IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT07/2014

In the matter between:

THE HELEN SUZMAN FOUNDATION	**Applicant**
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
MINISTER OF POLICE	**Second Respondent**
HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	**Third Respondent**
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**Fourth Respondent**

HEADS OF ARGUMENT ON BEHALF OF SECOND AND FOURTH RESPONDENTS

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1. Two features distinguish the legislation under scrutiny. It constitutes, firstly, an attempt to align the provisions relating to the Directorate for Priority Crime Investigation ("the Directorate") with the judgment of this Court in **Glenister v President of RSA**[1] ("*Glenister 2*"); and secondly, an attempt to amend the provisions of the South African Police Service Act, 1995, ("the SAPS Act"), as it existed pursuant to the South African Police Service Amendment

[1] **2011 (3) SA 347 (CC)**

Act, 2008, ("the 2008 Amendment Act"), in order to ensure that the Directorate has the necessary operational independence to fulfil its mandate without undue influence. This is clear from the headnote to the South African Police Service Amendment Act, 2012 ("the 2012 Amendment Act") which introduced the impugned provisions.

2. Applicant's principal contention is that "*the various provisions of the SAPS Act, as amended, did not remedy the constitutional defects identified by this Court in Glenister*."[2]

3. Applicant is wrong. In these heads of argument we establish, firstly, that the defects found in Chapter 6A of the SAPS Act in *Glenister 2* have been appropriately remedied, and secondly, that individually and collectively the defects found by the Court *a quo* and other defects contended for by the applicant do not and cannot deprive the Directorate of the necessary operational independence to fulfil its mandate.

4. We deal with each of these subjects chronologically below.

[2] Applicant's heads of argument paragraph 4

A THE DUTY TO ESTABLISH AN INDEPENDENT ANTI-CORRUPTION UNIT AND THE NATURE OF INDEPENDENCE REQUIRED

5. In *Glenister 2* this Court stated that corruption disenables the State from respecting, protecting, promoting and fulfilling the full enjoyment of fundamental rights and freedoms as required by s7(2) of the Constitution.[3] Corruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights.[4] That corrosion necessarily triggers the duties s7(2) imposes on the State.

6. It is open to the State in fulfilling those duties to choose how best to combat corruption. That choice must withstand constitutional scrutiny.[5]It is possible to determine the contents of the obligation s7(2) imposes on the State without taking international law into account.[6] Even without international law "*on a common sense approach, our law demands a body outside executive control to deal effectively with corruption.*"

7. However, the issue is not whether the DPCI has full independence, but whether it has an adequate level of structural and operational

[3] See paragraph 175
[4] Paragraph 200
[5] Paragraph 200
[6] Paragraph 201

autonomy, secured through institutional and legal mechanisms, to prevent undue interference.[7] The Court associated itself with a report in 2007 by the OECD; Specialised Anti-corruption Institutions; Review of Models.[8] This stated that "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference.*"

8. What was required was not insulation from political accountability but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit.[9] This Court did not mean to impose on Parliament an obligation to create an agency with a measure of independence appropriate to the judiciary.[10]

9. To the above formulation a further consideration was added; namely, whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy protecting features.[11]

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[7] Paragraph 206
[8] See paragraphs 187 and 188
[9] Paragraph 216
[10] Paragraph 207 of *Glenister 2*
[11] The Court relied on **Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa intervening) 2005 (5) SA 246 CC at paragraph 32**, endorsing the finding in **R v Valente** In **Van Rooyen's case**, at paragraph 34. The Chief Justice agreed that "*an objective test properly contextualised is an appropriate test for the determination of the issues of independence of the Magistracy (in connection with the appointment procedures and security of tenure)*." He added that the perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. He endorsed the

10. The Court also stated that there are many ways in which the State can fulfil its duty. The Court would not be prescriptive as to what measures the State took, as long as they fall within the range of possible conduct that a reasonable decision maker in the circumstances may adopt. A range of possible measures was therefore open to the State, all of which would accord with the duty the Constitution imposes, so long as the measures taken are reasonable.[12]

11. The present Chapter 6A dispensation, created by the 2012 SAPS Amendment Act, has eliminated all means of undue interference that the executive, and particularly the Minister could exercise. It has also severely curtailed executive control. The Directorate has been expressly mandated with the function of investigating corruption free of Ministerial policy or oversight. The measures taken by the State are reasonable.[13] In order to vitiate the impugned sections of the SAPS Act it was incumbent upon the applicant and the Court *a quo* to establish that the legislation does not rule out inhibitions on effective anti-corruption activities; and

statement by a United States Court that "*we ask how things appear to the well-informed, thoughtful and objective observer, rather than a hypersensitive, cynical and suspicious person.*" Bearing in mind the diversity of our society this cautionary injunction was of particular importance in assessing institutional independence.

[12] Paragraph 191

[13] Essentially the reasonableness of the legislation is the prerogative of Parliament. See **New National Party of South Africa v Government of the RSA 1999 (3) SA 191 (CC).**

that it threatens imminently to stifle the independent functioning and operations of the Directorate.[14] They have failed to do so. We will analyse each section challenged further below and demonstrate that individually and collectively they place no inhibitions on effective anti-corruption activity and do not stifle independent functioning and operations.

B **REMEDYING THE 2008 AMENDMENT ACT**

12. In *Glenister 2* this Court concluded that the provisions introduced by the 2008 Amendment Act, "*failed to afford (the DPCI) an adequate measure of autonomy. Hence it lacks the degree of independence arising from the constitutional duty of the State to protect and fulfil the rights in the Bill of Rights. Our main reason for this conclusion is that the DPCI is insufficiently insulated from political influence in its structure and functioning. But we rest our conclusion also on the conditions of service that pertain to its members, and in particular its head. These make it vulnerable to an undue measure of political influence.*"[15]

13. In essence therefore there were two types of inhibition on independence. Both related to undue political interference. These

[14] *Glenister 2* paragraph 231
[15] Paragraph 208

two grounds were amplified under two headings, namely: "*Accountability and oversight by the Ministerial Committee*"[16] and "*Security of tenure and remuneration*".[17] The provisions of the 2012 Amendment Act eradicated both bases for invalidation. We deal with each basis chronologically below.

14. The Court appreciated that the international agreements at issue required the Republic to establish an anti-corruption agency "*in accordance with the fundamental principles of its legal system*". It accepted that our legal system requires some level of executive involvement in any area of executive functioning. It did not cavil with some measure of executive involvement. It was the extent, and the largeness with which its shadow loomed in the absence of other safeguards, that was inimical to the independent functioning of the Directorate. Therefore the provisions of s17I, as it existed under the 2008 amendment, inevitably attracted adverse judgment.

<u>The Ministerial Committee</u>

15. This section provided for "*Coordination by Cabinet*". It authorised a Ministerial Committee to <u>determine policy guidelines in respect of</u>

[16] Paragraphs 228 to 244 of the judgment
[17] Paragraphs 217 to 227 of the judgment

the functioning of the Directorate; and directed the Committee to oversee the functioning of the Directorate.[18] Section 17I therefore directly facilitated undue interference by the executive. Accordingly, the Court stated that the power of the Ministerial Committee to determine guidelines was untrammelled and could specify categories of offences that it was not appropriate for the Directorate to investigate – or, conceivably, categories of political office-bearers whom the Directorate was prohibited from investigating.[19] The legislation did not rule out far-fetched inhibitions on effective anti-corruption activities, but left them open.[20] The section allowed the Ministerial Committee to

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[18] Section 17I provided as follows:
"*Coordination by Cabinet*
17I. ((1) The President shall for purposes of subsections (2) and (3) designate a Ministerial Committee which shall include –
- *(a) at least the Ministers for –*
  - *(i) Safety and Security;*
  - *(ii) Finance;*
  - *(iii) Home Affairs;*
  - *(iv)Intelligence; and*
  - *(v) Justice; as well as*
- *(b) any other Minister designated from time to time by the President.*

(2) The Ministerial Committee may determine

- *(a) policy guidelines in respect of the functioning of the Directorate;*
- *(b) policy guidelines for the selection of national priority offences by the Head of the Directorate in terms of section 17D1(a);*
- *(c) policy guidelines for the referral to the Directorate by the National Commissioner of any offence or category of offences for investigation by the Directorate in terms of section 17D(1)(b);*
- *(d) procedures to coordinate the activities of the Directorate and other relevant Government departments or institutions.*

(3) (a) The Ministerial Committee shall oversee the functioning of the Directorate and shall meet as regularly as necessary;
- (c) *The National Commissioner and the Head of the Directorate shall, upon request of the Ministerial Committee, provide performance and implementation reports to the Ministerial Committee.*"

[19] See paragraph 230 of *Glenister 2*
[20] See paragraph 231

"oversee" the Directorate "*when of necessity they are themselves part of the operational field within which it is supposed to function.*"[21]

16. Under 2012 amendment these powers have been removed. Coordination by a Ministerial Committee is limited to determining procedures to coordinate the activities of the Directorate and other relevant Government departments or institutions. The capacity for undue influence identified by this Court has been entirely done away with.

Security of tenure and remuneration

17. The Court found that members of the Directorate enjoyed no specially entrenched employment security. The head of the Directorate and the persons appointed to it enjoyed little if any job security.[22] The Head was slotted into the SAPS as a Deputy National Commissioner and the membership consisted of persons appointed by the National Commissioner of SAPS on the recommendation of the Head plus an adequate number of legal officers and seconded officials.

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[21] Paragraph 232
[22] Paragraph 219

18. Members could be dismissed under the broad grounds contained in ss34 and 35 of the SAPS Act. They enjoyed the same security of tenure as other members of the police force – no more and no less. Their dismissal was subject to no special inhibitions, and could occur at a threshold lower than dismissal on an objectively verifiable ground like misconduct or continued ill-health.[23]

19. Insofar as remuneration was concerned the 2008 provisions stipulated that the conditions of service for all members (including the grading of posts, remuneration and dismissal) were governed by regulations, which the Minister determined. The absence of statutorily secured remuneration levels gave rise to problems similar to those occasioned by a lack of secure employment tenure.[24]

20. To these criticisms the Court added the existence of renewable terms of office,[25] and a conclusion that the appointment of the Directorate's members was not sufficiently shielded from political influence.[26]

[23] Paragraph 221
[24] Paragraph 227
[25] Paragraph 249
[26] Paragraph 248 read with 219

Appointment

21. Whereas the 2008 provisions did not require the consideration of any specific criteria for the appointment of the National Head,[27] the present s17CA(1) introduces certain criteria as jurisdictional facts, the objective existence of which are a prelude to the appointment of Heads of the Directorate.[28]

22. The appointee must be "*a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate.*" Similar considerations apply to the Deputy National Head and Provincial Heads.

23. Renewable terms of office for the Heads no longer exist. They are appointed for "*a non-renewable fixed term of not shorter than seven years and not exceeding ten years*." These periods are to be determined at the time of appointment."[29]

24. In terms of s17DB the National Head determines the fixed establishment of the Directorate and the number and grading of posts, in consultation with the Minister of Police and the Minister

[27] See s17CA(2)(b) of the 2008 provisions
[28] See **DA v President of the RSA 2012 (1) SA 417 SCA paragraph 118 and DA v President of the RSA 2013 (1) SA 248 CC** at paragraph 20
[29] See sections 17CA(1), (2), (4), (5), (6) and (7)

for Public Service and Administration; and appoints the staff of the Directorate.

Remuneration

25. The Heads enjoy minimum rates of remuneration with reference to the salary levels of the highest paid Deputy National Commissioner, Provincial Commissioner and Deputy Provincial Commissioner.[30] Their remuneration scales must be submitted to Parliament for approval and may not be reduced except with the concurrence of Parliament.[31]

26. Remuneration, allowances and other terms and conditions of service and benefits of the National Head must be determined by the Minister with concurrence of the Minister of Finance by notice in the Gazette; and of the Deputy National Head and Provincial Heads by the Minister after consultation with the National Head and with the concurrence of the Minister of Finance.[32]

27. In terms of the common s17G under the 2008 and 2012 dispensations, remuneration, allowances and other conditions of service of members of the Directorate had to be regulated by the

[30] Section 17CA(8)(b)(i), (ii) and (iii)
[31] Section 17CA(9)
[32] Section 17CA(8)(a)

Minister in terms of s24 of the SAPS Act. However, the 2012 Amendment Act introduced s17CA(18), which requires the regulations referred to in s17G to be submitted to Parliament for approval.

28. The Minister must submit the remuneration scale payable to the National Head, as well as the Deputy and Provincial Heads to Parliament for approval and such remuneration scales may not be reduced except for the concurrence of Parliament (s17CA(9)).

Dismissal

29. In terms of s17DA the National Head may not be suspended or removed from office except in accordance with objectively verifiable grounds; that is, by the Minister for misconduct, on account of continued ill health, or incapacity to carry out his or her duties of office efficiently, or because he or she is no longer a fit and proper person to hold the office concerned; or on a finding by a Committee of the National Assembly of misconduct, incapacity or incompetence. This overlap provides a check and balance on the exercise of executive power.[33]

[33] Compare **In re Certification of the Constitution of the RSA, 1996; 1996 (4) SA 744 CC paragraph 111**

30. Furthermore, the Minister's power of removal is fettered by the requirement that an inquiry must be held into the Head's fitness to hold office, led by a judge or retired judge and performing it's function subject to the Provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000). In the case of a finding by a Committee of the National Assembly, there would in addition have to be the adoption by the National Assembly of a resolution calling for that person's removal from office adopted with the supporting vote of at least two-thirds of the members.

31. In terms of s17CA(19) any disciplinary action against the Deputy National Head, Provincial Head, member or employee must be considered and finalised within the Directorate structures subject to the relevant prescripts.

32. In terms of s17CA(20) no Deputy National Head, Provincial Head, member or administrative staff may be transferred or dismissed from the Directorate except after approval by the National Head.

Conclusion

33. In the above circumstances the criticism levelled at the provisions of Chapter 6A in *Glenister 2* have all been appropriately addressed. The issue that remains is whether the various sections challenged by the applicant, either individually or collectively, offend the constitutional obligation resting on Parliament to create an independent anti-corruption entity, in that they do not rule out inhibitions on effective anti-corruption activities and they threaten imminently to stifle the independent functioning and operations of the Directorate. We submit that this answer is in the negative.

34. One would hardly expect provisions in the 2008 dispensation that escaped the censure of this Court to be inhibitory. The same applies to new provisions that were specifically introduced in 2012 in order to render the Directorate independent.

35. Paramount among the latter is s17D(1)(aA). This vests the Directorate with the functions of preventing, combating and investigating selected offences not limited to offences of corruption defined by Chapter 2 of PRECCA[34] or referred to in s32 thereof. This section was amended by the 2012 Amendment Act and provides that persons in authority who know or suspect such

[34] The Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004)

offences are bound to report them to the Directorate. The introduction of s17D(1)(aA) has the effect of making the Directorate a dedicated anti-corruption entity. Previously it was not one.[35] Its previous mandate was described entirely in terms of national priority offences and any other offence referred to it by the National Commissioner.[36]

36. Unlike s17D(1)(a), which deals with national priority offences which in the opinion of the National Head need to be addressed by the Directorate, and s17D(1)(b) which deals with any other offence or category of offences referred to from time to time by the National Commissioner, s17D(1)(aA) is not subjected to any policy guidelines issued by the Minister and approved by Parliament.

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[35] See paragraph 233 of *Glenister 2*.

[36] The previous S17D provided as follows:
Section 17D "*(1) The functions of the Directorate are to prevent, combat and investigate –*

(a) national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Ministerial Committee, and

(b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Ministerial Committee.

2. If, during the course of an investigation by the Directorate, evidence of any other crime is detected and the Head of the Directorate considers it in the interest of justice, or in the public interest , he or she may extend the investigation so as to include any offence, which he or she suspects to be connected with the subject of the investigation.

3. The Head of Directorate may at any time prior to or during an investigation by the Directorate request the National Director of Public Prosecutions to designate a Director of Public Prosecutions to conduct an investigation in terms of section 28 of the National Prosecuting Authority Act, 1998 (Act No.32 of 1998)."

37. The provisions of s17D(1A) only serve to fortify this conclusion. The section requires the National Head of the Directorate to ensure that the Directorate observes the "*policy guidelines referred to in subsection (17D(1))*". No such policy guidelines are referred to in s17D(1)(aA) in relation to corruption.

38. Upon a proper interpretation of s17D(1)(aA) the National Head selects offences of corruption and other offences described in s34 for investigation[37] free of Ministerial policy guidelines.

C THE INDIVIDUAL SECTIONS STRUCK DOWN

39. The Court *a quo* struck down ss 16, 17A, 17CA, 17D, 17DA and 17K(4) to (9), although individually some of these sections bore no adverse relationship whatsoever to the degree of independence of the Directorate. Section 17A is a definition section; and sub-

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[37] The reason for this interpretation is that s17D(1)(aA) must be read in context with s17D(1)(a), which in turn must be read together with s17K(4)(a). The last-mentioned section provides that the Minister shall determine, with the concurrence of Parliament, "*policy guidelines for the selection of national priority offences by the National Head of the Directorate referred to in s17D(1)(a).*" It is apparent from this provision; firstly that the National Head must select national priority offences; and secondly, that this is referred to in s17D(1)(a). However, s17D(1)(a) does not use the word "*selection*" as it is used in the referring section 17K(4)(a). Instead s17D(1)(a) refers to national priority offences, "*which in the opinion of the National Head of the Directorate need to be addressed by the Directorate*." It is apparent from the quoted words that they mean that National Head *selects*" national priority offences. Accordingly, when the words "*selected offences*" are used in the immediately following s17D(1)(aA) "*selected offences*" implicitly refers back to the "*selection*" of national priority offences originating in SK(4)(a)(i). This selection is made, and can be made, by no-one other than the National Head. This interpretation of selection not only accords with the words "*in the opinion of the National Head in s17D(1)(a)*" but also with the words "*and the Head of the Directorate considers it in the interests of justice*" etc as it is used in s17D(2); that is, the National Head is *dominus* in the functioning of the Directorate: If, during the course of an investigation by the Directorate, evidence of any other crime is detected and the Head of the Directorate considers it in the interest of justice, or in the public interest, he or she may extend the investigation so as to include any offence which he or she suspects to be connected with the subject of the investigation.

sections 17CA (8), (9), (10), (11), (12), (13), (17), (18), (19), (20), (21), 22 and 17K(4) to (9) were not considered in the judgment.

40. Below we firstly consider the sections that were struck out by the Court, and then we consider the other sections being challenged by the applicant, as well as the grounds proffered in each case. We emphasise that upon analysis of each section, and all of them collectively, the question that must be answered is whether the provisions leave open inhibitions on the effective anti-corruption activities of the Directorate and imminently stifle the operation and functioning of the Directorate. The applicant – in his submissions – and the Court *a quo* – in its findings – often ignore this vital question.

SECTION 16

41. Applicant deals with s16 under the heading "Jurisdiction and Political Control."[38] Applicant wrongly emphasises s16(1) as a jurisdictional source of the Directorate's functioning[39]. In fact s17D establishes the mandate of the Directorate; and s17D(1)(a)(A) establishes the Directorate's jurisdiction over corruption, independently of Ministerial policy. Section 16 falls into Chapter 6

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[38] Heads part D

[39] See heads paragraph 83

of the SAPS Act which deals with Organised Crime and Public Order Policing Unit. Section 16(1) and (2) both deal with national priority offences as defined in s17A rather than corruption which is defined in PRECCA. Section 16(1) provides that "*circumstances amounting to criminal conduct and endeavour thereto, as set out in sub-section (2)*" must be regarded as crimes. The crimes referred to fall within the definition of national priority offence.[40] These provisions are unrelated to the Directorate's mandate and jurisdiction over corruption.

42. In terms of s17D(1)(aA) the Directorate has a mandate to investigate offences of corruption defined in PRECCA. Section 16(3) deals with something else, viz "*criminal conduct and endeavour thereto*." This relates to the national priority offences described in ss16(1) and (2)[41]and not corruption. Furthermore, s17AA provides that the provisions of Chapter 6A (where the mandate to investigate corruption in terms of s17D(1)(aA) lies), in respect of the mandate of the Directorate, applies to the exclusion of any section within the SAPS Act.

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[40] Section 16 provides as follows:

"*16* ***National prevention and investigation of crime***

(1) Circumstances amounting to criminal conduct or an endeavour thereto, as set out in subsection (2), shall be regarded as organized crime, crime which requires national prevention or investigation, or crime which requires specialized skills in the prevention and investigation thereof".

[41] Criminal conduct and endeavour thereto contemplated in s16(2)

43. Section 16(3) was substituted by s3(b) of the 2012 Amendment Act. It provides that in the event of a dispute between the National Head and the National Commissioner or the National Head and the Provincial Commissioner regarding the question whether "*criminal conduct or endeavour thereto*" falls within the mandate of the Directorate, the determination by the National Head, in accordance with the approved policy guidelines, shall prevail. The mandate of the Directorate in terms of s17D is therefore not inhibited. Quite the opposite.

44. Little room exists for a dispute between the National Head of the Directorate and Police Commissioners in relation to corruption. Offences in respect of corrupt activities are defined independently of ss16 and 17A of the SAPS Act. Sections 3 to 17 of PRECCA (i.e. Parts 1, 2, 3 or 4) define corrupt activities differently from s16(1) and (2). In terms of s34(1) of PRECCA any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offence under Parts 1, 2, 3 or 4, or s20 or s21 of PRECCA,[42] must report such knowledge or suspicion or cause such knowledge or

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[42] or the offences of theft, fraud, extortion, forgery or uttering a forged document involving an amount of R10 000,00 or more

suspicion to be reported to the Directorate. Contrary to the applicant's submission SAPS could hardly investigate corruption without the knowledge of the Directorate.[43]

45. Furthermore the policy making powers of the Minister, in terms of s16(3) and any dispute would relate to a question about national priority offences. The policy provisions in this section do not limit the mandate or jurisdiction of the Directorate to fight corruption.[44]

46. The draft policy guidelines recently tabled by Parliament illustrate that the investigation of corruption, as referred to in Chapter 2 of PRECCA and as described in s17D(1)(aA), is not subject to the policy guidelines.[45]

47. Section 16(4)(a) provides that the Provincial Commissioner shall be responsible for the prevention and investigation of all crimes or alleged crimes committed in the Province concerned. However, in terms of S16(4)(b), where an investigation of a crime or alleged crime reveals that the circumstances referred to in s16(2) are present, a Provincial Commissioner must report the matter to the National Head as soon as possible. In terms of s16(4)(c) the

[43] Contrary to applicant's allegation in paragraph 83.
[44] Contra the applicant's heads paragraphs 91 to 93.
[45] Contra the applicant's heads paragraphs 100, 101 and 117.

National Head may, after consultation with the Provincial Commissioner, direct that the national priority offence be investigated by the Provincial Commissioner. These provisions do not imminently stifle the independence of the Directorate. If such offences are kept within the remit of the provincial SAPS this would occur in violation of s16(4). That would in any event not involve offences of corruption, because persons in authority are required to report such offences directly to the Directorate in terms of s34 of PRECCA.

48. Therefore s16 does not leave open any inhibitions on effective anti-corruption activities of the Directorate. The legislation has the opposite effect.

49. The Court *a quo* misdirected itself in considering s16(4)(a) read with s16(4)(b).[46] It accepted the applicant's contention that the duty to report is located in the incorrect place because the Directorate must have optionality over jurisdiction. This fails to take account of the object of s16(4)(b); and that a statutory duty rests upon people who hold a position of authority to report

[46] See paragraphs 91 to 94 of the Judgment

corruption and serious theft, fraud, extortion, forgery or uttering directly to the Directorate rather than to SAPS.

50. The Courts finding that "*the impugned legislation does not ensure that the DPCI's jurisdiction is exclusive or primary or even that certain key crimes such as corruption, must be referred to the DPCI by SAPS if they are perpetrated in more than one Province,*" is simply wrong.[47] So too is the conclusion that there is nothing to prevent the SAPS from investigating corruption without the involvement or even the knowledge of the Directorate. This might be true of national priority offences, but not corruption.

SECTION 17A

51. This section defines the meaning of Directorate, Ministerial Committee, national priority offence and Operational Committee. National priority offence means organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof, as referred to in s16(1). None of these definitions inhibit effective anti-corruption activities by the Directorate. In fact the

[47] See paragraph 94 of the Judgment

section was neither challenged by the applicant nor dealt with in the judgment of the Court *a quo*.

SECTION 17CA

52. Section 17CA deals with the appointment, remuneration and conditions of service of members of the Directorate under 22 sub-sections. The High Court misdirected itself by declaring the whole of this section unconstitutional without any reference to or analysis of sub-sections 17CA(8), (9), (10), (11), (12), (13), (17), (18), (19), (20), (21) and (22). The applicant challenged two aspects of appointment; namely, an alleged lack of adequate criteria as well as the necessity for Parliamentary oversight. He also challenged the provisions relating to extension of tenure.

Appointment of the Heads of the Directorate

53. In relation to appointment applicant argued that the criteria in s17CA(1) are unjustifiably broad, and do not provide sufficient guidelines to the delegee (the Minister), in compliance with the requirements of lawful delegation under the Constitution. The Court *a quo* found that there was insufficient guidance in

s17CA)(1) "*to guard against the infringement of rights in the exercise of the power conferred.*"[48]

54. The applicant relies for authority on **Freedom of Expression Institute and Others v President, Ordinary Court Martial NO and Others**[49] and **Affordable Medicines Trust v Minister of Health**.[50] They do not support applicant.[51] In the first case neither the relevant legislation nor the Military Discipline Code required that lay members of the ordinary court martial be legally qualified, although they were permitted to convict and imprison people for up to two years. This violated s174(1) of the Constitution, which required, *inter alia*, that a judicial officer be appropriately qualified person. In the second case the challenge was directed at the allegedly vague phrase "*on the prescribed conditions*". The challenge failed *inter alia*, because the Director-General ("the D-G") in the exercise of his or her discretion, had to have regard to all relevant considerations and disregard improper considerations; and had to impose conditions rationally related to the purpose for which discretionary powers were given; and credit had to be given

[48] Judgment paragraph [46]
[49] **1999 (2) SA 471 (C)**
[50] **2006 (3) SA 247 (CC) paragraph 34**
[51] Nor does the case of **Dawood v Minister of Home Affairs** **2000 (3) SA 936 (CC) at paragraphs [54] to [57]** assist applicant. In that case no attempt **at all** was made by the Legislature to give guidance to departmental officials in relation to their power to refuse to extend or grant temporary permits in a manner that would protect the constitutional right of spouses and family members.

to the D-G that he or she would do so in accordance with the law and the Constitution. Most importantly the issue there was a subjective discretion whereas the criteria for appointment in s17CA(1) are objective jurisdictional facts.

55. The issue in **Democratic Alliance v President of the Republic of South Africa and Others**[52] is directly comparable to the present one. However, the Court *a quo* found this judgment to be distinguishable on the issue of criteria because of an additional criterion in s9(1) of the National Prosecuting Authority Act; namely, that such an appointee must "*possess legal qualifications that would entitle him or her to practise in all the Courts in the Republic.*" This criterion, so the Court found, fetters the appointment power of the President, while the appointment power of the Minister in respect of the Head is comparatively unguided and unrestrained.[53] The **Freedom of Expression** case shows that such a requirement is necessary where judicial powers are to be exercised. Obviously a state prosecutor would require a specific (legal) qualification. Not so a police investigator. The Court *a quo* was wrong; and further misconceived the effect of the judgments of this Court and the SCA in the **DA** case.

[52] **2013 (1) SA 248 (CC); and 2012 (1) SA 417 (SCA)**
[53] Paragraph 42

56. The criteria common to the Directorate and the NPA are that the appointee must "*be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned*". These requirements constitute jurisdictional facts, the objective existence of which are a prelude to the appointment of the Heads of the Directorate.[54] The Minister is left with no discretion to appoint a person who does not have those qualities. Such discretion as he may have is to make an appointment from among persons who are "*fit and proper*" etcetera.

57. Appointment it is not left to the subjective judgment of transient Ministers, but has to be objectively assessed to meet the constitutional objective of independence.[55] The section must be construed to achieve its constitutional purpose.[56] Due regard must be had to the purpose of the statutory provision.[57] That purpose, is set out in the heading to the 2012 SAPS Amendment Act.[58] The criteria for appointment would have to be applied by the Minister

[54] See SCA judgment paragraph 118
[55] Compare SCA judgment paragraph 116 and 117.
[56] Compare paragraph 107
[57] SCA judgment paragraph [120]. Court *a quo* judgment paragraph 417
[58] Namely, to align the provisions of the legislature with the judgment in *Glenister 2* and to ensure that the Directorate has the necessary operational independence to fulfil its mandate without undue interference.

with that purpose in mind.[59] Furthermore, the Minister must not only have regard to the relevant factors that are brought to his knowledge, but also those that can reasonably be ascertained by him.[60] The Minister is not entitled to bring his own subjective view to bear.[61]

58. In the circumstances, before he or she is eligible for appointment, an appointee has to manifest objectively that he or she is a fit and proper person, duly experienced, conscientious and of sufficient integrity and independent mind to be entrusted with the responsibilities of the office of Head of Directorate. No further criteria are necessary. Certainly none have been suggested by the applicant or the Court *a quo*. Sufficient guidance for the Minister is already provided by the legislation.

59. If the appointee must meet the criteria above as an objective fact before the Minister may exercise any discretionary power at all, and the potential appointee is a fit and proper person etc. there can be no "*risk of the unconstitutional exercise of the discretionary power conferred*." The Court *a quo* was wrong in concluding both

[59] See by analogy **Affordable Medicines Trust v Minister of Health** **2006 (3) SA 247 (CC) paragraph [55]**
[60] SCA judgment paragraph 108
[61] Compare paragraph 116

that such risk exists as a result of the terms of s17CA, and that the only limit on that risk is judicial review.[62]

60. Applicant also submits that Parliament must play a more meaningful role in the appointment of the Head,[63] and that because the Minister with Cabinet appoints the Head this does not sufficiently insulate the Head from political interference. The mere fact that the Executive makes the appointment is not inconsistent with judicial independence. [64] Section s17CA(3) obliges the Minister to report to Parliament on the appointment of the Head. This is consonant with s92(3) of the Constitution and is not a mere make-weight. Contrary to what the Court *a quo* found[65] Parliament does have a veto power. In terms of s17DA(3) and (4) the National Head may be removed from office by the National Assembly. In addition, S17K(1) requires Parliament to effectively oversee the functioning of the Directorate. Parliament is therefore

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[62] See judgment paragraph 46
[63] The applicant's head paragraph 42
[64] In the First Certification judgment this Court held that the Executive could have retained the power to appoint Judges (and Magistrates) itself without infringing the institutional independence required by the constitutional principles. The mere fact that the executive makes or participates in the appointment of judges is not inconsistent with judicial independence required by constitutional principal VII. What is crucial to the independence to the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive. See **In re Certification of the Constitution of the RSA, 1996; 1994 (4) SA 744 CC paragraph 124**; and **Van Rooyen & Others v The State & Others 2002 (5) SA 246 (CC);** and the **DA** case (supra) paragraph 18 where the Court said: It does not follow that appointment by the executive render the appointed "*a political appointee*".
[65] Judgment paragraph 49

required to provide a check and a balance on appointment by the Minister.[66]

61. In *Glenister 2* no criticism as such was levelled against appointment by the Minister. In paragraph 249 the Court stated that "*We have further found that the appointment of its members is not sufficiently shielded from political influence*". The appointment of members was dealt with in paragraph 219.[67] Save for this there was no elaboration on political influence regarding appointment.

62. The applicant raises the same argument *mutatis mutandis* with reference to the Deputy Head and Provincial Heads. He minimises the requirement of consultation with the Head in this regard. The submissions above are repeated. It cannot be said that ss17CA(4) and (6) leave open inhibitions on effective anti-corruption activities and imminently stifle its independence.

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[66]In *Glenister 2* this Court recognised that Parliament operates as a counterweight to the Executive and its Committee system ensures that questions are asked, that conduct is scrutinised and motives are questioned. See paragraph 239

[67] "*[219] What is more, the head of the DPCI and the persons appointed to it enjoy little if any special job security. The provisions at issue provide that the head of the DPCI shall be a Deputy National Commissioner of the SAPS, and shall be 'appointed by the Minister in concurrence with the Cabinet.' In addition to the head, the Directorate comprises persons appointed by the National Commissioner of the SAPS 'on the recommendation' of the head, plus 'an adequate number of legal officers' and seconded officials. The Minister is required to report to Parliament on the appointment of the head of the DPCI.*"

Extension of tenure

63. In *Glenister 2* this Court stated that a renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office holder may be vulnerable to political and other pressures.[68] The provisions of the 2008 Amendment Act were silent as to any specifically entrenched term of office for the Head of the Directorate.

64. Section 17CA(1) now stipulates that the Head shall be appointed for a "*non-renewable fixed term of not shorter than 7 years and not exceeding 10 years.*" Section 17CA(2) provides that the period referred to in sub-section (1) is to be determined at the time of appointment. No degree of tergiversation can translate these provisions to mean anything other than that the Head is appointed for a non-renewable fixed term.

65. Nevertheless the applicant contended and the Court *a quo* agreed that the provisions of s17CA(15) and (16)[69] were of opposite

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[68] Paragraph 223

[69] *Section 17CA(15) & (16)* provides as follows:

"*(15) The Minister shall with consent of the National Head or Deputy National Head of the Directorate, retain the National Head, or the Deputy National Head of the Directorate, as may be applicable, in his or her office beyond the age of 60 years for such period which shall not-*

(a) exceed the period determined in section 17CA; and

(b) exceed two years, except with the approval of Parliament granted by resolution.

meaning and effect; i.e. although S17CA(15) expressly provides that the Minister may not retain the Heads in office for a period which exceeds the fixed period determined in s17CA. Applicant's conclusion is based on an interpretation of the words "*retain in his or her office*" in s17CA(15). The specific provisions of section 17CA(1) and (2) must override the general provisions of S17(A)(15).

66. The true effect of the section is to allow the Minister to retain the Heads in office beyond the age of 60 years. The object of inserting this provision is to accommodate imperative retirement provisions at age 60 which would otherwise apply in terms of s45(1)(a) of SAPS Act.

67. The High Court misdirected itself by declaring sub-sections 17(15) and 17(16) to be unconstitutional on the basis of the judgment of this Court in **Justice Alliance of South Africa v President of the Republic of South Africa & Others.**[70] That case dealt with a genuine "*renewal*" of the terms of the Office of the Chief Justice and even then, this Court found that "*age is an indifferent criterion*

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(16) The National Head or Deputy National Head of the Directorate may only be retained as contemplated in subsection (15) if-

(a) he or she wishes to continue to serve in such office; and

(b) the mental and physical health of the person concerned enables him or her so to continue."

[70] 2011 (5) SA 388 (CC)

that may be applied in extending the term of office of a Constitutional Court judge[71]".

SECTION 17D

68. Section 17D deals with the functions of the Directorate. [72]

69. The ratio in *Glenister 2* was focussed on and dealt with the duty that rests upon the State to establish an anti-corruption unit, having the necessary independence required by the Constitution. The introduction of s17D(1)(aA) is therefore material because the Head of the Directorate is empowered to select offences of corruption as defined for investigation. There is no subjection of his selection to policy guidelines. The Applicant's contention that presently one member of the Executive (as opposed to a Ministerial Committee) is empowered to impose guidelines as to

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[71] JASA's case at paragraph [91]

[72] The previous S17D provides as follows:

Section 17D "*(1) The functions of the Directorate are to prevent, combat and investigate –*

(c) national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Ministerial Committee, and

(d) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Ministerial Committee.

2. If, during the course of an investigation by the Directorate, evidence of any other crime is detected and the Head of the Directorate considers it in the interest of justice, or in the public interest , he or she may extend the investigation so as to include any offence, which he or she suspects to be connected with the subject of the investigation.

3. The Head of Directorate may at any time prior to or during an investigation by the Directorate request the National Director of Public Prosecutions to designate a Director of Public Prosecutions to conduct an investigation in terms of section 28 of the National Prosecuting Authority Act, 1998 (Act No.32 of 1998)."

how, where and when the Directorate should act[73] is wrong. (This is also is apparent from the guidelines approved by Parliament that were presented to the Court *a quo* by Mr Glenister.) The conclusions of the Court *a quo* in paragraphs [95] to [107] of the Judgment are therefore also wrong.

SECTION 17DA: SUSPENSION AND REMOVAL FROM OFFICE OF THE NATIONAL HEAD OF DIRECTORATE

70. Section 17DA deals with the suspension and removal of the National Head.

Suspension

71. The Minister may provisionally suspend the Head pending an enquiry into his or her fitness to hold such office as the Minister deems fit.[74] The Minister may also suspend the Head at any time after the start of proceedings of a Committee of the National Assembly for the removal of that person. Applicant contends that this is constitutionally invalid.

72. The fact that suspension takes place before the enquiry or after the start of proceedings of a Committee of the NA is not necessarily open to objection. The nature of the allegation against

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[73] See Judgment of the Court *a quo* paragraph 96
[74] See s17DA(2)(a)

the Head may, in itself, be so serious as to make it inappropriate for the person concerned to continue to exercise powers as a Head while the allegation is being investigated. The Minister would have to have reliable evidence before him and would have to conduct the suspension in a manner consistent with PAJA. If in the particular circumstances of the case his decision cannot be justified or he has failed to comply with the requirements of natural justice, his decision would be liable to be set aside on review by the High Courts. That constitutes adequate protection against any possible abuse of a power of suspension.[75]

73. In terms of s17DA(2)(c), during the period of suspension, the Head shall be entitled to such salary, allowance, privilege or benefit to which he or she would otherwise be entitled, unless the Minister determines otherwise. The Minister's discretion is subject to PAJA and would have to be fairly exercised.[76] If good reason exists for the suspension, the withholding of salary is not necessary disproportionate. In **Van Rooyen's** case[77] this Court stated "*There is no reason why a magistrate who is not fit to hold office, and is removed from office for that reason, should be paid for the period*

[75] Compare by analogy **Van Rooyen & Others v The State & Others 2002 (5) SA 246 (CC) paragraphs 170 and 171**
[76] See **Zondi v MEC for Traditional and Local Government 2005 (3) SA 589 (CC) at paragraph 101.**
[77] Supra paragraph 175

during which she or he is under suspension prior to removal. If the magistrate is not removed from office the salary withheld has to be paid."

Removal by the Minister

74. The Minister may remove the Head from office for misconduct; on account of continued ill-health; on account of incapacity to carry out duties efficiently; or on account of being no longer a fit and proper person to hold the office. This in turn is subject to an inquiry led by a judge or retired judge. (The Minister may "*thereupon remove him or her from office.*")

75. The first three grounds above are not materially different to the grounds on which judges may be removed in countries such as Australia, Canada, New Zealand the UK. They are similar to the grounds on which the Public Protector, the Auditor-General or a member of the SA Human Rights Commission, the Commission on Gender Equality and the Electoral Commissioner may be removed from office (viz. misconduct, incapacity or incompetence).[78] The fourth ground is the failure of an objectively justiciable fact that is required for the Head's appointment. Identical criteria apply to the

[78] See **Van Rooyen's** case (supra) paragraph 162

removal of the National Director of Public Prosecutions in terms of s12(6) of the National Prosecuting Authority Act.

76. Checks exist on any undue influence that the Minister may seek to exercise in dismissing the Head. The Minister's power of control is limited either by PAJA or by the right to fair labour practices vested by s23 of the Constitution. If s17DA(2) authorises administrative action it must be read together with PAJA. [79] Insofar as it may not be administrative action, the incumbent may assert rights under the Labour Relations Act.[80]

77. The Court *a quo* erred in concluding that the finding of the inquiry by a judge is not binding on the Minister.[81] He would be hard pressed to resist any claim supported by a finding of the judicial officer who enquired into the claimant's fitness to hold office. Contradicting such finding is likely to lead to a conclusion that the exercise of the power authorised by s17DA, in pursuance of which the Minister's decision was taken, was so unreasonable that no reasonable person could have so exercised the power.[82]

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[79] See **Zondi v MEC for Traditional and Local Government Affairs (supra) at paragraph 101;**
[80] See **Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC) at paragraph 64**
[81] Judgment paragraph 80
[82] See section 6(2)(h) of PAJA

78. A further check on removal by the Minister is contained in s17DA(2)(b); namely, that the removal of the Head, the reason therefore and the representations of the Head, if any, must be communicated in writing to Parliament within fourteen days of such removal.[83] In *Glenister 2* this Court recognised that Parliament operates as a counterweight to the executive.[84] In the circumstances it cannot be argued that the s17DA leaves the dismissal by the Minister open to undue political interference. The mischief that had to be guarded against, according to *Glenister 2* was the lack of special measures entrenching member's employment security to enable them to carry out their duties vigorously.[85] None of the present measures regulating dismissal existed at the time of the judgment.

79. Applicant is wrong in submitting that the provisions of s17DA(2)(a)(iii) permit removal of the Head if she cannot carry out her duties efficiently.[86] What the section focuses on is "*incapacity*" to carry out duties of office efficiently. The Public Protector,

[83] If Parliament is in session or, if not, within fourteen days after the commencement of its next ensuing session.
[84] Paragraph 239
[85] See paragraph 222
[86] Heads paragraph 67

Auditor-General or a member of the Human Rights Commission may be removed from office on this ground.[87]

80. These Chapter 9 institutions are established by the Constitution outside of the administration and are responsible to the National Assembly, which participates in their appointment and removal. Policing is a function of the administration and the relevant Minister is therefore responsible for its administration, including appointment and removal. There is nothing "*undue*" about this responsibility. Identical procedures for the appointment and removal of the Head of the Directorate to those applicable Chapter 9 institutions – for which the applicant argues – is not necessary for the independence of the Directorate.

Overlapping power of Parliament to dismiss

81. In the First Certification case[88] this Court held that overlapping powers of the executive and the legislature provides a singularly important check and balance on the exercise of executive power. It makes the Executive more directly answerable to the elected Legislature. The requirement that the Minister must provide Parliament with a full report concerning dismissal (and

[87] See s194(1)(a) of the Constitution
[88] Supra paragraph 111

appointment) embraces s92(3)(b) of the Constitution. The fact that the Minister and the NA may both dismiss an incumbent head on materially similar grounds cannot be a basis for constitutional invalidity. It is constitutionally endorsed. The Court *a quo* was therefore wrong in concluding that the two processes differ from each other in an arbitrary manner and cannot pass constitutional muster.[89]

SUB-SECTIONS 17K(4) TO (9)

82. It is not clear why sub-section 17K(4) to (9) were struck down. Although they are referred to in the order, they were not dealt with in the judgment. Presently the applicant argues that s17D(1)(a) read with s17K(4) facilitates unacceptable political control and potential interference beyond constitutionally acceptable limits.[90] However, as shown above 17K(4) affects national priority offences rather than the investigation of corruption *per se.*

D THE FURTHER SECTIONS CHALLENGED BY THE APPLICANT IN ITS APPLICATION FOR LEAVE TO APPEAL

Re Section 17H and 17K(1) to (2B) – Financial control

83. Applicant contends that in order to ensure its independence, the budget of the Directorate must be sufficient to fulfil its core

[89] Judgment paragraph 88
[90] Heads paragraph 95

mandate;[91] and that the Directorate must be in control of determining its budget and approval by Parliament. It should not be dependent on the "*grace of, hand-outs or agreement from the SAPS or the Executive*." Allegedly Parliament should appropriate the funds specifically for the Directorate on the Directorate's own submissions as to its requirements. However, this is precisely what the 2012 dispensation provides for.

84. Parliament determines what the Directorate will receive. The monies appropriated are ring-fenced for the Directorate; because the Head prepares and provides the National Commissioner with the necessary estimate of revenue and expenditure of the Directorate in order to give effect to sub-section 17H(5); (in terms of s17H(2)); and in terms of s17K(2A) a full breakdown of the specific and exclusive budget of the Directorate must be included in the budget report to Parliament.

85. Although s17H(3) provides that the Minister must mediate between the National Commissioner and the Head if they are unable to agree on an estimate of revenue and expenditure of the Directorate, neither the Commissioner nor the Minister is

[91] Heads paragraph 126

authorised by the SAPS Act to actually determine the estimate for the Directorate in the case of disagreement. The Head, however, has an opportunity to defend the Directorate's budgetary requirements before Parliament, in terms of s17K(2B). This section requires him to make a presentation to Parliament on the budget of the Directorate.

86. The Head does not act under the supervision or direction of either the Minister or a National Commissioner of Police. In terms of s17H(6) the Head must have control over the monies appropriated by Parliament in respect of the expenses of the Directorate. These expenses relate to the exercise of the powers, the carrying of their duties and the performance of the functions of the Directorate; and the remuneration and other conditions of service of members of the Directorate.[92] In terms of s17H(5) monies appropriated by Parliament must be regarded as specifically and exclusively appropriated for the Directorate and may only be utilised for that purpose.

87. The National Commissioner is bound by these provisions. She cannot deny the Head his right to use monies appropriated by

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[92] See s17H (1)

Parliament for its statutory purposes. Accordingly the Directorate has access to funds reasonably required to enable it to perform its functions i.e. it has "*financial independence*".[93] By comparison the previous dispensation, which drew no adverse comment in *Glenister 2*, provided no more than that expenditure in connection with the administration and functioning of the Directorate had to be paid from monies appropriated by Parliament for this purpose to the Department vote in terms of the Public Finance Management Act; and that the National Commissioner was to be the accounting officer.

88. In terms of s38(1)(a)(3) of the PFMA, the National Commissioner, as accounting officer, must ensure that the Department (including the Directorate) maintains "*an appropriate procurement system*". Any legally appropriate system would have to afford the National Head the control required by s17H(6).

89. In the above circumstances, and contrary to applicant's submission[94] there is no compelling reason why the Head should be the accounting officer of the Directorate. The applicant does not submit, and cannot submit that the provisions referred to above

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[93] See **New National Party v Government of the Republic of South Africa & Others 1999 (3) SA (3) SA 191 (CC) at paragraphs 98 and 99**

[94] Heads paragraph 30

leave open inhibitions on the effective anti-corruption activities of the Directorate or imminently stifle its functioning and operations.

Section 17E(8) – Integrity testing

90. The applicant contends that s17E empowers the Minister to prescribe measures to test the integrity of members of the Directorate, including random entrapment, the use of polygraph and testing for alcohol and drug abuse. Furthermore, it asserts that this would encompass the use of interception of communication devices against Directorate members at every level, including the Head.

91. The 2008 Amendment Act contained an identical provision to section 17E(8). It drew no adverse comment from this Court. The section does not refer to the interception of communication of members for the monitoring of their conversations. Interception is prohibited by s2 of the Regulation of Interception of Communications and Provisions of Communication Related Information Act 70 of 2002.

92. It is unclear from the applicant's submission how s17E(8) places inhibitions on effective anti-corruption activities. The Minister's powers are limited to prescribing "*measures*" for integrity testing. He is not authorised to implement specific measures mentioned in s17E(8). His power does not affect the independence of the Directorate. The checks and balances the applicant argues for[95] are therefore superfluous.

Section 17G – Conditions of Service

93. The applicant submits that there are no guarantees in respect of the conditions of service under s17G read with s24 of the SAPS Act; and that all conditions of service are at the grace of the Minister. This allegedly creates unacceptable incursions on the independence of the Directorate.

94. The power of the Minister to regulate, in terms of s17G read with s24, has been significantly curtailed in a manner that would prevent undue interference; that is, the regulations must be submitted to Parliament for approval in terms of s17CA(18). This represents a fundamental change from the position under the

[95] Heads paragraph 139

previous dispensation. This requirement is a rare statutory device.[96]

95. The pronouncement of this Court in *Glenister 2* in relation to the need for secure conditions of service, including secure levels of remuneration[97] resulted in material and effective changes being enacted by Parliament.[98] The applicant has chosen to view s17G in isolation. In so doing it disregards the safeguards provided to guarantee the conditions of service of members of the Directorate. In particular it is simply incorrect to state, as the applicant does, that "*all conditions of service are at the grace of the Minister*"[99], when the regulations made in terms of s17G are subject to Parliamentary approval.

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[96] Not even the provisions regulating the DSO demanded Parliamentary approval of the regulations made by the Minister of Justice and Constitutional Development in respect of a wide range of matters affecting the DSO, such as numerical establishment of the DSO, conditions of service, salaries, wages and allowances of special investigators, structures, grades, ranks and designations in the DSO, as well as the transfer and dismissal of DSO members.

[97] See paragraphs 208, 227 and 249

[98] In terms of s17CA(1) the Head is appointed "*for a non-renewable fix term*"*;* but only if jurisdictional facts exists to ensure that he or she is a fit and proper person. The same applies to the Deputy (s17CA(4) and the Provincial Head s17CA(6). In terms of s17DA a Head may only be dismissed on objectively verifiable grounds. Remuneration, allowances and other terms and conditions of service and benefits of the Head or determined by the Minister with the concurrence of the Minister of Finance, by notice in the Gazette (s17CA(8)(a)) and of a Deputy National Head and Provincial Heads by the Minister after consultation with the Head and with the concurrence of the Minister of finance (s17CA(8)(b)). The salary of the Head must be not less than the salary of the highest paid Deputy National Commissioner; of the Deputy Head not less than the salary level of the highest paid Divisional Commissioner; and of the Provincial Head not less than the salary level of the highest paid Deputy Provincial Commissioner (s17CA(8)(b)(i), (ii), (iii)). The Minister must submit the remuneration scale payable to the Head, the Deputy and Provincial Heads to Parliament for approval, and such remuneration scale may not be reduced except for the concurrence of Parliament (s17CA(9)). Section 17CA(19) provides that any disciplinary action against the Deputy National Head, Provincial Head, member or employee in the service of the Directorate must be considered and finalised within the Directorate structures subject to the relevant prescripts, thereby insulating members from external interference. Section 17CA(20) provides that no Deputy National Head, member or administrative staff may be transferred or dismissed from the Directorate, except after the approval by the Head.

[99] The applicant's heads paragraph 144

<u>Section 17I – Coordination by Cabinet</u>

96. The applicant contends that s17I(2) is malignant when read with ss 16, 17D and 17K. The precise submission is that "*it is unclear why there is a need for the DPCI's cooperation with other State bodies (including the prosecutorial service and intelligence) to be done through the medium of and procedures determined by a Ministerial Committee. The (Directorate) should, as an independent body be able to liaise with any other organ of State or functionary 'as circumstances require and not be dictated to by the National Executive.'*"[100] The coordination envisaged by s17I is allegedly inimical to the constitutionally required structural and operational independence of the Directorate. Such coordination was allegedly identified in paragraph 228 of *Glenister 2*.

97. As stated above the powers of the Committee that were criticised in *Glenister 2* (including paragraph 228) have been materially eliminated by the 2012 Amendment. It cannot be said that the existing procedures will fetter the Directorate; or involve hands-on regulation as previously existed under the 2008 dispensation. The Committee may establish procedures, but it may not be involved in the coordination of the Directorate's activities.

[100] Heads paragraph 147

98. The reasons why ss 16, 17D and 17K do not have the potential to undermine the independence of the Directorate in the investigation of corruption have been dealt with above. So too are the reasons why the sections were wrongly held to be unconstitutional by the High Court

E **JOINDER**

99. The issue of joinder is not a basis upon which the respondents seek any form of judgment from the Court. If there is merit in the point the Chief Justice might consider directing the parties to give notice to the Speaker of the National Assembly, and the Chairperson of the National Council of Provinces, of the forthcoming confirmation and appeal proceedings; and an opportunity to make such representations as they see fit on 15 May 2014.[101]

100. The second respondent contends that the Speaker and Chairperson are necessary parties because they have a legal interest in the subject matter of the litigation which was affected prejudicially by the judgment of the Court *a quo*. The reason is

[101] See **Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21**

that in *Glenister 2*[102] this Court concluded that Parliament had breached a constitutional obligation to create an independent anti-corruption entity, "*which is both intrinsic to the Constitution and which Parliament assumed when it approved the relevant international instruments ...*". That is a finding of substantive law, equivalent to the finding of Ngcobo CJ[103] regarding Parliament's failure to comply with its constitutional obligation to facilitate public involvement in its legislative process. Accordingly this Court held that Chapter 6A of the SAPS Act was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the Directorate. Parliament was then afforded 18 months to remedy the defect. The crisp issue in these proceedings remains whether or not Parliament has remedied its constitutional breach. That is a legal issue that has affected, and may still affect Parliament prejudicially: and not merely the executive who administer the legislation.

F **CONCLUSION**

101. In all circumstances the declaration of invalidity of s16 as well as ss17A, 17CA, 17D, 17DA and 17K(4) to (9) should be set aside;

[102] Paragraph 248
[103] Judgment paragraph 29

and leave to appeal against the judgment of the Court *a quo* should be refused.

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MICHAEL DONEN SC

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THABANI MASUKU

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HERMIONE CRONJE

Counsel for Respondents

Chambers

CAPE TOWN

4 APRIL 2014