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

APPEAL CASE NO 1065/19
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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APPELLANT'S HEADS OF ARGUMENT

INTRODUCTION

1. This is an unfortunate case in which the Court below (per Hughes J) sanctioned an agreement between the parties which allows them to adopt an interpretation of section 6(3)(b) of the Independent Police Investigative Directorate Act, 2011 ("**the IPID Act**") which they prefer, which has now – contrary to a long line of authority - become a binding court order, and which interpretation is manifestly inconsistent with our courts' jurisprudence on the independence of IPID.

2. The Constitutional Court has already had occasion to consider the independence of the Independent Police Investigative Directorate ("**IPID**"), and held as follows:

"*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. 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, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference*."[1]

3. The Constitutional Court went on to turn its face against "*conduct [that] has the potential to expose IPID to constitutionally impermissible executive or political control*".[2] Said the Court:

"*That action is not consonant with the notion of operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution*."

4. Even more vigilance is required in the case of renewals. The Constitutional Court has stressed that renewals left to the discretion of political actors strike at the very heart of independence and are inconsistent with the Constitution.[3]

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1 *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) ("***McBride***") para [35], quoting a report by the Organisation for Economic Co-operation and Development titled: "*Specialised Anti-corruption Institutions: Review of Models*", which was cited with approval by the Constitutional Court in *Glenister.*

2 *McBride* at para [40].

5. Despite the judgments mentioned above, the Minister of Police ("**the Minister**"), the Portfolio Committee on Police ("**the Committee**") and the erstwhile Executive Director of IPID ("**Mr McBride**") have, privately, agreed on a mechanism for the renewal of the Executive Director's tenure via a settlement agreement made an order of court by the Honourable Madam Justice Hughes on 12 February 2019 ("**the Hughes Order**").[4] In so doing, these parties have applied, and the High Court has endorsed, a constitutionally impermissible interpretation of section 6(3)(b) of the IPID Act.

6. This private agreement and agreed interpretation concentrate 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.

7. The legality of the agreed interpretation was never ventilated in open Court. Indeed, there was no argument on any interpretation of section 6(3)(b) of the IPID Act, and no written heads of argument were filed by any of the Minister, the Committee or Mr McBride to explain why their agreed interpretation was constitutionally compliant.

8. Instead, the High Court rubberstamped the agreement as a consent order, without any consideration as to its constitutionality. It did so despite efforts by the appellant ("**HSF**"), which had been admitted by consent of the parties and by the

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[3] *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].

[4] Appeal record ("**AR**") volume 3 pages 325 - 326.

Court, as an *amicus curiae*. So admitted, the HSF sought to halt the parties' efforts to avert a proper hearing by their proposed settlement agreement.

9. The HSF advanced submissions that such an approach ought not to be adopted by Hughes J, and that before any agreement was endorsed as a court order Her Ladyship was constrained to hear legal argument on interpretation and consider the merits of the matter (as opposed to short-cutting the hearing by giving effect to the parties' agreement in this regard).

10. 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, simply because it was agreed between the litigants. This is unconstitutional and amounts to a failure of judicial duty, as the Constitutional Court has already ruled.[5]

11. This agreed interpretation conflates the appointment of an Executive Director with the renewal of his / her tenure, does violence to the independence (and the perception of independence) of IPID and is contrary to our courts' jurisprudence on renewals and the need for insulation from political and executive interference.

12. The new interpretation by the parties, and endorsed by Hughes J, is as follows:

12.1 First, the Minister must make a recommendation or "preliminary decision" as to whether or not to renew the Executive Director's tenure.[6] This immediately creates the danger that an Executive Director may shape his or her actions

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

[6] The Hughes Order AR volume 3 page 325 para 1.

so as to win the Minister's approval. Such a concentration of power has, repeatedly, been ruled unconstitutional.

12.2 Second, the Committee must then consider this decision and either endorse or reject it.[7] It has no guidelines stipulated by which it must make its decision – which itself (by virtue again of the Constitutional Court's judgments mentioned above) 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.

12.3 Moreover, the Committee is a political entity,[8] and has admitted as much on oath even indicating that its members would have to report back to their political party structures in order to consider the renewal decision.[9] 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.

13. The above interpretation is thus unconstitutional.

14. Interpretation of legislation is an objective enquiry, which must be performed within the context of the overarching principle of supremacy of the Constitution. In interpreting legislation, it is the Court that ultimately must apply its mind to the correct constitutionally compliant interpretation of legislation. To this end, the different interpretations by the actual or potential actors implicated by it are not

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[7] The Order AR volume 3 page 325 para 2.

[8] *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].

[9] The Committee's answering affidavit ("**PC AA**") AR volume 2 page 167 para 33.

dispositive and cannot limit the interpretative exercise; certainly, these actors cannot "settle" interpretation amongst themselves.

15. Given the above, the Hughes Order, cannot stand. Not only was it reached in a constitutionally impermissible manner, but it endorses a constitutionally impermissible interpretation of the IPID Act which breaches fundamental jurisprudence pertaining to the need for effective independence.

CHRONOLOGY

16. On 5 September 2018, Mr McBride directed a letter to the Minister[10] 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*".

17. On 13 November 2018, after no response from the Minister, Mr McBride sent a follow-up letter, dated 13 November 2018,[11] enquiring once again as to the Ministry's intention regarding his term of office.

18. On 16 January 2019, over 4 months later, the Minister finally addressed a letter to Mr McBride[12] 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.[13] This was, unambiguously, a decision as to whether or not to renew Mr McBride's tenure as Executive Director ("**the Non-Renewal Decision**").

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[10] The Minister's answering affidavit ("**Minister's AA**") AR volume 1 page 125.

[11] Minister's AA AR volume 1 page 126.

[12] Mr McBride's founding affidavit ("**McBride's FA**") AR volume 1 page 31 - 32.

[13] McBride's FA AR volume 1 page 31 para 3.

19. Mr McBride then wrote to the Minister on 22 January 2019,[14] bringing to the Minister's attention the fact that, in light of 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.

20. 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*".[15] 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.[16]

21. 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.[17] 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.[18] Pertinently, she went on to state that the matter could not be considered by the Portfolio Committee until such time as the Minister makes such

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[14] McBride's FA AR volume 1 page 33 - 35.

[15] Minister's AA AR volume 1 page 121 - 122

[16] McBride's FA AR volume 1 page 38 - 39.

[17] Minister's AA AR volume 1 page 123.

[18] Minister's AA AR volume 1 page 123 line 24 - 26.

recommendation[19], thus elevating the Minister's decision to being a jurisdictional pre-requisite before the Committee could act.

22. 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.[20]

THE HIGH COURT PROCEEDINGS

23. The matter was set down for hearing on the urgent roll of the High Court of South Africa, Gauteng Division, Pretoria on 12 February 2019.

24. 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**").

25. 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.

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

26.1 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. The

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[19] Minister's AA AR volume 1 page 123 line 26 - 27.

[20] AR volume 1 page 1 - 4.

Constitutional Court held in *Eke v Parsons* 2016 (3) SA 37 (CC) ("***Eke***") that 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.[21] 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 in *ACSA*,[22] 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.

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

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

[22] [2018] ZACC 33 (27 September 2018), paras [1] to [4].

26.3 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.

26.4 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 was not asked to address the correct interpretation in oral argument. None of the parties thus were 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.

26.5 Thirdly, aside from the order entrenching the involvement of the Minister and the Portfolio committee in the renewal of Mr McBride's term, the HSF pointed out that the settlement order was impracticable, as the Committee had indicated, on oath, (and before the settlement order was agreed) that it would be rushed into taking a decision by the date Mr McBride's term as Executive Director expired, and its decision may well be unlawful and subject to review.[23] The Hughes Order was thus also contrary to the evidence before the Court.

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[23] PC AA AR volume 2, page 157 - 162, para 15, 19.1 - 19.2, 21, 22.1.1 - 22.1.3 and 22.2.1.

26.6 Finally, the HSF highlighted that parties' interpretations carried no additional weight simply by virtue of their designations. Indeed, that approach was expressly rejected in *JASA* where the Constitutional Court held that "*The contention is faulty for yet another reason. It implies that the way in which Parliament understood the constitutional amendment that it approved is binding on the manner in which this Court must interpret the amendment. It cannot be so. Even if it were possible to arrive at this result, we are obliged to determine objectively the meaning of the constitutional provision irrespective of the meaning as perceived by Parliament.*"[24] (emphasis added).

27. 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. Mr McBride did, however, point out that interim relief, whereby Mr McBride remained Executive Head, should then be considered by the Court should the matter not be resolved by 28 February 2019 (being the last day of Mr McBride's term as Executive Director on his version).

28. The Minister and the Committee, however, opposed the HSF's position, including, remarkably with respect, 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 order of court. 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.

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[24] *JASA*, para [60].

29. 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 remained 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.

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

MADAM JUSTICE HUGHES' REASONS

31. On 21 February 2019, Madam Justice Hughes provided reasons for the Hughes Order ("**the Reasons**").[25]

32. In the Reasons, Madam Justice Hughes states that "*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*".[26]

33. 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

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[25] AR volume 3 page 327 - 334.

[26] The Reasons AR volume 3 page 329 para 5.

HSF was arguing why the 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. In turn, in such debate, the HSF would have submitted that the consent order is manifestly unconstitutional and should be rejected (as it did in its written heads of argument before the court *a quo*).

34. In a terse paragraph, Hughes J held 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.*"[27] However, there is no analysis of the legality of the interpretation of s 6(3)(b) of the IPID Act, no analysis of how the settlement agreement is practical (in the face of the evidence by the Committee in which it says that it could not take a decision as quickly as that directed in the Hughes Order without exposing itself to potential judicial review[28]) and no analysis as to why, in determining rights *in rem*, the settlement agreement should be given effect to.

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

[27] The Reasons AR volume 3 page 333 para 17.

[28] PC AA AR volume 2, page 157 - 162, para 15, 19.1 - 19.2, 21, 22.1.1 - 22.1.3 and 22.2.1.

36. Furthermore, the Reasons state that HSF was only admitted as an *amicus* in the main case, and not in relation to the settlement agreement, and that the HSF is raising a "new issue" of which the parties were unaware.[29]

37. 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 issues which were raised by the HSF in the main matter.

38. The parties were, moreover, well aware of the HSF's interpretation and position regarding any settlement. When Mr McBride, on 6 February 2019,[30] circulated a proposed settlement agreement (which was not the settlement agreement ultimately made an order of court but a preceding version), the HSF immediately, on 7 February 2019,[31] alerted all parties that:

38.1 "*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).*

38.2 *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,*

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[29] The Reasons AR volume 3 page 332 para 13.

[30] AR volume 1 page 141 - 143.

[31] AR volume 3 page 355 - 356.

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.

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

39. The parties were thus forewarned of the HSF's position; were directed to the authority relied on and were told what the HSF would seek to argue if they proceeded with their attempted agreement.

40. The parties then purported to settle two hours before the hearing. Their last-minute efforts to do so did not relieve the Court *a quo* of its constitutional obligations. Rather – as per *ACSA*, *McBride* and *Eke* – 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 after argument on the interpretational merits, and to deliver a written judgment supporting the Court's interpretation.

41. Having been admitted as an *amicus*, the HSF's arguments on the merits were required to be heard and considered by the Court. This is so even if the parties were unaware of the HSF's position vis-a-vis settlement. When it comes to interpretation of legislation, the fact that an *amicus*' interpretation may carry the day, as opposed to that of a cited party, occurs frequently[32] and is hardly

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[32] See for example *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("**Glenister II**")

controversial - it is the amicus' very purpose to assist the Court in reaching the correct legal conclusion.

42. 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. 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.

43. 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".[33] 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.

44. 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's 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.

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[33] The Reasons AR volume 3 page 332 - 333 para 13 - 15.

45. The effect of the Hughes Order, as read with the Reasons, is also to curtail the important role of an *amicus* in constitutional litigation. The Reasons suggest that it is permissible, in 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 undermines the constitutionally recognised role of an *amicus*. This is a further reason why the Reasons and the Hughes Order are in conflict with the Constitution.

THE UNLAWFUL INTERPRETATION ADOPTED IN THE HUGHES ORDER

46. 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.

47. When read with the Speaker's letter of 4 February 2019,[34] the Minister's recommendation or preliminary decision is now a jurisdictional prerequisite for a renewal to be considered.[35]

48. This patently 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

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[34] Minister's AA AR volume 1 page 123 line 24 - 27.

[35] 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).

consideration on renewal, then 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.

49. Even if this possibility does not arise in practice, the mere possibility itself gives rise to the perception of diminished independence. The Constitutional Court has stressed as follows 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*".[36]

50. The susceptibility to, and possibility of, undue influence is substantially enhanced in the context of a renewal as compared to the initial appointment.

50.1 The Minister may, for ulterior purposes such as the incumbent's particularly effective campaign against corruption of 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

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[36] *Glenister II* at para 222. See also paras 234 – 236.

perception of impairment, of constitutionally required independence is palpable in both instances.

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

50.3 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).

50.4 The Hughes Order also creates a logical difficulty - if the Minister's recommendation is not to renew, and the Portfolio Committee does not endorse this, 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 Hughes Order may still not mean that any decision to affirm the renewal exists.

51. The second leg of the Hughes Order, whereby the Committee confirms or rejects the Minister's preliminary decision, involves substantial political oversight over renewal, which is constitutionally unacceptable. It allows a select committee of the National Assembly which is a political body (as recognised in South African

jurisprudence),[37] to pass judgement, without any guidelines, on the security of tenure of the Executive Director.

51.1 This is precisely the kind of power that has been held by the Constitutional Court to be unconstitutional in a trilogy of cases: *Glenister*, *Helen Suzman Foundation*[38] and *JASA*.[39]

51.2 The Committee now sits in judgment of the Minister's recommendation (which carries weight) before it takes a decision, after seeking input from "*the various party structures that each member represents*".[40]

51.3 This Committee, moreover, comprises a majority from the same political party as the Minister. 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.

52. Constitutional principle, including the constitutionally required structural, operational and institutional independence of the IPID, which is critical to the ability of that body to fulfil its constitutional and legislative mandate as well as the Republic's obligations under international law, requires an interpretation of

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[37] *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].

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

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

[40] PC AA AR volume 2 page 167 para 33.

legislation which places the renewal of the Executive Director's tenure beyond the remit of political actors. The Hughes Order is the antithesis of that.

THE LAWFUL INTERPRETATION

Renewability of the type contended for by the Hughes Order is plainly unconstitutional

53. It is trite that terms of office of independent institutions which are renewable in the hands, or at the instance, of any political actors (including Parliament) or third parties are incompatible with the requirements of adequate independence.

54. This was held in *Helen Suzman Foundation*, where the Constitutional Court stated the following:[41]

> *"[78] Subsections (15) and (16) apply to a National Head or Deputy National Head who would have reached the age of 60 years and would thus be expected to retire. The possibility of a continuation in an office by an incumbent, who is mentally and physically healthy and willing to continue beyond the age of 60 years, would only arise when that age has already been reached. No one can tell reliably whether her health permits continuation beyond 60 years, seven years in advance. This continuation is renewal or extension of tenure by another name. <u>It would obviously happen if the Minister is inclined to allow continuity. After all she has the countervailing discretion to renew or not to renew.</u> But for factors like health and willingness that would inform the Minister's decision to allow or not allow the National Head or the Deputy National Head to continue in office, <u>no</u>*

[41] Paragraphs [78] to [82] (emphases added, except where indicated otherwise).

guidelines for renewal are set out in the section. And that is how virtually unfettered the Minister's discretion is.

[79] The words "retain", "may only be retained" and "continue to serve in such office" and the requirement that one could serve beyond the age of 60 years if the "mental and physical health of the person concerned enables him or her so to continue", all suggest that subsections (15) and (16) are about the extension of the term of office when the incumbent reaches the age of 60 years but not at the time of the assumption of office. One cannot be retained in an office before she assumes that position. Similarly, to continue in an office presupposes that one would have been working in that office before.

[80] This favour, extendable to these functionaries on undisclosed bases, has great potential to compromise the independence of the affected official and by extension the DPCI. The incumbent would have known at the time of appointment that she might, by reason of age, require an extension at the age of 60 years. And that could affect the independence of the incumbent. It is for this reason that the Court in Glenister II observed that—

"[a] renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures."

While dealing with conditions of service, Glenister II remarked as follows on the impact of the renewability of terms of office on independence:

"[T]he lack of employment security, including the existence of renewable terms of office . . . are incompatible with adequate independence." (Emphasis added.)

[81] The danger of renewability was also dealt with in JASA. Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to "behave" herself in anticipation of renewal.

[82] The extension of the term of office of the National Head and the Deputy National Head in terms of section 17CA(15) and (16) has in a way been decided by Glenister II and is inimical to the adequacy of the independence of the DPCI. It is incompatible with the independence necessary for the National Head and Deputy National Head to be faithful to their mandate. These subsections are constitutionally invalid."

55. Similarly, in *JASA*, the Constitutional Court stressed:

"*It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution*

of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal."[42] (emphasis added)

56. This approach is fully supported by various international law instruments, including:

56.1 Article 9(2) of the United Nations Convention against Transnational Organized Crime (to which South Africa is a State Party)[43] which 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.

56.2 Article 6(2) of the United Nations Convention against Corruption (to which South Africa is a State Party)[44] which 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-

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42 *JASA* para [73].

43 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.

44 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.

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.[45]

56.3 The Organisation for Economic Co-Operation and Development review of the models of the various specialised anti-corruption institutions internationally, titled *Specialised Anti-corruption Institutions: Review of Models* ("**the OECD Report**").[46] 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.*[47]
>
> …
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> *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*

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

[46] 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.

[47] OECD Report at p10

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).

57. 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 Hughes Order permits, however, of that unconstitutionality.

58. 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.

59. This is possible, as set forth below.

The only constitutionally compliant interpretation

60. As stated above, non-renewable terms of office of functionaries in independent public institutions are a central feature of independence.[48]

61. 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.

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[48] *JASA* para [73].

62. It was held in *Glenister* that when determining the adequate independence of the Directorate for Priority Crime Investigations, the public perception of independence is 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*."[49]

63. In this case, while the legislation refers to the term being renewable, it does not indicate at whose instance the term is renewed.

64. Here, the interpretation which gives effect to constitutional requirements and values - and therefore <u>must</u> be favoured - is one that protects IPID's independence and ensures that renewal is not left to the discretion of politicians, for all the reasons set forth above.

65. In this context, it is important to recall the purpose of IPID and role of the Executive Director, as interpreted by the Constitutional Court:

> "*IPID is an independent police complaints body established in terms of section 206(6) of the Constitution. Section 4(1) of the IPID Act requires it to function independently of SAPS. This is to ensure that IPID is able to investigate cases or complaints against the police without any fear, favour or prejudice or undue external influence. Section 4(2) of the IPID Act requires that each organ of state assist the Directorate to maintain its impartiality and to perform its functions effectively. Importantly, section 2 of the IPID Act*

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

requires IPID to play an oversight role over SAPS and Municipal Police Services. Given the nature, scope and importance of the role played by police in preventing, combating and investigating crime, IPID's oversight role is of cardinal importance. This is aimed at ensuring accountability and transparency by SAPS and Municipal Police Services in accordance with the principles of the Constitution.

IPID is headed by an Executive Director who is nominated by the Minister in terms of section 6(1) of the IPID Act. This nomination must be either confirmed or rejected by the Parliamentary Committee within a period of 30 parliamentary working days.

The Executive Director's responsibilities are set out in section 7 of the IPID Act. They include: providing strategic leadership to the Directorate;[27] appointing provincial heads of each province;[28] appointing such staff as may be necessary to enable the Directorate to perform its functions in terms of the Act;[29] giving guidelines concerning the investigation and management of cases by officials within the respective provincial offices, the administration of national and provincial offices and, the training of staff at national and provincial levels; referring criminal cases revealed as a result of an investigation to the NPA for criminal prosecution and notifying the Minister of such referral; ensuring that complaints regarding disciplinary matters are referred to the National Commissioner and where appropriate, the Provincial Commissioner; once a month submitting a summary of disciplinary matters to the Minister and providing the Secretary with a copy thereof; and keeping proper records of all financial transactions, assets and liabilities of the

Directorate, ensuring that the Directorate's financial affairs comply with the Public Finance Management Act and, preparing an annual report in the manner contemplated in section 32. The Executive Director is also the accounting officer of the Directorate. Evidently, his duties are extensive and wide."[50]

66. IPID, headed by its Executive Director, is thus 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*".[51]

67. IPID's importance in our constitutional project is concretised by its corruption fighting function, particularly where that corruption may be in the ranks of those who have sworn to protect and serve the public, being the South African Police Service and Municipal Police Services. These bodies, in turn, house essential corruption fighting organisation themselves, including, for example, the "Hawks" (the DPCI).

68. IPID is thus the constitutional answer to the query *quis custodiet ipsos custodes*, ensuring that those who are mandated to root out corruption, uphold the law and prevent crime are not themselves guilty of corruption or unlawful conduct.

69. Given that members of the police, most particularly the DPCI, are charged with fighting corruption, often at an executive level, it is essential that not only are these

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[50] *McBride* paras [24] - [26].

[51] IPID Act preamble.

bodies sufficiently independent, but the body which exercises oversight over them - namely IPID - is itself independent.

70. In assessing independence, the Constitutional Court has already grappled with the question as to "*[w]hat then does the independence of IPID mean?".* Paragraphs 31 to 39 of *McBride* traverse this issue, and it is telling that the following was described as useful and illuminating in trying to define and delineate the contours of independence as it pertains to the independence of IPID:

> "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. 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, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference*."[52]

71. In *McBride*, the Constitutional Court decried the involvement of the Minister in IPID, adjudging the Minister's power of removal as being "*antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my*

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52 *McBride* para [35], quoting the OECD Report referenced above, which was cited with approval by the Constitutional Court in *Glenister.*

mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not."[53]

72. In short, IPID and its Executive Director are of paramount national and constitutional importance, they must be independent and be seen to be independent, and independence is defrayed through any political interference or the possibility therefor.

73. In light of this, section 6(3)(b) cannot be interpreted to afford the Minister or the Committee any role in the renewal process.[54] This is particularly so where there are no objective criteria for renewal. In the context of renewals, for all the reasons given above, they should be treated with even greater circumspection where it is suggested that such powers are to be exercised by political actors, who necessarily will or may have political agendas.

74. IPID must enjoy sufficient structural and operational autonomy so as to shield it from undue political influence; this can only be achieved by removing the option to renew from any political actor. Of course, the Committee and Parliament are, similarly, political actors. Indeed, members thereof may even be the subject of DPCI investigations, with IPID in turn exercising oversight over the DPCI.

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[53] *McBride* para [38].

[54] See, too, *McBride* para [39].

75. While the Minister and the relevant Parliamentary Committee play a part in appointing the Executive Director of IPID, 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. The renewal thus cannot, as a matter of constitutional principle, be left to political happenstance.

76. 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.

77. The Executive Director would still remain subject to constitutionally compliant oversight through the mechanisms established in the Constitution and the removal powers under the IPID Act.

APPEALABILITY OF THE HUGHES ORDER AND REASONS

78. As demonstrated above, the Order has far-reaching effects. The Order declared the Minister's decision on the renewal of Mr McBride's term of office one which had to be confirmed or rejected by the Portfolio Committee and endorsed the settlement agreement reached between the respondents. In so doing, the court *a quo* endorsed the underlying interpretation of the IPID Act, as chosen by the respondents, which was being given effect to. The constitutionality of this interpretation, however, was never ventilated in open court and no argument on

the merits of the matter was advanced by the parties, despite the HSF's submissions - supported by Constitutional Court precedent - to the contrary.

79. There is, with submission, no legal basis on which an order of that nature could ever properly be issued and is inconsistent with the Constitutional Court's finding in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC), in particular paragraph 25 thereof where the Court held:

> "*There are sound reasons why a court should carefully scrutinise a settlement agreement before making it an order of court. Once a settlement agreement is made an order of court, it is interpreted in the same way as* ***<u>any judgment or order and affects parties' rights in the same way</u>****. Madlanga J in Eke put the matter thus:*
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> > *"The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order,* ***<u>the order brings finality to the lis between the parties; the lis becomes res judicata (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order</u>****.*" (emphasis added).

80. The Order directs performance by the Minister and the Committee on the basis of a clearly unlawful and unconstitutional interpretation of the IPID Act. The final effect of the Order is that the power to renew the term of office of the Executive Director of IPID lies in the hands of political actors and exposes IPID to real or potential undue political interference.

81. Further, there is now judicial precedent - and sanction - through the Order that the Minister (an individual political actor) plays an important part in the renewal process, being afforded the power (if not responsibility) to make a preliminary decision. It is this preliminary decision which then falls to be considered by the Portfolio Committee.

82. The fact that a litigant prays for, or even that all parties to a matter agree to, an unlawful result does not mean that there is no issue which must be debated or judicially considered.[55] In giving effect to the settlement agreement reached by the parties, the court *a quo* effectively decided the interpretation of the IPID Act and lent the imprimatur of the Court to such interpretation.

83. The declarations contained in the Order thus amounted to decisions, which decisions have final effect and are appealable.

THE PRACTICAL EFFECT OF THE APPEAL – AND IN THE INTERESTS OF JUSTICE THAT IT BE HEARD

84. On 28 February 2019, the Portfolio Committee made a final decision not to renew Mr McBride's term, which decision must stand until reviewed and set aside.[56] Mr McBride has taken the Portfolio Committee's decision not to renew his term on review. However, Mr McBride's review application presupposes that the Portfolio Committee was entitled to make its decision in the first place. It does not deal with the interpretation of s6(3)(b) of the IPID Act - this issue having already been decided by the court *a quo* in rubberstamping the private settlement agreement reached by the respondents.

85. This appeal will determine the separate and objectively fundamental question of the constitutionality and lawfulness of the interpretation endorsed by the Hughes Order and Reasons. In other words, the issues raised in Mr McBride's review of

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

[56] See the sample of news articles attached as annex "RA1" to the HSF's replying affidavit in response to the Minister's answering affidavit before this Court.

the Portfolio Committee's decision are thus entirely irrelevant to the question of law on appeal before this Honourable Court.

86. That is not to say that the determination of the legal question by this Court will have no practical effect.

87. Not only will the legal conclusions by this Court guide future courts regarding the manner in which consent orders are endorsed in public law matters, and provide practical impacts for Parliament, the Minister and the Committee regarding future renewal and appointment of the head of IPID.

88. This Court's decision will also have a practical impact on Mr McBride's review application and any appeals arising therefrom.

89. And if the HSF is successful in these proceedings, the outcome of this appeal will be a death-knell to review proceedings in their entirety, as the legal underpinning for such proceedings will have been removed.

90. In any event, this Court – on account of the stance adopted by the court a quo – is faced directly with the question of an unconstitutionality in respect of IPID's interpretation and an unconstitutionality in relation to the manner in which that interpretation was given judicial endorsement in a settlement agreement. The jurisprudence on section 172(1)(a) of the Constitution is well settled – a court faced with an unconstitutionality must declare it so.[57]

91. An unconstitutional interpretation of the IPID Act cannot stand. Not only is the Hughes Order now a public pronouncement on the renewal process, but it will also

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[57] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para 52.

likely affect the functioning of IPID. IPID's officials will now have to consider themselves beholden to the political branches, whatever the decision of the Committee.

92. 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 this appeal will provide clarity on the place of *amici*, quite aside from 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.

93. 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.

94. This appeal is thus not moot as it will have a very clear practical effect - it will not only affect the review proceedings but will also - fundamentally - determine the manner by which the Executive Head of IPID is to be appointed or replaced.

95. Additionally, the Constitutional Court has held that "*to the extent that it may be argued that this dispute is moot . . . this Court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this Court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear*

the matter".[58] It is in the interests of justice, for the all the reasons mentioned above, that the appeal be heard (even if it is moot, which the HSF denies).

96. There is, moreover, an entirely separate basis for the appeal to be heard. That is on account of the order of costs made by Hughes J.

COSTS

97. Quite extraordinarily, Hughes J awarded costs to the Minister and Committee as a result of resisting the HSF's application for leave to appeal in the court *a quo*, despite no party seeking costs against the HSF in the leave to appeal application.

98. In addition, such an award is entirely contrary to *Biowatch*[59] in which it was held that an unsuccessful party in constitutional litigation against the state must be spared from paying the state's costs ("**the Biowatch principle**"). 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.[60] None of these circumstances existed 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 political and economic integrity of the country, is sufficiently

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[58] *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) at para 27. See also *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC).

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

[60] *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].

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. To do so would impose a chilling effect on constitutional and public interest litigation, reinterpret *amici* intervention in high profile constitutional matters and close the doors of the court to (or at the very least chill the efforts of) parties who have, thus far, made a valuable contribution to the Republic's constitutional jurisprudence.

99. The Court *a quo* thus manifestly misdirected itself in its award of costs against the HSF in the application for leave to appeal *a quo*, which warrants this Court's setting aside of the costs order.

CONCLUSION

100. In the circumstances, we pray that the HSF's appeal be upheld with costs and that the Hughes order be substituted with the order set out in the notice of appeal.

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17 March 2020