IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓
DATE 22/1/15 SIGNATURE ✓

CASE NO: 1054/2015

DATE: 23/01/2015

IN THE MATTER BETWEEN

THE HELEN SUZMAN FOUNDATION	APPLICANT
AND	
THE MINISTER OF POLICE	1ST RESPONDENT
LIEUTENANT GENERAL ANWA DRAMAT	2ND RESPONDENT
MAJOR-GENERAL BERNING NTLEMEZA	3RD RESPONDENT
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	4TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant (also, at times, referred to as "HSF") applies for certain declaratory relief flowing from the suspension by the first respondent ("the Minister"), on

23 December 2014, of the second respondent (without being disrespectful, but for the sake of brevity, I will refer to him as "Dramat") from his position as the National Head of the Directorate for Priority Crime Investigation ("DPCI").

The applicant also applies for ancillary declaratory relief, *inter alia*, flowing from the appointment by the Minister of the third respondent as Acting National Head of the DPCI following the Minister's suspension of Dramat.

[2] Before me, Mr Unterhalter SC, assisted by Mr Du Plessis, appeared for the applicant and Mr Mokhari SC, assisted by Ms Seboko, appeared for the first respondent.

[3] Dramat, although duly cited by the applicant, did not take an active part in the proceedings although he did, through his attorney, file a written notice to abide on 13 January 2015.

Attached to the founding papers, there is also a letter from Dramat's attorney, dated 12 December 2014, written to the Minister in response to the latter's notice of "contemplated provisional suspension" to Dramat dated 9 December 2014. In this letter to the Minister, Dramat's attorney also challenges the lawfulness of the intended suspension of his client.

[4] The third and fourth respondents did not take part in the proceedings.

[5] The matter was enrolled before me as an urgent application on Thursday 15 January 2015. On that occasion the question of urgency was challenged on behalf of the

Minister, not because the latter felt that the case was not urgent, but because of the technical objection that the case was enrolled for a Thursday instead of a Tuesday, in terms of the existing Practice Directive, and insufficient time was given to the Minister to file his opposing affidavit and heads of argument.

During an adjournment, the question of urgency was resolved, and the Minister was afforded an opportunity to file his opposing papers and heads of argument which were given to me over the week-end of 17 and 18 January. The case was postponed until 19 January, when the merits of the case were argued before me.

Brief notes on the chronological sequence of events

[6] On 9 December 2014, the Minister wrote a letter to Dramat under the following heading:

> "Contemplated Provisional Suspension of the National Head of the Directorate for Priority Crime Investigation Lieutenant General Dramat in terms of section 17DA(2)(a)(i) and (iv) of the South African Police Service Act 68 of 1995, SAPS Act.
>
> Subject: Rendition of Zimbabwean nationals in 2010/2011
>
> This serves to advise your good-self that the Minister of Police is considering placing you on provisional suspension in terms of section 17DA(2)(a)(i) and (iv) of the SAPS Act on the following grounds ..."

For reasons which will appear later, the repeated reference by the Minister to the provisions of section 17DA(2) is of some significance.

[7] The notice of 9 December 2014 (evidently only given to Dramat on 10 December) is a lengthy affair. However, I consider the contents to be, in particular, of importance from the point of view of the Minister, so that it is convenient to quote extracts therefrom:

> "The following Zimbabwean nationals were renditioned and/or illegally deported by the Directorate for Priority Crime Investigation in 2010 and 2011 following a joint operation with Zimbabwean police (then follows eight names).
>
> The Zimbabwean nationals ... were allegedly fugitives for a crime of murder and robbery committed in Zimbabwe. They were renditioned from South Africa to Zimbabwe; it is further alleged that two of them were eventually killed by Zimbabwean police. ...
>
> The exchange of criminal suspects between the two law enforcement agencies was allegedly not done in terms of Southern African Development Community's Protocol on Extradition; South Africa's Extradition Act 67 of 1962, as well as national legislation on mutual legal assistance in criminal matters.
>
> According to the Hansard record of parliament of 13th December 2011, your reply dated 25 November 2011, you supposedly responded to a parliamentary question on these acts of renditions, wherein you supposedly misled the Minister and parliament by stating that it was the Department of Home Affairs who deported the Zimbabwean nationals; well-knowing that the Zimbabwean

nationals were wanted for criminal offences in Zimbabwe and had been illegally deported by Directorate for Priority Crime Investigation (DPCI).

There is suggestive evidence at my disposal that the Zimbabwean nationals were wanted in Zimbabwe in connection with the murder of a police colonel ... Therefore, in such an instance, mutual legal assistance on criminal matters and extradition procedures should have been instituted.

Evidence at my disposal, suggest that you probably sanctioned the entry of Zimbabwean police to South Africa and further sanctioned a joint operation between Directorate for Priority Crime Investigation (DPCI) and Zimbabwean police to trace the fugitives.

Furthermore, there is suggestive evidence that the South African Department of Home Affairs and the Zimbabwean Embassy were not involved in the illegal deportation of the Zimbabwean nationals.

In this regard you are instructed to furnish reasons to the Minister of Police, within the next five (5) days, as to why you should not be provisionally suspended pending internal investigations on the following acts of misconduct;

(1) undermining the legislative authority of the Minister of Justice and the South African judiciary to make a determination and adjudication on the extradition of the Zimbabwean nationals wanted in Zimbabwe for the murder of a police colonel ...;

(2) bringing the international image of the Republic of South Africa into disrepute by contravening the SADC Protocols on Extradition, Mutual and Legal assistance and the United Nations' Convention against the Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, by allegedly being an accomplice or co-perpetrator on torture, murder and renditions of Zimbabwean nationals;

(3) possibly misleading the Minister and parliament as to the lawfulness of the deportations in question and the departments involved;

(4) allegedly committing the following criminal law offences:

(i) kidnapping;

(ii) defeating the ends of justice;

(iii) forgery, fraud;

as an accomplice and co-perpetrator;

(5) allegedly, involving the Directorate for Priority Crime Investigation in illegal renditions activities.

Your co-operation in the spirit of good governance is appreciated.

Kind regards

N P T Nhleko
Minister of Police

Date: 10/12/2014" (The underlining is presumably that of the Minister.)

[8] On 12 December 2014 Dramat's attorney wrote a lengthy letter (the contents of which I will not quote, for the sake of brevity) to the Minister in reaction to the 9/10 December notice of Contemplated Provisional Suspension.

I briefly summarise some of the features of this letter, which, like the 9/10 December notice, is an annexure to the founding affidavit:

The attorney has been acting for Dramat since September 2013 in the matter surrounding the so-called "Zimbabwean rendition". Correspondence had been exchanged between the attorney, the State Attorney, the National Commissioner and IPID (the Independent Police Investigation Directorate to which I will refer as "IPID").

The attorney, correctly in my view, reminded the Minister that section 17DA(2) was found to be invalid and unconstitutional by the Constitutional Court on 27 November 2014 and severed, or deleted from the SAPS Act on that date. The case referred to, which I will revisit later, is *Helen Suzman Foundation v President of the Republic of South Africa and others* (case no CCT 07/14) and *Hugh Glenister v President of the Republic of South Africa and others* (case no CCT 09/14). The attorney pointed out to the Minister that the purpose of this constitutional litigation in *Suzman* and *Glenister* was to ensure that the DPCI is adequately independent and has operational autonomy. The attorney points out to the Minister, correctly, that the main thrust was to forbid improper interference by the Minister and the National Commissioner with the Head and members of the DPCI in the exercise or performance of their powers, duties and functions. (I will refer to the *Suzman* and *Glenister* cases as "the 2014 judgment".)

The attorney also reminded the Minister that he was cited as the second respondent in the Constitutional Court in the aforesaid cases, fully represented by three advocates and that he should be aware of the orders of constitutional invalidity deleting

section 17DA(2) and the "(2)" in section 17DA(1) from the SAPS Act. The attorney then says the following to the Minister:

> "You would therefore be in contempt of the Constitutional Court, should you proceed with the contemplated provisional suspension of Lieutenant General Dramat. Clearly your advisors should from time to time look at the law and recent Constitutional Court judgments against you."

The attorney then reminds the Minister that Dramat dealt with the allegations against him with regard to the so-called Zimbabwean rendition, in a statement of 23 October 2013 which is again attached to the attorney's letter as annexure "A". The attorney also stated that he finds it alarming that it had come to the attention of Dramat that certain witnesses had been told (presumably by IPID officials) that unless they incriminate Dramat, they would be of no value to the investigator. It was also submitted in the aforesaid statement that the DPCI was at the time (and still is according to the attorney) tasked and seized with very sensitive and high profile investigations and that the timing of the then IPID investigation and the current contemplated suspension was seen as a "smear campaign" to derail any investigations or arrests that the DPCI is in the process of conducting. The attorney, correctly, refrained from listing details of the sensitive matters and the high profile individuals.

The attorney then also reminded the Minister that IPID sent an undated letter to Dramat which contained the same allegations as those referred to by the Minister in his Notice of Contemplated Suspension. Dramat was required to answer certain questions regarding the "rendition" of the Zimbabwean nationals which he did in a statement dated 11 November 2013 which is also attached to this letter of the attorney

as annexure "B". In the statement it was specifically pointed out that Dramat never authorised or sanctioned co-operation or kidnapping of any of the Zimbabwean nationals referred to in the IPID correspondence. It was also pointed out that Dramat unequivocally denied any knowledge of any action whatsoever that he authorised or participated in which was aimed to defeat the due administration of justice. Fraud and theft allegations were equally vague and spurious and denied. The attorney pointed out to the Minister that the Notice of Contemplated Suspension takes the matter far beyond the allegations made by IPID, namely that Dramat undermined the legislative authority of the Minister of Justice and the judiciary and that he is allegedly an accomplice and co-perpetrator on torture, murder and renditions. It was recorded that Dramat was reserving his rights in this regard. It was pointed out that neither IPID, nor the National Commissioner or the NDPP complied with the request of more than a year earlier for concrete evidence in support of these allegations to be furnished to Dramat. At all times, Dramat offered his full co-operation with a *bona fide* investigation. Dramat got information that the authorities were trying to get a warrant for his arrest. It was reiterated by his attorney that Dramat would voluntarily appear before a competent court to answer to any charges. The attorney again recorded that efforts now to press on with the alleged Zimbabwean rendition complaint, more than four years after the event, amounted to nothing other than slanderous, malicious conjecture designed to derail sensitive investigations of the DPCI and/or an attempt to discredit the reputation and integrity of Dramat and the DPCI.

The attorney concludes by reminding the Minister that he does not have the power to suspend the Head of the DPCI and any efforts to continue to do so would be met with an application to this court for urgent relief.

[9] The Minister did not answer this letter. The statements, "A" and "B", attached to the letter, are broadly summarised in the letter, and the contents will not be repeated.

[10] On 23 December 2014, the Minister wrote to Dramat informing him that he was placing Dramat "on precautionary suspension with full pay and benefits" with immediate effect.

In the letter, which is difficult to read because of the quality thereof, the Minister acknowledges the fact that section 17DA(2) of the South African Police Services Act had been struck down. He argues, that he nevertheless retains the right to suspend Dramat. He argues that he is empowered to do so on a certain reading of the 2014 judgment and that he is also empowered to suspend Dramat in terms of certain provisions of the Public Service Act, 1994 ("the Public Service Act" or "the PSA") which came into operation on 3 June 1994 as well as the Public Service Handbook.

[11] On 24 December 2014, Dramat responded to the suspension notice in a long letter written to the Minister under his own hand.

I find it convenient to quote some of the paragraphs:

> "1. I have for several months reflected very carefully on the issues that have unfolded in front of me. I have consulted my legal representatives and I have been advised of my legal remedies.
>
> 2. I respectfully point out that the tactical 'backpedalling' from the initial notice and the current reliance on the Public Service Act and Public

Service Regulations and *SMS Handbook* is a clear indication to me that no matter what steps I take to defend my position, a decision had already been made, from the outset, to remove me from my position.

4. Having seen our country enter into a democratic phase, I felt that I could contribute in a meaningful way and continue to develop the principles which I fought and for which I was imprisoned.

5. My appointment as the Head of the DPCI, I perceived at the time, was based on my credentials, my level of expertise and the fact that I respectfully believe that I have always acted with integrity in the manner in which I deal with people and investigations.

6. No doubtedly you are aware that I have recently called for certain case dockets involving very influential persons to be brought or alternatively centralised under one investigating arm and this has clearly caused massive resentment towards me.

7. I can unequivocally point out that I am not willing to compromise the principles that I have always believed in. I am not willing to be 'agreeable' or 'compliant' in so far as I would then be acting contrary to my own moral principles and, also, contrary to the position in which I was appointed.

10.1 The so-called 'Zimbabwean rendition investigation' is a smoke-screen. There are no facts whatsoever that indicate that at any given time I have acted illegally or unlawfully ... Most certainly there has never been any evidence whatsoever that I have, in any way, interfered with any potential witnesses or attempted to jeopardise the investigation against me during the past four years.

10.2 I wish to reserve my rights to fully vindicate myself against all those who have sought to tarnish my name and reputation. I do not wish to engage with those involved in this correspondence, in so far as that is reserved for another forum, if necessary.

11. I therefore deny, with respect that the Notice of Precautionary Suspension is legal, valid or regular. In fact it is totally irregular and constitutionally invalid.

12. I am also aware that in the next two months there will be a drive to remove certain investigations that fell under my 'watch', re-allocate certain cases and that unfortunately, certain sensitive investigations may even be closed down. This is something that I have to live with.

14. I note with interest that a two month period has been set to hold an 'enquiry' (*sic*!). I can honestly say that the investigation into the 'Zimbabwean rendition' case, has run for a very lengthy period of time and till to date there has been no evidence whatsoever. It is clear that I am being pushed out.

17. ... After due consideration, with specific reference to the background alluded to above, I am willing to submit a request to vacate office by applying to the National Commissioner to approve my early retirement in terms of section 35 of the Act. Quite clearly there is a pre-condition that the unlawful precautionary suspension be uplifted without me having to approach the court to do so.

18. I therefore require that we should enter into a joint consensus seeking meeting as a matter of urgency to prevent any instability within the

DPCI. Under the above circumstances your reply is eagerly anticipated by no later than 5 January 2015."

As far as I could make out no such reply was forthcoming.

[12] On 30 December 2014, the present applicant's attorneys wrote to the Minister as follows:

"1. We represent the Helen Suzman Foundation ('our client').

2. Our client understands that Lt Gen Dramat has been placed on 'precautionary suspension' by you in your capacity as the Minister of the Police and that the suspension is for a period of sixty days from 23 December 2014. Our client also understands that no other disciplinary processes to remove Lt Gen Dramat have been instituted or followed by you or any other body at this stage.

3. As you will know, as a matter of South African law, it is imperative for the DPCI to be adequately independent from the National Executive. The suspension of the National Head strikes at the very heart of our constitutional democracy.

4. As you will also know, our client is (and has been) concerned to ensure that the rule of law is upheld in all spheres, including the essential fight against corruption and organised crime mandated by the Constitution.

5. You will doubtless agree that, in this context, it is important to ensure that any suspension of the National Head or any office-bearers in the DPCI is constitutionally compliant and lawful. It appears that the suspension was not grounded in law.

6. To this end, our client requires you to furnish the following information in writing by no later than Wednesday, 7 January 2015, so that it may adequately protect its rights and the public interest:

6.1 a copy of any document which evidences or constitutes the purported suspension of Lt Gen Dramat, including any letter of suspension issued to Lt Gen Dramat;

6.2 the effective date of the suspension;

6.3 the duration of the suspension;

6.4 whether any of the facts in paragraph 2 above are incorrect and, if so, which facts and for what reason;

6.5 a copy of any documents and information on the basis of which the suspension was decided by you;

6.6 a copy of any reports pertaining to Lt Gen Dramat produced by the Independent Police Investigative Directorate;

6.7 full reasons for the suspension of the National Head;

6.8 details of what empowering provision you have used or invoked for the purposes of the purported suspension of the National Head;

6.9 what disciplinary steps have been taken by you or any other institution or body in relation to Lt Gen Dramat that relate in any way to the suspension or the grounds for such suspension;

6.10 a copy of any letter purportedly appointing any other person, including Major General Berning Ntlemeza, as Acting National Head of the DPCI.

7. Should you fail to deliver the above information timeously or should the information not negate our client's concerns about the unlawfulness of the decision to suspend the National Head, our client will have no option but to assume that there was no lawful basis for such decision, to assume that the facts in paragraph 2 are correct and to exercise its legal rights in its and the public's interest on an urgent basis.

Yours faithfully"

[13] There was no answer to this letter, so that the applicant launched its application on 9 January, two days after the dead-line it imposed expired. I have dealt with the procedural development of the case between 15 January, when it was first enrolled, and Monday 19 January.

What could be added to this chronology, is that when the Minister filed his answering affidavit, the applicant called, in terms of rule 35(12), for the opportunity to take copies of certain documents referred to in the answering affidavit including the "IPID report", certain "witness statements", "other relevant documentation", a "report" and a "file". In an answer, the Minister refused to make these copies available claiming that the applicant was shifting the goal-posts having based its application on whether the Minister had the power to suspend the National Head in the light of the 2014 judgment. The Minister also claimed that, according to IPID, the matter was still under investigation and its report, until the investigation is completed, is confidential. On this basis, the Minister offered no evidence whatsoever to show improper involvement of Dramat in the "Zimbabwean rendition" case. Dramat himself, as the only possible role player, before this court, in the affair, expressly denies any

involvement, as appears from his two statements, dating back to 2013, furnished to the Minister by his attorney. He repeats his denial of any liability in his 24 December letter to the Minister.

Declaratory relief sought by the applicant

[14] The relevant paragraphs of the notice of motion read as follows:

> "2. declaring that the decision of the Minister of Police, the Honourable Mr Nkosinathi Nhleko ('the Minister'), of 23 December 2014, to suspend Lt Gen Anwa Dramat, the National Head of the Directorate for Priority Crime Investigation ('DPCI') ('the suspension decision') is unlawful and setting aside the suspension decision;
>
> 3. declaring that the decision of the Minister to appoint Major-General Berning Ntlemeza as Acting National Head of the DPCI ('the appointment decision') is unlawful and setting aside the appointment decision;
>
> 4. declaring that the Minister is not empowered to suspend the National Head of the DPCI other than in accordance with sections 17DA(3) and (4), read with section 17DA(5), of the South African Police Service Act, 1995;"

There is also a prayer for costs against whoever opposes the application.

Section 17DA and other provisions of the South African Police Service Act, 1995 ("the SAPS Act")

[15] The DPCI (also popularly known as "the Hawks") is a creature of the SAPS Act. It is created in terms of section 17 which constitutes Chapter 6A of the SAPS Act. More particularly, it is created by section 17C(1) which provides:

> "The Directorate for Priority Crime Investigation is hereby established as a Directorate in the Service."

The "Service" means the South African Police Service established by section 5(1) of the SAPS Act.

Section 17C(2) provides that the Directorate consists of, *inter alia*, the National Head of the Directorate at national level, "who shall manage and direct the Directorate and who shall be appointed by the Minister in concurrence with Cabinet" and subsection (2)(aA) also provides for a Deputy National Head at national level.

[16] I turn to section 17DA which goes under the heading "Removal from office of National Head of Directorate".

Before portions of this section were struck down as unconstitutional by the Constitutional Court in the 2014 judgment, and deleted from the SAPS Act with effect from the date of the order, which was 27 November 2014, it read as follows:

> "(1) The National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (2), (3) and (4).
>
> (2) (a) The Minister may provisionally suspend the National Head of

the Directorate from his or her office, pending an inquiry into his or her fitness to hold such office as the Minister deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office –

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the National Head of the Directorate, the reasons therefor and the representations of the National Head of the Directorate, if any, shall be communicated in writing to Parliament within fourteen days after such removal if Parliament is then in session or, if Parliament is not then in session, within fourteen days after the commencement of its next ensuing session.

(c) The National Head of the Directorate provisionally suspended from office shall during the period of such suspension be entitled to such salary, allowance, privilege or benefit to which he or she is otherwise entitled, unless the Minister determines otherwise.

(d) An inquiry referred to in this subsection –

(i) shall perform its functions subject to the provisions of the Promotion of Administrative Justice Act, 2000

(Act 3 of 2000), in particular to ensure procedurally fair administrative action; and

(ii) shall be led by a judge or retired judge: provided that the Minister shall make the appointment after consultation with the Minister of Justice and Constitutional Development and the Chief Justice.

(e) The National Head of the Directorate shall be informed of any allegations against him or her and shall be granted an opportunity to make submissions to the inquiry upon being informed of such allegations.

(3) (a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.

(b) The adoption by the National Assembly of a resolution calling for that person's removal from office.

(4) A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with the supporting vote of at least two-thirds of the members of the National Assembly.

(5) The Minister –

(a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

(b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.

(6) The Minister may allow the National Head of the Directorate, at his or her request, to vacate his or her office –

(a) on account of continued ill-health; or

(b) for any other reason which the Minister deems sufficient.

(7) The request in terms of subsection (6) shall be addressed to the Minister at least six calendar months prior to the date on which the National Head of the Directorate wishes to vacate his or her office, unless the Minister grants a shorter period in a specific case." (Emphasis added.)

[17] It is common cause that the Constitutional Court, in the 2014 judgment, dated 27 November 2014:

(1) declared the "(2)" in section 17DA(1) inconsistent with the Constitution and therefore invalid, and deleted it from the date of the order;

(2) declared section 17DA(2) inconsistent with the Constitution and therefore invalid, and deleted it from the date of the order.

[18] This means:

(1) that section 17DA(1) now reads (in peremptory language):

"The National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (3) and (4)."

(2) Where section 17DA(2) has now been deleted and declared unconstitutional and invalid, the Minister no longer has the power, in terms of that subsection, to provisionally suspend the National Head and, pending an inquiry, remove him or her from office for the reasons mentioned in the relevant subsection; and

(3) the powers of the Minister to suspend or remove the National Head are now limited to the provisions of subsection (5)(a) and (b) which renders the Minister's power to suspend and/or remove the National Head subject to the prior start of the proceedings of a Committee of the National Assembly for the removal (subsection (5)(a)) and the passing of a resolution by the National Assembly calling for the removal of the National Head by a two-thirds majority (subsection (5)(b)).

[19] From the aforegoing, the following remarks are also, in my view, valid:

1. The "Contemplated Provisional Suspension" notice by the Minister to Dramat of 9/10 December 2014 is invalid because it purports to base this contemplated provisional suspension on the provisions of section 17DA(2)(a)(i) and (iv) which, by then, had already been struck down as invalid and unconstitutional and deleted from the Act.

2. The remarks by the Minister in his suspension notice to Dramat of 23 December 2014 that

> "The remaining provisions of the section (my note: which would include subsections (3), (4) and (5)) deal with the suspension and removal of the Head when the process for the removal has been

> initiated by Parliament. These provisions are not applicable to the current situation."

are misplaced. It fails to take into account the peremptory provisions of section 17DA(1), as it now reads and as it read when the suspension notice was given, that "the National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (3) and (4)".

[20] It is common cause that, when the suspension and provisional suspension notices were sent to Dramat, there had not been (and still is not) a "start of the proceedings of a Committee of the National Assembly for the removal of that person" or a resolution by the National Assembly calling for the National Head to be removed, which are the only two occurrences which can trigger the powers of the Minister to suspend or remove the National Head, depending on the circumstances.

[21] In their comprehensive and able argument, counsel for the Minister offered submissions on the interpretation of the 2014 judgment and the effect thereof on the striking down of subsection (2) which are not in harmony with the remarks I have made. I will consider those submissions when dealing with the 2014 judgment.

Helen Suzman Foundation v President of the Republic of South Africa and others; Glenister v President of the Republic of South Africa and others (CCT 07/14, CCT 09/14) [2014] ZACC 32 of 27 November 2014: "the 2014 judgment"

[22] As I have already indicated, the Minister contends for a different conclusion following the deletion by the Constitutional Court of section 17DA(2) to the one I attempted to advance.

[23] Correctly, the Minister says the following:

> "33. The contemplated suspension in section 17DA(5) is triggered by the process that is initiated by the Committee of the National Assembly for the removal from office of the Head of the DPCI on account of misconduct, incapacity or incompetence. If the Committee of the National Assembly makes a finding against the Head of the DPCI, he/she may be removed from office by the adoption of a resolution supported by a vote of at least two-thirds of the members of the National Assembly. The procedure in section 17DA(5) for the suspension of the Head of the DPCI is triggered by the commencement of the proceedings before the Committee of the National Assembly. So, the section 17DA(5) suspension is parliamentary initiated. That is the marked difference between the procedure in the repealed section 17DA(2) and the section 17DA(5)."

[24] The Minister then goes on to submit that, despite the striking down and deletion of 17DA(2), he nevertheless retains the right of suspension and removal of the Head. He does so in the following terms:

> "34. In striking down section 17DA(2) the Constitutional Court did not explicitly or implicitly say that as the Minister I cannot suspend the Head of the DPCI other than in terms of section 17DA(5). To the

contrary, the Constitutional Court affirmed my power to suspend and my power to execute an oversight role over the Head of the DPCI. If the judgment of the Constitutional Court were to be read to imply that I cannot suspend the Head of the DPCI other than in terms of section 17DA(5) then this would invariably mean that my oversight role over the Head of the DPCI has been abrogated."

[25] The Minister then goes on to advance the following interesting and, at first blush, attractive, argument:

"This would mean that I would play a meaningless oversight role to hold the Head of the DPCI accountable to the legislation applicable to him, but I cannot initiate an investigation upon receiving information pointing to serious allegations of misconduct against him, and I cannot initiate an inquiry to ascertain the veracity of such allegations nor to institute a disciplinary inquiry. This would mean that I can only fold my arms and be at the mercy of the parliamentary Committee should it decide to start the proceedings for the removal of the Head of the DPCI. It is also not clear how the parliamentary Committee would initiate the proceedings for the removal of the Head of the DPCI without an investigation relating to the alleged conduct."

[26] The Minister then goes on to advance what he considers to be the correct interpretation of the judgment in the context of the Minister's powers to suspend the Head:

"36. On a proper reading of the Constitutional Court judgment, it struck down section 17DA(2) on two grounds: first that the subsection lacks

clarity meaning that it is convoluted; second, that the words 'as the Minister deems fit' gives the Minister the discretion to suspend the Head of the DPCI without pay which invariably compromises the job security of the Head of the DPCI and insulation from political and executive interference. I fully agree with the Constitutional Court's *ratio decidendi* on this issue. The Head of the DPCI and the DPCI must be protected from executive and political interference. He or she must be independent and perform his/her duties without fear, favour or prejudice.

37. However, in finding that section 17DA(2) is inconsistent with the provisions of job security, independence and that it lacks clarity, the Court, however, made it clear that that does not mean that I do not have the power to suspend the Head of the DPCI in the context envisaged in section 17DA(2) save for the offending provisions of the subsection which I have already dealt with above."

[27] In support of his argument, the Minister relies on what was said in paragraph [85] of the 2014 judgment:

"[85] But for 'as the Minister deems fit' and the possibility of a suspension without pay and benefits provided for in subsection (2)(c), I can find no reason to attack the bases on which this subsection empowers the Minister to suspend the National Head. These are specific, objectively verifiable and acceptable grounds for suspension and removal. Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the *audi alteram partem* rule and

unfairly undermines the National Head's ability to challenge the validity of the suspension by withholding the salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably, the Minister's mind would already have been made up that the National Head is guilty of what she is accused of. Personal and familial suffering that could be caused by the exercise of that Draconian power also cry out against its retention. It is the employer's duty to expedite the inquiry to avoid lengthy suspensions on pay."

(I emphasised the first portion of this paragraph in the judgment because it is also emphasised by the Minister, if I understand him correctly, as the main thrust of his argument as to how to interpret the judgment.)

[28] What the Minister fails to do, is to also scrutinise the paragraphs in the 2014 judgment following upon paragraph [85]:

"[86] The only real threat to job security is the Minister's power to remove the National Head from office in terms of section 17DA(1) and (2). These provisions are not clearly set out and therefore do not provide even a modicum of clarity. The removal process is initiated through the appointment of a judge by the Minister to head an inquiry into whether the National Head should be removed from office on any of the grounds listed in section 17DA(2)(a). Based on the recommendation of that judge, the Minister may remove the Head. Thereafter the fact of the removal, the reason therefor and the

representations of the National Head, if any, are to be conveyed to Parliament within fourteen days of the removal.

[87] Unlike section 12(6) of the NPA Act that empowers Parliament to reverse the removal of the NDPP or Deputy NDPP by the President, section 17DA(2)(b) does not say what it is that Parliament is required to do upon receipt of the information relating to the Minister's removal of the National Head. There is no provision made for Parliament's interference with that decision. This begs the question, what purpose does it then serve to inform Parliament? A proper reading of subsection (2) indicates that the Minister's removal of the National Head is, subject to whatever Court processes that may ensue, final. Parliament has no meaningful role to play but merely to note the decision. One would have thought that the requirements that Parliament be informed of the removal, be furnished with reasons for the removal and the representations by the National Head within fourteen days of removal, where intended to facilitate speedy intervention by Parliament before more, possibly unjustified, damage is done to the life of the National Head or the functionality of the DPCI. That intervention would ordinarily entail an assessment of the propriety of the finding of wrongdoing and the punishment meted out to the National Head, if correctly found guilty of wrongdoing.

[88] But, not only is the section silent on what Parliament is supposed to do, it is also silent on how it is to do whatever is supposed to be done, if any, and on the time frames within which any action is to be taken. It is similar to section 17CA(3) which requires the Minister to inform

Parliament of the appointment of the National Head within fourteen days of the appointment, but does not say what, if any. Parliament is supposed to do with that information. Evidently it is, as in this instance, merely for noting. All these are additional pointers to the lack of clarity that pervades the SAPS Act as amended. Parliament's power to intervene, as in the case in terms of section 12(6) of the NPA Act, cannot be read into this section without the Court usurping the legislative role of Parliament. There is a yawning chasm between the subsection (2) procedure and the role of Parliament set out in subsections (3) to (6).

[89] This subsection (2) removal power is inimical to job security. It enables the Minister to exercise almost untrammelled power to axe the National Head of the anti-corruption entity. The need for job security was articulated in *Glenister II* in these terms:

> 'At the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.'
>
> (My note: this is a reference to *Glenister v President of the Republic of South Africa and others* 2011 3 SA 347 (CC) at paragraph [222].)

[90] Subsections (3) to (6) provide for those special measures that entrench the employment security of the National Head. They deal

with the suspension of the National Head by the Minister, flowing from a possible removal process initiated by a Committee of the National Assembly. Although the Minister still has the power to suspend, no provision is made for suspension without salary, allowances and privileges. A recommendation by a Committee of the National Assembly for the removal of the National Head would have to enjoy the support of at least two-thirds of the members of the National Assembly to be implemented. The removal would then be carried out by the Minister.

[91] This suspension by the Minister and removal through a Parliamentary process guarantees job security and accords with the notion of sufficient independence for the anti-corruption entity the State creates. That portion of section 17DA(1) that refers to subsection (2) and subsection (2) itself are, however, inconsistent with the constitutional obligation to establish an adequately independent corruption-busting agency. They must thus be set aside. The balance of section 17DA passes constitutional muster and would thus continue to guide the suspension and removal process of the National Head." (Emphasis added.)

[29] The Minister, in his argument, has placed a particular emphasis on the last sentence of paragraph [91] which stipulates: "The balance of section 17DA passes constitutional muster and would thus continue to guide the suspension and removal process of the National Head." The Minister argues that the use of these words "is quite telling" and then submits:

"The choice of the words in these lines is consistent with what the Court had already found in paragraph [85] that my power to suspend the Head of the DPCI do not get abrogated by the deletion of section 17DA(2)."

The Minister appears to argue that these remaining provisions of section 17DA (including (3), (4) and (5) dealing with suspension and/or removal through the parliamentary process) can be used by the Minister for "guidance" when he exercises his still existing powers of suspension in a manner other than in terms of section 17DA(5).

Astonishingly, the Minister then says the following about the "guidance" so available to him:

"The guidance I received from the remaining provisions of section 17DA is that a suspension must be with pay and the removal if it were to be considered must be done through a parliamentary process." (Emphasis added.)

It seems to me that the Minister concedes that the "guidance" is linked to the suspension or removal through a parliamentary process. This concession, if it is one, flies in the face of the Minister's argument that "... the Court however made it clear that that does not mean that I do not have the power to suspend the Head of the DPCI in the context envisaged in section 17DA(2)..."

[30] I can find no support whatsoever for the Minister's submissions and for the interpretation which he seeks to attach to the 2014 judgment:

1. In paragraph [91] of the 2014 judgment, it is stated unequivocally that the reference to subsection (2) in 17DA(1) as well as subsection (2) itself are inconsistent with the constitutional obligation to establish an adequately independent corruption-busting agency and must be set aside. This was done with effect from the date of the order, on 27 November 2014.

2. This means that section 17DA(1) now provides, in peremptory terms, that: the National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (3) and (4). There is no room whatsoever for the Minister's argument that he can, somehow, still suspend the Head "in the context envisaged in section 17DA(2)".

3. It follows that the "contemplated provisional suspension" of Dramat, of 9/10 December 2014, which was expressly based on the provisions of section 17DA(2), long after this subsection was deleted by the Constitutional Court, was unlawful as it flew in the face of the 2014 judgment and section 17DA(1), and therefore void *ab initio* ("van die aanvang af nietig" – Hiemstra and Gonin *Trilingual Legal Dictionary* 2nd ed page 144).

4. It follows that the suspension of Dramat by the notice of suspension of 23 December 2014, which incorporates, by reference, the contemplated provisional suspension, and which declares the provisions of section 17DA(3) and (4) to be "not applicable" and which, like the "contemplated provisional suspension" was written well after the deletion of the offending provisions on 27 November 2014, is also unlawful and void *ab initio* as it flies in the face of the 2014 judgment and the provisions of section 17DA(1).

In *Pikoli v President of Republic of South Africa and others* 2010 1 SA 400 (GNP) at 408C-E the following is said:

> "The purported exercise of public power that is not authorised by law is invalid from the outset. A declaration that executive action is invalid 'is merely descriptive of a pre-existing state of affairs'. In the interest of an orderly society, however, such action is treated as if it were valid until it is declared invalid. The Court that finds executive action not authorised by law, must declare it invalid."

See also sections 1(c) and 2 of the Constitution of the Republic of South Africa, 1996.

Cora Hoexter *Administrative Law in South Africa* 2nd ed p545-546.

Fose v Minister of Safety & Security 1997 3 SA 786 (CC) where the learned Judge, still dealing with the interim Constitution 200 of 1993, says the following at 834F:

> "Section 4(1) makes unconstitutional conduct a nullity, even before Courts have pronounced it so."

At 834I, the learned Judge points out that it is not the declaration itself (that administrative or executive conduct is unconstitutional) that renders the conduct unconstitutional. The declaration is merely descriptive of a pre-existing state of affairs.

Cora Hoexter, op cit, also referred to by the learned Judge in *Pikoli*, puts it as follows on p545-546 where she deals with remedies in proceedings for judicial

review (more with regard to the Promotion of Administrative Justice Act no 3 of 2000, or "PAJA", but I am of the view that the same remarks apply to other executive action not necessarily included in the definition of "administrative action" in PAJA. Indeed, in *Pikoli*, the court was confronted with executive action not included in the definition of administrative action, and involving the removal from office by the President of the National Director of Public Prosecutions):

> "An administrative action or decision, no matter how blatantly illegal it may appear to be, continues to have effect until such time as it is pronounced invalid by the Court. At that point the decision not only ceases to have effect but may be treated as if it never existed. Invalidity thus operates with retrospective effect, both at common law and under the Constitution, as a consequence of constitutional supremacy and in accordance with the doctrine of objective invalidity. In administrative law 'setting aside' is a logical consequence of declaring the decision to be invalid, and is simply a way of saying that the decision no longer stands, or that it is void. It is one of the remedies provided for in section 8 of the PAJA."

(The learned author here refers to section 8(1)(c) of PAJA.) At 547, the learned author also states: "An invalid act, being a nullity, cannot be ratified, 'validated' or amended." I do not refer to all the authorities listed in the footnotes.

Mr Mokhari, in his diligent address, and on the subject of the unlawful act being treated as valid until it is declared unvalid, also referred me to the well-known case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 6 SA 222 (SCA) where the following is said at 242B-C:

> "The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

It is clear, as I pointed out, that this principle is recognised both in *Pikoli*, and by *Cora Hoexter*. However, where the declaration of invalidity operates with retrospective effect, and has the effect of the unlawful act being treated as if it never existed, it would seem to me that all actions taken by the Minister following the unlawful suspension will be tainted and of no consequence if I were to declare the suspension to be unlawful and invalid.

[31] As to the reference by *Cora Hoexter* to PAJA, Mr Mokhari also reminded me of the provisions of section 8 of that Act. If I understood him correctly, he argued that from the wording of paragraph 5.1 of the founding affidavit ("to review and set aside the decisions of the Minister ..."), it is plain that this is an application for review in terms of PAJA, so that the remedy sought falls under section 8(c) of that Act which reads as follows:

"(1) The Court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

(a) ...

(b) ...

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) ..."

If I understood the argument correctly, it is that in the light of these provisions it is incumbent on this court to remit the matter for reconsideration by the Minister unless it is considered to be an exceptional case (which I understood counsel to argue it is not) whereupon the court can substitute or vary the decision of the Minister.

In his replying address, Mr Unterhalter argued, correctly in my view, that this is not a review application in terms of PAJA but an attack on the legality of the Minister's decision.

It seems to me that one of the leading cases on the subject is *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 1 SA 374 (CC) where the following is said at 400D-F:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."

In this case, I have found, that the Minister purported to exercise a power and perform a function beyond that conferred upon him by law, following the order in the 2014 judgment.

Cora Hoexter distinguishes between the application of the principle of legality and the PAJA route. At 122 she says:

> "But legality also has a wider meaning that goes *beyond* administrative action, and this is probably the more common usage of the term today. Here it refers to a broad *constitutional* principle of legality that governs the use of *all* public power rather than the narrower realm of administrative action. This principle of legality (or 'legality and rationality') is an aspect of the rule of law, a concept implicit in the interim Constitution and the founding value of our constitutional order in terms of section 1(c) of the 1996 Constitution. The

fundamental idea it expresses is that 'the exercise of public power is only legitimate where lawful'."

For these reasons, I am of the view that it is appropriate to attack the actions of the Minister on the strength of the principle of legality, rather than in terms of PAJA. It should also be borne in mind that the executive powers or functions of the National Executive, or some of them referred to in the definition of "administrative action" in PAJA, are excluded from the operation of that Act. One of the actions excluded from the PAJA definition is contained in the provisions of section 92(3) of the Constitution which reads:

"Members of the Cabinet must –

(a) act in accordance with the Constitution ..."

[32] I turn to the position of the third respondent.

The position of the third respondent, Major-General Berning Ntlemeza ("the third respondent")

[33] In the founding affidavit, the applicant alleges that an Acting National Head (here purportedly the third respondent) cannot be appointed if Dramat was not lawfully suspended. The applicant argues that in the circumstances the appointment decision of the third respondent must suffer the same fate as the suspension decision of Dramat.

[34] This allegation is not dealt with in the opposing affidavit. The Minister only offers a blanket denial of everything in the founding papers inconsistent with his version in the opposing affidavit.

[35] I have pointed out that section 17C of the SAPS Act provides for the establishment of the DPCI and provides that the Directorate will, *inter alia*, consist of a Deputy National Head at national level.

[36] The procedure involving the appointment of the Deputy National Head as Acting National Head is governed by the provisions of section 17CA(12). This subsection reads as follows:

> "(12) (a) Whenever the National Head of the Directorate is absent or unable to perform his or her functions, the Minister shall appoint the Deputy National Head of the Directorate as the Acting National Head of the Directorate.
>
> (b) Whenever the office of the National Head of the Directorate is vacant or the National Head of the Directorate is for any reason unable to take up the appointment contemplated in subsection (1), the Minister shall appoint the Deputy National Head of the Directorate as the Acting National Head of the Directorate.
>
> (c) If both the National Head of the Directorate and the Deputy National Head of the Directorate are absent the Minister shall appoint a suitably qualified and experienced person as the Acting National Head of the Directorate.

(d) Whenever the Deputy National Head of the Directorate is absent or unable to perform his or her functions, the National Head of the Directorate shall appoint a suitably qualified and experienced person as the Acting Deputy National Head of the Directorate.

(e) Whenever the office of the Deputy National Head of the Directorate is vacant the Head of the Directorate shall appoint a suitably qualified person as the Acting Deputy National Head of the Directorate."

[37] In the Minister's heads of argument, it is stated that the Minister appointed the third respondent as Acting National Head in terms of subsection (12)(c). It is stated that the Minister could not appoint the Deputy National Head of the DPCI because the DPCI does not have a Deputy National Head currently. Under these circumstances, it is questionable whether the Minister complied with the provisions. Subsection (12)(e) provides that if the office of the Deputy National Head is vacant (like here) the Head of the Directorate shall appoint a suitably qualified person as the Acting Deputy National Head, and not the Minister. It is also questionable whether subsection (12)(c) was applicable because that foreshadows a situation where both the National Head and the Deputy National Head "are absent". It may be arguable that such a state of affairs does not apply to the present circumstances. Nevertheless, I make no formal pronouncement on this, as the issue was not pressed before me.

[38] In prayer 3 of the notice of motion, the applicant seeks declaratory relief to the effect that the appointment of the third respondent by the Minister as Acting National Head of the DPCI is unlawful and also for the setting aside of that appointment decision.

[39] It was argued on behalf of the Minister that the relief sought in prayer 3 would not necessarily follow even if prayer 2 was granted. The relief sought in prayer 2 is a declaration that the decision of the Minister to suspend Dramat as the National Head is unlawful and the setting aside of that suspension decision is also sought.

It was argued on behalf of the Minister that the granting of prayer 3, following upon the granting of prayer 2, will only be a foregone conclusion if further relief is granted to the applicant to the effect that Dramat should be reinstated in his position, something not expressly requested in the notice of motion.

In this regard, I was referred by Mr Mokhari to the case of *Transnet Ltd and others v Chirwa* 2007 2 SA 198 (SCA) where it is stated that the process by which the employee was dismissed was tainted through bias, and was correctly set aside in terms of section 6(2)(a)(iii) of PAJA. It was held that where the learned Judge *a quo*, having set aside the dismissal by the employer, also granted retrospective reinstatement, he was wrong in taking the latter step. It was held that in administrative law the subject is usually entitled only to have the decision at issue set aside and the matter remitted for a fresh decision. It is on this basis, if I understood the argument correctly, that it was argued that reinstatement of Dramat will not follow, even upon granting of the relief in prayer 2 namely a declarator to the effect that the suspension was invalid and unlawful. It was further argued that, even upon the granting of prayer 2, and the

setting aside of the suspension of Dramat as unlawful, the Minister is still obliged "in the absence of the reinstatement of Dramat" to ensure that the DPCI has a National Head, which the Minister did by appointing the third respondent in compliance with section 17CA(12)(c).

In his replying address, Mr Unterhalter confirmed that reinstatement of Dramat was not specifically sought and need not be granted in those terms. He argued, correctly, that this was not a PAJA application, as I have already pointed out so that the *dicta* in *Chirwa* and, for that matter, the provisions of the Labour Relations Act are not applicable. This is not a case of Dramat approaching the court as an aggrieved employee. The applicant is not acting on behalf of Dramat but as a non-governmental organisation with the objective, *inter alia*, to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights. He pointed out that the applicant approaches the court, firstly, in its own interest. It is an organisation that is primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law. These are all implicated by the unlawful decisions of the Minister to suspend Dramat and to appoint the third respondent. It was argued that, in addition to his unlawful actions, the Minister has failed in his constitutional duty to protect the independence of the DPCI and uphold the rule of law in South Africa. It was argued, secondly, that the applicant also approaches the court in the public interest. All South Africans have an interest in the rule of law, the requirements for a properly functioning constitutional democracy and, in particular, that urgent steps be taken to root out corruption. Counsel confirmed, correctly in my view, that this is a challenge based on the principle of legality, and not a PAJA application.

[40] I return briefly to the argument raised in the founding papers (not specifically challenged in the opposing affidavit) that the third respondent cannot be appointed if Dramat was not lawfully suspended and that the appointment decision of the third respondent must suffer the same fate as the suspension decision of Dramat.

In *Seale v Van Rooyen NO and others, Provincial Government, North West Province v Van Rooyen NO and others* 2008 4 SA 43 (SCA) the following is said at 50C-D:

> "I think it is clear from *Oudekraal*, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent."

In commenting on this decision, *Cora Hoexter*, at 549-550, says, after quoting the relevant passage from *Seale*:

> "In other words, as *Oudekraal* itself makes clear, the factual existence of an act is capable of supporting subsequent acts only as long as the first act is not set aside. In this instance a decision to grant a servitude had indeed been set aside, and the subsequent registration of the servitude was therefore of no force and effect."

[41] In the circumstances, I have concluded that the position is as follows, and I find accordingly:

1. the purported suspension of Dramat was not authorised by law, unconstitutional and invalid from the outset – *Pikoli* at 408C-D;

2. the appointment of the third respondent as Acting National Head depends for its validity on the suspension of Dramat and is, consequently, invalid as the legal foundation for such an appointment was non-existent – *Seale* at 50C-D;

3. where the suspension of Dramat was invalid and a nullity from the outset, he was, in law, never suspended, so that there is no basis for ordering his reinstatement;

4. where the appointment of the third respondent as Acting National Head depended for its validity on the suspension of Dramat, which was invalid and a nullity, the appointment of the third respondent is also invalid as the legal foundation therefor was non-existent. Such appointment, therefore, also falls to be declared invalid, and, inasmuch as it may be necessary, set aside.

Other legislation and provisions relied upon by the Minister in support of his decision to suspend Dramat

[42] In the face of the striking down and deletion by the Constitutional Court of section 17DA(2) of the SAPS Act, which the Minister argues, as I have illustrated, did not deprive him of his powers to suspend and remove Dramat, the Minister also, in the purported suspension notice of 23 December 2014, suggested that he is empowered to suspend Dramat by the provisions of the Public Service Act, Proclamation no 103 of 1994, and the so-called *SMS Handbook*, and more particularly chapter 7 thereof.

[43] In section 1 of the Public Service Act ("the PSA") "member of the services" is defined as meaning a member of –

"(a) ...

(b) the South African Police Service appointed, or deemed to have been appointed, in terms of the South African Police Service Act, 1995 (Act 68 of 1995); or

(c) ..."

Section 2(2) of the PSA provides:

"(2) Where members of the services, educators or members of the Intelligence Services are not excluded from the provisions of this Act, those provisions shall, subject to subsection (2A), apply only in so far as they are not contrary to the laws governing their employment." (Emphasis added.)

The provisions in subsection (2A) are not applicable for present purposes.

[44] As already pointed out, chapter 6A of the SAPS Act (containing sections 17A to 17L) deals with the DPCI, which is also established in terms of section 17C(1). It also, in section 17CA contains detailed provisions relating to the appointment, remuneration and conditions of service of those comprising the DPCI. I have quoted, at some length, from some of the provisions of the SAPS Act. In short, the provisions of the SAPS Act fully govern the employment of members of the DPCI. This includes 17DA dealing with the removal from office of the National Head of the Directorate. Consequently, any conditions or provisions in the PSA, not in harmony with what is enacted in the SAPS Act, will not apply to Dramat. The argument of the Minister, in this regard, can therefore not be upheld.

[45] It was pointed out by counsel for the applicant, correctly in my view, that the *Senior Management Service Handbook*, published in 2003 ("*SMS Handbook*") is delegated legislation under the PSA and would therefore also not be applicable to the suspension and/or removal of the Head of the DPCI as this is governed, as pointed out, by section 17DA of the SAPS Act.

[46] In any event, if one has regard to chapter 7 of the *SMS Handbook*, on which the Minister relies, the provisions of paragraph 2.3 thereof under the heading "Scope of application" read as follows:

> "(1) This Code and Procedure applies to the employer and all members. It does not, however, apply to the employer and members covered by a disciplinary Code and Procedure –
>
> (a) ...
>
> (b) contained in legislation or regulations."

The disciplinary procedure in the present case, specifically the suspension and/or removal of the National Head of the DPCI, is covered by the SASP Act so that chapter 7 of the *SMS Handbook* does not apply to Dramat.

It was also argued on behalf of the applicant that the *SMS Handbook* merely confirms that which the SAPS Act makes abundantly clear. Section 17DA(1) of the SAPS Act unambiguously provides, as already mentioned, that the Head of the DPCI shall not be suspended or removed from office except in accordance with the provisions of subsection (3) and (4). Peremptory language in a statute must, in the absence of strong indications to the contrary, be interpreted as compulsory and not merely

directory. Not only are there no such contrary indications, but all the indications are that it should be interpreted to exclude any other mechanisms for suspension. It follows that the Minister's attempted reliance on any other legislation to justify his actions is misplaced.

Other arguments offered on behalf of the Minister

[47] I have dealt with most of the arguments presented on behalf of the Minister.

[48] An argument advanced on behalf of the Minister, which I have not yet mentioned, was raised for the first time during the proceedings before me. It has to do with a compromise or *transactio*.

In short, it has to do with Dramat's letter to the Minister of 24 December 2014, extracts of which I have quoted. The argument seems to be based on Dramat's utterance that he is willing to submit a request to vacate his office by applying for approval of early retirement but subject to the precondition that the unlawful precautionary suspension be uplifted without Dramat having to approach the court to do so.

[49] The argument, if I understood it correctly, appears to be that these utterances by Dramat constitute a compromise or an agreement not to litigate so that the applicant is debarred from proceeding with this application.

[50] I was referred to the case of *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and others* 1978 1 SA 914 (A). In the judgment it was

stated, at 921B-C that a *transactio* is an agreement between litigants for the settlement of a matter in dispute and the purpose thereof is not only to put an end to existing litigation but also to prevent or avoid litigation.

Inasmuch as such a *transactio* may have been binding on the applicant, which it clearly is not, there is no evidence whatsoever of such an agreement having been entered into between the Minister and Dramat. Indeed, in his opposing affidavit, dated 14 January 2015, the Minister says that he is in the process of arranging a meeting with Dramat.

[51] In any event, as Mr Unterhalter correctly argued, no agreement between Dramat and the Minister, if there were to be one, can act as a bar to the applicant proceeding with the present application. The applicant, as stated, litigates in its own interest and in the public interest in an effort to uphold the principles of democracy and constitusionalism, as well as the rule of law. The application is aimed at attacking the constitutionality and validity of the Minister's actions.

[52] In the circumstances, I see no merit in the Minister's argument based on the alleged compromise or *transactio*.

The applicant's *locus standi*/standing to launch this application

[53] In the opposing affidavit, the Minister argues that this relief is sought by the applicant "on behalf of the second respondent" in circumstances where the second respondent has not authorised the applicant to bring the application on his behalf neither has he filed an affidavit supporting the application. It is argued that the applicant has no right

in law to bring an application on behalf of the second respondent for his reinstatement or the upliftment of his suspension when there is no evidence in the founding papers to the effect that the second respondent seeks to challenge the suspension in court. It is argued that the applicant seeks to be the guardian of the second respondent when the latter has the ability and capacity to act on his own behalf and to bring an application himself, if he so wishes.

[54] The applicant's assertion that it brings the application in the public interest is, so the Minister submits, a red herring because the applicant cannot act in the public interest when the aggrieved party is present and available to act on his own. It is argued that the applicant cannot rely on the provisions of section 38 of the Constitution to establish the necessary *locus standi* to launch this application. The applicant is required, so the argument goes, to demonstrate in the founding papers that Dramat is unable to act on his own and for that reason it was in the public interest that the applicant should so act. Consequently, the applicant does not have the necessary legal standing to bring this application.

[55] In response to this argument, it was pointed out on behalf of the applicant that the latter does not contend that it seeks relief "on behalf of the second respondent". This is not a requirement under the law on own-interest standing. Nor is it a requirement that the applicant must demonstrate that Dramat "supports the application". It is irrelevant whether Dramat is "present and available to act on his own". This fact is irrelevant to the objective legal question as to whether or not the Minister acted in accordance with the law in his attempts to remove Dramat from office.

[56] Counsel for the applicant pointed out that their client relies on own-interest and public interest standing, *inter alia* as provided for in sections 38(a) and (d) of the Constitution.

Section 38 reads as follows:

> "38. **Enforcement of rights.** - Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest, and
>
> (e) an association acting in the interest of its members."
>
> (Emphasis added.)

[57] I was reminded by counsel for the applicant that their client brings this application, firstly, in its own interest. It was submitted that it is trite that our law accords generous rules for standing which permit applicants to seek relief either on their own behalf or on behalf of others. It is also trite, so it was submitted, that constitutional standing is broader than traditional common law standing. See *Giant Concerts CC v Renaldo Investments (Pty) Ltd and others* 2013(3) BCLR 251 (CC).

It was further argued that even if the applicant's own interest standing is questionable (which the applicant denies) this may not prohibit a court from hearing the matter, if the interests of justice so demand. CAMERON J said in *Giant Concerts*,

> "There may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."

[58] Counsel submitted that the applicant has sufficiently demonstrated that as an organisation which is primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law, its rights and interests are affected by the unlawful decisions of the Minister to suspend Dramat and to appoint the third respondent. This is a matter of such grave importance that it is undoubtedly in the interest of justice for the applicant to invoke section 38(a) of the Constitution. This is particularly so in the context of the applicant's involvement in ensuring that the DPCI is properly insulated from political interference and safeguarding the DPCI's independence, through its interventions as an *amicus curiae* in *Glenister II* and as an applicant in the 2014 judgment. In neither of those cases the *locus standi* of the applicant was attacked. It is difficult to see how an objection to the *locus standi* can be upheld in this particular matter under these circumstances. After all, the present matter flows from the 2014 judgment for reasons which have already been explained.

[59] As to public interest standing, which also involves the 2014 judgment, section 38(d) of the Constitution allows a party to bring constitutional challenges "in the public

interest". It has been held repeatedly that the court should adopt a "generous" or "broad" approach to standing in these matters. CAMERON J held in *Beukes v Krugersdorp Transitional Local Council* 1996 3 SA 467 (W) at 474 that such a generous approach is not limited to the Constitutional Court, but should be adopted by "all courts that are called upon to adjudicate constitutional claims" and the generous nature of the test applies both in respect of who qualifies as having standing and how that standing may be evidenced.

[60] It was also argued that the conduct or views of Dramat do not in any way affect the public interest in upholding the rule of law and dealing with blatantly unlawful acts by the National Executive in respect of a key public institution. In any event, so it was further argued, it is clear from Dramat's letter of 24 December 2014 that the offer (of taking early retirement) was made under duress and because Dramat is disillusioned with the Minister's inability to act lawfully and with attempts to subvert his office and authority.

[61] In all the circumstances, I am satisfied that the applicant has made out a proper case for legal standing and that the attack on the applicant's standing is ill-founded. I add, for the sake of clarity, that I was specifically informed by counsel for the Minister during the proceedings that the issue of standing was not raised as a point *in limine* for immediate decision but that it had to be decided as part of the main judgment.

Conclusions

[62] I have already set out my conclusions, particularly when dealing with the position of the third respondent and other subjects.

[63] For the reasons mentioned, and because of my finding of unlawful conduct and unconstitutional conduct on the part of the Minister, I am satisfied that a proper case was made out for the relief sought.

Costs

[64] The costs should follow the result in the normal manner. The costs should also include the costs of two counsel.

[65] Counsel on both sides were in agreement before me that the costs flowing from the proceedings of 15 January 2015 should be costs in the application.

The order

[66] I make the following order:

1. It is declared that the decision of the first respondent (the Minister of Police) of 23 December 2014 to suspend Lieutenant General Anwa Dramat, the National Head of the Directorate for Priority Crime Investigation ("the DPCI") is unlawful and invalid and the decision is set aside.
2. It is declared that the decision of the Minister to appoint Major-General Berning Ntlemeza as Acting National Head of the DPCI is unlawful and invalid and the decision is set aside.
3. It is declared that the Minister is not empowered to suspend the National Head of the DPCI other than in accordance with sections 17DA(3) and (4), read with section 17DA(5), of the South African Police Service Act, 1995.

4. The Minister is ordered to pay the costs of the applicant, which will include the costs of the proceedings of 15 January 2015 and the costs of two counsel.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

1054/2015

HEARD ON: 15 & 19 JANUARY 2015
FOR THE APPLICANT: D UNTERHALTER SC ASSISTED BY M DU PLESSIS
INSTRUCTED BY: WEBBER WENTZEL
FOR THE 1ST RESPONDENT: W MOKHARI SC ASSISTED BY Ms T SEBOKO
INSTRUCTED BY: HOGAN LOVELLS (SOUTH AFRICA) INC AS ROUTLEDGE MODISE INC