IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 1065/2019
GP Case No.: 6175/19

In the matter between:

HELEN SUZMAN FOUNDATION	Appellant
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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FOURTH RESPONDENT'S SUPPLMENTARY HEADS OF ARGUMENT (PORTFOLIO COMMITTEE ON POLICE NATIONAL ASSEMBLY)

INTRODUCTION

1. Although this Court's Directive for the filing of supplementary heads of argument was limited in nature, the Helen Suzman Foundation ("**HSF**") has opted to belabour its case.[1]

2. In order to avoid repetition, the fourth respondent, being the Portfolio Committee on Police National Assembly ("**PCP**") does not answer those argument already canvassed.

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[1] The HSF only commences addressing this Court's questions on p 12 of its 18-page supplementary heads of argument. Respectfully, most of pp 8 – 11 of the HSF's supplementary heads of argument are a regurgitation of its arguments in its main heads of argument.

3. Instead, the PCP submits that the HSF's appeal falls to be dismissed because:

3.1. the HSF has no *locus standi* to prosecute the appeal – it lost such standing when the matter settled;

3.2. the HSF has no interest in the *lis* as it existed on the pleadings – instead the HSF seeks to run a case of its own despite it being an *amicus curiae*; and

3.3. the HSF's intended appeal would have no practical effect – the matter has long since settled and the Order granted by the Court *a quo* does not impact any current or future litigation; and

3.4. the HSF's intended appeal has been rendered moot – both because the first respondent has accepted appointment to another office and because there is a new Executive Director of the second respondent.

4. The PCP submits that the HSF must, with respect, fail on all counts. In the premises, the PCP persists in its submission that the appeal ought to be dismissed, with costs.

LOCUS STANDI

5. The HSF makes a generic argument, relying on *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another*,[2] that an *amicus curiae* may seek leave to and prosecute an appeal despite not being a cited party.

6. But *Campus Law Clinic* is unhelpful to the HSF. At paras 24 and 25 of the judgment, the Constitutional Court took the approach that ought to be dispositive of the HSF's persistence in prosecuting this appeal.

> "[24] In our view, therefore, it is not in the interests of justice that the application for leave to appeal be granted. The substantive issue which the applicant wishes to have adjudicated has not been properly aired on the record in the matter in which it seeks leave to appeal. It would not be appropriate to consider whether the order and practice direction made by the SCA is correct without a consideration of the broader issues.
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> [25] In reaching this conclusion, we should note that the existence of the SCA judgment is no bar to the Campus Law Clinic or other interested body or person pursuing this matter in other proceedings. The Campus Law Clinic was not a party to the proceedings in the SCA. Moreover, it is clear from the application for direct access that the issues that the Campus Law Clinic wishes to be adjudicated are broader than the issues adjudicated upon by the SCA."

7. Respectfully, relying on the HSF's "lodestar" authority, this appeal is a non-starter.[3] In fact, when regard is had to the Constitutional Court's own clarification, the HSF's position is more tenuous.[4]

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2 *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) at paras [20]-[22] ("**Campus Law Clinic**").

3 As an aside, the Court ought to note that the facts of *Campus Law Clinic* made the "principle" finding fact specific. As identified by the HSF at para 5 of its supplementary heads of argument, that matter involved a situation where there was "*no litigant willing and able to take the matter further*", i.e. to prosecute an appeal. This matter is entirely different. The first respondent is available to prosecute an appeal. Unlike the HSF, he did not.

8. The matter before the Court *a quo* was litigated on the acceptance that the PCP was vested with the authority to make the renewal decision.

9. As is clear from prayer 3 of the Notice of Motion, the first respondent sought to compel the PCP to take a decision before his term of office expired.

> "3. The [PCP] is directed to take a decision on or before 28 February 2019 on whether to renew the appointment of the First [Applicant] as the Executive Director of IPID"[5]

10. This is exactly what the first respondent achieved when the matter settled.[6]

11. *Campus Law Clinic*, in short, makes matters worse for the HSF. Although it was a party to the proceedings *a quo*, the HSF seeks that this Court adjudicate matters other than those in issue before the Court *a quo*.

12. Thus, the attempt by the HSF to rely on *Campus Law Clinic* to rectify its failure[7] to squarely bring the challenge it mounts in respect of section

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4 HSF supplementary heads of argument: p 4 para 9, quoting *University of Witwatersrand Law Clinic v Minister of Home Affairs and Others* 2008 (1) SA 447 (CC) at para [6]. In that same judgment, and in that same paragraph, the Court stated "… *To permit a party to join an application for leave to appeal made by an amicus would be to subvert the clear understanding in Campus Law Clinic that parties to litigation are those who in the first place must seek to prosecute the litigation*." This applies to the HSF's conduct in these proceedings. It has joined the proceedings *a quo* as an *amicus curiae* and now purported to prosecute the litigation as a party, and on appeal, in its own right, despite it enjoying "subordinated" status to the actual parties in the proceedings and the issues they traversed.

5 Appeal Record: Vol 1, Notice of Motion p 2, prayer 3.

6 Appeal Record: Vol 3, Hughes Order pp 325 – 326.

7 HSF supplementary heads of argument: p 8 para 21. The HSF's suggestion that it brings this appeal to "*seek by way of relief … for the prayers sought in the notice of motion in the Court a quo*" not only confirms it failed to bring that relief in its own right, but that it now wishes to do so in stead of the first respondent. As addressed elsewhere, what it fails to

6(3)(b) of the Independent Police Investigative Directorate Act, 1 of 2011 ("**the IPID Act**"), is wholly unsustainable.

13. So, too, is the curious attempt by the HSF to contend that the settlement agreement was an Order obtained in a constitutionally impermissible manner.[8]

14. The only reason it has been able to persist with this appeal is because the matter was debated and determined in open Court. The HSF presented arguments unrelated to the actual proceedings. Its submissions were "rejected". There this should end.

15. As the Court *a quo* correctly found, the explicit reason for the HSF's intervention in these proceedings was only to be admitted as an *amicus curiae*.[9] [10] (As an aside, the HSF seems to concede this but nonetheless persists with the appeal[11])

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appreciate, however, is that even the first respondent never sought the constitutional relief that the HSF now impermissibly seeks on his behalf.

8 HSF supplementary heads of argument: p 5, para 10 quoting *Department of Transport and Others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) at para [147].

9 Appeal Record: Vol 3, Judgment of the Court a quo, p 333 para 16.

10 Appeal Record: Vol 2, HSF Notice of Application: Application to be admitted as *amicus curiae,* pp 294-295 prayers 1 – 5.

11 HSF supplementary heads of argument: p 7 para 17.

16. Assuming that the HSF's arguments were right on the merits, which is denied,[12] the point remains that at no time did it ask this Court to make a ruling regarding the constitutionality of section 6(3)(b) of the IPID Act.

17. Even its notice of appeal in this Court seeks relief other than the "*interpretative argument*" it says the Court *a quo* erred in not considering.[13]

18. Recalling that the HSF's "*interpretative argument*" is to the effect that section 6(3)(b) of the IPID Act must be read so as to vest the power of renewal with the incumbent Executive Director of IPID, as opposed to the PCP,[14] it is clear that the HSF's persistence with this appeal is misguided.

19. Indeed, the HSF's persistence is made worse by the fact that when it intervened as *amicus curiae* in the Court *a quo*, it expressly reserved its rights to challenge, *inter alia*, section 6(3)(b) of the IPID Act. [15]

20. The matter settled on a different basis to what the HSF anticipated. The constitutional challenge brought by the first respondent was conditional and never ventilated. The HSF lost its standing to prosecute the appeal.[16]

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12 PCP Main Heads: pp 14-18, paras 23-28.

13 Appeal Record: Vol 3, HSF Notice of Appeal, annexure NA1. pp 368-369, prayer 2.1.

14 Appeal Record: Vol 2, HSF Founding Affidavit, pp 300 – 301, paras 8-10; Appeal Record: Vol 2, HSF Founding Affidavit, pp 303 – 306, paras 23-30; Appeal Record: Vol 2, HSF Founding Affidavit, pp 313 – 315, paras 57-65.

15 Appeal Record: Vol 2, HSF Founding Affidavit, p 317, para 72. Of relevance is how the HSF framed its reservation of rights. It stated, "... *nothing in these papers is to detract from the HSF's ability to challenge such aspects in due course.*"

16 See, for example, PCP Main Heads: pp 29-30, paras 57-59.

21. This Court cannot and should not sit as a court of first instance in respect of complex constitutional matters that the parties have never been asked to consider and have, in fact, asked the HSF to properly prosecute by means of a frontal constitutional challenge rather than through the back door in an ill-fated appeal.[17]

22. When it is appreciated that the issue the HSF anchored its participation on has never been ventilated, then this Court's enquiries in terms of its Directive for supplementary heads takes on added significance.

23. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[18] the Constitutional Court refused the Democratic Alliance's application to be admitted as an *amicus curiae, inter alia* on the basis that an *amicus* should not "*serve or bolster a sectarian or partisan interest against any of the parties in litigation*"[19].

24. The HSF did not only enter these proceedings as the first respondent's standard bearer, wherein it declared its support for his return to office,[20] it

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17 PCP Answering Affidavit in the HSF application for leave to appeal to the Supreme Court of Appeal: pp 7-9, paras 22-30,

18 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*, 2012 (6) SA 223 (CC) ("***OUTA***").

19 *OUTA*: para 13.

20 Appeal Record: Vol 2, HSF Founding Affidavit, p 315, para 67.

goes one step further by seeking relief to benefit the first respondent that he himself did not seek in the Court *a quo*.[21]

25. As the Court went on to state in OUTA, while it may be appropriate in some instances for parties to be granted *amicus curiae* status when it litigates in the public interest, it would not be appropriate to do so where the *amicus* concerned makes common cause with one of the parties and adopts "*an overall position ... better suited to a litigant than a friend of the Court*".[22]

26. The HSF's participation in these proceedings is not different. As the Constitutional Court said in OUTA, "*It would therefore be inappropriate to permit the DA to advance a sectarian interest under the guise of an amicus curiae."*[23]

27. The sectarian interest the HSF improperly advances in these proceedings is a policy choice regarding how the IPID Act ought to be interpreted. In the absence of a properly brought frontal challenge, the HSF, like the DA in OUTA, should be given no comfort.[24]

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21 Appeal Record: Vol 1, Notice of Motion pp 1-2, prayers 1-6. Attention is drawn to the fact that in prayer 3 of the Notice of Motion the first respondent sought that the question of his renewal as Executive Director of IPID be remitted to the PCP; and at prayer 4 the first respondent sought constitutional relief but which is clearly conditional.

22 *OUTA*: para 14.

23 *OUTA*: para 15.

24 This is why the HSF's argument at para 7 of its supplementary heads of argument – "*For the Court to come to a decision on any of the relief sought or to grant any relief in respect of the renewal process, it had to consider section 6(3)(b) and come to a conclusion on its proper interpretation, with the aid of, inter alios, the HSF's submissions*" – is mistaken.

28. OUTA was recently approved of by this Court in *Komape and Others v Minister of Basic Education and Others.*[25] This Court should once again adopt a similar view in respect of the HSF as it did in Richard Spoor Inc. because –

28.1. as a litigant, the HSF is acting in its own interests in having an issue determined that was never the subject of the proceedings in the Court *a quo*;[26]

28.2. the HSF seeks to have an issue opportunistically and pre-emptively determined in these proceedings, but which is already the subject matter in another Court,[27] no doubt to the potential benefit of the first respondent; and

28.3. as the Court recognised on that occasion it is inappropriate for an *amicus* to seek a determination in respect of a separate, polycentric cause of action which has not been properly pleaded or ventilated

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The HSF's arguments are a side-attempt to attack section 6(3)(b). This is impermissible. The principle of subsidiarity applies. See *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) at para [73] and *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 (30 September 2015) 161 at para [44] and [45]. The HSF cannot attack the outcome of a process concluded pursuant to section 6(3)(b) of the IPID Act where neither it nor any other party has challenged the underlying Act itself. A "reading-in" order or binding "interpretation" consequent thereupon is impermissible where the Act itself has not been squarely challenged.

25 *Komape and Others v Minister of Basic Education and Others*, 2020 (2) SA 347 (SCA) ("**Komape**").

26 *Komape* at para 5.

27 *Komape*: para 6.

by the parties in the court of first instance and consequently not an issue on record before this Court sitting as a court of appeal.[28]

29. But even if we are mistaken in respect of both *OUTA* and *Komape*, because the parties seeking to intervene as an amicus were a political party and a firm of attorneys, and were motivated by politics and money, then we submit that the HSF must still fail.

30. In *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others*,[29] this Court (per Wallis JA) set out the role that an amicus is to play when it intervenes as such.

> "3. Finally, new contentions are those that may materially affect the outcome of the case. It is not feasible to be prescriptive in this regard but prospective amici and their advisers must start by considering the nature and scope of the dispute between the parties and, on that basis, determine whether they have distinct submissions to make that may alter the outcome or persuade the court to adopt a different line of reasoning in determining the outcome of the appeal. Obvious examples would be urging the court to adopt reasoning based on provisions of the Constitution in construing a statute, where the parties have not taken that course, or a submission that the fundamental legal principles to be applied in determining the dispute are other than those submitted by the parties where their adoption would materially affect the outcome of the case. No doubt others can be imagined"[30]

31. In that matter, the HSF was admitted as an amicus because it sought to raise new arguments within the context of the live dispute as framed by the pleadings.

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28 *Komape*: paras 7 and 8.

29 *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) at para [26] – [39] ("*Al-Bashir*").

30 Appeal Record: Vol 1, Notice of Motion p 2, prayer 3.

32. This Court, however, refused the application to intervene as an *amicus* of no fewer than four other applications by NGOs who, despite their bona fides, added nothing new to the actual dispute before the Court and, in some instances, sought to adduce evidence in respect of a substantively different case to that which the Court was asked to consider.[31]

33. The point emphasised by the Court in *Al-Bashir*, and which, with respect, we submit ought to be followed in these proceedings, is that it is not open to an *amicus* to intervene and run a substantively different case of its own. It is constrained by the dispute as framed by the parties and advance different arguments in respect thereof.

34. In the premises, the HSF has no *locus standi* to prosecute this appeal not only because the issue it places before this Court is not properly before it, but also because the HSF as an *amicus* in the Court *a quo,* could not have and cannot do so. It sought different relief to the first respondent and cannot be granted such, let alone on appeal.

THIS COURT'S APPEAL JURISDICTION

35. Construed on the basis advanced above, this Court's appeal jurisdiction is not engaged at all. The HSF's new attempt to introduce a challenge that it

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31 See, for example, *Al-Bashir* at para [35].

did not itself raise – namely a finding premised on the doctrine of objective constitutional invalidity[32] – is too little, too late.

36. Notwithstanding it amounting to prejudicial conduct in that the PCP is forced to continuously engage with trial by ambush, the appeal, such as it is, falls to be dismissed.

MOOTNESS AND NO PRACTICAL EFFECT OF THIS COURT'S ORDER

37. Assuming that the HSF overcomes its problems regarding *locus standi* and jurisdiction, the appeal still falls to be dismissed on account of the fact that it the appeal is moot and any order will have no practical effect.

38. Regarding mootness, the point remains that once the matter settled between the parties in the Court *a quo*, the controversy that the Court could have determined, came to an end. The HSF's attempt to resuscitate a dead dispute perfectly demonstrates the mootness of its case on appeal.

39. Additionally, and on at least two occasions, this Court has accepted submissions by counsel regarding a factual state of affairs that have a direct impact on this Court's entertainment of an appeal.[33]

40. In this regard, this Court should note that –

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32 HSF supplementary heads of argument, p 4 para 8.

33 See *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) at paras 4-5; and *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at para [27].

40.1. on or about 16 July 2020, the first respondent was appointed as the Director of the Foreign Branch of the State Security Agency[34]; and

40.2. on or about 17 July 2020, a new permanent executive Director of IPID was appointed.[35]

41. In the premises, the appeal will have no practical effect because the factual circumstances underlying the HSF's appeal at the time it was launched have changed. They also render this appeal moot.

42. In regard to the HSF's attempt to have the first respondent returned to office, that is clearly no longer viable.

42.1. In the first instance, the first respondent has been appointed to another office and has perempted his rights of review.

42.2. In the second instance, there is no relief sought before this Court or any Court to have the incumbent Executive Director's appointment set aside.

43. It is well established in our law that a finding on an issue in principle need not result in practical effects flowing therefrom in the absence of separate relief to that effect.[36]

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34 https://www.news24.com/news24/southafrica/news/robert-mcbride-to-head-foreign-branch-of-state-security-agency-20200716.

35 https://www.sabcnews.com/sabcnews/dikeledi-ntlatseng-appointed-as-the-new-ipid-head

44. Even if unlawful, the subsequent appointments made after the first respondent's vacating office are legally valid and continue to have effect until reviewed and set aside.[37]

45. At the very least, this Court cannot purport to grant such an order, not least of which because the persons affected by that potential order have not been joined to these proceedings.

46. We also highlight that the HSF's attempt to get this appeal heard on the basis that the Court *a quo*'s costs orders (in the application for leave to appeal) is mistaken.[38]

47. Those costs orders were vacated when leave was granted. The issue of costs in both the application for leave to appeal and this appeal in this Court is now costs in the cause.[39]

48. In the premises, the HSF's intended appeal once again falls to be dismissed because it is moot and will furthermore have no practical effect.

COSTS AND CONCLUSION

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36 See, for example, *Corruption Watch NPC and Others v the President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC). In those proceedings, the consequent appointment flowing from the original unlawful conduct was separately challenged. No such challenges exist in these proceedings.

37 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at paras [32]-[34]. Also see *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at paras [101]-[103].

38 HSF supplementary heads of argument: pp 17 – 18, para 45.

39 Appeal Record: Volume 3, SCA Order Granting Leave to Appeal, p 364.

49. The HSF has recently escaped a costs order in what was ostensibly public interest litigation. The Full Bench of the High Court, Gauteng Division, Pretoria did not mulct the HSF with costs because of the HSF's apparent *bona fide* but mistaken view on the law.[40]

50. In these proceedings, the PCP is constrained to submit that the HSF should not get away as lightly on this occasion. It has been given every opportunity to withdraw this appeal as well bring fresh proceedings in its own right but has obstinately refused to do so.

51. Regrettably, its conduct amounts to the kinds of conducted excepted from protection under the so-called *Biowatch* Rule.[41]

52. As such and for the aforesaid reasons, the PCP persists in its submission that the appeal ought to be dismissed with costs., including the costs of two counsel.

TEMBEKA NGCUKAITOBI, SC
KAMEEL PREMHID

Counsel for the fourth respondent

Chambers, Sandton
28 October 2020

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[40] *Helen Suzman Foundation v Speaker of the National Assembly and Others* Case no. 32858/2020 (5 October 2020). This was a Full Bench decision per Mlambo JP, Kollapen J and Baqwa J.

[41] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at para [23]. Also see *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at para [138].