Gauteng Division of the High Court, Pretoria against the whole of the judgment and order handed down by her Ladyship, the Honourable Madam Justice Hughes on 12 February 2019 ("**the principal judgment and order**");

2. that the entirety of the judgment and order of the Honourable Madam Justice Hughes handed down on 19 March 2019, refusing leave to appeal against the principal judgment and order, be set aside;

3. that the costs of the application for leave to appeal to the court *a quo* and the costs of this application be costs in the appeal;

4. granting the applicant further and / or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **FRANCIS ANTONIE** will be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed the address of the applicant's attorneys, Webber Wentzel, detailed below, as the address at which the applicant will accept notice and service of all process in connection with this application.

TAKE NOTICE FURTHER that if any respondent wishes to oppose this application, he or she is required, within one month from the date of service of this application, to file an answering affidavit.

Dated at Johannesburg on this 20th day of April 2019.

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To:
THE REGISTRAR
Supreme Court of Appeal
Bloemfontein

To:
THE REGISTRAR
High Court of South Africa
Gauteng Division, Pretoria

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2019 -04- 23
Z. KHANYILE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

AND TO:
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Received without Prejudice
Ontvang sonder
benadeling van regte
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10:16
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AND TO:

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STATE ATTORNEY
RECEPTION
10:40
2019 -04- 23
PRIVATE BAG/PRIVAATSAK X91
PRETORIA 0001
(3)
STAATSPROKUREUR

IN THE SUPREME COURT APPEAL OF SOUTH AFRICA
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PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Fourth Respondent

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FOUNDING AFFIDAVIT: APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation (**"HSF"**), situated at 6 Sherborne Road, Parktown, Johannesburg, a non-governmental organisation whose objectives are to defend the values that underpin our constitutional democracy, to defend the rule of law and to promote respect for human rights.

2. I am duly authorised to depose to this affidavit and bring this application on behalf of the HSF.

3. The facts contained in this affidavit are to the best of my knowledge both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. Where I make any legal submissions, I do so on the advice of the HSF's legal representatives.

INTRODUCTION

4. This is an application for leave to appeal against the order of 12 February 2019[1] ("**the Order**") and the reasons for the Order dated 21 February 2019 ("**the Reasons**") of the Gauteng Division of the High Court in Pretoria (per Hughes J), attached as annexes "**FA1**" and "**FA2**" respectively.

5. Hughes J refused the HSF's application for leave to appeal on 19 March 2019 ("**the leave to appeal judgment *a quo***"). A copy of the leave to appeal judgment *a quo* is attached as annex "**FA3**". At the time of signing this affidavit, the final court order in the leave to appeal application could not be obtained from the High Court. I attach as annex "**FA3A**" a letter from the HSF's correspondent attorneys (Hills Incorporated), which has been stamped by the registrar of the High Court, in which it is confirmed that the final court order was handed down by Hughes J on 19 March 2019 and currently cannot be obtained. As soon as the court order becomes available, it will be provided to the registrar of this Honourable Court.

6. This matter concerns the interpretation of section 6(3)(b) of the Independent Police Investigative Directorate Act, 2011 ("**the IPID Act**"). In terms of the Order, the court *a quo* (per Hughes J) has sanctioned an agreement between the parties which grants

[1] The HSF is not in possession of the final signed court order but attaches the final draft which was made an order of court as per paragraph 18 of the Reasons.

relief which is inconsistent with the Constitution and is based on an interpretation of section 6(3)(b) of the IPID Act which is constitutionally untenable and undermines the independence of the Independent Police Investigative Directorate ("**IPID**").

7. The Constitutional Court has stressed on more than one occasion that renewals left to the discretion of political actors strike at the very heart of independence and are inconsistent with the Constitution.[2] It has struck down legislative provisions on that basis.

8. Despite these binding precedents, the Minister of Police ("**the Minister**"), the Portfolio Committee on Police ("**the Committee**"), IPID and the now former Executive Director of IPID ("**Mr McBride**") have, privately, agreed on a constitutionally impermissible mechanism for the renewal of the Executive Director's tenure, and the High Court has endorsed it, thus putting the imprimatur of judicial authority behind it.

9. This private agreement and agreed interpretation of section 6(3)(b) of the IPID Act concentrates the power of renewal in the Minister and the Committee, thus exposing IPID to political interference or the perception of such interference. It is plainly an unlawful interpretation.

10. The legality of the agreed interpretation was never ventilated in open court before Hughes J. Indeed, there was no argument on any interpretation of section 6(3)(b) of the IPID Act or the constitutionally propriety of the relief to be granted in terms of the settlement agreement. Even written heads of argument were not filed by the Minister, the Committee or Mr McBride to explain why their agreed interpretation was constitutionally compliant.

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2 *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) ("***JASA***"), para [73]; and *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) ("***Helen Suzman Foundation***"), paras [78] to [82].

11. Instead, the High Court endorsed the agreement without much analysis or ado as a consent order. It did so despite submissions by the HSF, which had been admitted as an *amicus curiae* by the High Court. The HSF sought to halt the parties' efforts to avert a proper hearing by their proposed agreement. The HSF advanced submissions that such an approach ought not to be adopted by the court *a quo*, and that before any agreement was endorsed as a court order, the court *a quo* was constrained to hear legal argument on interpretation and consider the merits of the matter (as opposed to simply acceding to giving effect to the parties' agreement in this regard).

12. No argument on the merits was advanced by the parties. Instead, Hughes J rubberstamped the settlement agreement as a court order without considering the merits of the matter.

13. In so doing, the High Court has now given judicial effect to the interpretation of section 6(3)(b) of the IPID Act adopted by the parties and issued mandatory orders on that basis. In short, the High Court allowed the relevant political actors to choose an interpretation of their liking and has endorsed this, simply because it was agreed. This is unconstitutional and amounts to a failure of judicial duty, as the Constitutional Court has recently ruled.[3]

14. The interpretation by the parties, and endorsed by the court *a quo*, is as follows:

14.1 First, the Minister must make a recommendation as to whether or not to renew the Executive Director's tenure. This immediately creates the danger that an Executive Director may shape his or her actions so as to win the Minister's approval, and in such circumstances any recommendation by the Minister is

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[3] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (2) BCLR 165 (CC), paras [1] to [4].

effectively compromised. Such a concentration of power has, repeatedly, been ruled to be unconstitutional by the Constitutional Court.

14.2 Second, the Committee must then consider this decision and either endorse or reject it. It has no guidelines stipulated by which it must make its decision – which itself (by virtue again of this Court's judgments) renders the Committee's decision unconstitutional, an unconstitutionality that is compounded by the fact that the only "guideline" that it will receive is the Minister's compromised recommendation.

14.3 Moreover, the Committee is a political entity, and has admitted as much on oath before the court *a quo*, even indicating that its members would have to report back to their political party structures in order to consider the renewal decision. Again, this exposes IPID to undue political interference, as the Executive Head may wish to curry favour – or be perceived to curry favour – with a particular political party or faction.

15. The above interpretation is thus manifestly unlawful but, through a consent order, was made an order of Court. The Order directs performance by the Minister and the Committee on the basis of the unconstitutional interpretation. This performance has now been carried out by the relevant parties. Mr McBride's tenure as Executive Director was "not renewed" by the Minister acting in tandem with the Committee and an Acting Executive Director has been appointed by the Minister.

16. The final effect of the Judgment and Order is that the power to renew the term of office of the Executive Director of IPID now lies in the hands of political actors and exposes IPID to undue political interference. Given the above, the Order cannot be allowed to stand. Not only was it reached in a constitutionally impermissible manner,

but it endorses a constitutionally impermissible interpretation which breaches fundamental jurisprudence pertaining to the need for effective independence.

THE PARTIES

17. The applicant is the HSF. The HSF is situated at 6 Sherborne Road, Parktown, Johannesburg, was established in 1993 and is a non-governmental organisation whose objectives are "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".

18. The first respondent is Mr McBride, the (former) Executive Director of IPID (which institution is the second respondent). Since, and as I illustrate in this affidavit, as a result of, the proceedings before the court *a quo*, Mr McBride's term of office as Executive Director has terminated. The Committee took a decision not to renew his term of office, on the recommendation of the Minister. Both Mr McBride and IPID are legally represented herein, and their attorneys of record will be served upon.

19. The third respondent is the Minister of Police. The third respondent's office is located at the Department of Police at 231 Pretorius Street, 756-7th floor Wachthuis Building, Pretoria, 0002. The Minister is cited in his official capacity as the individual who took the initial decision not to renew Mr McBride's tenure as Executive Director, and as the individual who has, under the Order, taken a "preliminary decision" not to renew the Executive Director's term of office. The address of the Minister for the purposes of legal proceedings is c/o The State Attorney, Pretoria at SALU Building, 316 Thabo Sehume Street, Pretoria.

20. The fourth respondent is the Portfolio Committee on Police: National Assembly ("**the Committee**"). The Committee's office is located at Parliament Street, Cape Town. The Committee is cited in its capacity as the body which purports to make the final decision on the renewal and / or extension of the term of office of the Executive

Director of IPID and, as the body which now, under the Order, has made this decision. The address of the Committee for the purposes of legal proceedings is c/o The State Attorney, Pretoria at SALU Building, 316 Thabo Sehume Street, Pretoria.

RELEVANT CHRONOLOGY

21. On 5 September 2018, Mr McBride directed a letter to the Minister bringing to the Minister's attention the fact that his five year term of office would come to an end on 28 February 2019. Mr McBride also sought confirmation as to whether the "*Ministry [intended] to retain or extend [his] contract*". A copy of this letter is annexed marked "**FA4**".

22. It appears that over a month passed with no response from the Minister, leading to Mr McBride sending a follow-up letter, dated 13 November 2018, enquiring once again as to the Ministry's intention regarding his term of office. A copy of this letter is annexed marked "**FA5**".

23. On 16 January 2019, over 4 months later and in relation to an office of paramount constitutional importance, the Minister formally addressed a letter to Mr McBride in which he stated that he has "*decided not to renew or extend [Mr McBride's] Employment Contract as Executive Director of IPID*" and that Mr McBride's final day in office would be 28 February 2019. This was, unambiguously, a decision as to whether or not to renew Mr McBride's tenure as Executive Director ("**Non-Renewal Decision**"). A copy of this decision is annexed marked "**FA6**".

24. Mr McBride then wrote to the Minister on 22 January 2019 (a copy of which correspondence is annexed marked "**FA7**"), bringing to the Minister's attention the fact that, in light of binding Constitutional Court jurisprudence, any decision so taken by the Minister would be unlawful and called upon the Minister immediately to withdraw his decision and, in any event, to provide Mr McBride with reasons for the

decision not to renew or extend Mr McBride's term of office. The deadline provided in this letter was 25 January 2016.

25. It was only once Mr McBride wrote to the Minister on 22 January 2019 that the Minister engaged the Committee. This he did on 24 January 2019 in a letter calling on the Committee to "*either confirm or reject [his] decision not to renew the term of office of Mr McBride*". The Minister informed Mr McBride on the same day that he had engaged with the Committee regarding the status of Mr McBride's term of office. A copy of these letters is annexed marked "**FA8**" and "**FA9**" respectively.

26. The letter addressed to the Committee on 24 January 2019 received the attention of the Speaker of the National Assembly, who responded on 4 February 2019. She recorded in that letter that the Minister may make recommendations regarding Mr McBride's renewal or extension of his term of office which she would then refer to the Committee. She went on to state that the matter could not be considered by the Committee until such time as the Minister makes such recommendation, thus elevating the Minister's decision to being a jurisdictional pre-requisite before the Committee could act. A copy of this letter is annexed marked "**FA10**".

27. Urgent litigation was instituted by Mr McBride and IPID *inter alia* to set aside the Minister's decision of 16 January 2019 and to compel the Committee to make a decision as to the renewal of his tenure as Executive Head by 28 February 2019. A copy of Mr McBride and IPID's notice of motion is annexed marked "**FA11**".

28. On 5 February 2019, the HSF's legal representatives addressed a letter (attached as annex "**FA12**") to the representatives of Mr McBride, IPID, the Minister and the Committee in order to seek the parties' consent to the HSF being admitted as *amicus curiae* in the matter. All the parties consented on 5 February 2019, as is evident from the correspondence attached as annex "**FA13**".

29. The HSF's application to be admitted as *amicus curiae* was served on the parties on 6 February 2019 and filed at court on 7 February 2019. In its application for admission, the HSF set out the basis for its intervention - that to the extent that renewable terms are permitted, as is the case in the renewable term of office of the Executive Director of the IPID, the decision to renew the term of office should not depend on political judgement or lie with any political actor, including members of the Executive or Parliamentary Portfolio Committees. This, the HSF submitted, is necessary in order to sufficiently protect independent policing bodies from political interference and in order to ensure compliance with South Africa's constitutional and international law obligations.

30. On 6 February 2019, Mr McBride circulated a proposed settlement agreement (the letter and attachment are annexed marked "**FA14**"). This was not the settlement agreement ultimately made an order of court but a preceding version. The HSF immediately, on 7 February 2019, alerted all parties that:

> "*any settlement order will necessarily amount to a pronouncement on rights in rem and entails a consideration of the correct interpretation of section 6(3)(b) of the IPID Act. This, as confirmed by the Constitutional Court in Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others (CCT257/17) [2018] ZACC 33 (27 September 2018), requires argument in open court and a written judgment from the relevant judge(s).*
>
> *To this end, please note that any settlement will thus still require argument before Court on the interpretative issues and the relief sought, and the HSF, for the reasons set out in its supporting affidavit dated 6 February 2019, contends (and will argue) that the correct order which should be granted is in terms of paragraph 2 of the original notice of motion dated 29 January 2019, buttressed*

by a proper interpretation of section 6(3)(b) of the IPID Act, as set forth in HSF's papers.

To the extent necessary, the HSF will address the Court in relation to the above at the hearing on 12 February 2019."

31. A copy of the HSF's letter is annexed marked "**FA15**".

32. The parties were thus forewarned of the HSF's position; were directed to the authority relied on and were told what the HSF would be arguing if they proceeded with their attempted agreement. The parties did not settle at that stage, and the Committee filed an answering affidavit denying that the relief sought by Mr McBride was competent.

THE HIGH COURT PROCEEDINGS

33. The matter was set down for hearing on the urgent roll of the High Court of South Africa, Gauteng Division, Pretoria, for 10:00 (or so soon thereafter as the matter may be heard) on 12 February 2019.

34. Two hours before the hearing, the HSF received a courtesy copy of an order which Mr McBride, IPID, the Minister and the Committee had agreed the night before (which was in the terms of the Hughes Order) ("**the settlement order**").

35. At the hearing, first, both HSF and Corruption Watch were admitted as *amicus curiae*. Counsel for Mr McBride and IPID then introduced the settlement order, noting, however, that the HSF had raised some issues therewith.

36. The HSF broadly argued the following before Madam Justice Hughes:

36.1 firstly, the settlement order could not be made an order of Court without proper judicial consideration, through argument in open court and submissions, of the

interpretation it proposed. The HSF stressed that this was not simply a settlement of a private dispute, but the interpretation of legislation at the heart of an essential institution of national importance. Any settlement agreement to be made an order of court was required to be unobjectionable, its terms must accord with both the Constitution and the law and its terms must not be at odds with public policy.[4] The HSF stressed that any settlement order in this matter will necessarily amount to a pronouncement on rights *in rem*, determining the objective status of the Minister's decision and the rights and duties of the Committee, and entail a consideration of the correct interpretation of section 6(3)(b) of the IPID Act. Any such order by a court, as confirmed by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others*,[5] requires full consideration in open court, must accord with and be justified by the merits of the matter and the relevant judge is required to produce a written judgment setting forth reasons for the decision. Such an order, unlike orders bearing simply on rights *in personam*, cannot simply be taken by agreement.

36.2 The HSF also pointed out to Madam Justice Hughes that it had been stressed in *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) (6 September 2016) at footnote 25, that:

> "*Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the*

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[4] *Eke v Parsons* 2016 (3) SA 37 (CC) at paras [25] and [26].

[5] [2018] ZACC 33 (27 September 2018), paras [1] to [4].

result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."

36.3 The HSF thus argued that, as a first stage, the settlement order at least had to be debated in open Court, argument on the interpretation of section 6(3)(b) of the IPID Act had to be heard by Madam Justice Hughes and she had to deliver a written judgment setting forth the Court's interpretation of this section.

36.4 Secondly, the HSF pointed out that, substantively, the settlement order was premised on, and gave effect to, an unlawful interpretation of section 6(3)(b) of the IPID Act. The HSF had submitted full written heads of argument on the correct interpretation of section 6(3)(b) of the IPID Act, but the Court refused to hear any submissions on the correct interpretation in oral argument. None of the parties thus was requested to make any written or oral submissions on the constitutional issues implicated by the settlement agreement in question or the initial dispute between the parties.

36.5 Finally, the HSF highlighted the fact that parties' interpretations carried no additional weight simply by virtue of their designations. Indeed, that approach was expressly rejected by the Constitutional Court on multiple occasions.[6]

37. In answer through their counsels' oral submissions, Mr McBride and IPID did not abandon the settlement order, but indicated that they were not opposed to the HSF's position.

38. The Minister and the Committee, however, opposed the HSF's position, including, remarkably, on the basis that the HSF was merely an *amicus* and had no standing to complain about the legality of the agreement proposed by the parties to be made an

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[6] See for example *JASA*, para 60.

order of court. It is trite, however, that an *amicus* may seek leave to appeal despite not being a cited party,[7] in appropriate circumstances. Importantly, the Minister and the Committee opposed the HSF's position without any argument on the merits of the correct interpretation of section 6(3)(b) of the IPID Act.

39. The HSF thus submitted that the Court should not make the settlement order an order of Court, and the parties should instead address the Court on the substantive issues relating to the settlement and the correct interpretation of the IPID Act. The HSF further submitted that if the Court needed time to hear the parties properly and further time to give a reasoned judgment, the Court could – and should – issue a status *quo* order confirming that Mr McBride remain in his position and prohibiting the Minister and/or the Portfolio Committee from taking any decisions in respect of his renewal pending the outcome of the application.

40. Her Ladyship refused the HSF's request and proceeded to make the settlement agreement an order of court.

THE FLAWS IN THE JUDGMENT OF THE COURT A QUO

41. On 21 February 2019, Madam Justice Hughes provided reasons for the Order, attached above as annex "**FA2**".

42. At the outset, Her Ladyship appears to have misunderstood what was being argued by the HSF. The HSF was not bringing an "application" from the bar that the Court rejects the settlement agreement and decline to make it an order of court. There was no reason for the HSF to bring any application and it did not do so. Rather, having been admitted as an *amicus curiae* in the proceedings, the HSF was arguing why the

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[7] See, for example, *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) paras 19 - 22, and *University of Witwatersrand Law Clinic v Minister of Home Affairs and Others* 2008 (1) SA 447 (CC) para 6.

proposed draft order, dealing as it did with national legislation and rights *in rem*, could not simply be rubberstamped by the Court, but had to be debated on the merits in open court and a written judgment given setting forth the court's substantive interpretation. This is in line with the Constitutional Court's clear pronouncements discussed above. In turn, in such debate, the HSF would have (as it did in its written heads of argument) submitted that the settlement agreement is manifestly unconstitutional and should be rejected. Instead, the Court should simply have set aside the Minister's decision and interpreted section 6(3)(b) of the IPID Act in the manner set forth in this application for leave to appeal.

43. As is clear from the Reasons, there was no interrogation - at all - of how section 6(3)(b) fell to be interpreted in a constitutional manner, or why the parties' agreed interpretation is a permissible one. This aspect was further not ventilated in open Court. In a terse paragraph, Hughes J simply states that "*I am satisfied that the terms of the agreement are legitimate, practically achievable, not against public policy and do not infringe either the law or Constitution.*" (para [17]).

44. There is no analysis of the legality of the interpretation of section 6(3)(b) of the IPID Act, no analysis of how the settlement agreement is practical (in the face of the strident evidence by the Portfolio Committee before Her Ladyship in which the Committee said that it could not take a decision as quickly as that directed in the Order without exposing itself to potential judicial review) and no analysis as to why, in determining rights *in rem*, Her Ladyship can simply give effect to the settlement agreement.

45. On this basis alone, Hughes J failed in her constitutional duty and the Order must be set aside.

46. Curiously, with respect, the HSF's objections were dismissed on the basis of a technical argument which was not even put to the HSF. The Reasons state that the HSF was only admitted as an *amicus* in the main case, and not in relation to the settlement agreement, and that the HSF was raising a "new issue" of which the parties were unaware.

47. This is manifestly incorrect. The settlement agreement was made available to the HSF but two hours before the hearing. If anyone was introducing new matter, it was the parties. In any event, the settlement agreement is an integral part of the proceedings and implicates the very argument/issues which were raised by the HSF in the main matter.

48. As set forth above, the parties were, moreover, well aware of the HSF's interpretation and position regarding any settlement.

49. The parties then purported to settle two hours before the hearing. Their last-minute efforts to do so did not relieve the Court of its constitutional obligations. Rather – as per *Big Five Duty Free*, *McBride* and *Eke v Parsons* – Hughes J was constrained to consider the interpretation of s6(3)(b) of the IPID Act on its merits, to do so in open Court and to deliver a written judgment supporting the Court's interpretation.

50. Having been admitted as an *amicus*, the HSF's arguments on the merits were required to be heard and considered by the Court.

51. Moreover, the parties and the Court were fully cognisant of the HSF's contentions as to the only lawful interpretation of s6(3)(b) of the IPID Act. This was plainly set forth in the HSF's application for admission as *amicus curiae* dated 6 February 2019. Further, the HSF's heads of argument were filed in Court and delivered to all parties on 11 February 2019, and addressed both the merits and the proper approach to make settlement agreements orders of court.

52. Her Ladyship, inexplicably, concluded that the HSF's arguments on the legal principles and merits implicated by the settlement amounted to "new evidence" and "new issues". This finding shows, with respect, that Hughes J fundamentally misdirected herself on important issues of constitutional principle, and had not read, or disregarded, the written submissions made by HSF.

53. In any event, even if this was "new argument", her Ladyship was obliged to hear it in order to discharge her duty as per the judgment in *ACSA*. Indeed, it was incumbent on her to raise the issues herself *mero motu*, in order to discharge that duty (as the Constitutional Court judgment in *McBride* made clear, in footnote 25, quoted above). Her Ladyship was constitutionally obliged to hear and take into account the HSF's (and the parties') arguments on the merits. She did not do so, and instead lent her judicial authority to a constitutionally impermissible agreement, which gives effect to an unlawful interpretation of s6(3)(b) of the IPID Act.

THE UNLAWFUL INTERPRETATION ADOPTED IN THE HUGHES ORDER

54. As per the Hughes Order, the Minister's decision was not declared unlawful as sought by Mr McBride and IPID, but was rather judicially endorsed as a preliminary decision to be confirmed or rejected by the Committee.

55. When read with the Speaker's letter of 4 February 2019 (already annexed as "**FA10**"), the Minister's recommendation or preliminary decision is now a jurisdictional prerequisite for a renewal to be considered: the Minister's recommendation lays the foundation for the decision of the Committee on renewal.[8]

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[8] See *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) at 718B/C-J and *Oosthuizen's Transport (Pty) Limited & others v MEC, Road Traffic Matters, Mpumalanga & others* 2008 (2) SA 570 (T).

56. This manifestly erodes the independence of the institution of IPID, however. If the Minister's recommendation is to carry any weight at all, or is the prerequisite for a consideration on renewal, then plainly it creates the possibility that an incumbent Executive Director who wished to have his or her term renewed would seek to curry the favour of the Minister. It allows a single political actor to wield influence over the tenure of the head of a critical, independent constitutional institution.

57. Even if this possibility does not arise in practice, the mere possibility itself gives rise to the perception of diminished independence. It was stressed in *Glenister II*:

> "*While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously*".[9]

58. The susceptibility to, and possibility of, undue influence is substantially enhanced in the context of a renewal as compared to the initial appointment. The Minister may, for ulterior purposes such as the incumbent's particularly effective campaign against corruption of specific political actors, be inclined not to renew (or recommend renewal), and no-one will ever be able to prove, or even know, such purposes. Conversely, the incumbent may, in the fulfilment of his office seek to curry favour to secure renewal. The impairment, and perception of impairment, of constitutionally required independence is palpable in both instances.

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9 At para 222. See also paras 234 – 236.

59. This is contrary to the rule of law and constitutional requirements of independence. For this reason alone, the legislation must be interpreted to afford no power or role to the Minister in respect of renewals, contrary to the Order.

60. Further, by impermissibly elevating his role to one essential to or informing renewal, the Minister creates the potential where he can, simply through delay, artificially create a vacancy which would then allow the Minister - unilaterally - to graft an acting Executive Director of IPID for up to a year (under section 6(4) of the IPID Act).

61. The Order also creates a logical difficulty - if the Minister's recommendation is not to renew, and the Committee does not endorse this, what then? Does a renewal occur? It is unclear whether, in such instances, a renewal would be automatic or whether a vacancy would then be created for the Minister to fill. The Order may still not mean that any decision to affirm the renewal exists.

62. The second leg of the Order, whereby the Committee confirms or rejects the Minister's preliminary decision, involves substantial political oversight over renewal, which is also constitutionally unacceptable. It allows a select committee of the National Assembly which is a political body (as recognised in South African jurisprudence),[10] to pass judgement, without any guidelines, on the security of tenure of the Executive Director. This is precisely the kind of power that the Constitutional Court has already held to be unconstitutional in a trilogy of cases: *Glenister*, *Helen Suzman Foundation*[11] and *JASA*.[12]

63. The Committee now sits in judgment of the Minister's recommendation before it takes a decision, after seeking input from "*the various party structures that each member*

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[10] *Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of South Africa and Others* 2014 (4) BCLR 481 (WCC), para [101].

[11] *Helen Suzman Foundation*, *supra*, paras [78] to [82].

[12] *JASA*, *supra*, para [73]

represents". This Committee, moreover, comprises majority members of the same political party as the Minister. The relevant extracts from the Committee's own papers recording these facts are attached as annex "**FA16**". Given that the Committee records, on its own version, that its members seek input from the political parties to which they belong, it is plain that the decision whether to renew will be substantially informed by political considerations of the kind which directly undermine the independence and efficacy of an institution such as IPID. The possibility, and perception, of untoward political influence is palpable.

64. Ultimately, terms of office which are renewable at the instance of third party political actors invite or give the impression of rent-seeking and irremediably undermine independence. They are unconstitutional. The Order permits, however, of that unconstitutionality. Courts have a duty, under the Constitution, to avoid that result, by giving the legislation a constitutionally compliant meaning, which does not unduly strain the language used in the legislation.[13]

65. The Order also does not give effect to South Africa's international law obligations or sections 233 or 39(1)(b) of the Constitution.

65.1 Sections 39(1)(b) and 233 of the Constitution reinforce the importance of international law. In terms of section 233, "*[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*". Section 39(1)(b), on the other hand,

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[13] See for example *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors and Others v Smit NO and Others* 2001 (1) SA 545 (CC), para [22] to [24]; *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC), para [35]; *Tshwane City v Link Africa* 2015 (6) SA 440 (CC), paras [114] to [117]; *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), para [18]; *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (6) SA 115 (CC), para [12]; *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC), para [38] to [39].

requires the Court to take account of international law when interpreting the Bill of Rights.

65.2 Article 9(2) of the United Nations Convention against Transnational Organized Crime (to which South Africa is a State Party)[14] states that *"[e]ach State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions*" (emphasis added). This provision places duties on states to ensure independence, which must include measures to ensure officials of anti-corruption bodies cannot be subjected to undue influence.

65.3 Article 6(2) of the United Nations Convention against Corruption (to which South Africa is a State Party)[15] states that "*[e]ach State Party shall grant [anti-corruption bodies] the necessary independence, in accordance with the fundamental principles of its legal system, to enable the [bodies] to carry out its functions effectively and free from any undue influence*." This provision requires legislation that ensures necessary independence of anti-corruption bodies such as IPID, by ensuring that they operate free of undue influence. In addition, it states that such measures must be in accordance with the fundamental principles of our legal system ie the Constitution.[16]

65.4 The Organisation for Economic Co-Operation and Development ("**OECD**") undertook a review of the models of the various specialised anti-corruption

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[14] Adopted by the UN General Assembly on 15 November 2000, by resolution A/RES/55/25 and in force from 29 September 2003. Signed by South Africa on 14 December 2000 and ratified on 20 February 2004.

[15] Adopted by the UN General Assembly on 31 October 2003, by resolution 58/4 and in force from 14 December 2005. Signed by South Africa on 9 December 2003 and ratified on 22 November 2004.

[16] This was confirmed in *Glenister* at para [123].

institutions internationally and delivered a 2008 report in that regard, titled Specialised Anti-corruption Institutions: Review of Models ("**the OECD Report**").[17] The following are extracts from the OECD Report that reflect international experience and best practice:

> "*Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body. ...Transparent procedures for appointment and removal of the director together with proper human resource management and internal controls are important elements to prevent undue interference.*[18]
>
> ...
>
> *In short, independence, first of all entails de-politicisation of anti-corruption institutions. ...Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge with preventive functions. ...In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case*" (emphasis added).

66. The Order does not give effect to any of the above legal requirements. Instead, it gives political actors unfettered discretion to determine the occupant of the highest office of IPID, an anti-corruption body, thus undermining the effectiveness of this

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17 In compiling the Report, the OECD drew criteria from the UN Convention Against Corruption, and considered best practices from the 35 OECD countries. South Africa is one of seven non-OECD member countries that is party to it.

18 OECD Report at p10

body in combatting corruption and preventing South Africa from complying with its international obligations.

The only constitutionally compliant interpretation

67. Non-renewable terms of office of functionaries in independent public institutions are a central feature of independence.[19] Where an individual is placed in high office with enormous powers, the prospect of renewal at the discretion of an individual or body should not exist as this has the possibility to shape how the incumbent exercises his or her powers, in the hope of securing a discretionary renewal. Even if this scenario does not play out in fact, the mere existence of such a renewal power will suffice to affect the perception of independence of that institution, which cannot be permitted.

68. The Constitutional Court held in *Glenister* that when determining the adequate independence of the Directorate for Priority Crime Investigations, the public perception of independence was an additional factor to consider beyond the actual structural and operational autonomy of the institution. To this end, the Court held that "*public confidence that an institution is independent is a component of, or is constitutive of, its independence*," and that "*public confidence in mechanisms that are designed to secure independence is indispensable.*"[20]

69. In this case, while the IPID Act refers to the term being renewable, it does not indicate at whose instance the term is renewed. So it is left to interpretation. In such an instance, the interpretation which gives effect to constitutional requirements and values must be favoured.[21] And this interpretation is one that protects IPID's

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19 *JASA* para [73].

20 *Glenister* at para [207] citing *S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) at para [32].

21 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors and Others v Smit NO and Others* 2001 (1) SA 545 (CC), para [22] to [24]; *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC), para [35]; *Tshwane City v Link Africa* 2015 (6) SA 440 (CC), paras [114] to [117]; *Kubyana v Standard Bank of South Africa Ltd* 2014 (3)

independence and ensures that renewal is not left to the discretion of politicians, for all the reasons set forth above.

70. IPID, headed by its Executive Director, is an institution of immense national importance. It is an essential organisation which gives effect to chapter 2 of the Constitution of the Republic of South Africa, 1996, by "*provid[ing] for the upholding and safe-guarding of fundamental rights of every person*".[22]

71. It is true that the Minister and the relevant Parliamentary Committee play a part in appointing the Executive Director. But a renewal of a term of office is, as the Constitutional Court has held, qualitatively different from an initial appointment, as there is a greater opportunity for political favouritism and perverse incentives and disincentives. Once invested with significant power, there should be no external influences which should sway - or have the potential to sway - the incumbent to abuse such power for ulterior purposes.

72. The renewal thus cannot, as a matter of constitutional principle, be left to political happenstance. For this reason, the only constitutionally compliant interpretation which safeguards independence and the perception thereof is that the term contemplated in section 6(3)(b) of the IPID Act is renewable at the instance only of the Executive Director of the IPID and not at the instance of the Minister, a parliamentary committee or the Executive.

73. A different reading, which places that decision in the hands of <u>any</u> political actor, would not promote or fulfil constitutional rights or requirements, and would open the door to undue political interference, or the risk or apprehension of such interference.

SA 56 (CC), para [18]; *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (6) SA 115 (CC), para [12]; *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) [38] to [39].

22 IPID Act preamble.

74. The Executive Director would, of course, still remain subject to constitutional oversight through the mechanisms established in the Constitution and the removal powers under the IPID Act.

75. Based on the above, the HSF respectfully submits that the HSF's prospects of success on appeal are good and it is probable, let alone reasonably possible, that another court will come to a different conclusion.

COMPELLING REASONS FOR THE APPEAL

76. Quite aside from the abovementioned reasons as to why leave to appeal should be granted, this matter presents the quintessential case for "compelling reasons" under section 17(1)(a)(ii) of the Superior Courts Act, 2013. This section provides, in relevant part, that leave to appeal may only be given where the judge or judges concerned are of the opinion that "*there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration*."

77. These reasons are:

77.1 The Order goes directly against Constitutional Court precedent on rights *in rem*. It thus creates contradictory and conflicting judgments in relation to how such matters are to be determined and how settlement agreements may be made orders of Court.

77.2 This matter involves one of the highest constitutionally mandated institutions in the country. The Order undermines the structural and operational independence of IPID. This alone provides sufficiently compelling reason for leave to appeal to be granted.

77.3 If an Executive Director or Acting Executive Director is appointed as a result of the operation of the Order, with the Minister and the Committee having made a

renewal decision, the HSF contends that such Executive Director (whether permanent or acting) has unlawfully been appointed. Pursuant to this unlawful appointment, this Executive Director will be taking far reaching decisions of national importance on a day to day basis, all of which may be unlawful and subject to review. Not only will this do significant damage to the actual and perceived independence of IPID, but the Constitutional Court has already determined that *ex post facto* review of such decisions is not an effective remedy in law.[23]

77.4 The Order will have a chilling effect on the role of *amici curiae*, given that it reinterprets and limits their role. The Order suggests that it is permissible, in high end and significant constitutional litigation, for the parties simply to make private agreements as to the meaning and import of statutory provisions and have these made an order of court, thus binding the State and others, in circumstances where *amici* would not even have input in relation to matters of principle. This is so even if the *amici* were formally admitted in the case (and thus, by definition, have something important to say about the matter which is materially different from the submissions of the parties). This impermissibly undermines the constitutionally recognised role of an *amicus*, which has been recognised as central by the Constitutional Court on several occasions (eg *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC), para [12]).

THE APPLICATION FOR LEAVE TO APPEAL BEFORE THE COURT A QUO

78. It is respectfully submitted that leave to appeal was incorrectly denied by the court *a quo*. As is evident from the leave to appeal judgment *a quo* attached above as

[23] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 para [247].

annex "**FA3**", the court *a quo* per Hughes J misdirected itself in its consideration of the HSF's application for leave to appeal.

79. At paragraph 11 of the leave to appeal judgment *a quo* Hughes J states:

> "*I do not read into ACSA's case that it is a prerequisite before making a settlement agreement an order of court that there 'must be argument in open court' even in the case of a pronouncement on a right in rem. What I take from this case and the paragraphs 1-4 referred to therein, by applicant, is that a judgment in rem cannot be set aside by a settlement agreement on appeal by the parties without reasons being advanced by the court. I view this as pertaining to an appeal situation and not to situation I had before me on 12 February 2019 … Consequently, in this matter in the exercise of my inherent jurisdiction, it did not necessitate argument in open court by the parties for me to conclude that the lis between the parties was no more*".

80. The Constitutional Court in *ACSA* stated that "*For a judgment in rem to be set aside by a settlement agreement, the court hearing the appeal must give its sanction to the agreement being made an order of court on the basis that the setting aside is justified by the merits of the appeal*"[24] and "*unless the appeal court determines that the merits of the appeal accords with the outcome of the settlement agreement it cannot make the settlement agreement an order*".[25]

81. It is axiomatic that in order for a court to come to the conclusion that the merits of a matter accord with a settlement agreement, the court would need to consider the merits. The court can only consider the merits of a matter by considering the parties' submissions on the merits. This is what is required by *ACSA* - a consideration of the

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[24] ACSA at para 1.

[25] ACSA at para 3.

merits of a matter with the assistance of submissions, before rubberstamping a settlement agreement as a court order (and not simply, as Hughes J seems to believe, "argument in open court"). This did not occur in the present matter.

82. While *ACSA* concerned a settlement on appeal, it is plain that the principles from *ACSA* apply to courts of first instance as well as appeal courts. There was no basis for Hughes J to distinguish the matter on this fact. It is implausible for the principles contained in ACSA to relate only to settlement agreements in appeal matters. In any event, the Constitutional Court has held in a separate occasion (see footnote 25 of *McBride* quoted above) that a court is obliged to require the parties to deal with a point of law when the parties proceed on an incorrect perception of what the law is, which is clearly the case in this matter. This *dicta* was brought to the attention of Hughes J during the hearing; there is no indication from the Reasons, however, that Hughes J considered this at all.

83. Hughes J also contends in the leave to appeal judgment *a quo* that the appeal will have no practical effect as the Committee's decision (which has now been made) will stand until reviewed and set aside. With respect, such a contention demonstrates Hughes J's lack of appreciation for the far-reaching effects of the Order.

84. The issues at stake go far beyond the renewal of Mr McBride's term of office and will have significant repercussions for South Africa in relation to its constitutional and international law framework for ensuring the protection of the structural, operational and institutional independence of IPID. As a result of the Order, IPID is now insufficiently insulated from executive interference with regard to renewal of terms of office of the Executive Director. This, in turn, unacceptably undermines (a) the unit's ability to fulfil its constitutional mandate and (b) public confidence in the institution of IPID.

85. Should the appeal succeed, the Order and Reasons will be overturned. This will restore Mr McBride as Executive Director of IPID as the Minister's and Committee's decisions (as sanctioned in the Order and Reasons) will be set aside. The appeal will therefore not only have an effect, but one which is of manifest national importance.

86. In addition, the Order and Reasons will have an important influence on how other courts interpret and apply domestic and international law in relation to IPID and the exercise of public power in the context of other independent institutions. The correct interpretation of section 6(3)(b) of the IPID Act is integral to ensuring the structural, operational and institutional independence of IPID. The failure to apply an interpretation which best vindicates the Constitution may also result in the appointment (on either a temporary or even permanent basis) of the Executive Director of IPID pursuant to a procedurally flawed process. The dangers of such unlawful appointments - even of acting heads / directors - are clearly illustrated in domestic case law and international best practice.

87. An unconstitutional interpretation of this key piece of legislation cannot stand. Not only is the Order now a public pronouncement on the renewal process, but it will also likely affect the functioning of IPID at this critical juncture, but also for all future renewals, creating the spectre, or real possibility, of political interference with which IPID and its officials will then have to deal. IPID's officials will now have to consider themselves beholden to the political branches, whatever the decision of the Committee.

88. Moreover, given the improper manner in which the Order was granted, and substantial implications which that Order and the Reasons have for the role of amici in constitutional litigation, it is plain that the appeal will provide clarity on the place of amici, the rights of parties and responsibilities of courts in relation to settlement

orders reached by agreement. This appeal therefore has substantial implications for the administration of justice.

89. Absent this appeal by the HSF, the Republic will be burdened with an order, ostensibly binding IPID, the National Executive and Parliament, which was improperly reached, which applies an unconstitutional interpretation to the IPID Act, and which directs high ranking officials to participate in and implement an unconstitutional process. If successful, the appeal will thus clearly have an important effect on the functioning and independence of IPID as the appeal court will have to consider, in its reasoning, the correct interpretation of the IPID Act.

90. Lastly, Hughes J awarded costs to the Minister and Committee as a result of resisting the HSF's application for leave to appeal. This award is astounding not least because neither the Minster nor the Committee sought costs against the HSF. In addition, such an award is entirely contrary to what has by now become a trite principle in our law - that an unsuccessful party in constitutional litigation against the state be spared from paying the state's costs (**"the Biowatch principle"**).[26]

91. The only exception to the Biowatch principle is in circumstances where the litigation is frivolous or vexatious or based on improper motives or where the interests of justice require a costs order against the unsuccessful party.[27] None of these circumstances exist in the HSF's application for leave to appeal. As has been demonstrated above, the HSF's application for leave to appeal was brought in the interest of ensuring that a lawful, constitutionally compliant interpretation of legislation is upheld. Moreover, it was brought to ensure that IPID, an institution of paramount constitutional importance which exists to curb rampant corruption threatening the

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[26] *Biowatch Trust v Registrar: Genetic Resources, and Others* 2005 (4) SA 111 (T).

[27] *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) para [18]; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para [138].

political and economic integrity of the country, is sufficiently independent and protected from undue political influence. The HSF thus sought leave to appeal the Order and Reasons in its own interest and in the public interest and ought not to be saddled with a costs order for doing so.

CONCLUSION

92. For the reasons set out above, the HSF respectfully submits that it is clear from the above, that another court may and, indeed, probably will, come to different conclusions to those reached in the Order and Reasons. In addition, as has been demonstrated above, there are other compelling reasons why the appeal should be heard.

93. In the circumstances, the HSF submits that it has made out a proper case for leave to appeal to be granted in this matter, in accordance with the application for leave to appeal to which this affidavit is attached.

SOUTH AFRICAN POLICE SERVICE
STATION COMMANDER
2019 -04- 20
CLIENT SERVICE CENTRE
SOUTH AFRICAN POLICE SERVICE

DEPONENT

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Johannesburg on 20 April 2019, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.

7106146520087
S.E. Magagula
COMMISSIONER OF OATHS
Full names: SIBONGILE MAGAGULA
Address: 11 Dundalk Avenue
Capacity: Parkview
SERGEANT.

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

CASE NO: 6175/19

In the matter between:

ROBERT MCBRIDE	First Applicant
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	Second Applicant
and	
MINISTER OF POLICE	First Respondent
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Second Respondent

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DRAFT ORDER

BY AGREEMENT BETWEEN THE PARTIES, THE FOLLOWING ORDER IS MADE:

1. It is declared that the decision taken by the First Respondent not to renew the appointment of the First Applicant as the Executive Director of the Independent Police Investigative Directorate (IPID) is a preliminary decision that must be still be confirmed or rejected by the Second Respondent.

2. It is recorded that the Second Respondent intends to take a decision regarding the renewal of the First Applicant's appointment on or by 28 February 2019.

3. The matter is postponed to the urgent roll on 26 February 2019 and for that

purpose:

3.1. The Second Respondent will report on affidavit by 22 February 2019 on its progress on taking a decision regarding the renewal of the First Applicant's appointment; and

3.2. All parties will be entitled to make submissions to this Court on whether any further just and equitable orders should be granted, including but not limited to whether the Second Respondent should be given a further period to make a decision on the renewal of the First Applicant's appointment and whether the First Applicant's term of office ought to be extended pending the Second Respondent's decision.

4. There is no order as to costs.

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BY ORDER OF COURT

THE REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

21/2/2019
DATE

SIGNATURE

Case Number: 6175/19

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant for admission as amicus curiae
CORRUPTION WATCH	Applicant for admission as amicus curiae

In re:

ROBERT McBRIDE	FIRST APPLICANT
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	SECOND APPLICANT

and

MINISTER OF POLICE	FIRST RESPONDENT
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	SECOND RESPONDENT

Coram: HUGHES J

REASONS

HUGHES J

[1] I encountered this application in the urgent court. The applicants, Robert McBride and The Independent Police Investigative Directorate, seek the relief as set out below:

'(1) It is directed that in terms of Rule 6 (12) of the Rules of this Court, this application be treated as an urgent application and the applicants' non-compliance with the forms and service and time-periods provided in the Uniform Rules of Court is condoned.
(2) It is declared that the decision of the First Respondent (the Minister of Police) not to renew the appointment of the First Applicant as the Executive Director of the Independent Police Directorate (IPID) is unconstitutional, unlawful and invalid, and the decision is set aside.
(3) The Second Respondent (the Portfolio Committee on Police) is directed to take a decision on before 28 February 2019 on whether to renew the appointment of the First Respondent as Executive Director of IPID.
(4) To the extent necessary, it is declared that section 6 (3) (b) of the Independent Police Investigative Directorate Act 1 of 2011 is unconstitutional and invalid to the extent it confers the power to renew the appointment of the Executive Director of IPID on the Minister of Police, rather than on the Portfolio Committee on Police.
(5) The Applicants' costs, including the costs of two counsel, are to be paid by the First Respondent, alternatively (in the event that this application is opposed by the Second Respondent) by the Respondents jointly and severally.'

[2] The respondents are the Minister of Police and the Portfolio Committee on Police: National Assembly. At the commencement of these urgent proceedings, Helen Suzman Foundation (HSF) and Corruption Watch filed application papers seeking to intervene as *amicus curiae.*

[3] The interlocutory applications to intervene as *amicus curiae* were not opposed by either of the parties. Having read their application papers and having considered that both parties had consented to their admission as *amici*, I was of the view that they had made out a case to intervene as *amicus curiae.* Thus, I duly granted both leave to intervene.

[4] After the applications of the *amici* were disposed of, the applicants together with the respondents, advised me that they had concluded an agreement which was dispositive of the issues before me and requested that this agreement be made an order of court.

[5] HSF objected to having the agreement made an order of court. Instead, they sought to bring an application from the bar, that I reject the agreement and decline to make it an order of court. In essences HSF sought that the initial application of the applicants be heard.

[6] The basis upon which HSF sought that I grant them an opportunity to have the initial application ventilated was twofold. Firstly, they contended that the interpretation by both the applicants and the respondents, as appears on the papers, of section 6 (3) (b) of Independent Police Investigative Directorate Act 1 of 2011 (the IPID Act) was incorrect, bad in law and contrary to the prescripts of the Constitution. Secondly, they argued that the agreement which was sought to be made an order of court, lacked practicality and legitimacy.

[7] Before addressing the points raised by HSF, I find it prudent to set the submissions that an amici ought to make as is set out in Rule 16A of the Uniform Rules of Court. Rule 16A prescribes as the follows:

'Rule 16A Submissions by *amicus curiae*

(1) (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.

(d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.

(2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these Rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein

as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties.

(3) The written consent contemplated in subrule (2) shall, within five days of its having been obtained, be lodged with the registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

(4) The terms and conditions agreed upon in terms of subrule (2) may be amended by the court.

(5) If the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or she may, within five days of the expiry of the 20-days period prescribed in that subrule, apply to the court to be admitted as an amicus curiae in the proceedings.

(6) An application contemplated in subrule (5) shall-

(a) briefly describe the interest of the amicus curiae in the proceedings;

(b) clearly and succinctly set out the submissions which will be advanced by the amicus curiae, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties; and

(c) be served upon all parties to the proceedings.

(7) (a) Any party to the proceedings who wishes to oppose an application to be admitted as an amicus curiae, shall file an answering affidavit within five days of the service of such application upon such party.

(b) The answering affidavit shall clearly and succinctly set out the grounds of such opposition.

(8) The court hearing an application to be admitted as amicus curiae may refuse or grant the application upon such terms and conditions as it may determine.

(9) The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so.'

[8] Having admitted HSF and Corruption Watch, it is clear that they had advanced submissions that would assist this court or were different from the applicants and the respondents that on their own admission were 'purely legal in nature', were crucial to advancement of justice and were of public interest. Crucial to its contention as regards their difference in the interpretation of section 6 (3) (b) of the IPID Act was the argument they advanced being; that 'Common to these interpretations,...is that the renewal power vests in a political actor,...the failure timeously to exercise this power will allow for an appointment of an acting Executive Director...'[1]. Obviously they

[1] At para 5 of HSF's Heads of Argument page 1

contend that none of the interpretations of the applicants nor the respondents are correct.

[9] The crux of HSF's grip with the other parties' interpretation of the relevant section is that it places power on a political level and a committee of the National Assembly, that being, the Portfolio Committee on Police. They view this as untenable as it subjects renewal of the Executive Director to political oversight.

[10] HSF submits that in interpreting the relevant section the correct interpretation would be that 'the appointment of the Executive Director of IPID is renewable at his instance and not at the insistence of either of the respondents.'[2] They further submit that though their interpretation is materially different to that of the parties concerned, it is however integral to the determination of the issues between the parties.

[11] With regards to the second point raised, that being that it would not be legitimate and practical if the agreement between the parties is made an order of court. This obviously arises from HSF's interpretation of section 6 (3) (b) as opposed to that of the parties concerned, as the latter's interpretation goes against the prescripts of the Constitution, thus not legitimate, and is not practical as it susceptible to political interference. HSF place reliance on the principles enunciated in *Eke v Parsons 2016* (3) SA 37 (CC), which in a nut shell advocates that a court ought to be slow in adopting the terms of a settlement agreement entered into by parties and making it an order of court. This is so, because in order for an order to be competent and proper, it must relate directly and indirectly to the *lis* or issue between the parties. Further requirements are that the agreement ought not to be objectionable and the terms must be practically and legally capable of being included as an order. In addition, the terms of the said agreement would have to hold practical and legitimate advantage. Lastly, the terms of the agreement to be made an order, can't be found to be against public policy and they must accord with the law and Constitution[3].

[2] At para 23 of NOM of HSF page 10
[3] *Eke* para [25] and [26] at page 49

[12] I propose to first deal with the issue regarding HSF having the requisite power to make the submissions that it does in respect of the agreement between the parties being made an order of court. This is in relation to its application having been made in terms of Rule 16A (6) as per their notice of motion. In address the aforesaid I place reliance specifically on Rule 16A (6) (b) set out above. According to this sub-rule HSF would have had to set out in its application papers the submissions it relies upon for the agreement not to be made an order of court in its founding papers, which would 'assist the court and that are different from the other parties' concerned.

[13] In this case, HSF only advances why it should be admitted as an *amici*, as regards its interpretation of section 6 (3)(b) being different to that of the other parties. It did not deal with any objections raised as regards the current agreement between the parties being made an order of court. The objection raised by HSF from the bar, in my view, raises new issues between the parties, which have not been considered and addressed by the parties.

[14] In support of my view expressed above I rely on the dicta *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) at paragraph 5 where the Constitutional Court said the following:

'[5] The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence'.

[15] In the circumstances before me, I am mindful that what is sought to be made an order of court is an agreement between the parties, and the terms and conditions thereof are derived from the parties themselves. I am also cognisance of the warning sounded in *Eke*. Hence, it is my view that the objections raised by HSF, though in terms of the submissions advanced to be admitted as *amici* they don't amount to new contentions, however in relation to the agreement between the parties, this to my mind amounts to new issues advocating new evidence. Why do I say so? I

say so because HSF is not addressing the interpretation issue any longer but now ventures into the terrain of the agreement between the parties, which in essence is a totally new issue, not canvassed on the papers. Accordingly not dealt with by both the parties and the *amici*, especially so as regards the objection that the agreement is contrary to law and practically unenforceable.

[16] I agree with the submissions of Adv. Ngcukaitobi that the *amici* was permitted to intervene based on the case made out by the applicants in their founding papers and the respondents reply thereto. This did not include the agreement reached by the parties, and as such, if an issue is taken with same, the parties ought to be given an opportunity to respond accordingly. I am mindful of HSF's purpose, as stated in its founding affidavit in seeking to be admitted as an *amici*, that being, HSF sought to place their interpretation of section 6 (3) (b) before this court[4] and not challenging the agreement eventually concluded between the parties.

[17] As things stand before me I am satisfied that the terms of the agreement are legitimate, practically achievable, not against public policy and do not infringe either the law or Constitution. In the result the terms of the agreement between the parties, before me, is made an order of court.

[18] The following agreement between the parties is made an order of court:

> '[1] It is declared that the decision taken by the First Respondent not to renew the appointment of the First Applicant as the Executive Director of the Independent Police Investigative Directorate (IPID) is a preliminary decision that must still be confirmed or rejected by the Second Respondent.
>
> [2] It is recorded that the Second Respondent intends to take a decision regarding the renewal of the First Applicant's appointment on or by 28 February 2019.
>
> [3] The matter is postponed to the urgent roll on 26 February and for that purpose:
>
> 3.1 The Second Respondent will report on affidavit by 22 February 2019 on its progress on taking a decision regarding the renewal of the First Applicant's appointment; and
>
> 3.2 All parties will be entitled to make submissions to this Court on whether any further just and equitable orders should be granted, including but not limited to whether the Second Respondent should be given a further period to make a decision on the

[4] At para [8] of the founding Affidavit page 7

renewal of the First Applicant's appointment and whether the First Respondent's term of office ought to be extended pending the Second Respondent's decision.

[4] There is no order as to costs.'

W HUGHES
JUDGE OF THE HIGH COURT, PRETORIA

For the 1st and 2nd Applicants:	Adv S Budlender Adv J Bleazard
Instructed by:	Adams & Adams
For the 1st Respondent:	Adv J Mitchell
Instructed by:	State Atttorneys
For the 2nd Respondent:	Adv T Ngcukaitobi Adv Premhid
Instructed by:	State Atttorneys
For the *Amicus curiae*:	
Helen Suzman Foundation	Adv M du Plessis SC
Instructed by:	Webber Wentzel
Corruption Watch:	Adv R Tulk Adv Y Ntloko
Instructed by:	Webber Wentzel

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

19/3/19
DATE

SIGNATURE

Case Number: 6175/2019

In the application for leave to appeal by:

HELEN SUZMAN FOUNDATION	APPLICANT
and	
ROBERT McBRIDE	1st RESPONDENT
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	2nd RESPONDENT
MINISTER OF POLICE	3rd RESPONDENT
PORTFOLIO COMMITTEE OF POLICE:NATIONAL ASSEMBLY	4th RESPONDENT

Coram: HUGHES J

REASONS

HUGHES J

[1] In this application the applicant, Helen Suzman Foundation, the amicus curiae, seeks leave to appeal the order I made on 12 February 2019. This order made was an agreement reached by the parties in the proceeding, namely all the respondent's in this application, an order of court. Leave to appeal is sought to the Supreme Court of Appeal, alternatively the Full Court of this division, of the whole of my judgment and order.

[2] The applicants seeks leave to appeal on two levels the one being that there are reasonable prospects on appeal and the other being that there are compelling reasons for the grant of leave to appeal.

[3] Section 17(1) of the Superior Courts Act 10 of 2013 sets out the circumstances upon which leave to appeal may be granted. Of specific relevance in this particular case, is section 17(1)(a)(i) and (ii). I set out below section 17(1) in its entirety for easy reference:

'Section 17(1)

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.' [My emphasis]

[3] Previously the test applied in applications of this nature, was whether there were reasonable prospects that another court 'may' come to a different conclusion. The operative word being 'may' which does not denote certainty. See *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B. Notably what emerges from section 17 (1) is that the threshold for granting leave to appeal has levitated. This is

evident from the use of the words 'only' which constrains the granting of leave to those grounds specified. In addition in section 17(1)(a)(i) the use of the word 'would' is indicative of the reasonable prospects of success being certain. I refer to *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [6], where Bertelsmann J stated the following:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H.** The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.' [My emphasis].

[4] Plasket AJA had the opportunity to consider what constitutes reasonable prospects of success and stated the following:

'[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'[1] [My emphasis]

[5] The grounds for leave centre on two crisp aspect both according to the applicant both resulting in the granting of an order in circumstances which were against constitutional principles. These grounds assert that my reasoning for the granting of the order was erroneous, impermissible and failed to accord with the prescripts as set out by the constitutional court in *Airports company South Africa v Big Five Duty Free (Pty) Limited and Others*[2].

[6] I deem it necessary to set out these grounds as they appear in the applicants heads of argument:

---

[1] *S v Smith* 2012 (1) SACR 567 (SCA) 570 at para [7]
[2] [2018] ZACC 33 (27 September 2018) [ACSA case]

'10.1 In Airports Company South Africa v Big Five duty Free (pty) Limited and Others, the Constitutional Court held that any court order which pronounces on rights *in rem* requires argument in open court, must accord with and be justified by the merits of the matter and the relevant judge is required to produce a written judgment setting forth reasons for the decision. Such an order, unlike orders bearing simply on rights in *personam*, cannot simply be taken by agreement.

10.2 Madam Justice Hughes was required to hear argument, in an open Court, as to the legality of the respondent's agreed interpretation of s6 (3) (b) of the IPID Act. She could not simply accept the interpretation agreed to, privately, by the Minister, the Committee and Mr McBride. No such argument was led, however, and there was no judicial interrogation of the correct interpretation.'[3]

[7] What I do not propose to do is to set out the exhaustive grounds upon which the applicant seeks leave to appeal again or repeat that which is set out in my reasons for the order made, in as much as that which was relevant was dealt with in the reasons.

[8] The applicant nails its colours to the mast on section 17(1)(a)(i), being that 'the appeal would have reasonable prospect of success' and 17(1)(a)(ii) that 'there is some other compelling reason why the appeal should be heard'[4].

[9] In addressing the ACSA case what I take from this case is that a court seeking to make a settlement agreement an order of court must determine that the merits accord with the outcome sought to be achieved by the settlement agreement. Further a court must give reasons for such decision.

[10] Firstly, I wish to proceed from the premise that in terms of section 173 of the Constitution the courts have 'inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice'. In addressing the ambit of this power in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*, the constitutional court said:

[3] At para 10 of the Applicant's heads of argument
[4] At para 7 of the Applicant's heads of argument

'...The power in s 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regulated orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction.'[5]

[11] Having said the above I do not read into ACSA's case that it is a prerequisite before making a settlement agreement an order of court that there 'must be argument in open court' even in the case of a pronouncement on a right *in rem*. What I take from this case and the paragraphs 1- 4 referred to therein, by applicant, is that a judgment *in rem* cannot be set aside by a settlement agreement on appeal by the parties without reasons being advanced by the court. I view this as pertaining to an appeal situation and not to situation I had before me on 12 February 2019. I have dealt with the caution warned of in *Eke v Parsons*[6] in paragraph 11 of my reasons for making the settlement an order of court. I do not intend to repeat same. Consequently, in this matter in the exercise of my inherent jurisdiction, it did not necessitate argument in open court by the parties for me to conclude that the *lis* between the parties was no more.

[12] On the second leg of the basis raised of compelling ground existing to grant leave, I am not persuaded that an interpretation of section 6 (3) (b) of the IPID Act was required prior to endorsing the settlement agreement as an order of court. In my view, all that the settlement did was end the *lis* between the parties by re-affirming what process ought to have been followed by the parties in terms of the IPID Act. Needless to say that process has already been followed.

[13] The second respondent raises the issue of section 16(2)(a) of the Superior Courts Act. The aforesaid section deals with whether the appeal if allowed would have any practical effect. They argue that if HSF is successful in their appeal for the matter to be reinstated as if the settlement was not reached, it still does not displace the Portfolio Committee's decision which stands until reviewed and set aside. The respondent also referred to the dicta of *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441 where a warning was sounded by the Appellant Court then cautioned against appeals purely for the 'pronouncing upon of abstract questions, or advising on

[5] 2007(1) SA 523 (CC) PARA 90
[6] 2016 (3) SA 37 (CC)

differing contentions, however important'. In my view, I am faced with this exact situation warned of in *Geldenhuys*. Further, I also agree with the second defendant that there will be no practical effect for the appeal as an *Oudekraal*[7] situation will be but the only result.

[14] In light of my reasons for making the settlement agreement an order of court it is my view that the applicant seeks to attain an audience on the interpretation and constitutionality of section 6(3)(b) via the backdoor. I persist for the reasons set out above that the applicant does not have reasonable prospect of success before another court and there are no other compelling reasons to grant leave to appeal.

[15] I need to make mention that the first respondent appeared in court but opted to abide the decision of this court. Thus, the only parties who resisted this application for leave to appeal is the third and fourth respondents.

[16] Consequently the following order is made:

[16.1] The application for leave to appeal is dismissed with costs.
[16.2] Such costs are awarded to the third and fourth respondents who resisted this application.

W. Hughes

[7] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004(6)SA 222 SCA

Judge of the High Court Gauteng, Pretoria

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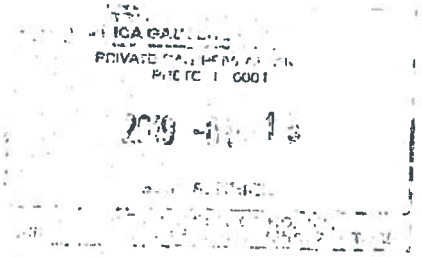
OUR REF: M. H SMIT/AJ/AE048/19
YOUR REF:
DATE: 18 April 2019

THE REGISTRAR OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA



BY HAND

Dear Mr/Ms,

RE: HELEN SUZMAN FOUNDATION // ROBERT McBRIDE, THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE, MINISTER OF POLICE & PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY

1. We refer to the abovementioned matter and confirm that we are the appointed correspondent attorneys of record for Webber Wentzel on behalf of the Applicant, The Helen Suzman Foundation.

2. We confirm that our online court order system is currently offline and the earliest prospect of same going online again is on Friday, the 19th of April 2019.

3. Due to the system being offline no online court orders can be given to your candidate attorney Ms. R. Deacon.

4. As per the file request form, the file can also not be found in the basement and therefore, no court order can be obtained at the moment.

5. On the 19th of March 2019 the Honourable J. Huges made and Order in the following terms:

5.1. *"[16] Consequently the following order is made:*

[16.1] The application for leave to appeal is dismissed with costs.

[16.2] Such costs are awarded to the third and fourth respondents who resisted this application"

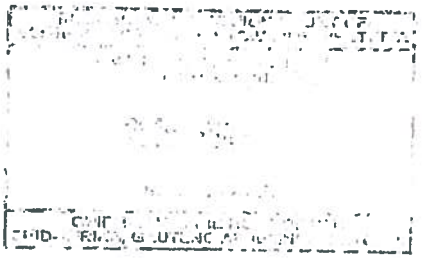
6. We trust the above is in order.

Yours faithfully,

HILLS INCORPORATED

P.P.

MARISKA SMIT



54 **FA4**

AA 1

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

Private Bag X941, PRETORIA, 0001. City Forum Building, 144 Madiba Street, PRETORIA
Tel: (012) 399 0211, Email complaints@ipid.gov.za

Honourable BH Cele
MINISTER OF POLICE, MP
WACHTHUIS
Pretoria
0001

By Hand

05 September 2016

INFORMATION NOTE

Dear Honourable Minister,

CONTRACT TERM: EXECUTIVE DIRECTOR

1. As you may be aware, I was appointed on the 1st March 2014. I was appointed through an appointment letter.
2. The appointment letter indicated that the appointment was for a five year term.
3. As such, my term ends on the 28th February 2019. That would be in just over five months' time.
4. I wish to understand whether the Ministry intends to retain or extend my contract.
5. Certainty in this regard will provide sufficient time to make the necessary arrangements and preparation, whatever the decision or intention is.

Kindly revert to me at your earliest convenience.

MR RJ McBRIDE
EXECUTIVE DIRECTOR: IPID
DATE: 05/09/2016

55 FA5
AA2.

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

Private Bag X941, PRETORIA, 0001. City Forum Building, 144 Madiba Street, PRETORIA
Tel: (012) 399 0211, Email: complaints@ipid.gov.za

Honourable BH Cele
MINISTER OF POLICE, MP
WACHTHUIS
Pretoria
0001

By Hand

INFORMATION NOTE

Dear Honourable Minister,

FOLLOW- UP: CONTRACT TERM - EXECUTIVE DIRECTOR

1. The above matter has reference. Information Note was submitted to the Minister's office on 6 September 2018 in this regard, copy attached as **Annexure A**. Subsequently a meeting was scheduled by the office of the Minister but could not take place.
2. The Information Note serves as a follow-up on the matter. My term ends on the 28th February 2019. That would be in just over three months' time.
3. As stated in the previous Information Note, certainty in this regard will provide sufficient time to make the necessary arrangements and preparation. Whatever the decision – retention, extension or not - the IPID will need to continue to function optimally.
4. It is thus recommended that the process of advertising the post and the selection of a suitable candidate commences at the earliest opportunity.

Kindly revert to me at your earliest convenience.

MR RJ McBRIDE
EXECUTIVE DIRECTOR: IPID
DATE: 13/11/2018

1

BHC 5.E

MINISTRY OF POLICE
REPUBLIC OF SOUTH AFRICA
Private Bag X463 PRETORIA 0001, Tel: (012) 393 2800, Fax: (012) 393 2819/20 · Private Bag X9080 CAPE TOWN 8000, Tel: (021) 467 7021, Fax: (021) 467 7033

MR RJ McBride
INDEPENDENT POLICE INVESTIGATIVE DIRECTOR
PO Box X941
PRETORIA
0001

Dear Mr RJ McBride

NON – RENEWAL / EXTENSION OF EMPLOYMENT CONTRACT: EXECUTIVE DIRECTOR: INDEPENDENT POLICE INVESTIGATIVE DIRECOTORATE (IPID)

1. I wish to bring to your attention that your Employment Contract you entered into between the former Minister of Police, Mr E.N Mthethwa, MP and yourself dated the 20th of February 2014 and the 1st of March 2014, respectively as an Executive Director of IPID is coming to an end on the 28th of February 2019.

2. In terms of Section 6 (3) (b) of the Independent Police Investigative Directorate Act, 2011 (Act No. of 2011) provides, "that such an appointment is for a term of five (5) years which is renewable for one (1) additional term only".

3. I hereby inform you that I have decided not to renew or extend your Employment Contract as Executive Director of IPID. You are hereby advised that your last official working day will be on Thursday, the 28th of February 2019.

4. I would like to take this opportunity to thank you for the services that you have rendered as the Executive Director of IPID and wish you well in your future endeavours.

5. The content of this letter will be communicated with the Minister for the Public Service and Administration, Minister Ayanda Dlodlo, MP.

Yours Sincerely,

BH Cele (MP)
Minister of Police
Date: 16/01/2020

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

Private Bag X941, PRETORIA, 0001. City Forum Building, 114 Madiba Street, PRETORIA
Tel: (012) 399 0000, Fax: (012) 399 1440, Email: complaints@ipid.gov.za

Honourable Minister B Cele
MINISTER OF POLICE
WACHTHUIS
Pretoria
0001
CC:

By Email

THE HONOURABLE SPEAKER AND THE HONOURABLE CHIEF WHIP
THE HONOURABLE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION
THE PORTFOLIO COMMITTEE ON POLICE

22 January 2019

INFORMATION NOTE

Dear Honourable Minister,

IN RE: DECISION NOT TO RENEW OR EXTEND APPOINTMENT TO THE OFFICE OF THE EXECUTIVE DIRECTOR OF IPID

1. Your letter dated 16 January 2019 bears reference.

2. You confirm that you have taken a decision not to renew or extend my employment contract as the Executive Director of IPID ("your decision"), and that my employment will accordingly come to an end on 28 February 2019.

3. By unilaterally determining whether my tenure as the Executive Director of IPID should be renewed or extended, and terminating my holding of the office, you have acted unlawfully and in violation of the constitutionally-entrenched independence of IPID.

4. The Constitutional Court held in *McBride v Minister of Police and Another*[1] that the Executive Director of IPID is not a public servant employed by the Minister of

[1] *McBride v Minister of Police and Another* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC)

Police under the Public Service Act. As the head of an independent institution, the Executive Director is appointed by and holds office at the instance of the relevant Parliamentary Committee, being the National Assembly's Portfolio Committee on Police (sections 6(1) to 6(3) of the IPID Act 1 of 2011).

5. The Constitutional Court specifically held that section 6(3)(a) of the IPID Act was unconstitutional for making the Executive Director subject to the laws governing the public service. The Constitutional Court held in paragraph 39 of its judgment that:

> "To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service – to the extent that they empower the Minister to unilaterally interfere with the Executive Director's tenure – is subversive of IPID's institutional and functional independence, as it turns the Executive Director into a public servant subject to the political control of the Minister".

6. As is recorded in the aforesaid judgment of the Constitutional Court, the Minister of Police correctly conceded in those legal proceedings that s 6(3)(a) was unconstitutional, for the reasons stated by the Constitutional Court.

7. The decision you have now taken purports to backtrack on that concession and is in direct contravention of the provisions of IPID Act and the judgment of the Constitutional Court.

8. The decision whether or not to renew or extend my term as the Executive Director of IPID is not yours to take. It is a decision that vests in the relevant Parliamentary Committee as the body ultimately responsible for appointing the Executive Director.

9. In the circumstances I respectfully demand that you –

   9.1. withdraw your decision; and

   9.2. immediately refer the decision on whether to renew or extend my employment contract to the Portfolio Committee on Police.

10. Should you fail to accede to the aforesaid demands by close of business on 24 January 2019, I will seek legal redress on an urgent basis.

11. Moreover, and in any event, your decision is an exercise of public power that is subject to the principle of legality. Accordingly, even if you had the relevant power (which you do not), I am entitled to the reasons for your decision.[2] In the event that you decide not to accede to my demands, I hereby request the written reasons for your decision, to be furnished to me by no later than close of business on 24 January 2019.

12. A copy of this letter is being sent to the Portfolio Committee on Police under cover of the letter **attached** hereto for your information.

13. All my rights are reserved.

Yours Sincerely

MR RJ MCBRIDE
EXECUTIVE DIRECTOR: IPID
DATE: 22/09/2019

[2] See: Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) at paras 42-46

61 FA8
AA3

MINISTRY OF POLICE
REPUBLIC OF SOUTH AFRICA
Private Bag X463 PRETORIA 0001, Tel. (012) 393 2800, Fax (012) 393 2819/20 • Private Bag X9080 CAPE TOWN 8000, Tel (021) 467 7021, Fax: (021) 467 7033

REFERENCE: 3/19(2/2013)

Mr F Beukman
Chairperson of Portfolio Committee on Police
P O Box 15
CAPE TOWN
8000

Dear Chairperson,

NON-RENEWAL OF EMPLOYMENT CONTRACT: EXECUTIVE DIRECTOR: INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

1. The appointment of the Executive Director of IPID is regulated in terms of the provisions of section 6 of the IPID Act, 2011.

2. Mr RJ Mcbride was appointed to this position on the 1st of March 2014 and in terms of the provisions of section 6(2)(b) of the said Act, his term of office will expire on the 28th of February 2019.

3. Section 6(2)(b) of the said Act further states that the appointment of the Executive Director is renewable for one additional term.

4. On the 16th of January 2019 I informed Mr Mcbride that I do not intend to renew his appointment for another term and that his appointment will end on the 28th of February 2019. Copy of letter attached for ease of reference.

5. Mr Mcbride responded in a letter dated 22 January 2019, which letter was also addressed to your Committee. Copy attached for ease of reference.

BHC

NON-RENEWAL OF EMPLOYMENT CONTRACT: EXECUTIVE DIRECTOR: INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

6. In the said response Mr Mcbride is expressing the views that the decision to renew, or not renew, the term of office is not within the power of the Minister of Police but rather the relevant Portfolio Committee. He is relying on the well-known judgment of the Constitutional Court in Mcbride v Minister of Police (2016) ZACC 30 in this regard.

   The said judgment centred around the powers of the Minister of Police to suspend, discipline and remove the Executive Director of IPID and ruled that such actions must be overseen by parliamentary oversight. The judgment did not extend to analyse the provisions of section 6(3)(b) of the said Act insofar as it relate to the renewal of a term of office.

7. In the light of the above, as well as to avoid protracted litigation between myself and Mr Mcbride, it is requested that the Portfolio Committee either confirm or reject my decision not to renew the term of office of Mr Mcbride.

   Any ensuing litigation will not be in the interest of the Department and therefore it is requested that this matter be dealt with the urgency that it deserves.

Yours sincerely,

BH CELE (MP)
MINISTER OF POLICE
Date: 24/01/2019

"RM 24 63 FA9

MINISTRY OF POLICE
REPUBLIC OF SOUTH AFRICA

Private Bag X463 PRETORIA 0001, Tel: (012) 393 2800, Fax: (012) 393 2819/20 • Private Bag X9080 CAPE TOWN 8000, Tel: (021) 467 7021, Fax: (021) 467 7033

Mr RJ Mcbride
Independent Police Investigative Directorate
P.O. Box X941
PRETORIA
0001

Dear Mr RJ Mcbride

NON-RENEWAL/EXTENSION OF EMPLOYMENT CONTRACT: EXECUTIVE DIRECTOR: INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

1. Your letter dated 22 January 2019 refers, the contents which have been noted.

2. This reply does not intend to deal with each and every averment in your letter and a failure to do so must not be seen as an admission there-of.

3. The reference to the Constitutional Court judgment in Mcbride v Minister of Police is noted. It must however be placed on record that I do not intend to remove you from office. Your term of office expires on the 28th of February 2019 and the intention of my letter was to make that visible to yourself. I have been advised that based on governing labour law principles you cannot claim any right or legitimate expectation to the renewal of your contract.

4. My decision not to renew your employment contract will be forwarded to the relevant Parliamentary Committee for consideration.

5. You will be advised of the outcome of the above process.

NON-RENEWAL/EXTENSION OF EMPLOYMENT CONTRACT: EXECUTIVE DIRECTOR: INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPID)

Yours faithfully

BH CELE (MP)
MINISTER OF POLICE
Date: 24/01/2019

65FA10

AA4

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY
THE SPEAKER

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2595 FAX: 27 (21) 461 9462
speaker@parliament.gov.za
www.parliament.gov.za

4 February 2019

Mr B Cele MP
Minister of Police
Private Bag X463
PRETORIA
0001

Dear Minister Cele,

DECISION NOT TO RENEW THE CONTRACT OF EMPLOYMENT OF MR ROBERT MCBRIDE

It has been brought to my attention that a letter dated 24 January 2019, regarding your decision not to renew the employment contract of Mr R McBride, has been addressed to the Chairperson of the Portfolio Committee on Police, the Honourable F Beukman, with a request that the Committee either confirm or refuse your decision.

Mr McBride's terms of employment are regulated by legislation and a contract (of employment), and to the extent that the term of office is governed by legislation, you can make recommendations to the National Assembly regarding its non-renewal or otherwise, for its decision.

You are therefore welcome to make any recommendations to the Assembly, and that such recommendations should be addressed to me for onward referral to the Committee in terms of the rules, for consideration and report. As such, the matter cannot be considered by the committee at this stage.

I should also mention that the legislation as currently formulated does warrant reconsideration to the extent that it grants powers to a committee at the exclusion of the parent structure which in this instance is the National Assembly.

Yours sincerely,

B Mbete MP
Speaker of the National Assembly

SIC

66 **FA11**

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 6175/19

In the matter between:

ROBERT MCBRIDE First Applicant

THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE Second Applicant

and

MINISTER OF POLICE First Respondent

PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY Second Respondent

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NOTICE OF MOTION

KINDLY TAKE NOTICE that the Applicants intend to make application to this Honourable Court on Tuesday, 12 February 2019 at 10h00, or so soon thereafter as the matter may be heard, for an order in the following terms:

1. It is directed that in terms of Rule 6(12) of the Rules of this Court, this application be treated as an urgent application and the applicants' non-compliance with the forms and service and time-periods provided in the Uniform Rules of Court is condoned.

2. It is declared that the decision of the First Respondent (the Minister of Police) not to renew the appointment of the First Applicant as the

Executive Director of the Independent Police Investigative Directorate (IPID) is unconstitutional, unlawful and invalid, and the decision is set aside.

3. The Second Respondent (the Portfolio Committee on Police) is directed to take a decision on before 28 February 2019 on whether to renew the appointment of the First Respondent as Executive Director of IPID.

4. To the extent necessary, it is declared that section 6(3)(b) of the Independent Police Investigative Directorate Act 1 of 2011 is unconstitutional and invalid to the extent it confers the power to renew the appointment of the Executive Director of IPID on the Minister of Police, rather than on the Portfolio Committee on Police.

5. The Applicants' costs, including the costs of two counsel, are to be paid by the First Respondent, alternatively (in the event that this application is opposed by the Second Respondent) by the Respondents jointly and severally.

6. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **ROBERT MCBRIDE** will be used in support of this application.

TAKE NOTICE FURTHER that in view of the urgency of this matter the time-periods for the filing of affidavits have been shortened as follows:

- The respondents must file their notice of opposition, if any, by 16h00 on Friday, 1 February 2019; and
- The respondents must file their answering affidavits, if any, by 16h00 on Monday, 4 February 2019.
- The applicants will file a replying affidavit, if any, by 12h00 on Thursday, 7 February 2019.

DATED at Pretoria this 29th **day of JANUARY 2019.**

J MARAIS
ADAMS & ADAMS
Attorneys for First Respondent
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mpumelelo.ndlela@adams.africa
Ref: JSM/TDM/mnn/LT4287

TO: **REGISTRAR OF THE HIGH COURT**
PRETORIA

AND TO: **THE MINISTER OF POLICE**
231 Pretorius Street
756-7th floor Wachthuis Building
Pretoria
0002

BY EMAIL: suluwale.asiat@gmail.com
PhokaneN@saps.gov.za
MfeteSJ@saps.gov.za
PhilanderDarane@saps.gov.za
Chamanes@saps.gov.za

BY HAND: **THE STATE ATTORNEY**
Attorney for the First Respondent
21st Floor SALU Building
316 Thabo Sehume Street
Pretoria
0001

AND TO: **THE PORTFOLIO COMMITTEE ON POLICE**
Parliament of South Africa
Parliament Street
Cape Town

BY EMAIL: fbeukman@mweb.co.za

BY HAND: **THE STATE ATTORNEY**
Attorney for the Second Respondent
21st Floor SALU Building
316 Thabo Sehume Street
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0001

WEBBER WENTZEL

in alliance with > Linklaters

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4 Daventry Street
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Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / D Rafferty / L Pillay	5 February 2019

Dear Sirs

Robert McBride and Another ("the applicants") // Minister of Police ("Minister") and another (GP case no 6175/19) ("the application")

1. We refer to the application and confirm that we act for the Helen Suzman Foundation ("**HSF**").

2. The HSF only recently became aware of the application. After taking legal advice as quickly as it was able, the HSF is of the view that it has a substantial interest in these proceedings on the basis of what is set forth below. In the circumstances, the HSF seeks the parties' consent to intervene as *amicus curiae* in the application.

3. The HSF is a non-governmental organisation whose objectives are to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights. The HSF is an organisation primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law, all of which are implicated in this matter.

4. In addition, the HSF was granted leave to intervene as *amicus curiae* in the matter of *McBride v Minister of Police and Another* 2016 (2) SACR 585 (CC). Not only does the application rely heavily on that judgment, but also at least two other matters concerning constitutional requirements pertaining to the institutional and operational independence of key state institutions, where the HSF played a central role: *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) and *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

5. The submissions which the HSF intends to make may be broadly outlined as follows:

5.1 Independent policing bodies ie bodies which are sufficiently protected from executive, political and other interference are indispensable in the fight against, *inter alia*, corruption and organised crime. This is particularly so in the context of an organisation such as Independent Police Investigative Directorate ("**IPID**"), which is constitutionally mandated to investigate the guardians of our constitutional democracy. Where these bodies' independence is undermined, it will in turn impact on the capacity of these bodies to effectively and efficiently combat these vices and fulfil their constitutional and legislative mandates, as fortified by international law.

5.2 The Constitutional Court has recognised non-renewable terms of office of such bodies as a central feature of independence. To the extent that renewable terms are permitted however, as is the case in the renewable term of office of the Executive Director of the IPID, the decision to renew the term of office should not depend on political judgement or lie with <u>any</u> political actor, including members of the Executive or Parliamentary Portfolio Committees. This is necessary in order sufficiently to protect independent policing bodies from political interference. These constitutional imperatives are reinforced by international jurisprudence.

5.3 A renewal of a term of office is qualitatively different from an initial appointment, as there is a greater opportunity for political favouritism and perverse incentives and disincentives in the former. The actions of the independent body may be impermissibly influenced by the potential for renewal or non-renewal if the decision to renew is left to the discretion, and in this case completely unguided discretion, of a political actor. The renewal thus cannot, as a matter of constitutional principle, be left to political happenstance.

5.4 For this reason, the HSF intends to make written and oral submissions that the term contemplated in section 6(3) of the IPID Act is renewable at the instance only of the Executive Director of the IPID and not the Minister (or a parliamentary committee). This would result in a constitutionally compliant reading of that section. A different reading, which places that decision in the hands of a political actor, would not promote or fulfil constitutional rights or requirements, and would open the door to undue political interference, or the risk of an apprehension of such interference.

5.5 In the alternative, and in the event that the applicants succeed in having the Portfolio Committee on Police directed to take the decision on whether to renew Mr McBride's term of office, the HSF intends to make written and oral submissions on the need for broader just and equitable relief, in the exercise of the Court's power under section 172 of the Constitution, to ensure that the Minister is interdicted from appointing a new Executive Director, and that Mr McBride's tenure is maintained

until a decision to renew Mr McBride's term of office is taken by the Portfolio Committee on Police. Such relief is necessary to protect the integrity of the office of the Executive Director and to ensure that Mr McBride's ability to be restored to his position is not irreparably harmed by the appointment of a new Executive Director in the period during which the Portfolio Committee must take this decision.

6. The HSF has a clear interest in these proceedings and believes that its submissions will be of material benefit to the Honourable Court hearing the matter. Its submissions will, in substance, differ from the submissions of the applicants and respondents.

7. Given that the application is set down for hearing on 12 February 2019, please let us know by no later than 17:00 on 5 February 2019 and in writing whether your respective clients consent to the HSF being admitted as *amicus curiae* in this matter. For that purpose, please direct correspondence directly to the writer at vlad.movshovich@webberwentzel.com

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

FA13

PATENT, TRADE MARK, COPYRIGHT, DESIGN,
COMMERCIAL, PROPERTY & LITIGATION ATTORNEYS

Adams & Adams

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To: vlad.movshovich@webberwentzel.com

From: jac.marais@adams.africa

Cc: Thando.manentsa@adams.africa
Moya.vaughan-williams@adams.africa
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Our Reference: JSM/TDM/MV-W/mnn/LT4287
Your Reference: V Movshovich

Date: 5 February 2019

WEBBER WENTZEL
Johannesburg

ATTENTION: V MOVSHOVICH

Dear Sirs

ROBERT MCBRIDE & THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE // MINISTER OF POLICE & PORTFOLIO COMMITTEE ON POLICE
CASE NO: 6175/19

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1. Your letter of earlier today bears reference.

2. Our clients consent to the Helen Suzman Foundation being admitted as *amicus curiae*, subject thereto that, this does not jeopardise the timelines for the hearing of the application on 12 February 2019.

Yours faithfully
ADAMS & ADAMS

J MARAIS
Checked and signed by author and sent electronically

From: Sebelemetsa Ramathiti <RSebelemetsa@justice.gov.za>
Sent: 05 February 2019 18:05
To: Lavanya Pillay; Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty
Cc: jac.marais@adams.africa; Thando.manentsa@adams.africa; moya.vaughan-williams@adams.africa; Mpumelelo.ndlela@adams.africa
Subject: RE: McBride and Another // Minister of Police and Another (GP case no 6175/19)
Importance: High

Afternoon

Be informed that the Respondents' will not oppose the admission of the HSF as *amicus curiae*.

Trusting you find the above in order.

Best,

Ramathiti Joseph Sebelemetsa
Senior Assistant State Attorney
Office of the State Attorney – Pretoria
Tel: 012 309 1623
Direct Fax: 086 507 1910
Cell: 071 870 2442
Email: rsebelemetsa@justice.gov.za
Alternative Email: ramatics@gmail.com
Website: www.justice.gov.za

"Vanhu I Swivumbiwa Swo Hlamarisa."

From: Lavanya Pillay [mailto:Lavanya.Pillay@webberwentzel.com]
Sent: 05 February 2019 10:08 AM
To: jac.marais@adams.africa; Thando.manentsa@adams.africa; moya.vaughan-williams@adams.africa; Mpumelelo.ndlela@adams.africa; Sebelemetsa Ramathiti
Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty
Subject: McBride and Another // Minister of Police and Another (GP case no 6175/19)
Importance: High

Dear all

Please find attached correspondence for your urgent attention.

Yours faithfully

Lavanya Pillay
Trainee Attorney

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FA14

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BY EMAIL

TO: RSebelemetsa@justice.gov.za

FROM: Jac.Marais@adams.africa

CC: Thando.Manentsa@adams.africa
Moya.Vaughan-Williams@adams.africa
Mpumelelo.Ndlela@adams.africa

Our Reference: LT4287/JSM/TDM

Your Reference: 00418/2019/Z64/jb

Date: 6 February 2019

ATTENTION:MR RJ SEBELEMETSA
SENIOR ASSISTANT STATE ATTORNEY
OFFICE OF THE STATE ATTORNEY – PRETORIA

Dear Sirs

ROBERT MCBRIDE & THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE // MINISTER OF POLICE & PORTFOLIO COMMITTEE ON POLICE
CASE NO: 6175/19

1. Your client's answering affidavit bears reference.

2. The Minister has accepted that, to be lawful, his decision must be a preliminary one. The Minister also confirms, under oath, that his intention was, in fact, to take a preliminary decision which is subject to confirmation or rejection by the Second Respondent.

3. In light of the aforesaid, and in order to settle the matter, our instructions are to propose that the parties agree to the draft order **attached** hereto.

4. Our client's aforesaid offer, to resolve the application in terms of the draft court order, is made with prejudice.

5. If your clients do not accept our client's offer **by 09h00 on 7 February 2019**, we will take it that our client's offer has been rejected.

Yours faithfully,
ADAMS & ADAMS

J MARAIS
Checked and signed by author and sent electronically

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

CASE NO: 6175/19

In the matter between:

ROBERT MCBRIDE	First Applicant
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	Second Applicant
and	
MINISTER OF POLICE	First Respondent
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Second Respondent

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DRAFT ORDER

BY AGREEMENT BETWEEN THE PARTIES, THE FOLLOWING ORDER IS MADE:

1. It is declared that the decision taken by the First Respondent not to renew the appointment of the First Applicant as the Executive Director of the Independent Police Investigative Directorate (IPID) is a preliminary decision that must be still be confirmed or rejected by the Second Respondent.

2. The Second Respondent is directed to take a decision on or before 28 February 2019 on whether to extend or renew the appointment of the First Applicant as Executive Director of IPID.

3. There is no order as to costs.

.....

BY ORDER OF COURT

THE REGISTRAR

WEBBER WENTZEL

in alliance with > Linklaters

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Applicants' Attorneys
4 Daventry Street
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Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / D Rafferty / L Pillay 3005284	7 February 2019

Dear Sirs

Robert McBride and Another ("the applicants") // Minister of Police ("Minister") and another (GP case no 6175/19) ("the application")

1. We refer to the above matter as well as the proposed settlement order circulated by the applicants on 6 February 2019.

2. Please note that any settlement order will necessarily amount to a pronouncement on rights *in rem* and entails a consideration of the correct interpretation of section 6(3)(b) of the IPID Act. This, as confirmed by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* (CCT257/17) [2018] ZACC 33 (27 September 2018), requires argument in open court and a written judgment from the relevant judge(s).

3. To this end, please note that any settlement will thus still require argument before Court on the interpretative issues and the relief sought, and the HSF, for the reasons set out in its supporting affidavit dated 6 February 2019, contends (and will argue) that the correct order which should be granted is in terms of paragraph 2 of the original notice of motion dated 29 January 2019, buttressed by a proper interpretation of section 6(3)(b) of the IPID Act, as set forth in HSF's papers.

S.E.

4. To the extent necessary, the HSF will address the Court in relation to the above at the hearing on 12 February 2019.

Yours faithfully

pp

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: **6175/19**

In the matter between:

McBRIDE, ROBERT	First Applicant
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	Second Applicant
and	
MINISTER OF POLICE	First Respondent
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Second Respondent

---

ANSWERING AFFIDAVIT

CONTENTS

I, the undersigned,

FRANCOIS BEUKMAN

do hereby make oath and state that –

1. I am an adult male Member of Parliament. I am the Chairperson of the National Assembly's Portfolio Committee on Police in the Parliament of the Republic of South Africa ("**the Committee**"). I depose to this affidavit in that capacity.

2. The facts in this affidavit are, to the best of my knowledge, true and correct. I have personal knowledge of these facts or I have ascertained them from documents under my control. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which I accept as being true and correct.

3. I am duly authorised to depose to this answering affidavit on behalf of the Committee subject to what is stated further below.

A. THE SPEAKER'S LETTERS TO THE MINISTER AND MC MCBRIDE

4. Before I address this application at all, as against the Committee, I wish to bring the following to the Court's attention:

FA

32. The artificiality of urgency in these circumstances is dangerous because it is inimical to careful and considered decision-making.

33. Given that the Committee is a multi-party structure that requires time to debate its position, let alone seek input from the various party structures that each member represents, Mr McBride's attempt to truncate the Committee's decision-making into a timetable that suits him is simply not borne out in fact or law.

34. Mr McBride cannot, in effect, seek that this Court dictate to the Committee how it should exercise its lawfully delegated powers in terms of the IPID Act in circumstances where no breach of its statutory duties has been established.

35. In particular, the Court should be hesitant to grant relief in circumstances where doing so may create the conditions for Mr McBride to potentially found a future challenge to the Committee's decisions. This is discussed further below.

C2. The Application is Premature

36. I point out to the Court that in terms of Mr McBride's letter of demand (see annexure "**RM2.3**"), and his letter of demand sent by his attorneys of record (see annexure "**RM2.6**"), the Committee was required to give Mr McBride the assurances he requested by 31 January 2018. The latter letter was sent on the day the application was launched.

WHEREFORE I pray that the application is dismissed with costs.

DEPONENT

I CERTIFY that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit which was signed and sworn to, before me, at .....on this the ..... day of ..... , the Regulations contained in Government Notice No R 1258 dated 21 July 1972 (as amended) and Government Notice No R 4648 dated 19 August 1977 (as amended) having been complied with.

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER PARLIAMENT
PROTECTION AND SECURITY SERVICES
WESTERN CAPE
2019 -02- 06
PRIVATE BAG X1 STALPLEIN 8015
CAPE TOWN
SOUTH AFRICAN POLICE SERVICE

COMMISSIONER OF OATHS