IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case number: 1065/2019
GP case number: 6175/2019

In the matter between:

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

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THE MINISTER OF POLICE'S SUPPLMENTARY HEADS OF ARGUMENT

INTRODUCTION

1 This dispute is not justiciable. Any order that this Court grants in HSF's favour will have no practical effect. The High Court's order changed nothing.[1] By the time Mr McBride's application was heard by the High

[1] The order is reproduced as an annexure to these heads of argument.

Court, there was, in his own assessment, "[n]o longe[r] any dispute" between the parties.[2] Mr McBride got exactly what he had asked for.[3]

2 Because there is no dispute between the parties, there is "no longer an existing controversy" for this Court to decide.[4] This litigation is "no longer justiciable."[5]

3 The high hurdle of justiciability aside, this appeal has no practical effect.

- The Portfolio Committee decided against renewing Mr McBride's term. Even if HSF wins here, the Portfolio Committee's decision stands (unless, of course, it is set aside in Mr McBride's pending review, where HSF is cited as a party and where HSF can raise the same arguments it raises here).[6]

- The Portfolio Committee appointed someone else to be IPID director. Even if HSF wins here, the new appointment will stand (again, unless it is set aside in a review).

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[2] Replying affidavit (to the Minister of Police); p 127, para 5.

[3] Notice of motion; record p 2, para 3.

[4] *Minister of Justice v Estate Stransham-Ford* 2017 (3) SA 152 (SCA) at para 21.

[5] *Stransham-Ford* (note 4) at para 21.

[6] Mr McBride's review is pending in the Gauteng Division under case number 13929/19. HSF is cited as the Sixth Respondent.

- Mr McBride now has a new job: head of the foreign branch of the State Security Agency. Even if HSF wins here, Mr McBride will presumably not still opt to moonlight as IPID director.

4 HSF also has no standing to resurrect this litigation. The appeal should be dismissed.

HSF LACKS STANDING TO RESURRECT THIS LITIGATION

5 HSF does not have standing because there is no longer any lis between the parties. Mr McBride, the dominus litis, sued for, amongst other things, an order directing the Portfolio Committee to decide whether to renew his term.[7] Mr McBride's whole case was that section 6(3)(b) of the IPID Act leaves renewability to the Portfolio Committee. In the end, all the parties agreed with Mr McBride's interpretation. And because everyone agreed, there was, in Mr McBride's assessment, "(no longer) any dispute."[8] No live dispute meant no justiciable issue.

6 The agreement between the parties—incorporated in a draft order—meant there was "there is no longer any dispute or *lis* between the parties."[9] Their agreement "disposed of all disputed issues by agreement *inter se*", leaving

[7] Notice of motion; record p 2, para 3.

[8] Replying affidavit (to the Minister of Police); p 127, para 5.

[9] *Legal Aid South Africa v Magidiwana* 2015 (2) SA 568 (SCA) at para 20.

"nothing … for a court to adjudicate upon and determine."[10] This means this Court has "no discretion" but to dismiss this appeal.[11]

7 Arguing against this Court's cases, HSF claims it "trite" that an amicus can resurrect already-settled litigation.[12] HSF relies mainly on *Campus Law Clinic* for that proposition.[13]

8 Unlike here, there were adverse parties and concrete disputes in *Campus Law Clinic*.

- Standard Bank sued several mortgagors. After the High Court refused to declare the properties executable, Standard Bank appealed. And although the original defendants did not appear in the High Court or on appeal, the "issues remained alive between the parties".[14] Alone, that distinguishes this appeal, where, as between these parties, there is no dispute (as Mr McBride himself acknowledged in the High Court).

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[10] *Magidiwana* (note 9) at para 22.

[11] *Magidiwana* (note 9) at para 22.

[12] HSF's supplementary heads of argument; p 2, para 4.

[13] *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa* Ltd 2006 (6) SA 103 (CC).

[14] *Campus Law Clinic* (note 13) at para 15. The Supreme Court of Appeal appointed counsel to argue the defendants' position, as appellate courts often do when a respondent chooses not to participate in an appeal. The "issues remained alive", however, because one of the parties, Standard Bank, actively pursued its appeal.

- Standard Bank won on appeal. Campus Law Clinic, a stranger to the litigation, tried to appeal the Supreme Court of Appeal's decision.

- The Constitutional Court accepted that there was no "absolute bar" to Campus Law Clinic running the show. After considering several factors, the Court accepted that Campus Law Clinic had standing (but the Court ultimately refused to grant direct access over Campus Law Clinic's brand new case).[15]

9 HSF's reliance on *Campus Law Clinic* misses the point. No one denies that HSF would have standing to appeal the High Court's order if, like in *Campus Law Clinic*, "the issues remained alive between the parties."[16] But *Campus Law Clinic* says nothing about whether an amicus can continue the fight after the litigation between the parties has reached an end by a settlement agreement.

10 The more "principle[d]"[17], if sometimes less "tempt[ing]"[18] path is this: if there is "no longer any dispute or lis between the parties", there is no longer "an existing controversy", and so the "case [is] no longer justiciable."[19]

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[15] *Campus Law Clinic* (note 13) at paras 21-22.

[16] *Campus Law Clinic* (note 13) at para 15.

[17] *Magidiwana* (note 9) at para 22.

[18] *President of the Republic of South Africa v Democratic Alliance* 2018 JDR 0765 (SCA) at para 17.

[19] *Magidiwana* (note 9) at para 21.

11 In any event, *Campus Law Clinic* does not support HSF's claims to standing.[20] In particular, there is "another reasonable and effective manner"[21] for HSF to make its arguments about the Act: either in fresh litigation of its own, or, more conveniently, in Mr McBride's pending review of the Portfolio Committee's decision (where HSF is cited as a party).

12 *Big Five* and *Eke* are no help either.[22] Unlike this appeal, *Big Five* was about a judgment in rem, or a judgment that, to use the Constitutional Court's words, "determines the objective status of a person or thing."[23] The High Court's judgment in *Big Five* ticked the in-rem box because it set aside a tender.[24] Similarly, the High Court's judgment in *Eke* was a judgment in rem because it bound the defendant to all manner of obligations.[25]

13 The High Court's order here is very different: it did not interpret anything, did not direct anything (besides a housekeeping obligation on the Portfolio Committee), and did not set anything aside.[26] This is simply not a *Big Five*- or *Eke*-type case.

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[20] *Campus Law Clinic* (note 13) at paras 21-22.

[21] *Campus Law Clinic* (note 13) at para 21.

[22] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC) and *Eke v Parsons* 2016 (3) SA 37 (CC). See HSF's supplementary heads of argument; pp 8-11, paras 22-28.

[23] *Big Five* (note 22) at para 2.

[24] *Big Five* (note 22) at para 6.

[25] *Eke* (note 22) at para 3.

[26] Minister of Police's heads of argument; pp 10-15, paras 11-20. The High Court's order is reproduced as an annexure to these heads of argument.

14 *Big Five* and *Eke* also say nothing about whether an amicus may disrupt a settlement agreement—let alone whether an amicus may take the wheel after the parties have settled. In both *Big Five* and *Eke*, the validity of the settlement agreement was raised by one of the parties. In other words, there was in both *Big Five* and *Eke* what is missing here: a live controversy between adversarial parties. Mr McBride says there is no dispute here.[27] The Minister and the Portfolio Committee agree.[28] To use this Court's words, the "practical effect" of the High Court's order is that "there is no longer any dispute or lis between the parties."[29]

15 Nor does *Tasima* salvage standing.[30] HSF's argument that courts "must determine" whether conduct is constitutional begs the anterior questions of standing, jurisdiction, and practical effect. The "duty" of the Court to determine the constitutionality of conduct does not mean that a party with no standing can be allowed to pursue a case for as long as they label it is as constitutional litigation. Nor does it mean that a case that has become moot is not moot because it is about constitutional validity of law or conduct. Rules of standing and practicality are part and parcel of the constitutional enterprise, not outsiders to it.

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[27] Replying affidavit (to the Minister); p 127, para 5.

[28] See, for example, Minister's answering affidavit; record p 107, para 9; p 113, para 25; p 115, para 31. See also replying affidavit (to the Minister); record p 127, paras 4-5.

[29] *Magidiwana* (note 9) at para 20.

[30] *Department of Transport v Tasima (Pty) Limited* 2017 (2) SA 622 (CC). See HSF's supplementary heads of argument; p 5, para 11.

16 *OUTA* and *Komape* undermine HSF's claim to standing.[31] Both say that an amicus should not pursue a "sectarian or partisan interest".[32] Nor should an amicus stray beyond the "pleaded claim".[33] HSF falls at both hurdles. It has gone out of its way to support Mr McBride, even seeking relief that even he did not ask for (quite apart from HSF's still-unexplained reluctance to bring a direct challenge to the constitutionality of section 6(3)(b), which would leave Mr McBride without a renewed term).[34] And HSF's arguments are irreconcilable with Mr McBride's pleaded claim.

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[31] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) and *Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA).

[32] *OUTA* (note 31) at para 13 ("However, [an amicus] may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation."); *Komape* (note 31) at para 5 ("[A]n amicus should be objective and not seek to advance an interest of its own.").

[33] *Komape* (note 31) at para 7 ("[The would-be amicus] sought not to support the appellants but, rather, to make out a separate cause of action on their behalf, a cause of action which has not been pleaded, in respect of which the necessary evidence was not led at the trial and was thus not on record before this court on appeal. Accordingly [the would-be amicus'] submissions in that regard, albeit different from those of the parties, would be of no assistance to this court to determine what we are bound to determine in respect of the pleaded claim and the parties' evidence.").

[34] Notice of appeal; record p 369 (asking for an order "declaring that Mr McBride's tenure as the Executive Director of IPID is renewed for a five year period from 1 March 2019 to 28 February 2024.").

THIS APPEAL HAS NO PRACTICAL EFFECT

17 A century ago, this Court established a bedrock principle of our adversarial system of litigation: courts are not in the business of giving advisory opinions; courts solve "concrete controversies".[35]

18 There is nothing "concrete" about this appeal. The High Court did not decide anything because, by the time the application was heard, there was no longer a live dispute.

19 Recent events make this appeal even more abstract. A few months ago, the President named Mr McBride director of the foreign branch of the State Security Agency.[36] If this appeal succeeds and Mr McBride's term at IPID "is renewed", as HSF asks,[37] then Mr McBride must resign from this job—an outcome that he does not ask for and that is irreconcilable with his own

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[35] *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441 (applied recently in many cases of this Court and the Constitutional Court, including, for example, Dep*artment of Transport v Tasima (Pty) Limited* 2018 JDR 1122 (CC) at para 77 and *The Laser Transport Group (Pty) Ltd v Elliot Mobility (Pty) Ltd* 2019 JDR 2520 (SCA) at para 17).

[36] Mr McBride's appointment was reported widely: https://tinyurl.com/y2zolevq. This Court can take judicial notice of this fact. See, for example, *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) at paras 4-5 (noting that this Court was informed in supplementary heads of argument about subsequent events that meant the appeal would have no practical effect). See also *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at para 27 (nothing statements from the Bar about facts that made the appeal moot).

[37] Notice of appeal; record p 369 (asking for an order "declaring that Mr McBride's tenure as the Executive Director of IPID is renewed for a five year period from 1 March 2019 to 28 February 2024.").

case in the High Court.[38] And there is a further problem of lack of joinder of the current head of IPID appointed two months ago.[39]

20 Whichever way the appeal goes, the Portfolio Committee's decision not to renew Mr McBride's term, and its decision to appoint the current director, stand unless they are set aside in the pending review. Quite apart from Mr McBride's new job, the *Oudekraal* rule stands in the way of HSF's robust relief on appeal: for as long as the Portfolio Committee's decisions are extant, this Court cannot "rene[w]" Mr McBride's term.[40]

21 Even if HSF retreats its relief and asks only that the High Court's order be set aside without any consequential relief, this appeal would still not have practical effect.

22 To have practical effect, an appeal must "[affect] the position between the parties to the present dispute."[41] Play out the "present dispute" if HSF wins this appeal:

- The High Court's order is set aside.

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[38] See, for example, founding affidavit; record p 8, para 9; p 10, para 14; p 19, para 32; p 21, para 39.

[39] Ms Ntlatseng's appointment was also reported widely: https://tinyurl.com/yxgw7r6g.

[40] Notice of appeal; record p 369 (asking for an order "declaring that Mr McBride's tenure as the Executive Director of IPID is renewed for a five year period from 1 March 2019 to 28 February 2024.").

[41] *SA Metal Group (Pty) Ltd v ITAC* 2017 JDR 0521 (SCA) at para 20.

- The "present dispute"—Mr McBride's application—goes back to square one. That means, in effect, that Mr McBride's primary relief is resuscitated, which is for a direction that the Portfolio Committee must decide whether to renew his appointment.[42]

- Even with the High Court's order out the picture, Mr McBride's application will be moot because he got what he asked for: a Portfolio Committee decision on his renewal.

- The end result: an extant decision not to renew Mr McBride's term, a pending review against that decision, and an extent decision to appoint someone else as IPID director.

23 Even in its supplementary heads of argument, HSF struggles to pinpoint any practical effect of this appeal.

24 First, HSF argues that this appeal will "determine the separate and objectively fundamental question of the constitutionality and lawfulness of the interpretation endorsed by the Hughes Order".[43]

- This is wrong. The High Court's order did not "endors[e]" anything and it does not amount to "judicial precedent".[44] HSF repeatedly mischaracterises the High Court's order as laying down the "authoritative interpretation" of section 6(3)(b) of the Act that binds

[42] Notice of motion; record p 2.

[43] HSF supplementary heads of argument; p 14, para 34.

[44] HSF supplementary heads of argument; p 11, para 27.

"the Republic" for generations to come.[45] This is simply not so. "Judicial precedent" cannot be created by agreement between the parties (drafted by them, even). There is no authoritative interpretation of any statute. Mr McBride asked for the Committee to make the final decision as to the renewal of his term. The Minister and the Committee agreed to this. This is what the High Court endorsed. No more, no less. No one else is bound by this, except the parties to the agreement. When the term of the current IPID head ends, the order by agreement of Judge Hughes will clearly not bind anyone.

- Also, how exactly will this "judicial precedent" be used to "bin[d]" courts to its "authoritative interpretation"?[46] HSF doesn't say. There'd be more than a few problems. There's no "decision", only an order. What, then, is the ratio? HSF doesn't say. But without a ratio, there's no stare decisis.[47]

[45] HSF supplementary heads of argument; p 6, para 13.

[46] HSF's supplementary heads of argument; p 6, para 13; p 7, para 18.

[47] See, for example, *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) at para 56. See also P Olivier "Deriving the ratio of an overdetermined judgment: The law after *Turnbull-Jackson v Hibiscus Coast Municipality*" 2016 *SALJ* 522 at 522 ("The doctrine of precedent, or stare decisis, requires South African courts to follow rules endorsed in earlier judgments. A court is not, however, bound by every such rule — it is only bound by those that qualify as rationes decidendi.")

25 Second, HSF argues that Mr McBride's pending review is no answer because "none of the respondents are willing to abandon" the High Court's order, and so it is up to this Court to grasp the nettle.[48] It is not clear what the impact of "abandoning" the order is. The fact is that the order has been acted upon, fully. There is nothing left to abandon when an agreed order has been executed fully.[49]

26 In any event, it is unclear where the practical effect is in this argument.

- Even if this Court agrees with HSF's irrevocable-option interpretation, that does not yield any practical effect because the Portfolio Committee's decision remains extant.

- But in any event, HSF is a party to the pending review—a considerable bump in status compared to this litigation. HSF is free to raise all these arguments in the review.

27 Third, HSF argues that "the legal conclusion by this Court will guide ongoing and future conduct by the Minister, the Portfolio Committee and IPID".[50] But asking for a judgment to "guide ongoing future conduct" is just another way of asking for an impermissible "advisory opinion".[51] In truth,

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[48] HSF's supplementary heads of argument; p 15, para 36.

[49] The tender context gives a useful comparison: courts may decline to set aside an unlawful tender when there has been full performance. See, for example, *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at paras 23, 28-29.

[50] HSF's supplementary heads of argument; p 16, para 38.

[51] *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd* 2020 (4) SA 409 (CC) at para 47.

what HSF "really seeks is to have this court express a view on a legal conundrum that it hopes to have decided in its favour without in any way affecting the position between the parties."[52] Courts are there to resolve "concrete controversies".[53] Just last year, the Constitutional Court explained that courts are not legal-advice helpdesks.[54]

28 Fourth, HSF argues that because there are "competing and detailed submissions" in this Court about the interpretation of the Act, that somehow means there is a "live dispute".[55] This logic has the absurd implication that a respondent could never argue that an appeal lacks practical effect but also argue on the merits—the merits-argument would, so the logic goes, always create a live dispute. This Court has never put litigants to that kind of election.

29 Last and least, HSF tries to wag this whole appeal by the tail of the High Court's costs order. That's no good: this Court already set aside the costs order.

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[52] *SA Metal Group* (note 41) at para 19.

[53] *Geldenhuys* (note 35) at 441.

[54] *President of the Republic of South Africa v Democratic Alliance* 2020 (1) SA 428 (CC) at para 35 ("[C]ourts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here.").

[55] HSF's supplementary heads of argument; p 11, para 28.

CONCLUSION

30 HSF's abstract arguments are "best left to be resolved on another day" when they have some—*any*—practical effect.[56] This Court's century-old words should guide it again here: "courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."[57]

31 The appeal should be dismissed with costs.

TEMBEKA NGCUKAITOBI SC
JASON MITCHELL

Counsel for the Minister of Police
27 October 2020

[56] *Democratic Alliance* (note 54) at para 39.

[57] *Geldenhuys* (note 35) at 441.

ANNEXURE: THE HIGH COURT'S ORDER

[1] It is declared that the decision taken by the [Minister] not to renew the appointment of [Mr McBride] as the Executive Director of [IPID] is a preliminary decision that must still be confirmed or rejected by [the Portfolio Committee].

[2] It is recorded that the [Portfolio Committee] intends to take a decision regarding the renewal of [Mr McBride's] appointment on or before 28 February 2019.

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

[3.1] The [Portfolio Committee] will report on affidavit by 22 February 2019 on its progress on taking a decision regarding the renewal of [Mr McBride'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 Portfolio Committee] should be given a further period to make a decision on the renewal of [Mr McBride's] appointment and whether [Mr McBride's] terms of office ought to be extended pending [the Portfolio Committee's] decision.

[4] There is no order as to costs.