IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

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

In the matter between:

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

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THE MINISTER OF POLICE'S HEADS OF ARGUMENT

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INTRODUCTION AND THE FACTS

1 Near the end of his statutory five-year term, Mr McBride sued in urgent court for, amongst other things, an order directing the National Assembly's Portfolio Committee on Police to decide whether to renew his term.[1] Mr McBride's whole case was that section 6(3)(b) of the Independent Police Investigative Directorate Act[2] leaves renewability to the Portfolio Committee. He was the first to admit that the Act gives him "no statutory rights or entitlements" once his five years were up.[3] All agreed with this interpretation of section 6(3)(b). And because everyone agreed, there was, in Mr McBride's assessment, "(no longer) any dispute."[4] No live dispute meant no justiciable issue. Ours is, after all, a system of adversarial parties and, to use this Court's century-old words, "concrete controversies".[5] Without disagreement between the parties, there are neither adversarial parties nor concrete disputes.

2 Mr McBride, IPID, the Minister, and the Portfolio Committee agreed on the who (the Portfolio Committee) and the when (by 28 February) of renewal, and they recorded what they agreed in a written settlement

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

[2] Act 1 of 2011.

[3] Replying affidavit (to the Minister of Police); p 137, para 23.1.

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

[5] *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441.

agreement. The High Court made the settlement agreement an order of court.

3 HSF—not a party to the litigation, but an amicus—says the High Court was wrong.

4 HSF goes big, arguing that renewable terms are always unconstitutional. ("They are unconstitutional", HSF claims, in a few footnote-free words.[6]) But the HSF does not challenge the constitutionality of section 6(3)(b), and it never explains why.[7] Instead, HSF tries to fashion, through interpretation, this end result: though renewable terms "are unconstitutional", they are not *that* bad if we interpret some passive voice in section 6(3)(b) as giving the incumbent an irrevocable option to renew his own term.[8] On this interpretation, so the argument goes, when section 6(3)(b) says "such appointment … is renewable", it really means that the director has a right to renew his own term.

5 But that's not all. HSF even wants this Court to exercise Mr McBride's option for him, asking for an order that Mr McBride's term "is renewed".[9] No matter that Mr McBride—the dominus in all of this—disavowed

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[6] HSF's heads of argument; p 26, para 57.

[7] Maybe it's because a direct challenge would have the awkward result of leaving Mr McBride without a renewed term.

[8] HSF's heads of argument; p 27, para 64.

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

having a right to renew his own term time[10] and time[11] and time[12] again in the High Court. No matter, too, that not even HSF asked for this robust relief in High Court.[13]

6 Neither the text nor purpose of section 6(3)(b) supports HSF's interpretation. If Parliament intended to give IPID's director an irrevocable option to review his own term, it would have said so. HSF's interpretation also rests on a too-simple assumption that members of the National Assembly, like the executive, are mere "political actors".[14] The Constitution does not support applying this logic to terms renewable at the instance of the National Assembly or its committees.

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[10] Founding affidavit; record p 8, para 9 ("The decision whether to renew the appointment of the Executive Director is not one that the Minister is empowered to take. It is a decision that must be taken by the National Assembly's Portfolio Committee on Police").

[11] Founding affidavit; record p 10, para 14 ("I submit that whether my appointment is renewed is a decision that can only be taken by the Portfolio Committee").

[12] Founding affidavit; record p 10, para 16 ("I emphasise that I accept that I have no right to have my appointment renewed, nor any guarantee that the employment contract will be renewed."). See also replying affidavit (to the Minister); record p 137, para 23.1 ("I accept that, after my term expires, I have no statutory rights or entitlements. However, section 6(3)(b) does entitle me to have the renewal of my term in office considered and determined by the Portfolio Committee.").

[13] See, for example, founding affidavit in intervention application; record p 315, para 65; p 316, para 68.

[14] See, for example, HSF's heads of argument; p 19, para 51; p 21, para 53.

7 In the end, though, HSF's arguments are best left for another day. This appeal is a poor vehicle for them. The High Court's unremarkable order did not actually decide anything. Mr McBride got what he asked for: a decision by the Portfolio Committee, which he now reviews in a separate, pending review. *Oudekraal* means that this appeal will have no practical effect. The Portfolio Committee's decision stands unless it is set aside in Mr McBride's pending review, even if the decision's "legal underpinning … [is] removed", as HSF predicts.[15] HSF is free to raise these arguments in the review where, unlike here, there is a live and concrete dispute between adversarial parties.

8 These are the facts:

- Mr McBride was appointed IPID director in March 2014.[16] This was the "appointment" referred to in section 6 of the IPID Act: nomination by the Minister, confirmation by the Portfolio Committee.

- The Act gave Mr McBride a five-year term. His five years came to an end in February 2019.[17]

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[15] HSF's heads of argument; p 35, para 89. See, for example, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 99 ("[T]he absence of a jurisdictional fact does not make the action a nullity. It means only that the action is reviewable, usually on the grounds of lawfulness".).

[16] Founding affidavit; record p 6, para 4.

[17] Founding affidavit; record p 9, para 13.

- Section 6(3) of the Act says "such appointment … is renewable". About a month before his term expired, Mr McBride rushed to urgent court. He asked for two main things: one, an order declaring unlawful and setting aside the Minister's preliminary decision not to renew his term; and two, an order directing the Portfolio Committee to decide whether to renew his term.[18] Mr McBride rightly accepted that he had no right to a renewed term, but that it was up to the Portfolio Committee to decide.[19]

- Mr McBride was not met with much opposition. All the parties—Mr McBride, IPID, the Portfolio Committee, and the Minister—agreed that when section 6(3)(b) says "such appointment … is renewable", it means the Portfolio Committee is the one that decides whether to renew.[20]

- The Portfolio Committee undertook to make its decision before Mr McBride's term expired on 28 February 2019. There was, in short, no longer a live dispute. Mr McBride got what he asked for.

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[18] Notice of motion; record pp 1-2.

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

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

- The parties recorded their intentions in a settlement agreement, which was made an order of court.[21] The High Court's order did not interpret the IPID Act and did not direct the Portfolio Committee to do anything besides report on its progress.

- The Portfolio Committee decided not to renew Mr McBride's term. Mr McBride is reviewing the Portfolio Committee's decision in separate, pending proceedings.[22] HSF is cited as a party to the review—a significant status upgrade from this litigation, where it is just an amicus. Even in the review, Mr McBride's relief is more modest than what HSF asks for here: Mr McBride asks for the Portfolio Committee's decision to be set aside and remitted for a fresh decision (a fresh decision by the Portfolio Committee).[23]

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[21] High Court's order; record pp 325-326.

[22] In the Gauteng Division, under case number 13929/10.

[23] In the review notice of motion, issued on 28 February 2019, these are the two substantive prayers:

- "The decision of the [Portfolio Committee] not to renew the appointment of [Mr McBride] as the Executive Director of [IPID] is declared unlawful and invalid and is reviewed and set aside."
- "The decision is remitted to the [Portfolio Committee] for a fresh decision, which decision must be taken within 30 days of the date of this order."

9 HSF tries hard to repurpose Mr McBride's urgent litigation into something bigger about the IPID Act and the constitutionality of renewable terms of office. But what really happened in the High Court was more modest, and the High Court's order far less consequential—definitely not "precedent[ial]".[24] In short, HSF's quixotic appeal attacks something the High Court did not decide.

10 This Court should dismiss HSF's appeal for three independent reasons:

- The High Court's order is not appealable because it is not definitive of any party's rights and did not grant definite and distinct relief.
- Even if the order is technically appealable, an appeal will have no practical effect.
- Even if the order is appealable and even if some practical effect can be salvaged, the appeal should still be dismissed because HSF's interpretation of section 6(3)(b) has no basis in either the Constitution or the statute.

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[24] HSF's heads of argument; p 33, para 81.

THE HIGH COURT'S ORDER IS NOT APPEALABLE, NOR WILL THE APPEAL HAVE PRACTICAL EFFECT

11 HSF treats the High Court's order as having spoken the final word on section 6 of the IPID Act and the renewability of the IPID director's term,[25] describing the order with ominous labels like "binding"[26], "precedent[ial]",[27] and a "judicia[l] endorse[ment]".[28]

12 The labels attach too much consequence to the High Court's order. This is what the order says:[29]

> "[1] It is declared that the decision taken by the [Minister] not to renew the appointment of [Mr McBride] as the Executive Director of [IPID] is a preliminary decision that must still be confirmed or rejected by [the Portfolio Committee].
>
> [2] It is recorded that the [Portfolio Committee] intends to take a decision regarding the renewal of [Mr McBride's] appointment on or before 28 February 2019.

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[25] See, for example, HSF's heads of argument; p 4, para 10.

[26] HSF's heads of argument; p 1, para 1.

[27] HSF's heads of argument; p 33, para 81.

[28] HSF's heads of argument; p 17, para 46.

[29] High Court's order; record pp 325-326.

> [3] The matter is postponed to the urgent roll on 26 February [2019] and for that purpose
>
> [3.1] The [Portfolio Committee] will report on affidavit by 22 February 2019 on its progress on taking a decision regarding the renewal of [Mr McBride's] appointment; and
>
> [3.2] All parties will be entitled to make submissions to this Court on whether any further just and equitable orders should be granted, including but not limited to whether [the Portfolio Committee] should be given a further period to make a decision on the renewal of [Mr McBride's] appointment and whether [Mr McBride's] terms of office ought to be extended pending [the Portfolio Committee's] decision.
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> [4] There is no order as to costs."

13 The order did four things:

- First, the order declared that the Minister's preliminary decision not to renew Mr McBride's term was just that: a preliminary decision that the Portfolio Committee had to confirm or reject. The Minister, the Portfolio Committee, and Mr McBride all agreed the Minister

may make a preliminary recommendation to the Portfolio Committee.[30]

- Second, the order recorded what the Portfolio Committee intended to do: decide whether to renew Mr McBride's term, and to decide before 28 February 2019. That's *exactly* what Mr McBride asked for.[31]

- Third, a postponement.

- Fourth, costs.

14 Equally important is what the order did *not* do. It did not interpret the Act and does not set any "precedent".[32] It declared something over which there was no longer any dispute (paragraph [1]), recorded what the Portfolio Committee intended to—the very thing, recall, that Mr McBride came to court to ask for (paragraph [2]), and then did things courts routinely do: a postponement and a costs order (paragraphs [3] and [4]). The order does not even mention the Act, let alone decisively interpret section 6(3)(b).

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[30] See, for example:

- Minister's answering affidavit; record p 107, para 9; annexure "AA3" p 122 (at para 7).
- Replying affidavit (to the Minister); record p 127, para 4.
- Portfolio Committee's answering affidavit; record p 175, para 67.

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

[32] HSF's heads of argument; p 33, para 81.

15 Nor did the order define anyone's rights. It did not set aside any decisions, did not interpret any statutes, did not order anyone to do anything (besides a housekeeping obligation on the Portfolio Committee to report on its progress). Things would have worked out all the same without the order. After all, the parties ended up agreeing that it was for the Portfolio Committee to decide whether to renew Mr McBride's term. In Mr McBride's own words, by the time the parties arrived at court, there was "(no longer) any dispute" that "the final decision [on whether to renew Mr McBride's term] must be taken by the Portfolio Committee".[33]

16 And because everyone agreed that the renewal decision rested with the Portfolio Committee, the order did not change anything. Take it out the equation and nothing changes: the Portfolio Committee would still have considered, and decided against, renewing Mr McBride's term, and Mr McBride would still be reviewing the Portfolio Committee's decision.

17 The order also has no precedential value. HSF argues, for example, that "[t]he Minister's recommendation or preliminary decision is now a jurisdictional prerequisite for a renewal to be considered",[34] and that the High Court "already … decided" the interpretation of [section] 6(3)(b)".[35]

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[33] Replying affidavit (to the Minister); record p 127, paras 4-5.

[34] HSF's heads of argument; p 17, para 47.

[35] HSF's heads of argument; p 34, para 84.

18 The order does no such thing. From the start, Mr McBride asked that the Portfolio Committee be the one to decide renewal.[36] That wasn't some hard-fought concession negotiated on the courtroom steps. It was Mr McBride's case all along. In his founding affidavit, Mr McBride made it clear—again[37] and again[38] (and again[39])—that "[the decision to renew his term] must be taken by [the Portfolio Committee]".[40] What Mr McBride did not want was for the Minister to make the final decision. That's what he got.

19 The High Court's order does not endorse Mr McBride's interpretation of the Act. It does not even mention the Act, let alone finally "decid[e]" the proper interpretation of section 6(3)(b).[41] There's an easy fix if HSF disagrees with Mr McBride framed his case: HSF can challenge the Act in

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[36] Notice of motion; record p 2.

[37] Founding affidavit; record p 10, para 14 ("I submit that whether my appointment is renewed is a decision that can only be taken by the Portfolio Committee").

[38] Founding affidavit; record p 10, para 16 ("I emphasise that I accept that I have no right to have my appointment renewed, nor any guarantee that the employment contract will be renewed.").

[39] Founding affidavit; record p 19, para 31 ("[P]roperly construed it is the Portfolio Committee (as part of Parliament and being the body that decides whether to appoint the Executive Director) that is vested with the power to determine whether to renew the appointment of the Executive Director.").

[40] Founding affidavit; record p 8, para 9,

[41] HSF's heads of argument; p 34, para 84.

fresh proceedings, or raise these arguments in the pending review. The High Court's order does not stand in HSF's way.

20 The order recorded that the Portfolio Committee intended to make a decision. The Portfolio Committee later did just that. If the Portfolio Committee's decision was unlawful—for the reasons Mr McBride says in his pending review, or because, as HSF argues, section 6(3)(b) reserves renewal for the incumbent—then the proper avenue to challenge the decision is in the pending review. These are not technical arguments for their own sake; they go to the core of our party-driven adversarial system.[42]

21 This also means that the High Court's order is not appealable. To be appealable, an order must be "definitive of the rights of the parties" and must grant "definite and distinct relief".[43] The High Court's order did none of those things. It did not define Mr McBride's rights, did not interpret section 6(3)(b) of the Act, and did not order the Portfolio Committee to make a decision. The High Court's order, in short, made no difference.

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[42] *Geldenhuys* (note 5) at 441 ("(C)ourts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.").

[43] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532H-533B.

22 If a court order makes no difference, it cannot be "definitive of the rights of the parties" nor grant "definite and distinct relief".[44] This Court recently dismissed an appeal because it had "no direct effect on the final issue" in the case.[45] Just so here.

23 The appeal will also have no practical effect.[46] Just last year, this Court sounded a unanimous caution against judicial temptation "to decide an issue that may be of academic interest and the decision sought will have no practical effect or result."[47] This is surely one of those appeals.

24 To be sure, HSF's constitutional arguments about IPID's independence and the separation of powers may be interesting—"important", even.[48] But congested courts are not there to "decide issues of academic interest only."[49] None of this is new; a century ago, this Court cautioned against appeals for the sake of "pronounc[ing] upon abstract questions, or to

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[44] *Zweni* (note 43) at 532H-533B.

[45] *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd* 2019 JDR 0910 (SCA) at paras 4-5 (citing *Zweni* (note 43)).

[46] Under section 16(2)(a) of the Superior Courts Act 10 of 2013, this Court may dismiss an appeal "[w]hen at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result".

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

[48] *Geldenhuys* (note 5) at 441.

[49] *Legal Aid South Africa v Magidiwana* 2015 (2) SA 568 (SCA) at para 2 (leave to appeal dismissed in *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC)).

advise upon differing contentions, however important."[50] This is not only about avoiding a "dissipation of scarce judicial resources"—important as that is—but is "fundamental in the conception of the function of the court".[51]

25 It is not enough that an appeal will have some general public importance or will answer questions that may, someday, be worth answering. Rather, an appeal must "[affect] the position between the parties to the present dispute."[52] That is why, to use this Court's words, "[o]nce the parties have disposed of all disputed issues by agreement inter se, it must logically follow that nothing remains for a court to adjudicate upon and determine … [and] as a matter of principle there is no discretion for this court to exercise under s 16(2)(a)(i) of the[Superior Courts Act]."[53]

26 This appeal won't affect the parties "to the present dispute."[54] Whichever way the appeal goes, the Portfolio Committee's decision not to renew Mr McBride's term stands unless it is set aside in the pending review—entirely separate litigation. Indeed, the *Oudekraal* rule stands in the way

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[50] *Geldenhuys* (note 5) at 441.

[51] *Director-General Department of Home Affairs v Mukhamadiva* 2013 JDR 2860 (CC) at paras 34 and 39.

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

[53] *Magidiwana* (note 49) at para 22.

[54] *SA Metal Group* (note 52) at para 20.

of HSF's robust relief: for as long as the Portfolio Committee's decision is extant, this Court cannot renew Mr McBride's term.

27 Even a retreat to more modest relief would not give this appeal practical effect. Imagine HSF wins this appeal and asks only that the High Court's order is set aside without any consequential relief. That would take "the present dispute"—that is, Mr McBride's application—back to square one. That is, the "present dispute" would go back to Mr McBride asking for, to paraphrase his notice of motion, a direction that the Portfolio Committee decides, before 28 February 2019, whether to review his appointment as IPID director. Of course, that relief is now long moot; the Portfolio Committee already made its decision.

28 The right way to challenge the Portfolio Committee's decision is the pending review. It is there that, to use this Court's words, "the right remedy is sought by the right person in the right proceedings".[55] HSF is cited as a party in the review. All the arguments it raises here should properly be raised there. The only difference is this: the review has everything that this case lacks in a live dispute, between adversarial parties, on a properly ventilated record, with the potential of practical effect.

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[55] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 35.

29 Anticipating the practical difficulties that come with this appeal's extraordinary procedural posture, HSF tries to salvage some practical effect.[56]

30 First, HSF argues that a decision on section 6(3)(b) of the Act will affect Mr McBride's pending review.[57] But that is neither a "practical effect", nor one that is "on the facts of [this] particular case … necessary to decide".[58] A favourable decision for HSF in this appeal would be, at best, an "advisory opinion[n] on [an] abstract proposition[n] of law."[59] To be sure, armed with an advisory opinion, HSF would rush to the review to argue that the Portfolio Committee's decision should be set aside. But there's the rub: even if this Court's decision "remove[s] … the legal underpinning" of the review,[60] a win for HSF in this appeal does not, just like that, snuff out the review.[61] *Oudekraal* blocks that "shortcut".[62] The review is entirely separate litigation, and courts generally do not decide issues solely for their one-step-removed effect on separate litigation.

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[56] HSF's heads of argument; pp 34- 37, paras 84-96.

[57] HSF's heads of argument; p 35, paras 88-89.

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

[59] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21, note 18.

[60] HSF's heads of argument; p 35, para 89.

[61] HSF's heads of argument; p 35, para 89 (predicting that success on appeal would be a "death-knell to review proceedings in their entirety").

[62] *Kirland* (note 14) at para 68.

31 Next, HSF argues that this Court's decision will "guide" future courts on "consent orders … in public law matters" and "provide practical impacts" on "future renewal and appointment of the head of IPID".[63] But on HSF's own argument, *Big Five*, *Eke,* and *Buffalo City* are sure enough.[64] Nor is it enough for HSF to predict some future usefulness of a decision on section 6(3)(b). That would still amount to an advisory opinion on something best left for a live dispute—unlike in this litigation where, to use the dominus litis' words, "there is (no longer) any dispute."[65]

32 Finally, HSF argues that this appeal still has practical effect because "[the High Court's] unconstitutional interpretation of the IPID Act cannot stand" and because the order "applies an unconstitutional interpretation to the IPID Act … which directs high ranking officials to participate in and implement an unconstitutional process."[66] There is no basis for that extraordinary interpretation of the High Court's modest order. In short, the order did not interpret the Act and did not direct anyone to do anything, apart from requiring the Portfolio Committee to report on its progress.

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[63] HSF's heads of argument; p 35, para 87.

[64] See, for example, HSF's heads of argument; p 33, para 79 (quoting *Eke v Parsons* 2016 (3) SA 37 (CC) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC)). See also HSF's heads of argument; p 4, para 10 (citing *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC)).

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

[66] HSF's heads of argument; p 35, para 91.

33 In the end, even if HSF succeeds in this appeal, the position of the parties "will remain unaltered and the outcome, certainly as far as this case is concerned, will be a matter of complete indifference to [them]".[67] The interesting debates about renewable terms, international obligations, and the politicization of the National Assembly will, with respect, be just that: interesting debates with no practical effect.

34 For these reasons, this Court should dismiss the appeal, either because the High Court's order is not appealable—the dispute between Mr McBride and the respondents being moot—or because the appeal will have no practical effect.

HSF'S IRREVOCABLE-OPTION INTERPRETATION OF THE ACT STRAYS FAR FROM STATUTORY TEXT AND CONSTITUTIONAL PRINCIPLE

35 Section 6 of the IPID Act says the Minister nominates someone for "appointment" to director. The Portfolio Committee must then confirm or reject the Minister's nomination. If the Portfolio Committee confirms, the Minister's nominee is "appointed" director. Section 6(3)(b) then says: "such appointment is for a term of five years, which is renewable for one additional term only."

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[67] *Magidiwana* (note 49) at para 2.

36 The only sensible reading of section 6(3)(b) is that the power to renew rests with the Portfolio Committee. Arguing against text and plain meaning, HSF says we should read the passively voiced "renewable" as granting an incumbent director an irrevocable option to renew his own term

37 HSF tries this line of reasoning to bridge the wide gap between the text of section 6(3)(b) and its irrevocable-option interpretation:

- IPID needs to be independent from political interference.[68]
- A renewable term may expose an IPID director to political interference.[69]
- The National Assembly and its committees, like the executive, are "political bod[ies]".[70]
- To avoid political interference from political bodies, "renewable" in section 6(3)(b) should be interpreted as "renewable by the incumbent".[71]

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[68] See, for example, HSF's heads of argument; p 21, para 53.

[69] See, for example, HSF's heads of argument; p 26, para 57.

[70] See, for example, HSF's heads of argument; p 19, para 51.

[71] See, for example, HSF's heads of argument; p 27, para 64.

38 HSF does not argue that section 6(3)(b) is unconstitutional for giving IPID's director a renewable term. HSF instead tries to use *Hyundai* to reach an interpretive half-measure: section 6(3)(b) should be interpreted so that the incumbent director is the one who decides whether to renew his own term. This reduces HSF's case on renewable terms to renewable terms are bad, but not that bad if the incumbent gets to do the renewing. In this way, HSF interprets away the actual text of section 6(3)(b) to give the incumbent an irrevocable option to renew his term.

39 Of course, not even Mr McBride framed this case that way. From the get-go, Mr McBride accepted that he had no right to a renewed term, but that the decision rested with the Portfolio Committee.[72]

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[72] A few examples:

- Founding affidavit; record p 8, para 9 ("The decision whether to renew the appointment of the Executive Director is not one that the Minister is empowered to take. It is a decision that must be taken by the National Assembly's Portfolio Committee on Police").
- Founding affidavit; record p 10, para 14 ("I submit that whether my appointment is renewed is a decision that can only be taken by the Portfolio Committee").
- Founding affidavit; record p 10, para 16 ("I emphasise that I accept that I have no right to have my appointment renewed, nor any guarantee that the employment contract will be renewed.").
- Replying affidavit (to the Minister); record p 137, para 23.1 ("I accept that, after my term expires, I have no statutory rights or entitlements. However, section 6(3)(b) does entitle me to have the renewal of my term in office considered and determined by the Portfolio Committee.").

40 Be that as it may, HSF argues, relying on *Hyundai*, that to better promote IPID's independence, section 6(3)(b) must be interpreted as an irrevocable option to renew. *Hyundai* does not do away with statutory text. It is also not a basis to avoid a direct constitutional challenge. For *Hyundai* to apply, an interpretation should not be "unduly strained".[73] HSF's interpretation is just that: "unduly strained" and "not viable".[74]

The text

41 Section 6 reads, in relevant part:

> "6. Appointment of Executive Director
>
> (1) The Minister must nominate a suitably qualified person for appointment to the office of Executive Director to head the Directorate in accordance with a procedure to be determined by the Minister.
>
> (2) The relevant Parliamentary Committee must, within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.

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[73] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at para 24. See also *Democratic Alliance v Speaker, National Assembly* 2016 (3) SA 487 (CC) at para 33 (rejecting a similar "Hyundai-inspired interpretation" at "not viable").

[74] *Democratic Alliance* (note 73) at para 33.

(3) In the event of an appointment being confirmed-

(a) …

(b) such appointment is for a term of five years, which is renewable for one additional term only."

42 It is immediately apparent from subsections (1) and (2) that the Minister and the Portfolio Committee have an instrumental role in the appointment of the IPID director. This has two interpretive implications:

- Parliament never intended the appointment of an IPID director to be absolutely independent from the executive and legislative branches of government. This accords with what the Constitutional Court requires of independent institutions: adequate independence, not absolute or "insulat[ed]" independence.[75]

- Subsection 3(b) refers to "such appointment … , which is renewable". To any ordinary-meaning ear, the use of "such appointment" can mean only one thing: what is being renewed is the appointment referred to in subsections (1) and (2)—that is, the appointment made on the Minister's recommendation, confirmed by the Portfolio Committee. "[S]uch" means the renewal process must mirror the appointment process.

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[75] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 ("*Glenister II*") at para 216.

43 HSF's irrevocable-option interpretation places far too much interpretive faith in section 6(3)(b)'s passive voice. But Parliament does not "hide elephants in mouseholes".[76] Had Parliament intended to give the IPID director an irrevocable option to renew his term it would have said so. Indeed, had that been Parliament's intention, there would have been much simpler way to go about it: just give the IPID director a single term of ten years. It makes no sense for Parliament to instead have meant one five-year term, with the option of another five years.

The context and purpose

44 Constitutional purpose and design also stack against HSF's interpretation. In HSF's view, the Minister and the Portfolio Committee should play no role at all in renewing the IPID director's term.[77] Everyone agrees that IPID must be independent. But the point is to insulate IPID from the executive. The statute's current design fully achieves that purpose. Instead of detracting from independence, Parliament's multi-party system protects and safeguards IPID's independence. Parliamentary oversight also brings needed "political accountability."[78]

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[76] *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

[77] See, for example, HSF's heads of argument; p 27, para 64.

[78] *Glenister II* (note 75) at para 216. See also *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) at para 18.

45 To be sure, the *Glenister II* held that the head of the Hawks should be protected from "management" by "political actors".[79] But *Glenister II* said that about the executive, not Parliament. Quite the opposite of lumping together Parliament and the executive as the same bunch of "political actors" *Glenister II* makes clear that Parliament is the vehicle through which independence from the executive is assured and guaranteed:[80]

> "We appreciate that Parliament is unlikely to ignore its oversight role. But the provisions are nowhere designed to afford it as active an involvement in the functioning of the DPCI as that of the Ministerial Committee. In addition, the Ministerial Committee and the head of the DPCI have power to determine what the reports to Parliament contain. This is a significant power, which may weaken the capacity of Parliament to ensure a vigorously independent functioning DPCI."

46 From its start, the separation of powers has distinguished between the executive and legislative branches of government.[81] So too from our Constitution's start.[82] Even if a political party has sway in both, the line

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[79] *Glenister II* (note 75) at para 216.

[80] *Glenister II* (note 75) at para 242.

[81] Charles de Secondat, Baron De Montesquieu, *The Spirit of the Laws* (1748).

[82] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paras 108-109.

between the executive and the legislature cannot be so quickly erased, as *Glenister II* itself teaches:[83]

> "Under our constitutional scheme, Parliament operates as a counter-weight to the executive, and its committee system, in which diverse voices and views are represented across the spectrum of political views, assists in ensuring that questions are asked, that conduct is scrutinised and that motives are questioned."

47 Indeed, the take-home point from *Glenister II* is that *more* parliamentary oversight is the best medicine for independence, precisely because Parliament is, in our system of government, the counter-weight to executive power:[84]

> "Parliament's powers are insufficient to allow it to rectify the deficiencies of independence that flow from the extensive powers of the Ministerial Committee. This diluted level of oversight, in contrast to the high degree of involvement permitted to the Ministerial Committee in the functioning of the Directorate, cannot restore the level of independence taken at source."

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[83] *Glenister II* (note 75) at para 241.

[84] *Glenister II* (note 75) at para 241.

48 A few years later, and about this very Act, the Constitutional Court repeated its lesson that the *absence* of parliamentary oversight is a bad thing:[85]

> "It is axiomatic that public servants are government employees. They are beholden to government. They operate under government instructions and control. The authority to discipline and dismiss them vests in the relevant executive authority. This does not require parliamentary oversight. To subject the Executive Director of IPID to the same regime is to undermine or subvert his independence. It is not congruent with the Constitution."

49 Far from demanding the sort of isolation that HSF advocates, adequate structural independence envisages—requires, even—the National Assembly to be involved in the appointment and removal of the IPID director. Extension is part and parcel of appointment.

50 In this way, section 6(3)(b) does more than enough to protect the IPID director from the pressure of politics. After all, the most democratic and most directly accountable branch of government—the National Assembly—is the one that ultimately decides whether to renew the IPID director's term.

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[85] *McBride v Minister of Police* (CCT255/15) [2016] ZACC 30 (dealing with sections 6(3)(a) and 6(6) of the IPID Act).

51 For HSF, the National Assembly and its committees are not good enough. It repeatedly dismisses the National Assembly and the Portfolio Committee because the Committee "comprises majority members of the same political party as the Minister."[86] But this Court has already rejected this type of blunt and simple equivalence between members of the National Assembly and the political parties they represent.[87]

52 The Portfolio Committee is, in any event, far from a "political actor". Quite the opposite. The National Assembly is, after all, the only branch of government elected by the People. And as the People's representatives, members of the National Assembly must, as the Constitutional Court has held, put the People before the party.[88]

The cases

53 HSF's bad-political-actors logic has no support in any decisions of this Court or the Constitutional Court. HSF relies on the trio of *Glenister II*, *JASA*, and *Helen Suzman*,[89] but they are easily distinguishable because they dealt with terms of office renewable by the executive, not the National Assembly.

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[86] HSF's heads of argument; p 20, para 51.3; p 21, para 53.

[87] *Chairperson of the Nation Council of Provinces v Malema* 2016 (5) SA 335 (SCA) at para 20.

[88] *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC) at para 79.

[89] *Glenister II* (note 75); *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) ("*JASA*"); *Helen Suzman* (note 78).

- In *Glenister II*, a five-votes-to-four splintered Court held that the Hawks (formally, the Directorate for Priority Crime Investigation) was insufficiently independent. True enough, the majority noted in passing the risks of renewable terms and political pressures.[90] But the Court was dealing with a section of the police statute that gave *the Minister*—and the Minister alone—power to extend the term of the Hawks head.[91] *Glenister II* is no support for the same result when it is the National Assembly that decides renewal. If anything, *Glenister II* suggests the exact opposite. The majority compared the structural protections offered to the head of the Hawks to its predecessor, the Scorpions. While the President could remove the head of the Scorpions on specified grounds, the National Assembly had a veto.[92] The majority counted the National Assembly's oversight as one of the Scorpion's "special protection[s]" that "served to reduce the possibility that an individual member could be threatened—or could feel threatened—with removal for failing to yield to pressure in a politically unpopular investigation or prosecution."[93] In other words, the National Assembly's role in the Scorpions *supported*, not undermined, its independence. This reasoning cannot be squared

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[90] *Glenister II* (note 75) at para 223.

[91] Section 17CA(15) of the South African Police Service Act 68 of 1995.

[92] *Glenister II* (note 75) at para 225.

[93] *Glenister II* (note 75) at para 226.

with the starting point of HSF's *Hyundai* reasoning that the National Assembly is an independence-defeating political actor.

- *JASA* dealt with the President's statutory power to extend the term of the Chief Justice. The Court held the relevant section of the judges' remuneration statute unconstitutional, primarily because it was an unlawful delegation to the President of a power that section 176(1) of the Constitution reserves for Parliament.[94] The Court noted that Parliament plays a "significant role" in the "protection of judicial independence".[95] If the Court viewed parliamentary renewals with the same scepticism as HSF, the Court would surely have baulked at the very notion of Parliament having the power to extend a justice's term, even if section 176(1) of the Constitution allows it. To the contrary, going back to the Constitution's basic building blocks, the Court reaffirmed that Parliament is not the same as the executive.[96]

- *Helen Suzman* is similarly unhelpful. Its relevance here is what the Court said about the same section of the police statute as *Glenister II*—a term of office renewable by the executive, not the National Assembly.[97] Like *Glenister II*, the Court made clear that the standard

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[94] *JASA* (note 89) at para 62.

[95] *JASA* (note 89) at para 67.

[96] *JASA* (note 89) at para 32.

[97] *Helen Suzman* (note 78) at para 82.

for independent is "adequat[e] independent[ce]",[98] not "absolut[e]"[99] independence nor "insulation from political accountability."[100]

54 In the end, read in their full context, this trio of cases does not support treating the National Assembly as the Union Buildings by the sea.

The startling consequences

55 Apart from its lack of support in the cases, HSF's bad-political-actors logic has some startling consequences. The Judicial Services Commission, for example, suddenly becomes a politically dominated body that too, presumably, lacks independence.[101] On HSF's bad-political-actors logic, just like that, all of these very important institutions are no longer adequately independent:

- *The Electoral Commission*. Section 7 of the Electoral Commission Act 51 of 1996 allows the President, on the National Assembly's recommendation, to extend the seven-year term of office of a member of the Electoral Commission.

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[98] *Helen Suzman* (note 78)at para 9.

[99] *Helen Suzman* (note 78)at para 9.

[100] *Glenister II* (note 75) at para 216.

[101] The "political actors" would, on HSF's logic, be everyone listed in sections 178(1)(d), (h), (i), (j), and at least one of (k) of the Constitution, or sixteen out of twenty-five JSC members.

- *The Competition Commission*. Section 22 of the Competition Act 89 of 1998 allows the Minister to reappoint the Commissioner of the Competition Commission after expiry of an initial five-year term.

- *The Municipal Demarcation Board*. Section 9 of the Local Government: Municipal Demarcation Act 27 of 1998 allows a Demarcation Board member's term to be extended by the President, on the recommendation of a selection panel.

- *The Public Service Commission*. Section 4(5) of the Public Service Commission Act 46 of 1997 allows the President to the renew a commissioner's term of office on the recommendation of the National Assembly or the relevant provincial legislature.

- *ICASA*. Section 7 of the Independent Communications Authority of South Africa Act 13 of 2000 allows the Minister of Telecommunications to extend an ICASA councillor's term of office on the National Assembly's recommendation. Note here too that, like IPID, the independence of ICASA is also guaranteed in the Constitution.

- *CIPC*. Section 189 of the Companies Act 71 of 2008 states that the Commissioner of CIPC is appointed for an agreed term not to exceed five years, but may be reappointed after expiry of that term.

- *The Tax Board*. Section 111 of the Tax Administration Act 28 of 2011 states that the chairperson of the Tax Board serves for five years, and is eligible for reappointment "as the Minister thinks fit".

56 Consequences like that call for pause. Our separation of powers doctrine requires a degree of overlap between the branches of government.[102] To dismiss it all as politicians just doing what politicians do is, with respect, to turn the separation of powers into an unprecedented and constitutionally unsupported isolation of powers.

The foreign examples

57 That leaves HSF's resort to international law.[103] The treaties and reports it cites are broadly worded, like most international-law instruments are.

58 Specific foreign statutes are more helpful. Canada and New Zealand have equivalents of IPID. New Zealand has the Independent Police Conduct Authority, regulated by the Independent Police Conduct Authority Act 1988. And Canada has the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, regulated by the Royal Canadian Mounted Police Act 1985.[104] The executive members of these Canadian and

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[102] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paras 108-109.

[103] HSF's heads of argument; pp 24-26, para 56

[104] The New Zealand and Canadian statutes are included in the Minister's bundle of foreign statutes.

New Zealand IPIDs are appointed by Canadian and New Zealand "political actors", as HSF would presumably describe them.

- In New Zealand, the members of the Independent Police Conduct Authority are appointed "by the Governor-General on the recommendation of the House of Representatives". So is the Authority's chairperson. And a member may be reappointed by the Governor-General.

- In Canada, members of the Civilian Review and Complaints Commission are "appointed by the Governor in Council". The Governor in Council is a political appointment made by the Governor General on the advice of the Canadian cabinet. The Commission's chairperson is also appointed by the Governor in Council, and any member can be reappointed.

59 On Transparency International's latest corruption rankings, Canada is the twelfth least-corrupt country in the world. New Zealand tied for least.[105] On that measure, section 6(3)(b) of the IPID Act measures up well with the international gold standard.

60 For these reasons, there is no textual or purposive basis for HSF's roundabout reading of section 6(3)(b).

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[105] Transparency International *Corruption Perceptions Index 2019*, available at: https://tinyurl.com/wgu3kpg.

THE HIGH COURT DID NOT ERR IN MAKING ITS ORDER

61 There was nothing wrong with the High Court's procedure. HSF argues that the High Court got it wrong because the Court did not do what the Constitutional Court instructs about settlement orders and orders and judgments in rem.[106]

62 The premise of this argument is that the High Court's order is a judgment *in rem*. It isn't. And because it isn't, the cases HSF relies on are easily distinguishable.

63 Start with *Big Five*. *Big Five* was all about a judgment *in rem*, or a judgment that, to use the Constitutional Court's words, "determines the objective status of a person or thing."[107] The High Court's judgment in *Big Five* ticked the *in-rem* box because it set aside a tender.[108] Similarly, the High Court's judgment in *Eke* was a judgment *in rem* because it bound the defendant to all manner of obligations.[109]

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

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[106] HSF's heads of argument; p 4, para 10; p 33, para 79.

[107] *Big Five* (note 64) at para 2.

[108] *Big Five* (note 64) at para 6.

[109] *Eke* (note 64) at para 3.

65 *Big Five* and *Eke* also say nothing about whether an amicus may disrupt a settlement agreement—let alone whether an amicus may foist relief on a party who never asked for it, like HSF now tries to do on appeal. In both *Big Five* and *Eke*, the validity of the settlement agreement was raised by one of the parties. In other words, there was in both *Big Five* and *Eke* what is missing here: a live controversy between adversarial parties. There is no longer any dispute here, as Mr McBride himself acknowledged.[110]

66 As for the High Court's costs order, HSF does not come close to meeting the high standard for appellate interference with a trial court's decision on costs—the heartland of trial-court discretion.[111]

67 At best, HSF complains that the High Court incorrectly applied *Biowatch*. But *Biowatch* has never been a blank cheque for amici litigation on, in the end, the taxpayers' dime. Or, to use the Constitutional Court's words, *Biowatch* is no licence for "risk-free constitutional litigation."[112]

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

[111] See, for example, *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC) at paras 85-88.

[112] *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) at para 18.

68 Here, HSF joined the fray to try resuscitate an already *lis*-less case.[113] And HSF persists with this now zombie-like litigation despite there being, to use Mr McBride's words, "(no longer) any dispute".[114] There is no reason to "immunise [HSF] from a judicially considered, discretionarily imposed adverse costs order."[115]

CONCLUSION

69 This Court should dismiss the appeal with costs, including the costs of two counsel.

TEMBEKA NGCUKAITOBI SC
JASON MITCHELL

Counsel for the Minister of Police
15 April 2020

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[113] *Magidiwana* (note 49) at para 20 ("The practical effect of the settlement agreement is that there is no longer any dispute or *lis* between the parties.).

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

[115] *Lawyers for Human Rights* (note 112) at para 26.

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