IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 1065/2019

GP Case No.: 6175/19

In the matter between:

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

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FOURTH RESPONDENT'S HEADS OF ARGUMENT
(PORTFOLIO COMMITTEE ON POLICE NATIONAL ASSEMBLY)

Contents:

INTRODUCTION

1. Despite the sound and fury generated by the Helen Suzman Foundation ("**HSF**" or "**the Appellant**") that its appeal raises questions of constitutional significance, nothing could be further from the truth.

2. As properly appreciated by the Court *a quo*, the appellant's persistence in this appeal is to seek substantive relief that would have the effect of amending legislation contrary to the express intention of the Legislature, and in circumstances where none of the parties (including the applicant in the Court *a quo*) have had the opportunity of meaningfully engaging with same.[1]

3. Setting aside the Portfolio Committee on Police's ("**the PCP**") concerns regarding the appropriateness of an appeal court determining a constitutional challenge for the first time on appeal, and the implications arising therefrom when regard is had to the appropriate role played by the Court pursuant to the Separation of Powers doctrine, the HSF's appeal faces two further insurmountable hurdles.

   3.1. The highwater mark of the HSF's case is that our Courts' jurisprudence, on their version, in truth, supports complete

[1] See, for example, Appeal Record: Vol 1, Cele AA pp 106-107 paras 4-9. Also see Appeal Record: Vol 3 - Reasons for Order pp 329-333 at paras 5, 13-14 and 16.

independence for organs of state such as the second respondent ("**Independent Police Investigative Directorate**" or "**IPID**").

3.1.1. The logical conclusion of the HSF's argument is that "adequate independence" necessitates the removal of a political actor such as the PCP having any role to play in holding organs of state such as IPID accountable.

3.1.2. Not only has the HSF committed a categorical error in this regard (by failing to appreciate that the jurisprudence relied upon was concerned with undue political interference stemming from the Executive), it self-servingly overlooks the fact that the cases it relies on prove that Parliament plays an essential role in protecting the independence of IPID.[2]

3.1.3. Indeed what is remarkable about the argument of HSF is that it seeks to preclude Parliament, as a "political actor" completely in the extension of the term of the IPID Head. There is no provision in the Constitution that it can point to warranting such a radical

[2] See, for example, HSF Heads of Argument ("**HSF HoA**"), pp 1 – 2, para 2. The HSF's eliding the distinction between the Court's jurisprudence between the Executive, on one hand, and Parliament, on the other, is unsustainable.

proposition. Not even the tenure of Constitutional Court judges is protected in the manner contended for – the total exclusion of Parliament, as "political actor". In fact, as section 176(1) provides, Constitutional Court judges hold office for a specified period "except where an Act of Parliament extends the term of office of a Constitutional Court judge."

3.1.4. Thus, Parliament may, as "political actor", pass legislation to extend terms of office of Constitutional Court judges. Notably, it is not the manner of extension – Parliamentary discretion versus legislative determination – that is at the heart of the complaint. HSF wants the total exclusion of Parliament because it is comprised of ANC politicians, and the Minister is also an ANC politician. HSF wants the holder of office to extend his own term of office. The point is that the role of Parliament, as "political actor", in extensions of terms of office is recognised even in respect of Constitutional Court justices. It is absurd to argue that the mere possibility that terms of office of Constitutional Court justices right now can be extended

at the discretion of Parliament by legislation – say as reward for "good behaviour"—would render them pliable to political manipulation, thus eroding judicial independence.

3.1.5. When the provisions of section 176(1) came up for consideration before the Constitutional Court, the Court emphasised the role of Parliament in protecting judicial independence:

> "*It is notable that section 176(1) does not merely bestow a legislative power, but by doing so also marks out Parliament's significant role in the separation of powers and protection of judicial independence.*" [3]

3.1.6. What underlies the HSF's difficulties in these proceedings is that, taken to its logical conclusion, it actually mounts an attack on renewable terms of office. Yet when one strips the case bare, it appears that the real underlying point is to keep Mr McBride in office

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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) para 67.

by vesting on him the right to renew, rather than Parliament.[4]

3.2. Notwithstanding its fundamental errors on the law, the HSF's relief is also incompetent to the extent that:

3.2.1. It *mero motu,* and for the first time on appeal, seeks an extension to the first respondent's term of office. This is improper.[5]

3.2.2. Flowing therefrom, it seeks to invalidate the decision taken by the third respondent ("**the Minister of Police**" or "**the Minister**") to appoint an acting executive director of IPID in circumstances where that decision has not been challenged, let alone reviewed or set aside.

3.2.3. The HSF furthermore seeks binding relief from this Court that would amount to "reading in" words to section 6(3)(b) of the IPID Act, 1 of 2011 ("**the Act"**), fundamentally altering its meaning in circumstances where no relief to this effect has properly been sought by the HSF either in this Court or the Court *a quo*.

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4 Appeal Record: Vol 2, HSF FA: pp 307-308 para 38.

5 Appeal Record: Vol 3, Letter from State Attorney, p 374 paras 5-7.

4. For these reasons, the PCP contends that the HSF's appeal must be dismissed. Furthermore, and as demonstrated in these heads of argument, it is abusive, meaning that should the appeal be dismissed the HSF ought to be mulcted with costs on the ordinary scale.

THE HSF'S CASE IS WRONG ON THE MERITS

5. Although the PCP persists in its argument, developed further below, that the HSF's appeal ought to be dismissed for reasons arising from the improper way in which it has been prosecuted, the PCP will, for the sake of convenience, address the "merits" of the HSF's case.

6. In doing so the PCP shall demonstrate that, even on its most generous interpretation, the HSF is wrong on all scores.

7. The HSF's arguments before this Court can be summarised as follows:

    7.1. First, it contends that the settlement agreement reached by the parties in, and subsequently approved by, the Court *a quo* is a judgment *in rem* and now creates a binding precedent that the Minister is empowered to make a preliminary decision, which

decision is contrary to the established jurisprudence regarding adequate independence.[6]

7.2. Second, and extrapolating therefrom, the HSF contends that because the PCP is a political actor, and furthermore, that the majority of its members belong to the same political party as the Minister, that any participation of the PCP in the renewal process is axiomatically tainted by "politics" and is therefore unlawful.[7]

7.3. Third, given that neither the Minister nor the PCP, on the HSF's version, is permitted to participate in the renewal process the right of renewal must vest in the incumbent whose determination in respect of their incumbency is what is legally permissible.

The Minister's preliminary decision

8. The HSF contends that the Minister's preliminary decision is now a judicial prerequisite or jurisdictional fact that triggers the renewal process.

9. The HSF further contends that this preliminary decision-making process is open to abuse on account of the fact that the Minister may deliberately delay in making such a decision and accordingly artificially create a vacancy

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6 See, for example, Appeal Record: Vol 3, HSF Application for leave to appeal, p 337 para 1.4.

7 This argument is spurious and ignores how Parliament works the world over. See, for example, HSF HOA, p 5, para 12.3.

which the Minister may then fill, exercising the powers afforded to him under section 6(4) of the Act.

10. Notwithstanding that the HSF does not challenge section 6(4) of the Act in these proceedings, meaning that its arguments on this score, which may be interesting but are irrelevant, it has simply missed the mark in respect of what the settlement agreement actually did.[8]

11. First, the settlement agreement did no more than clarify that the Minister's "preliminary decision" was not the final decision regarding the possible renewal of the first respondent's term of office.

11.1. In other words, it did no more than clarify that it is the PCP and not the Minister who makes the final decision regarding renewal.

11.2. To the extent that the Minister's "preliminary decision" is regarded as such, the fact that it is subject to either confirmation or rejection by the PCP demonstrates, with respect, that nothing turns on it.

11.3. As the Speaker of Parliament has already clarified, the Minister's "preliminary decision" is in respect of his view *qua* Minister which

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[8] Respectfully, the HSF's reliance on *Airport Company South Africa v Big Five Duty Free (Pty) Ltd and Others* (CCT257/71) [2018] ZACC 33 (27 September 2018) is inapposite. See, for example, Pleadings Bundle: Committee AA, pp 16 – 17, para 40. See, also, HSF HOA, p 9, para 26.1.

is then on-sent to the PCP having no influence or weight than the feed-back that the PCP would receive pursuant to any public consultation process.[9]

11.4. The settlement agreement did no more than clarify the status of the Minister's "preliminary decision" as being exactly that. Ironically, the effect of this settlement order achieves the outcome sought by the HSF in this appeal, namely that the Minister's preliminary decision is not determinative of the question of renewal.

12. Second, the HSF's arguments regarding the potential abuse by the Minister in delaying taking a "preliminary decision" in order to create a vacancy such that he may appoint an acting executive director of IPID pursuant to section 6(4) of the Act, is speculative and simply mistaken.

12.1. As the HSF has already identified in its heads of argument, this Court's decision ought not to be influenced by the presupposition that the law will necessarily be abused.

12.2. If anything, the HSF's arguments regarding the potential for abuse arising from the issues it purportedly identifies with section 6(4) of the Act is more appropriately adjudicated in a potential challenge

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[9] See, for example, Pleadings Bundle: Committee AA, p 13, para 36.

to that section. The possible illegality arising from the abuse of that section is of no assistance vis-a-vis the correct renewing authority.

12.3. In any event, the PCP's power to renew is not triggered by the Minister's "preliminary decision" but is instead triggered by the fact that the executive director of IPID is appointed for a 5-year term that may be renewed once.[10]

12.4. This means that the PCP's powers of renewal is not activated by the Minister's "preliminary decision" but is instead activated by the incumbent's right to have a renewal decision made (regardless of whether it is favourable or not) when the term of office expires by effluxion of time.

12.5. The PCP's powers therefore can be exercised regardless of whether the Minister makes a "preliminary decision", but, as the parties in the Court *a quo* recognised, the Minister would still have a right to make his views known to the PCP as the ultimate renewing authority. No evidence exists that the PCP considered itself bound by the views of the Minister. If it did, it would be acting contrary to its lawful mandate.

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[10] The HSF's reliance on *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) is inapposite. The interpretation is not a subjective one of Parliament but an objective one created by the legislation itself.

13. In consequence, the HSF's arguments regarding the characterisation of the settlement agreement, after having received the approval of the Court *a quo*, is simply mistaken.

14. The Court *a quo's* approval simply served to settle the *lis* between the parties – being about the status of the Minister's "preliminary decision", and not the PCP's powers – and did not amount to a judgment *in rem*.[11]

15. Try as the HSF might, its attempts to elevate the Court *a quo's* decision in respect of the settlement agreement to having some magical precedential value is without merit.[12]

The HSF is wrong on political involvement

16. Once the Court properly appreciates that the Minister's "preliminary decision" is not a decision having legal effect in the proper sense, the Court will appreciate that the HSF's arguments on this score amount to nothing short of shadow-boxing.[13]

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11 Appeal Record: Vol 3, Reasons for Dismissing, Application for leave to appeal, p 361 paras 11 and 12.

12 See, for example, HSF HOA, p 3, para 5. The parties in the Court *a quo* are accused of having reached a "*private mechanism*" that determines the independence of IPID. They did no such thing.

13 Appeal Record: Vol 2, HSF FA: p 316 para 70.

17. All of the parties in the Court a quo, including the Minister, accept, following our Court's line of decisions in *Glenister v The President of the Republic of South Africa and Others*,[14] and *Helen Suzman Foundation*,[15] that it would be inappropriate for the executive to have untrammelled or unqualified powers in respect of the work done by an organ of state such as IPID.

18. The HSF mistakenly attempts to emphasise this point because it hopes to attack all forms of political involvement in the work done by IPID.

19. Without more, the HSF attempts to improperly extrapolate our Courts' reasoning in *Glenister* and *Helen Suzman Foundation* to mean that any political involvement, including that of the PCP, is impermissible.[16]

20. The crux of the HSF's case on this score seems to be that because the Minister and the majority of its members belong to the same political party, it means that the PCP's the decision-making processes would be, or is, open

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14 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC). Importantly, in this case, the HSF was admitted as an *amicus curiae* to a live dispute and sought substantive relief in that capacity. They also submitted new arguments in respect of the same relief sought by the applicant, Mr Glenister. The same is not true here.

15 *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

16 Appeal Record: Vol 2, HSF FA: p 306 para 30

to abuse not transparent, unaccountable, and improperly influenced by partisan political reasons.[17]

21. But the very authorities it relies upon demonstrates the exact opposite to be true. Our Courts have accepted that Parliament, as the representative body of the people of South Africa, has a legitimate role to play in holding all organs of state accountable and that fact that it is "political", without more, does not deny it the legitimate role it plays in our constitutional landscape.[18]

22. The fundamental problem identified by the HSF with a renewal power vesting in the hands of the PCP, is that it in some way incentivizes the incumbent to curry favour with its members; and so the argument goes, giving such powers to Parliament, is *ipso facto* unlawful.

23. What the HSF fails to appreciate is this:

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[17] But the political nature of the Committee is undoubtedly there when the Executive Director is appointed too. Putting aside for a moment that this is how Parliament in a democracy works (accepted in *Glenister* and *Helen Suzman Foundation*), the HSF's silence on this is telling: the logical conclusion of their mistaken arguments is that *any* political involvement must be removed which is total not adequate independence – a point our Courts have repeatedly rejected. Indeed, how the HSF expects someone like the Executive Director to be appointed – or renewed – or removed – at all, without Parliament's involvement, is unknown. See, for example, HSF HOA, p 20, para 51.3.

[18] The HSF in these proceedings attempts to rely on international law obligations to justify why this Court ought to prefer this interpretation but international law is only applicable to the extent that our international law obligations are consistent with our domestic constitutional obligations as interpreted by our Courts. See – Appeal Record: Vol 3 HSF Application for leave to appeal, pp 343-345 para 4.

23.1. Firstly, the Constitutional Court has already rejected the isolation of anti-corruption entities. In fact, the Constitutional Court endorses the position that in a democracy like South Africa, it is proper that Parliament exercise democratic oversight over other organs of state as part of its accountability mandate, but also to improve their independence.[19]

23.2. Secondly, the HSF overlooks that the Constitutional Court's previous jurisprudence sought to limit the concentration of power in the Executive Branch.[20]

24. In *Glenister*,[21] the majority, per Cameron J and Moseneke DCJ, held as follows:

"216. The second general point we make is that adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible. And it would be averse to our uniquely South African constitutional structure. What is required is not insulation from political accountability, but only insulation from a degree of management by political actors that

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19 This is evident from the first respondent's concession that political interference may arise *vis-a-vis* the Minister and not the Committee. See, for example Appeal Record Vol 2: McBride RA to the Minister: pp 192-193 para 23.

20 The first respondent as applicant in the Court *a quo*, appreciated that undue political interference stems from the Executive and not from Parliament. See, for example, Appeal Record: Vol 1: McBride FA, pp 12-20 paras 18-35.

21 *Glenister* above.

threatens imminently to stifle the independent functioning and operations of the unit."

...

"239. The new provisions require parliamentary oversight of the DPCI.227 In addition, the National Commissioner must submit an annual report to Parliament.228 And the head of the DPCI must at any time when requested by Parliament submit a report on the DPCI's activities.229 These are beneficial provisions. Under our constitutional scheme, Parliament operates as a counter-weight to the executive, and its committee system,230 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."

25. The PCP's ability consider the incumbent's renewal of office falls squarely within the Legislature's ongoing oversight role as foreshadowed above.

26. In *Helen Suzman Foundation v President of the Republic of South Africa and Others*,[22] the majority (per Mogoeng CJ), following the Court's earlier decision in *Glenister*, held as follows:

"[96] What could compromise the operational independence of the DPCI in relation to national priority offences, is the role of the all-important ministerial policy guidelines in determining the functions of the DPCI.[82] The power to issue policy guidelines for the operation of the DPCI has already been found to create "a plain risk of executive and political influence on investigations and on the entity's functioning."[83]

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22 *Helen Suzman Foundation* above.

> That these policy guidelines were previously issued by a Ministerial Committee and now by the Minister of Police alone, does not really subtract from the gravity of these concerns. They are all political actors whose role in influencing the functional activities of the DPCI is very likely to undermine its independence. The power to determine these guidelines is as untrammelled and objectionable under a single Minister as it was under a Committee of Ministers. It is as open now as it was before, to limit the class of national priority offences the DPCI is to confine itself to or to identify public office-bearers the DPCI is not allowed to investigate. [84] This time, a single senior politician is given the authority "to determine the limits, outlines and contents of the new entity's work. That . . . is inimical to independence." [85] The removal of the hands-on supervisory role of the Ministerial Committee has done very little, if anything, to minimise the threat to the institutional independence of the DPCI."

27. And in *McBride v Minister of Police (Helen Suzman Foundation amicus curiae)*,[23] the Court said that, with respect to vesting power in the Minister only:

> "[38] On the other hand, section 6 of the IPID Act gives the Minister enormous political powers and control over the Executive Director of IPID. It gives the Minister the power to remove the Executive Director of IPID from his office without parliamentary oversight. This is 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 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

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[23] *McBride v Minister of Police (Helen Suzman Foundation amicus curiae)* 2016 (2) SACR 585 (CC).

> 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."

28. These judgments dispose of the HSF's arguments regarding what it contends to be the constitutionally compliant interpretation of section 6(3)(b) of the Act.

Parliament role not incompatible with independence in international law

29. HSF's arguments have no basis in international law. International law does not contemplate the exclusion of Parliament. Like our system, international law does not suggest that Parliament's role is necessarily incompatible with independence.

30. The Commonwealth Human Rights Initiative report on Police Accountability ("the CHRI Report") states as follows:

> "*Much of how effectively [independent police oversight bodies] perform their functions depends on how truly separate they are from police and executive influence, and how autonomous and well embedded their status is in the country's legal architecture. Their effectiveness also depends upon the width and clarity of their mandate, the scope of their investigative powers … and the adequacy and sources of financing. The main purpose of setting up [independent police oversight bodies] is to ensure that complaints against the police will not be influenced in an untoward or biased manner, particularly by the executive. Independence is determined by the extent to which the body is at arms' length from the executive and the police. Firm constitutional or statutory underpinnings that clearly lay out jurisdiction, purpose and parameters, such as in South Africa*

and Ghana, protect the body from political whim."[24]

31. The United Nations' Handbook on Police Accountability, Oversight and Integrity, 2011 ("the UN Handbook") provides an overview of international best practice as regards police oversight.

32. The UN Handbook acknowledges that political interference may pose a threat to professional and impartial policing with integrity, and that the principle safeguard against undue influence is to have "*clear and transparent procedures defining appropriate government control. As an absolute minimum, the State must refrain from interfering in specific operational decisions*."[25] (Our emphasis.)

33. The UN Handbook then provides the following guidelines to address the potential risk of political interference in the operations and functions of oversight bodies:

> "*Establishment of a separate parliamentary committee overseeing police and/or security matters*
>
> *Ensuring that only appointments of the highest rank or ranks are subject to political control with all other appointments is an internal matter to be decided by police management; specific statement of the difference in law*
>
> *Clear and transparent selection and dismissal criteria with regard to* appointments *that are subject to political control*". [26] (Our emphasis.)

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[24] Commonwealth Human Rights Initiative Report on 'Police Accountability: Too important to neglect, too urgent to delay' (2005), pp 63 to 64

[25] UN Handbook p 100

[26] UN Handbook p 100

34. Like the CHRI Report, the UN Handbook suggests that "*effective police accountability*" includes "*an independent body that has complete discretion in the exercise of its functions and powers, has a statutory underpinning and* independent *and sufficient funding, reports directly to parliament and whose commissioners and staff are transparently appointed*".[27] (Our emphasis.)

35. The independent body must accordingly "*be transparent in its operations and be held accountable, usually to the Parliament or a committee of elected representatives*.[28] (Our emphasis.)

36. The UN Handbook goes on to give content to the principle of the institutional independence of police oversight bodies as follows:

> "*The mechanism should have full operational and hierarchical independence from the police and be free from executive or political influence.*
>
> *…*
>
> *The agency should be established constitutionally or created through legislation.*
>
> *The agency's members should be democratically appointed following consultation with or approval by the legislature, and should have the security of tenure.*
>
> *Financial independence should be secured by having the agency's budget approved by the legislature, with statutory guarantees*".[29] (Our emphasis.)

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27 UN Handbook p 70

28 UN Handbook p 68

29 UN Handbook p 70

37. Against the backdrop of these principles, the UN Handbook audits a host of institutions worldwide established for the purposes of investigating police conduct. South Africa is ranked *first* among those nations whose legislated police oversight bodies are considered "*fully independent*".[30]

38. While the UN Handbook and CHRI Report are silent on the requirements for security of tenure, the EPAC Police Oversight Principles provide that "[*e*]*ach person in charge of governance and control of police oversight body should have security of tenure and should be initially appointed for a minimum of 5 years. The tenure should last for a maximum of 12 years*." [31] At the level of international law, renewable terms of office are therefore not inimical the institutional independence of police oversight bodies.

39. Finally, we refer to the OECD DAC Handbook on Security System Reform ("the OECD Handbook"). It contemplates multiple levels of democratic oversight and accountability for security forces, premised on the principles of *"transparency, responsibility, participation and responsiveness of citizens.*"[32] In relation to the complementary control and oversight functions of the branches of government and independent agencies, the OECD Handbook assigns:

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30 UN handbook p 58

31 Clause 2.2.5, European Partners Against Corruption: Police Oversight Principles (November 2011)

32 The Organisation for Economic Co-operation and Development (OECD) DAC Handbook on Security System Reform: Supporting Security and Justice, OECD Publishing, Paris (2008) at p 112.

39.1. To the Executive: "*Ultimate command authority; setting basic policies, priorities and procedures; selecting and retaining senior* personnel*; reporting mechanisms; budget-management; powers to investigate claims of abuses and failures"*

39.2. To the Legislature: "*hearings;* budget *approval; investigations;* enacting *laws; visiting and inspecting facilities; and subpoena powers.*

39.3. And to independent oversight bodies, the "*receiving of* complaints *from the public ... investigating claims of failures and abuses;* ensuring *compliance with policy and the rule of law.*"[33] (Our emphasis.)

40. *The* OECD Handbook further recommends that independent police oversight bodies *"should function on the basis of statutory law, and report to parliament and the minister concerned directly*".[34] (Our emphasis.)

41. In summary, the attributes of independence required of an independent police oversight body are:

41.1. establishment by a constitution or creation through legislation;

41.2. An *adequate degree of operational and hierarchical* independence from the police and the executive to prevent political influence,

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[33] OECD Handbook 113

[34] OECD Handbook 115

with *complete discretion* in the exercise of its functions and powers;

41.3. *Clear and transparent* selection and dismissal criteria with regard to appointments that are subject to political control, and *security of tenure*;

41.4. independent and sufficient funding and resources; and

41.5. Accountability in the form of reporting to Parliament.

No basis to allow the incumbent power to renew own term

42. Even if the HSF was correct regarding its interpretation, which is denied, it is curious to note that the first respondent does not support it.[35] By contrast the first respondent has always accepted that he has no right to reappointment, nor that he has any right to automatic renewal.[36]

43. Importantly, the HSF's relief must be rejected because:

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35 Appeal Record: NOM, p 2 para 4. The first respondent's constitutional attack on sections 6(3)(b) of the Act was not only conditional it was also directed at clarifying that the Minister did not take a final decision regarding the renewal of first respondent's term of office. Also see Appeal Record: Vol 1, McBride FA: p 10 para 16.

36 See, for example Appeal Record: Vol 2, PCP AA: pp 168-169 paras 39 – 42.

43.1. there is no direct challenge to the constitutionality of section 6(3)(b) of the Act. This means that the HSF's interpretative arguments cannot be upheld by this Court on appeal;

43.2. Even if there were such a direct challenge, the HSF invites this Court to read in words to the statute which would fundamentally change its meaning. This Court was recently overturned on appeal by the Constitutional Court when it purported to do something similar by reading in words into the Intimidation Act, 72 of 1982 in order to make it constitutionally compliant.[37]

43.3. In that case, the Constitutional Court, in essence, found that a substantial reading in of words into a statute in order to render it constitutionally compliant was inappropriate. Instead, the Court ought to strike it down coupled, for example, with a suspension of its declaration of invalidity.

43.4. The Constitutional Court specifically cautioned against a court stepping into the role of the Legislature by effectively causing substantive amendments to a statute under the auspices of a reading in order.

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37 *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* 2020 (1) SACR 373 (CC) at paras [50]-[62].

43.5. Significantly, as pointed out further below, no party, including the HSF, seeks a declaration of invalidity and/or "reading in" relief meaning that, at the very least, the HSF's interpretative arguments are not justiciable.

43.6. This is over and above the fact that they are wrong.

43.7. Furthermore, if the HSF's arguments were correct, it would amount to converting a single five-year term, subject to one renewal, into a ten-year term. This is, with respect, clearly at odds with the Legislature's intention.[38]

43.8. As an aside, we point out that no other constitutional office bearer would enjoy such terms of office.

THE DEFECTS WITH THE HSF'S APPEAL

44. Although the PCP has addressed the merits above, we are of the view that any of the defects highlighted below serve to render the HSF's appeal fatally flawed warranting its dismissal. The PCP further submits that any one of these defects can dispose of the appeal without the Court needing to address the merits as discussed above.

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[38] See, for example, Appeal Record: Vol 1, McBride FA; p 8 para 9.

New relief improperly sought for the first time on appeal

45. In its notice of appeal the HSF purports to ask this Court to grant an order that the first respondent's term of office is extended for another five years.

46. Not only did the HSF not seek this relief in the Court a quo, it is also significant that the first respondent (as applicant) did not seek that his term of office be extended and only sought that a decision be made.

47. Indeed, even after the PCP chose not to renew his term of office, the first respondent has launched separate review proceedings attacking the PCP's decision wherein he does not seek a substitution order extending his term of office by judicial decree.

48. Instead, he properly seeks that if the PCP committed a reviewable error in failing to renew his term of office, that such decision be remitted to the PCP for reconsideration.[39]

49. In other words, the first respondent as the subject of the renewal decision, does not seek the extraordinary remedy of substitution that the HFS now seeks on his behalf which, perplexingly it purports to seek as an *amicus curiae*.

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[39] Pleadings Bundle: Minister's AA, Annexure AA2, p 32, para 3.

50. Respectfully even if the HSF is correct on its interpretation of section 6(3)(b) of the Act, which is denied, it has not served any evidence before this Court to suggest that the first respondent agrees that his term of office should automatically be extended flowing from this Court's order.

51. If anything, the first respondent's lack of participation in these proceedings, coupled with the relief he seeks as against the PCP's decision to not renew his term of office suggests the opposite.

The appeal is moot

52. In any event, even if the HSF is correct in its interpretation of section 6(3)(b) of the Act its appeal, such as it is, is moot on account of the fact that an acting executive director of IPID has been appointed pursuant to section 6(4) of the Act.[40]

53. Even if the first respondent were minded to extend his term of office flowing from this Court ruling in the HSF's favour, the fact remains that an acting executive director has been lawfully appointed and that until such time that such a decision is reviewed and set aside the acting incumbent can continue to hold office.

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[40] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27] and [36].

Relief contended for not properly sought

54. In addition to the difficulties raised above regarding what amounts to the HSF's reading in relief, we point out that in the Court *a quo* the relief sought by the HSF was only to be admitted as an *amicus curiae,* in its application for leave to appeal no relief per se was sought save for an attack on the judgment of the Court *a quo*, and in this Court the relief sought by the HSF is limited only to the Minister's "preliminary decision".[41]

55. Therefore and to the extent that the HSF expects this Court to make a binding pronouncement on the proper interpretation of section 6(3)(b) of the Act, no relief to this effect has even been sought before this Court and the Court *a quo*.

56. Indeed, all of the HSF's arguments regarding the so-called interpretive issue may in fact be ignored because, as the HSF itself recognises,[42] these arguments would more appropriately dealt with in a frontal attack to the constitutionality of section 6(3)(b) of the Act which has to date not been done.[43]

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41 Appeal Record: Vol 2, HSF FA: pp 314-315 para 61-67.

42 Appeal Record: Vol 2, HSF FA: pp 300-301 paras 6.3 – 11.

43 Appeal Record: Vol 2, PCP AA: p 175 para 68.

57. In particular, the Court should have regard to what the HSF said in its founding affidavit seeking admission as an *amicus curiae*, namely that –

> "The HSH reserves its rights in relation to the constitutionality of section 6(3), 6(4) and 6(5) of the IPID Act, and nothing in these papers is to detract from the HSF's ability to later challenge such aspects in due course."[44]

58. In other words:

58.1. at worst, the HSF properly appreciated that its ability to mount this attack was contingent upon there being a live *lis* between the parties;[45]

58.2. at best, the HSF appreciated that it had not mounted a constitutional challenge in respect of which the relief it now seeks on appeal as an *amicus curiae* would be appropriate.

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44 Appeal Record: Vol 2, HSF FA: p 317 para 72.

45 Our Courts do not intervene where there is no lis to do so. See, for example, *Minister of Finance v Oakbay Investments (Pty) Ltd* 2018 (3) SA 515 (GP). The argument raised by the HSF that the Court did not ensure a proper hearing is fanciful. There was no *lis* regards the power of the Committee. If such an issue was to be raised, it was for the HSF to properly seek substantive relief in its own right to that effect, not via the backdoor as an *amicus curiae*. See, for example, HSF HOA pp 3 – 4, para 8. The point of law was, thus, not "apparent" as the HSF wants this Court to believe. See, for example, HSF HOA, p 9, para 26.2. Simply producing heads of argument on the subject is not enough where no party seeks that relief from the Court. See, for example, HSF HOA, p 10, para 26.4. Equally, some "forewarning" is not the same as properly seeking relief under notice of motion as the HSF apparently contends. See, for example, HSF HOA, p 15, para 39.

59. In both instances, the HSF's own hedging of its bets serves to justify this Court dismissing the appeal.

COSTS AND CONCLUSION

60. Having regard to the HSF's improper conduct before the Court in seeking to secure substantive relief regarding section 6(3)(b) of the Act, which has never been done properly on notice of motion,[46] let alone in a way that allows the PCP to properly engage therewith, it should be mulcted with costs.

61. Respectfully its conduct is abusive, falling within the exception that public-interest litigants may sometimes be made to pay costs.

62. For the reasons above, the PCP contends that the appeal has no merit and ought to be dismissed.

TEMBEKA NGCUKAITOBI, SC
KAMEEL PREMHID

Counsel for the Portfolio Committee on Police: National Assembly

Chambers, Sandton
17 April 2020

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[46] Appeal Record: Vol 2, HSF NOM, pp 294-295 paras 1-3. Also see Appeal Record: Vol 3, Notice of Appeal, p 369 para 2.1.