

**IN THE SUPREME COURT APPEAL OF SOUTH AFRICA  
(BLOEMFONTEIN)**

**APPEAL CASE NO 424/19**

**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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**CONDITIONAL REPLYING AFFIDAVIT  
IN RESPONSE TO FOURTH RESPONDENT'S ANSWERING AFFIDAVIT**

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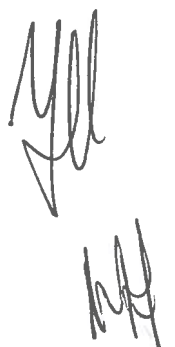


I, the undersigned,

**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. I deposed to the founding affidavit dated 20 April 2019 ("**the founding affidavit**") in the application for leave to appeal to this Court, and I am duly authorised by the HSF to depose to this affidavit on its behalf. I adopt the definitions used in the founding affidavit unless the context indicates otherwise.
2. The facts contained in this affidavit are, to the best of my knowledge and belief, both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. To the extent that I lack personal knowledge of any facts in this affidavit, I refer this Honourable Court to the confirmatory affidavit of Lavanya Pillay which will be filed together with this affidavit.
3. Where I make any legal submissions, I do so on the advice of the HSF's legal representatives.
4. This affidavit is a conditional reply to the answering affidavit filed on behalf of the fourth respondent ("**the Portfolio Committee**") dated 23 July 2019 ("**the Portfolio Committee's answering affidavit**"). Any allegation in the Portfolio Committee's answering affidavit which is not admitted, and to the extent that it differs from, or is not addressed in, what is stated in this affidavit or the founding affidavit, is denied.



**CONDITIONAL NATURE OF REPLY**

5. On 23 April 2019, the HSF served its notice of application for leave to appeal and founding affidavit on the respondents. In terms of this Court's rules, the Portfolio Committee's answering affidavit was due to be filed on 23 May 2019.
6. On 23 May 2019, the day on which the Portfolio Committee was required to deliver its answering affidavit, the HSF's attorneys of record, Webber Wentzel, were forwarded correspondence by its correspondent attorneys, in which the Registrar of this Honourable Court ("**the Registrar**") recorded that *"[t]he request for extension is granted. The fourth respondent should file his answering affidavit by 14 June 2019"*. This correspondence is attached marked "**RA1**". No request for extension had ever been delivered to Webber Wentzel or its correspondent, and it appears that the Portfolio Committee has been communicating with this Court to the exclusion of the applicant.
7. Correspondence ensued thereafter (annexed marked "**RA2**" - "**RA4**", the contents of which are incorporated by reference), with the end result that the Portfolio Committee finally filed papers only on 25 July 2019 (after having missed further extensions which it sought until 14 and 16 July 2019).
8. The Portfolio Committee has thus missed three deadlines of its own choosing, communicated with this Court without copying the HSF thereon and has plainly dragged its feet in preparing its answering affidavit. The Portfolio Committee attempts to blame its dilatory conduct on the election of a new National Assembly. However, the Portfolio Committee itself states that the Portfolio Committee and its Chairperson had been elected as early as 2 July 2019. There is no reason or proper explanation for the delay of more than 3 weeks from the date of the election of the Portfolio Committee to the date on which its answering affidavit was filed. The issues

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in this matter have not changed since the inception of the matter in January 2019. It is therefore unclear why the consultations between the Portfolio Committee, its Chairperson and its legal representatives would require such an extensive period, and no explanation is forthcoming.

9. It is thus disappointing to see that the Portfolio Committee - having acted as a law unto itself - then accuses the HSF of abusing court procedure (on the basis that the Portfolio Committee does not agree with the HSF's substantive arguments).
10. The Portfolio Committee has not met the exalted standard expected of the State when litigating. This replying affidavit is thus conditional on this Honourable Court granting leave to the Portfolio Committee belatedly to file its answering affidavit, notwithstanding that every period of the delay has not properly been explained.

#### **STRUCTURE OF THIS AFFIDAVIT**

11. To avoid prolixity, I shall not address the points or themes raised in the Portfolio Committee's answering affidavit which have already been dealt with in my affidavit in reply to the Minister's answering affidavit ("**the HSF's reply to the Minister**"). Instead, I pray that this Honourable Court have reference to the HSF's reply to the Minister when considering this affidavit and incorporate the averments set forth in the HSF's reply to the Minister by reference in this affidavit.
12. In the remainder of this affidavit, I respond to select paragraphs in the Portfolio Committee's answering affidavit, to the extent necessary. Any allegation in the Portfolio Committee's answering affidavit which is not admitted, and to the extent that it differs from, or is not addressed in, what is stated in this affidavit, the founding affidavit or the HSF's reply to the Minister, is denied.



**REPLY TO SELECT PARAGRAPHS****Ad paras 5 - 13**

13. It is true that the constitutional validity of section 6(3)(b) of the IPID Act was never ventilated before Court. This is the very complaint which the HSF has with the Order. It was never for the respondents, privately, to agree on an interpretation and then have the Court simply sanction such interpretation, absent a full ventilation of the issues before Court.
14. This private interpretation cannot absolve a Court of a duty to interrogate the settlement agreement and the statutory and constitutional interpretation which it sought to give effect to. Thus the fact that the parties may have privately settled their *lis* does not give them - or the Court - the power to determine the interpretation of statute and pronounce upon rights in rem.
15. The Portfolio Committee attempts to convince this Court that this appeal is an attempt by the HSF to defend "*an entirely new cause of action of its own creation*". This is incorrect. What is set forth in the HSF's papers has been its case all along. Sight should not, respectfully, be lost of what was before Court before settlement was privately reached - namely how the renewal provisions of the IPID Act operated.
16. The HSF does not "resuscitate" concluded proceedings - instead, it takes issue with the manner in which those proceedings were concluded and challenges the unconstitutional interpretation of the IPID Act which the Court *a quo* has endorsed through the Order.

**Ad paras 19 - 22**

17. I have already dealt with the Portfolio Committee's argument that the HSF was allegedly attempting to raise a new cause of action and was seeking distinct relief



above. This argument is without merit. In any event, given that the question before Court was the interpretation of the renewal provisions of the IPID Act, the HSF does not raise new relief in insisting that an improperly obtained order be set aside.

**Ad paras 26 - 27**

18. It is unfortunate that the Portfolio Committee's would choose to describe the HSF's argument as "*intellectual dishonesty*". Simply because the Portfolio Committee does not agree with the HSF does not entitle it to resort to slander and name-calling, in any manner or form. This conduct falls far short of the standard expected of State litigants.
19. I have explained in the founding affidavit that the interpretation of section 6(3)(b) advocated for by the HSF - 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 - does not amount to absolute independence. The Executive Director would still remain subject to constitutional oversight through the mechanisms established in the Constitution and the removal powers provided for under the IPID Act. Moreover, it is the only constitutionally compliant interpretation which adequately safeguards IPID's independence for the reasons set forth in the founding affidavit and HSF's reply to the Minister.

**Ad para 32**

20. The HSF does not seek to introduce its own substantive relief regarding the interpretation of the IPID Act. The Portfolio Committee has misunderstood the HSF's case. What the HSF seeks to do in this appeal is set aside the Order and Reasons on the basis that they were reached by the Court *a quo* without any argument or consideration of the merits of the case.



21. The Order reflects an unlawful interpretation of s6(3)(b) of the IPID Act. Further, the manner in which the Order was reached is contrary to established Constitutional Court precedent, and this too can be appealed. It is thus incorrect to suggest that the HSF is pursuing a case which was not before the Court *a quo* or implicated in the Court a *quo*'s processes.

**Ad paras 33 - 34**

22. I am advised that, while the Constitutional Court has recognised the role that Parliament has to play in a democracy, it has not endorsed Parliament as the rightful actor within which decisions on renewals of terms of office should vest. The case law referred to by the Portfolio Committee in this regard provides that adequate independence does not require absolute insulation from political accountability and states that Parliament acts as a counter-weight to the executive. The HSF does not disagree with this nor does it seek to undermine Parliament's oversight function. The interpretation of section 6(3)(b) which is argued for by the HSF ensures that IPID's Executive Director will still remain subject to constitutional oversight through the mechanisms established in the Constitution and the removal powers provided for under the IPID Act.

23. However, the very case law that the Portfolio Committee refers to in this paragraph makes clear that:

23.1 the Minister is a political actor;<sup>1</sup>

23.2 the Minister's role in influencing the functional activities of IPID is very likely to undermine its independence;<sup>2</sup> and

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<sup>1</sup> *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) para [96]

<sup>2</sup> *Ibid*

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- 23.3 there must be Parliamentary oversight over the Minister's decision to remove an Executive Director.<sup>3</sup>
24. As indicated in the HSF's reply to the Minister, the renewal considerations were, moreover, plainly mired in political machinations, or, at the very least, were perceived to be politically informed or motivated.
25. A renewal of a term of office is qualitatively different from an initial appointment or a removal. With renewals, as opposed to initial appointments, 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. Furthermore, there are clear guidelines contained in the IPID Act with regard to removals of Executive Directors. No such guidelines exist for the decision to renew an Executive Director's term of office. The Order accordingly allows the Portfolio Committee, which is a political body (as recognised in South African jurisprudence),<sup>4</sup> to pass judgement, without any guidelines, on the renewal and 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 *Glenister*,<sup>5</sup> *Helen Suzman Foundation*<sup>6</sup> and *JASA*.<sup>7</sup>
26. The Order further assigns significant powers in the renewal process to the Minister, which is similarly unlawful.

<sup>3</sup> *McBride v Minister of Police* 2016 (2) SACR 585 (CC) para [38]

<sup>4</sup> *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]

<sup>5</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para [249]

<sup>6</sup> *Helen Suzman Foundation, supra*, paras [78] to [82]

<sup>7</sup> *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]

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**Ad paras 37**

27. An application to compel the Portfolio Committee to take a renewal decision timeously presupposes that it has a right to take such decision, which is denied. This is the very point: the only reason why an order of that nature could have been issued is if an unconstitutional interpretation was placed on the IPID Act. There is thus simply no legal basis for the Order.

**Ad paras 38 - 39**

28. I have already explained in the preceding affidavits that under the HSF's interpretation of section 6(3)(b) of the IPID Act, the Executive Director would still remain subject to the removal powers under section 6 of the IPID Act. Should it be deemed that the incumbent Executive Director is no longer fit for the role, the necessary steps can be taken to remove him from office and appoint a new Executive Director.
29. Moreover, the Executive Director, as the only non-political actor in these circumstances, is the only actor who can take this decision and ensure that IPID is sufficiently protected from political interference. Any other interpretation, which places that decision in the hands of any political actor, would not promote or fulfil constitutional rights or requirements (discussed in detail in the founding affidavit), and would open the door to undue political interference, or the risk or apprehension of such interference.

**Ad paras 40 - 40.6**  


30. The Order is an order in rem and the Constitutional Court's decision in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd*<sup>8</sup> plainly applies (and applies to courts of first instance as well as appeal courts).
31. Further, as explained in my founding affidavit, "*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 result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.*"
32. The relevant point of law (being the correct interpretation of section 6(3)(b) of the IPID Act) did appear on the papers (and was raised during the HSF's argument before the Court *a quo*). The HSF, which had been duly admitted as an *amicus* in the matter, had made detailed submissions as to why the interpretation sought to be adopted by the respondents was legally impermissible and would do damage to our constitutional jurisprudence. These submissions were not heard in the context of there being any judicial consideration of the interpretation of the IPID Act, despite the Court being duty-bound to consider them.

**Ad paras 43 - 49**

33. I refer to the section pertaining to mootness in the HSF's reply to the Minister.

**Ad paras 56 - 60**

34. Given the Portfolio Committee's conduct, as described above, it is surprising for it to accuse the HSF of any abuse of Court process. Moreover, it fails to allege a single

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<sup>8</sup> (CCT 257/71 [2018] ZACC 33 (27 September 2018))

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instance of an abuse of process by the HSF. I further refer to the costs contentions in the the HSF's reply to the Minister.

**CONCLUSION**

35. The HSF submits that it is clear, from its founding affidavit, the HSF's reply to the Minister and this affidavit that another court may and, indeed, probably will, come to different conclusions to those reached in the Order and Reasons. Moreover, for the reasons set out in paragraphs 76 and 77 of the founding affidavit, this matter justifies leave to appeal being granted by virtue of there being "compelling reasons" as envisaged under section 17(1)(a)(ii) of the Superior Courts Act, 2013.

36. In the circumstances, the HSF persists in the relief sought in its notice of application for leave to appeal.

*[Handwritten Signature]*  
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 08 on August 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.

*[Handwritten Signature]*  
COMMISSIONER OF OATHS  
Full names: *Mashiane Morumae*  
Address: *15 Sturdee Avenue Rosebank*  
Capacity: *CSJ*





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Enquiries: Mr Myburgh

Date: 23 MAY 2019

Ref: 424/2019

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The State Attorney  
Private Bag X 20630  
Bloemfontein  
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Your ref: L Venter  
Symington & De Kok  
169B Nelson Mandela Drive  
Bloemfontein

Dear Sir

**APPEAL: HELEN SUZMAN FOUNDATION V ROBERT MCBRIDE & OTHERS**

Above named application has reference. The Presiding Judge has requested me to issue the following letter:

The request for extension is granted. The fourth Respondent should file his answering affidavit by 14 June 2019.

Regards

  
P.S.W. MYBURGH  
REGISTRAR

SUPREME COURT OF APPEAL.

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Supreme Court of Appeal**

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Your reference

Our reference

Date

V Movshovich / P Dela / D Cron / D  
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3005284

11 June 2019

Dear Sir

**Helen Suzman Foundation // Robert McBride and Others (GP case no: 6175/19; SCA case no: 424/2019) ("the proceedings")**

1. We act for the Helen Suzman Foundation ("our client") and refer to our client's leave to appeal application dated 20 April 2019 ("the application") in the proceedings.
2. On 23 May 2019, the day on which the respondents in the proceedings were required to deliver their respective answering affidavits, our correspondent, Symington & De Kok ("our correspondent") forwarded to us correspondence from yourself ("the 23 May 2019 letter") recording that "[t]he request for extension is granted. The fourth respondent should file his answering affidavit by 14 June 2019".
3. Prior to this communication, neither we nor our correspondent received any notification from any of the respondents in this matter requesting an extension to file their answering affidavits. We do not understand how the respondents could have approached this Court without copying us on the correspondence.
4. Be that as it may, the extension granted by the Supreme Court of Appeal in the 23 May 2019 letter related only to the fourth respondent. On 4 June 2019, we received the third

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Webber Wentzel is associated with ALN

respondent's application for condonation in relation to the late filing of its answering affidavit, which was delivered electronically on 30 May 2019. The HSF does not intend on opposing such application.

5. In light of the above circumstances and in order to avoid overburdening this Honourable Court with multiple affidavits at different times and possibly dealing with overlapping themes, our client requests that it be allowed to deliver its replying affidavit(s) within 10 days of receipt of the fourth respondent's answering affidavit, which will be the last answering affidavit to be received in terms of the directions of this Court. We note that the third respondent, at paragraph 17 of its application for condonation, is not opposed to this timeline.

Yours faithfully

PP 

**WEBBER WENTZEL**

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**RA3**

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**11 JUNE 2019**

Enquires: Mr R J Sebelemetsa  
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My Ref: 00418/19/Z64/jb  
Your Ref:

**TO: THE REGISTRAR  
SUPREME COURT OF APPEAL  
P O BOX 258  
BLOEMFONTEIN  
9300**

**"PER HAND"**

Dear Sir,

**Re: HSF v ROBERT McBRIDE & 3 OTHERS (CASE NO. 6175/19)**


1. We refer to the above matter, our letter of Wednesday, 22 May 2019, and the Order communicated via a letter from the Court on Thursday, 23 May 2019.
2. We write this letter to advise the Court of further events which affects our client's ability to participate in these proceedings.
3. We write to advise the Court that our client will be unable to file its answering affidavit in the above matter by Friday, 14 June 2019, being

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the extended deadline that our client has been given to file its answering affidavit.

- 4. On Wednesday, 5 June 2019, the National Assembly's Rules Committee met for the first time. This is the Committee that must be consulted by the Speaker before the establishment of the relevant Portfolio Committees (of which our client is one, being the fourth respondent in these proceedings). A copy of the Parliament's press statement regarding same is attached as "**PCP1**".
- 5. It is likely that our client will only be in a position to consider and depose to its affidavit in these proceedings after Tuesday, 2 July 2019. We record that our client advises us that Portfolio Committee Chairs (our client's likely deponent) will only be elected on that date.
- 6. As such, until such time that the fourth respondent is convened and its Chairperson elected, our client will be unable to file its answering affidavit. We note that even though the Chairperson may be elected on Tuesday, 2 July 2019, given the issue under consideration, our client will not be able to immediately depose to its affidavit in these proceedings.
- 7. We therefore request a further extension of 2 weeks within which to file our client's answering affidavit. Should this be granted, our client will endeavour to file its affidavit on or before Tuesday, 16 July 2019.
- 8. Please note that this letter is addressed to the Court in terms of Rule 11 of the Rules of the Supreme Court of Appeal. To that end, we request a copy of same to be transmitted to The President of the Court, The Hon. Madam Justice Maya JP, for The President to make an order in terms of Rule 11 or Rule 12 as the case may be.





9. I trust that you will find this to be in order.

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Yours Sincerely



**R J SEBELEMETSA**  
**FOR THE STATE ATTORNEY (PRETORIA)**

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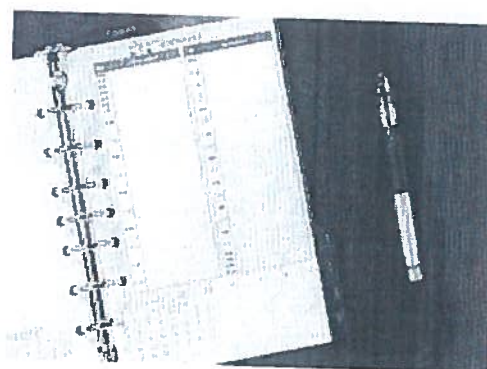
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## HAPPENING AT PARLIAMENT THIS WEEK

**Parliament, Sunday 9 June 2019** – The National Council of Provinces (NCOP) will this week determine its own systems, guidelines and committee configuration for the 6th Parliament as it holds inaugural meetings of its key structures this week.



A meeting of NCOP whips is scheduled for Tuesday. On Wednesday, the Council will hold its first meeting of the NCOP Rules Committee, chaired by Chairperson of the NCOP Mr Amos Masondo. On Thursday, the NCOP Programme Committee, also chaired by Mr Masondo, is scheduled to meet to determine the programme of the House and committees.

Today, Sunday, there'll be a swearing in of one outstanding designated Permanent Delegate of the NCOP, Mr Mohammed Dangor, who could not take up his seat during the first sitting of the House on 23 May. The swearing in will take place at Constitutional Hill and will bring to full occupation all the seats in the 54-seat

ya

MS

Council.

The National Assembly (NA) held its own inaugural meetings of key structures last week.

The NA Rules Committee, chaired by NA Speaker Ms Thandi Modise, met on 5 June and agreed on several issues. These included guidelines and determinations for regular items featuring at NA plenary sittings, establishing the Subcommittee on NA Rules and establishing NA portfolio and standing committees.

The NA Programme Committee, also chaired by the NA Speaker, met on 6 June and has published the NA's programme up to the end of July. Items on the agreed programme include President Cyril Ramaphosa's State of the Nation Address to a joint sitting of the NA and NCOP on 20 June, MPs' debate on the address at a joint sitting on 25 June and the President's reply to the debate at another joint sitting on 26 June.

Also included in the NA programme is the election, on 27 June, of NA House Chairpersons, election of NA members to the Pan-African Parliament and designation of representatives to serve in the Southern African Development Community Parliamentary Forum, on the Judicial Services Commission and on the Magistrates Commission.

Following the decision of the NA Rules Committee on the reconfiguration of the National Assembly committee system, these committees will begin their meetings from 2 to 9 July. At their first meetings, the committees will elect their chairpersons. In the interim, parties will determine the names of representatives, which will be published in the official parliamentary papers, to constitute membership of these committees. This will be in line with the composition agreed upon at the inaugural NA Rules Committee meeting: 11 Members – six from the African National Congress, two from the Democratic Alliance, one from the Economic Freedom Fighters and two from other parties.

The Budget Vote Debates and consideration of the Appropriation Bill are provisionally scheduled from 10 to 23 July.

The induction programme for MPs, which started in May after the election results were declared, continues this week with information and discussion sessions.



Issues for the sessions include MPs' constitutional mandate and responsibilities; MPs' interests, ethics and Code of Conduct; MPs' conduct and participation in plenary sittings of the NA and the NCOP and in committee meetings of the two Houses; the Parliamentary Budget Office; law making and public participation; MPs' facilities and benefits; security at Parliament; and relations with the media.

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Your reference  
 00418/19/Z64/jb

Our reference  
 V Movshovich / P Dela / D Cron / D  
 Rafferty / L Pillay  
 3005284

Date  
 18 July 2019

Dear Sir

**Helen Suzman Foundation // Robert McBride and Others (GP case no: 6175/19; SCA case no: 424/2019)**

1. We act for the Helen Suzman Foundation ("our client") and refer to:
  - 1.1 our client's leave to appeal application dated 20 April 2019 ("the application");
  - 1.2 the letter from the Supreme Court of Appeal ("SCA") dated 23 May 2019 in which the SCA granted an extension for the fourth respondent ("your client") to file its answering affidavit by no later than 14 June 2019;
  - 1.3 our letter to the SCA dated 11 June 2019 ("our letter"), in which we requested that our client be allowed to file its replying affidavit within 10 days of receipt of your client's answering affidavit, in order to avoid overburdening the SCA with multiple affidavits filed at different times which possibly deal with overlapping themes; and
  - 1.4 your letter addressed to the SCA dated 11 June 2019 ("your letter") in which you state that, despite requesting an indulgence to file your client's answering affidavit by 14 June 2019, your client was no longer able to meet this deadline and instead requested a further extension to file its answering affidavit by 16 July 2019.
2. To date, no answering affidavit has been forthcoming from your client.
3. Please note that if we do not receive your client's answering affidavit together with the relevant application for condonation by close of business on Monday, 22 July 2019, we shall assume that your client will not be filing an answering affidavit and that your client

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will not be opposing the application. We shall then proceed to finalise our client's reply on that basis and will file our client's reply within 10 days from 22 July 2019.

Yours faithfully

pp 

**WEBBER WENTZEL**

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