IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: **07/2014**

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF POLICE	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

1.

This argument represents the input of the President as Head of the Executive in resisting the challenges of the two Applicants – the Helen Suzman Foundation (**"HSF"**) and Hugh Glenister – to the constitutionality of Chapter 6A (or some of its provisions) of the South African Police Service Amendment Act 10 of 2012 (**"the Amendment"**). See: **PHILLIPS AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS, WITWATERSRAND LOCAL DIVISION, AND OTHERS 2003 (3) SA 345 (CC) [10] – [11]**.

THE ARGUMENT:

2.

The focus is on particularly the implication of the separation of powers doctrine in the proceedings, which implication is inherent in the nature and extent of both the challenges to the constitutionality of Chapter 6 provisions.

3.

The contents of the Heads are given the aforesaid focus, applicable

also to the Glenister application. Where there are additional considerations specially relevant to the Glenister application, these are set out in the Glenister Argument. This approach is adopted to avoid this Court being asked to read the same contentions in both sets of Argument filed by the First Respondent.

4.

These challenges impact on the separation of powers doctrine to an impermissible extent and should not be upheld. This Argument focusses on this aspect. Whilst the stance of the other Respondents that the specific provisions attacked are indeed not unconstitutional for failure to bestow sufficient independence on the DPCI, is then fully supported, the Presidency as First Respondent, does not present a comprehensive sub-section by sub-section analysis. This would result in repetition which is sought to be avoided. Indeed, the First Respondent contends that attacking the sub-sections individually, on the basis of the detraction of the postulated required independence of the DPCI represented by each sub-section, is at odds with the decision in **GLENISTER v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2011 (3) SA 347**

(CC) ("GLENISTER").

THE CHALLENGES TO CHAPTER 6A:

5.

It is common cause between the parties that the Government of the RSA must establish an independent anti-corruption policing entity which will generally fight corruption. The Government sought to create such entity as a discrete unit in the SAPS providing for its structures and mechanisms of operation in especially Chapter 6A of the SAPS Act. The **GLENISTER** judgment declared that this unit (the DPCI) did not meet the constitutional demands of independence and declared Chapter 6A unconstitutional to such extent.

6.

The Government has, through Parliament, made the various amendments, in 2012, to Chapter 6A and the issue now is whether, in a new challenge to these collective provisions of the Amended Act, the structure and mechanisms for operation of the DPCI ensure a sufficient degree of independence. In short, the challenge relates

to a question of sufficiency of independence.

THE GLENISTER JUDGMENT:

7.

The Applicants approach the challenges on the basis that the **GLENISTER** judgment determined with considerable precision what the Government must do to create an ACE of sufficient independence. Hence, Mr **"glenister"** sought enforcement by means of contempt proceedings when the amended Chapter 6A provisions and additions to the SAPS Act did not meet its expectations as to the necessary independent features required.

8.

This approach was incorrect and hence the Constitutional Court refused such attempt to enforce the **GLENISTER** judgment orders. That suggests that the value judgment to be brought to bear on the newly packaged unit (the DPCI) is to be a new one (obviously the legal principles in the **GLENISTER** judgment are to be respected and heeded in the process).

9.

The challenges before this Court to the Chapter 6 provisions now impugn specific provisions of Chapter 6A. This raises an additional complication.

10.

The attack on the constitutionality of Chapter 6A has become so widely ranged and focussed on individual sub-sections of the Amendment, that the connection thread with the decision of this Court in **GLENISTER** has been severed. In short, the decision of the Court *a quo* has so shifted in the process that **GLENISTER** no longer supports the reasoning and order therein in so far as individual sub-sections were struck down. This is addressed hereafter.

THE CORE ISSUE:

11.

The core issue before Court is whether the DPCI, given its now structural and operational framework, is sufficiently independent and

thus meets the constitutional obligation to create such entity, the degree of independence being informed by the Constitution and various international treaties. It is an issue which involves a value judgment and is one of degree (Compare: **GLENISTER [196]**).

THE GLENISTER DECISION:

12.

The Applicants treated and treat every word of **GLENISTER** as if this Judgment is a piece of legislation and if it is not **"fully redressed"** in the Amendment, Chapter 6A is to be struck down. The folly of so treating judgments is clear - **THOMAS CONSTRUCTION (PTY) LTD (IN LIQUIDATION) v GRAFTON FURNITURE MANUFACTURERS (PTY) LTD 1988 (2) SA 546 (A) 565A**.

13.

We set out hereunder what we understand the sense and sensibility of **GLENISTER** is – a meaning we contend is fully and clearly supported by the majority decision.

14.

The Court held that the Government had a constitutional obligation to create an independent Anti-Corruption agency.

15.

The question then was whether the legislation which created the DPCI as such Anti-Corruption unit, met the requirement of sufficient (**"adequate"** or **"necessary"**) independence. This was the whole of the then Chapter 6A of the SAPS Act. See **[160]** – no reference to individual sections; **[163]** the **"impugned legislation"**; **[164]** the legal provisions **"establishing" the DPCI** – also **[178];** also **[208]**.

16.

The question was to be answered with reference to the **"structural and operational attributes"** of the DPCI in Chapter 6A. This was to be an overall assessment and conclusion. See **[164] [178]**.

17.

What was required was not full or absolute independence but

adequate, sufficient or necessary independence from political and / or executive undue influence. See **[178] [206] [208] [214] [216]**.

18.

A roundabout and swings assessment with reference to all the attributes of the DPCI was called for. See **[239] [241] [244] – [246] [248]**.

19.

Some measure of oversight, control and accountability to the executive was acceptable; undue oversight, etc. was an unconstitutional trammelling of independence. See **[215] [236] [244]**.

20.

The comparison with the framework of the DSO demonstrated that the DPCI fell very far short from being sufficiently independent (**"markedly"**, **"how far fell short, far too little"**). See **[209] [211] [231]**.

21.

It was especially the lack of security of tenure and potential political control via the hands on policy determinations which signalled and exemplified the major lack of independence. See **[208] [213] [217] [228]**.

22.

As the then DPCI fell so markedly short in especially two aspects, the Court held Chapter 6A to be unconstitutional. In **GLENISTER** the Court (and we refer to the majority) adopted a package deal approach to the challenge and held that considered as a whole, given the mechanisms and structures of the entity (the DPCI) created, such entity lacked sufficient independence to meet the constitutional requirement of independence.

23.

23.1 We contend for the above because foremost, this is what **GLENISTER** says in the passages referred to.

23.2 Secondly, whilst the Court did isolate and focus on certain statutory provisions and features of the SAPS Act which informed its concern and eventual finding, it did not strike down individual sub-sections or apply a criterion other than an overall one.

24.

The **GLENISTER** judgment also therein recognises that it is testing for an acceptable end product – a sufficiently independent entity in framework and operational mechanism terms.

25.

This means that not every point of concern raised in the judgment necessarily needs to be addressed. Corrective legislation in respect of some of the features may suffice for these have or may have, a permeating effect on the overall assessment and amendments may even exponentially increase independence.

26.

It further means that how the Legislature addresses the specific concerns and which of these it addresses is its business (see **[196]** – the end product is to be tested afresh and judged as a whole, for it is a reasonably sufficient degree of independence in context, which is decisive.

27.

The inversive is also true; if the end product is a sufficiently independent entity measured against constitutional norms, individual sections cannot be targeted on the basis that their content is open to reasonable change which would increase the overall independence. Challenges to individual sections of the SAPS would require a stand-alone challenge by an Applicant with *locus* vis-à-vis that particular issue dealt with in the impugned individual section. That is not the Applicant's case.

28.

The challenge is then answered on the core issue of sufficient

independence (as per **GLENISTER [196]** with reference to the post 2012 amendment SAPS Act).

THE SEPARATION OF POWERS DOCTRINE:

29.

This doctrine has been endorsed as fundamental to the constitutional regime and it must be so. If this doctrine is undermined, it effectively undermines democratic government as the premises of our State and indeed Parliament as the legitimate funnel of expression of democratic will.

30.

This doctrine is set out in **INTERNATIONAL TRADE ADMINISTRATION COMMISSION v SCAW SOUTH AFRICA (PTY) LTD 2012 (4) SA 618 (CC):**

"[91] It is now clear from a steady trickle of judgments that the doctrine of separation of powers is part of our constitutional architecture. Courts are carving out a distinctively South

African design of separation of powers. It must be a design which in the first instance is authorised by our Constitution itself. In other words, it must sit comfortably with the democratic system of government we have chosen. It must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history. For instance, it must ensure effective executive government to minister to the endemic deprivation of the poor and marginalised and yet all public power must be under constitutional control. Our system of separation of powers must give due recognition to the popular will as expressed legislatively, provided that the laws and policies in issue are consistent with constitutional dictates."

"[92] In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the

Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so."

"[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

31.

See also **NATIONAL TREASURY AND OTHERS v OPPOSITION TO URBAN TOLLING ALLIANCE AND OTHERS 2012 (6) SA 223 (CC)**:

"[63] ... In ITAC we followed earlier statements in Doctors for Life and warned that —

> *'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.' "*

32.

The invocation of the separation of powers doctrine obviously cannot shield any branch of the State, against unlawful conduct.

(**NATIONAL TREASURY (supra) [64]**).

33.

See further: **SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS v HEATH AND OTHERS 2001 (1) SA 883 (CC) [26]**

MINISTER OF HEALTH AND OTHERS v TREATMENT ACTION CAMPAIGN AND OTHERS (No 2) 2002 (5) SA 721 (CC) [98] – [99]

DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, AND OTHERS 2009 (4) SA 222 (CC) [181] [182].

34.

Courts thus have the power to set aside executive and legislative decisions inconsistent with the Constitution. They cannot trench upon the separation of powers and aim to influence the conduct of

the Legislature and Executive branches of Government within the specific provinces of these.

35.

Of particular relevance are the following *dicta* in **MAZIBUKO AND OTHERS v CITY OF JOHANNESBURG AND OTHERS 2010 (4) SA 1 (CC):**

"[57] Those reasons are essentially twofold. The first reason arises from the text of the Constitution, and the second from an understanding of the proper role of courts in our constitutional democracy. …"

"[61] Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets

and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice."

(our underlining).

FRAMEWORK LOCATION AND NATURE OF THE DPCI

36.

The Anti-Corruption unit which the Government is to create as contemplated in **GLENISTER** and indeed in Chapter 6A, is obviously a policing agency. It is to police the crime of corruption.

37.

It is inherent to such policing that such agency will at times resort to clandestine behaviour (trapping, surveillance and the like) and non-transparent operations from information networks to armed raids and invasive search and seizure operations.

38.

In the South African Context and Constitutional framework the police describes a body of persons employed by the State and whose task it is to investigate criminality and generally enforce the provisions of criminal law in the field.

39.

The police is the civil force of a State responsible for the prevention, detection and investigation of crime and the maintenance of public order. An Anti-Corruption entity would thus police and enforce law in the specific domain of corruption.

40.

The DPCI on any approach, would have the core function of policing offences of corruption. The Constitution contemplates that such policing function and functioning would be located in the Police Service and the **GLENISTER** judgment **[162]** accepted that such location of the DPCI is not in itself, objectionable.

41.

Chapter 11 deals with the Constitutional framework of Security Institutions of which the police is one such body. The Court is respectfully referred to the general provisions of particularly S198(d) and S199(1) (a **single** police service), S199(7) and S199(8) (which imposes multiparty parliamentary committee oversight).

42.

Sections 205 – 208 deal specifically with the police service (which is an armed service) whilst S206 in particular establishes political responsibility for the police on the part of a Government (of the day) Minister.

> *"206 Political responsibility*
>
> *(1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.*
>
> *…*

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government."

43.

Whether the DPCI is located within the SAPS by reason of constitutional imperative or by constitutionally permissible election to do so, once so located it must fit seamlessly into the constitutional structure of the security forces. The Constitution cannot be unconstitutional.

THE COURT *A QUO*:

44.

The Court *a quo* struck down a number of the sub-sections of the Amendment. The other sub-sections impugned were considered to make the grade.

45.

The Applicants have subtly transmuted the overall approach in **GLENISTER**, into a wish list for each sub-section of the impugned provisions. The Court *a quo* has been persuaded into endorsement hereof in its sub-section by sub-section conclusion. How else, for example, is it a basis for striking down the appointment process of the Head of the DPCI that the provisions of S17CA do not accord with **"international best practice" [122.1]** save as a wished for result?

46.

What principle of our Constitution requires Legislation to meet best (and according to whom?) international practices in order to be valid? This is certainly not set as a requirement in **GLENISTER**. Why is it not for the Legislature to determine whether due to policy or finances or other practical constraints that the best practice should not be adopted?

47.

Similarly the other reasons for striking down S17CA are more wishes or choices than findings of unlawfulness with which Courts are primarily concerned see (**[122.1**] Court *a quo*). Why appointment by the Minister and Cabinet would as such constitute unacceptable political control is not clear. What it means is, however, clear – Chapter 6A may not provide for such appointment, but the NDPP who controls the prosecution for corruption, can be so appointed (that the NDPP must have a legal qualification is, with respect, bye the bye). Given the **DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2013 (1) SA 248 (CC)** decision which recognises as objective features the qualities of honesty and integrity it is difficult to see how the sub-section is unconstitutional if the **GLENISTER** comparison is resorted to,

48.

It is not quite clear why the Court *a quo* considered that an individual assessment of each impugned sub-section and individual striking downs, were appropriate. Its decision recognises a limping DPCI. It

struck down 6 sections (some partially)/. What if the Legislature amended four to meet the Court's concerns in the meantime?

49.

This could not be based on the sub-sections being susceptible to different interpretations (**DPP, TRANSVAAL (supra) [13]**).

50.

As indicated, the Court *a quo's* decision does not accord with the fundamentals of **GLENISTER**. There is no overall conclusion of a significant overall lack of adequate independence. That such a lack had to be a significant overall defect appears not only from **GLENISTER** but also from this Court's earlier decision in **EX PARTE CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: IN RE CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (4) SA 744 (CC) [477] – [481]**.

51.

The test is not whether the Government has complied with every constitutional demand (which glenister reads the concerns to be, hence the contempt application), but whether the DPCI in its new guise is adequately independent measured against the constitutional demands and the tests in **GLENISTER**).

52.

The reliance by the Applicants and in the Court *a quo* on differences between the Respondents as to the meaning of certain of the provisions of Chapter 6A, as advancing the conclusion of the unconstitutionality of these, has on analysis, no merit.

53.

The provisions of Chapter 6 were not impugned on the basis of their vagueness. Nor would an attack so premised promise success – **"vagueness"** in the sense that a statutory provision can be interpreted to have different meanings (and compare **NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY 2012**

(4) SA 593 (SCA)), is the ally of constitutionality unless all reasonable permissible interpretations yield unconstitutional results (in which case the susceptibility to different interpretations is truly irrelevant). The Court clearly can and will then prefer the interpretation which accords with Constitutional demands.

54.

The Legislature considered and passed the 2012 Amendment Act with the clear purpose of creating a sufficiently independent DPCI measured against the overall **GLENISTER** criterion. The history of the Amendment and the policy debates and process resulting in the 2012 Amendment are fully set out by the Minister. It suffices to stress that the Amendment was intended to create an independent DPCI within the **GLENISTER** required parameters. The Amendment was a deliberate and carefully considered attempt to meet the **GLENISTER** requirements.

55.

The overall assessment of independence in **GLENISTER**

ameliorates the invalidation of Chapter 6A as judicial intervention in the legislative and executive spheres. Precisely because **GLENISTER** concludes that Chapter 6A falls very substantially short of the necessary independence requirement, it is not judicially prescriptive as to form and content of DPCI legislation.

56.

It follows that the more concrete and specific the attack on particular Sections and sub-sections of Chapter 6A, the more compelling the argument that the Court has impermissibly donned the mantle of Legislature and / or Executive. There must come a time that the judicial conclusion that the Legislature's efforts failed to sufficiently bestow independence, cuts down the options to such an extent that the Court all but in express terms legislates the terms of the **"acceptable"** text.

57.

It is for this very reason that the HSF initially attacked the whole of Chapter 6A and sought for it to be struck down as a whole. A sub-

section by sub-section striking down for want of sufficient independence simply smacks of a Court blue print for the Legislation.

58.

It is respectfully submitted that the majority in **GLENISTER** may have erred in the direct constitutional impact afforded international treaties. S226 cannot serve to lend constitutionality to South African legislation reflecting such treaty. This is, however not necessary to address.

59.

It is, however, accepted that the police force contemplated in the Constitution, must be an independent service. The security forces are permanent entities and components of the constitutional framework. They are accountable within the system to the Government of the day and subject to Governmental control. Their tasks in the constitutional state clearly transcend political loyalty to the Government of the day.

60.

As part of the police force, an Anti-Corruption agency, must thus of necessity, have the necessary independence in the legal structural sense.

61.

It is also accepted that the notional independent DPCI would be aimed at combatting, *inter alia*, the corrupt activities of Government (the Executive and Legislative level) and as such cannot simply be an extension of the decision making hierarchy of these components.

62.

This Court and any other court obviously does not intrude on the province of the Legislature or the Executive if it considers the legislative framework of an Anti-Corruption agency and finds that it does not qualify as a policing entity as contemplated in Chapter 11 of the Constitution especially given the potential corruption of their political masters. Such agency must have the necessary structural independence contemplated in these Sections. The same basic

reason the highest Court rejected the High Court created by Parliament, namely, that it was not, given its structure, a Court, underlies **GLENISTER**. It was so dissimilar from the Anti-Corruption agency contemplated in the Constitution, that it did not qualify as such at all.

63.

This conclusion was controversial as the split decision in this Court indicates, but it provides a rational basis for the order which if the value judgment was sound, did not offend the separation doctrine.

64.

It is not in issue in this matter that corruption is a serious and heinous crime that threatens the very fabric of modern society. This has been spelled out in **GLENISTER**.

65.

That said, corruption is not a new offence – in its basic guise it has for all practical purposes been around and treated for the serious

crime it is, from the time crimes like murder, theft, assault and the like were recognised. It calls for effective policing and prosecution. At the same time it is difficult to perceive why the integrity and independence of a police official investigating a murder should be a lesser goal than that of the police official investigating a R100,000.00 government tender bribe.

66.

None of the above is intended to convey that Chapter 6A could not have created greater independence for the DPCI or even that such would not from a lawyer's perspective, have been preferable. Indeed, that may well be so. What is objected against is that such standards have somehow become the minimum requirements for the constitutional validity of each section of such Legislation. Such threshold especially on an individual sub-section basis is not what **GLENISTER** lays down.

67.

However serious the threat of corruption and however dire the need

for an independent DPCI to avoid the Government from shielding itself against policing of corrupt members thereof, the DPCI cannot be an absolutely independent stand-alone entity.

68.

That would clash generally with the South African constitutional system as a democratic structure in so far as ultimate power must lie with the general electorate through its directly elected representatives as the legislature and its indirectly elected representatives as the main Executive authority.

69.

It would also clash with the specific provisions of the Constitution regulating the security (inclusive of the police) forces in that Chapter 11 of the Constitution and particularly S198(d) which subjects policing *"to the authority of Parliament and the national executive".* This is recognised in **GLENISTER**.

70.

Like any other security and police service or branch thereof, the question of who guard the guardians, is a relevant once which requires an answer in the Constitutional context.

71.

Given the inherent nature of a DPCI, the undoubted power it inherently has and the need for a considerable degree of covertness in operation, the dangers of a DPCI becoming an instrument of oppression and a law unto itself are obvious. Comparisons or analogies with Chapter 9 Institutions are generally misplaced – none of such bodies comprise relatively large numbers of persons entitled to carry arms and empowered to invade privacy, dignity and other fundamental rights covertly.

72.

Where the line is drawn, is a policy matter determined by the Legislature. The more independent a DPCI, the greater the danger of it becoming a law unto itself; the greater the licence for Executive

control, the more likely is political interference to safeguard corrupt self- interests. In neither case is extreme delinquency of the DPCI or the Government as Executive, to be the realistic postulate of rational line drawing (**GLENISTER [234]**). Without some control, accountability is an empty concept.

73.

Our jurisprudence recognises the salutary practice of deciding no more than what is absolutely necessary to determine the case before Court particularly in Constitutional issues. Such practice promotes the necessary caution and judicious and pragmatic approach.

See: **KAUESA v MINISTER OF HOME AFFAIRS AND OTHERS 1995 (1) SA 51 (NM)**.

74.

The challenge to the individual Sections was and could only have been a facial one. The undesirability of interpreting each Section as

to its detailed meaning when that is not what **GLENISTER** sanctions, is then even more pressing.

75.

The First Respondent respectfully contends that due consideration must also be given to the following aspects in deciding whether the Amended 2012 SAPS Act creates sufficient independence for the DPCI in respect of its structure and mechanisms of operation:

75.1 Features of the SAPS Act which promote independence, cannot in any consistent judicial approach be ignored in the current value judgment.

75.2 The counter-effect of total independence is the tendency towards being a law unto itself, in such institutions. This submission does not conflate accountability with independence – measures for control such as provisional suspension, financial administration of flow of funds etc. simply are called for. The provisions dealings with these aspects must be practical and capable of reasonable and

expedient implementation given the dictates of democratic government under the doctrine of separation of powers.

75.3 There is very little if not no evidence that the DPCI in its current guise is offensive as South Africa's treaty compliance when the implementing conduct of the treaty partners is considered as informing the realistic content of the treaties.

76.

The Amendment brought numerous aspects of the DPCI in line with the DSO (and NPA) statutory provisions. The **GLENISTER** judgment does advise the merits of such comparison as a tool (of course, then also as a legislative model) for ascertaining independence.

77.

The appointment criteria now effectively equates (save for Minister /

President but both in Cabinet) the appointment of the NDPP and the Head of the DPCI. These are objective criteria which can be implemented through Court challenge. The decisions in **DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2012 (1) SA 417 (SCA)** and **DEMOCRATIC ALLIANCE 2013 (supra)** regarding the appointment of the NDPP, reflect the judicial control extant to ensure that persons of integrity are appointed as Head and Deputy Heads of the DPCI, as the SAPS Act now reads.

See: **DEMOCRATIC ALLIANCE 2013(supra) [20] – [26]**.

THE GLENISTER TESTS FOR ADEQUATE INDEPENDENCE:

78.

78.1 The CC held that the tests relate to the structural and operational features of the statutory anti-corruption body. The **GLENISTER** decision requires these aspects to be analysed.

78.2 The Second Respondent's analysis shows that the DPCI surpasses but at the very least matches the DSO in respect of structural and operational features. That ends the case.

78.3 The major deficiencies in the unamended Act were:

78.3.1 The inadequacy of provisions and particularly the absence of provisions regarding the conditions of service particularly security of tenure and remuneration as a category of what was lacking comparing it to the DSO in particular; it was lack of security of tenure of particularly the Head(s) which was decisive. **[208]**

See: **[209] [2010]** in particular.

78.3.2 The degree of party political control consisting of offensive powers of hand-on-

management, hands-on-supervision, and hands-on-interference **[235]** through the policy guideline powers of the Ministerial Committee and the co-ordination of Cabinet **[228]**.

79.

The Legislature addressed these in the 2012 Amendment by some 50 amendments and directed at the areas of concern. These amendments are fully dealt with by the other Respondents.

80.

If the **GLENISTER** template is then compared with the amendments, the overall result is clear. The DPCI is adequately independent given the **GLENISTER** demands as to the overall adequacy of the DPCI structurally and functionally.

SPECIFIC ASPECTS:

81.

The First Respondent supports the defence of the constitutionality of the struck down Sections of the Amendment by the other Respondents. If needs be, any specific aspect can be addressed orally.

82.

The First Respondent raises the following aspects in support.

83.

Appointment of DPCI functionaries by the Executive given the correspondence with the NDPP and DSO Head modes of appointment, is in accordance with the accountability of the Executive for the incumbent's conduct. The judgment in **VAN ROOYEN AND OTHERS v THE STATE AND OTHERS (GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA INTERVENING) 2002 (5) SA 246 (CC) [108] – [109]** is applicable and persuasive. The objective criteria for appointment and the right to challenge an

appointment suffices for adequate and comparable independence – compare: **DEMOCRATIC ALLIANCE 2013 (supra)**.

84.

It is the worst case scenario approach favoured by the Applicant which also underlies the concern about the 2 year extension of the term of office of a Head who has not served his full term when the age restriction kicks in (as Parliament would know at the outset). Practical considerations more than any evil agenda of potential manipulation and indeed off-set by the initial requirements of personal integrity, base this. A potentially delinquent Minister or Executive is and should not be the basis for interpreting a provision not to be sufficiently pro-active: **VAN ROOYEN (supra) [37]**.

85.

The power of appointment in the DPCI would necessarily in the absence of express provisions of suspension or termination imply such powers.

Compare: **MASETLHA v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER 2008 (1) SA 566 (CC) [66] [68]**

also: **FREE ENTERPRISES FUND AND BECKSTEAD AND WATTS LLP, PETITIONERS v PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD et al 130 S.G. 3138 (2010)**.

86.

If there is good cause for removal, such power should not be denied the executive.

87.

It is not clear why the Court *a quo* held that PAJA would not govern the removal process. It seems to us that it would.

88.

The Court *a quo* adjudicated the independence impact of the

Sections struck down, on a worst abuse scenario and the failure to guard against such occurring. Co-operation between Government Departments is enjoined by the Constitution – S41. The reasoning for striking down S16 and S17 in part because co-operation implicates the exclusiveness of the DPCI activities, has, in submission, no merit.

89.

The **JUSTICE ALLIANCE OF SOUTH AFRICA v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2011 (5) SA 388 (CC)** is not in point – that struck down a provision which was in conflict with an express term of the Constitution (properly interpreted). It did not deal with the question whether an independence value judgment threshold was achieved.

90.

The two broad deficiencies which underlay the **GLENISTER** finding of inadequate independence (see **[248] – [250]**) have been addressed in the Amendment so as to remove the substantial

failure. The comparison with the DSO and NDPP legal frameworks detailed by the other Respondents demonstrates this.

91.

The application in both the Helen Suzman Foundation and the Hugh Glenister application should then have been dismissed in the Court *a quo* and in this Court such is the order sought.

KJ KEMP SC

T MASUKU

Chambers, Durban and Cape Town

13th April 2014.