IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 255/15

In the matter between:

ROBERT MCBRIDE Applicant

and

MINISTER OF POLICE First Respondent

MINISTER FOR PUBLIC SERVICE AND ADMINISTRATION Second Respondent

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INTRODUCTION

1 This is an application for confirmation of the orders of constitutional invalidity and ancillary orders made by the High Court (Gauteng Division, Pretoria).[1]

2 It concerns the independence of the Independent Police Investigative Directorate (IPID). IPID is the body established to investigate alleged misconduct and offences, including corruption, committed by members of the South African Police Service (SAPS).

3 IPID is no ordinary statutory body. Rather, section 206(6) of the Constitution itself required that IPID be established and expressly provides that it must be "*independent*".

4 Despite this, the IPID Act[2] does not contain sufficient safeguards to ensure that the Executive Director of IPID and IPID itself can act independently. It allows a cabinet member – the Minister of Police – to suspend the Executive Director of IPID and remove him from office. It affords Parliament no role in this process whatsoever.

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[1] A copy of the judgment of the High Court is attached an annexure "A" to the founding affidavit in the confirmation application.

[2] Independent Police Investigative Directorate Act 1 of 2011.

5 The relevant provisions are not consistent with the requirements of independence as they have been articulated by this Court in ***Glenister II***[3] and ***Helen Suzman Foundation***,[4] in relation to the suspension and removal of the head of the Directorate for Priority Crimes Investigation (DPCI).

5.1 Those judgments are directly on point. The express constitutional provision requiring IPID's independence means that it must be entitled to <u>at least</u> the same independence as the DPCI – which is a similar institution, but with no express constitutional protection of its independence.

5.2 Yet it is plain that the IPID provisions at issue in this application are even <u>less</u> protective of independence than the DPCI provisions which were struck down unanimously by this Court in the ***Helen Suzman Foundation*** decision. They therefore cannot be consistent with the Constitution.

6 The High Court was therefore quite correct to declare that the relevant legislative provisions are unconstitutional to the extent that they they purport to authorise the Minister unilaterally to suspend,

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[3] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

[4] *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC).

take disciplinary steps pursuant to suspension, or to remove from office the Executive Director of IPID.[5]

7 In what follows we demonstrate that this Court should confirm the orders granted by the High Court. We deal with the following issues in turn:

7.1 The factual background;

7.2 The constitutional requirement of an independent IPID;

7.3 The impugned statutory and regulatory provisions; and

7.4 The remedy granted by the High Court.

THE FACTUAL BACKGROUND

8 The question before this Court is whether the impugned statutory provisions adequately protect the constitutionally required independence of IPID. This is, of course, an objective question – not tied to the specific facts of Mr McBride's case.[6]

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[5] The provisions concerned are sections 6(3)(a) and 6(6) of the IPID Act; sections 16A(1), 16B, 17(1) and (2) of the Public Service Act, 1994; Regulation 13 of the Regulation 13 of the Regulations for the Operation of the Independent Police Investigative Directorate (IPID Regulations).

[6] *Shaik v Minister of Justice & Constitutional Development* 2004 (3) SA 599 (CC) at para 27; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at para 26.

9 Nevertheless, the facts of this case helpfully demonstrate the inadequacy of the statutory protection of IPID's independence.

9.1 The Minister has been able unilaterally to invoke his disciplinary and removal powers to sanction Mr McBride for the performance of the very functions that he was required to conduct independently. This is not a case of an Executive Director being disciplined for abuses committed outside the scope of his office. The Minister has sought to remove Mr McBride for carrying out the functions of his office in a manner that the Minister did not approve of, in the context of a politically charged investigation.

9.2 Special protective measures are required to guard against such executive interference in the functions of independent institutions. As this Court explained in ***Glenister II***, *"the special protection afforded the members of the DSO served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution."*[7]

[7] *Glenister II* at para 226.

The two IPID reports

10 Mr McBride assumed the office of Executive Director of IPID on 3 March 2014.[8] In doing so, he became responsible for a publicly controversial IPID investigation, which entailed investigating the alleged involvement of Lieutenant-General Dramat, then the head of the DPCI, and Major-General Sibiya, the provincial head of the DPCI for Gauteng in the unlawful rendition of four Zimbabwean nationals in November 2010 and January 2011.

11 There were two versions of the IPID report produced in respect of this investigation.

11.1 The preliminary version of the report, dated 22 January 2014 (the preliminary January 2014 report) concluded that Lt-Gen Dramat and Maj-Gen Sibiya were involved in the illegal renditions, and recommended that they be criminally charged with kidnapping and defeating the ends of justice.[9] That report was signed by the IPID investigator in the matter, Mr Innocent Khuba, and sent by him to Advocate Mosing of the National

[8] RA volume 4, pp. 278-279 at para 29.

[9] The January 2014 report appears at volume 1, pp. 44-79.

Prosecuting Authority, who was involved in overseeing the investigation.[10]

11.2 The subsequent and final report on the matter, dated 18 March 2014 (the final March 2014 report) was signed by Mr Khuba, Mr Sesoko and Mr McBride. It was submitted to the NDPP on 13 April 2015 for a decision on prosecution.[11] This report found that "*There is no evidence that suggest[s] that Lt General Drama, Lt General Toka, Lt General Lebeya and Major General Hlatshwayo were involved",* [12] and recommended that:

> *"Based on the available evidence, the Independent Police Investigative Directorate recommends that no charges should be brought against Lt General Dramat and Major General Sibiya. The investigation established that there is no prima facie case against them. However with regard to Lt Col M Maluleke, there is a prima facie case to sustain charges of kidnapping and defeating the ends of justice."* [13]

[10] RA, volume 4 pp. 280-282 at para 33-35; Khuba's supporting affidavit, volume 4, pp. 375-376 at paras 11-14.

[11] The March 2014 report appears at volume 2, pp. 79-116.

[12] Record volume 2, p. 115 at line 44-45.

[13] Record volume 2, p. 116.

12 Mr McBride and Mr Khuba have explained the provenance of the two reports. Their evidence is confirmed by Mr Sesoko. In summary, they give the following account:

12.1 Mr Khuba submitted the preliminary January 2014 report to the NPA prior to Mr Mr McBride assuming office as Executive Director of IPID. Mr Khuba says that he did so under pressure from Advocate Mosing at the NPA, despite them both being aware that material evidence was still outstanding and notwithstanding that the January 2014 report was not properly authorised in accordance with IPID Regulations and operational policies.[14]

12.2 After submitting the preliminary January 2014 report, Mr Khuba continued to obtain the outstanding evidence and to revise the investigation report in the light of that evidence.[15] This included an expert location analysis of Lt-Gen Sibiya's cellphone records that disproved key allegations made against Lt-Gen Sibiya.[16]

[14] RA volume 4, pp. 282-283 at para 35; Khuba's supporting affidavit volume 4, pp. 375-380 at paras 11-19. The relevant regulations and policy are detailed in the RA para 33.3, volume 4, pp. 280-282.

[15] RA volume 4, pp. 283-284 at paras 36-39. Khuba's supporting affidavit volume 4, p. 378 at para 15.

[16] See in particular Khuba's supporting affidavit volume 4, pp. 386-387 at paras 45-46.

12.3 When Mr McBride assumed office on 3 March 2014, he was briefed on the investigation by Mr Khuba but was not advised of the existence of the preliminary January 2014 report. He understood that the investigation was not yet complete.[17] Mr McBride tasked Mr Khuba and Mr Sesoko with finalising the investigation report.[18]

12.4 With the benefit of Mr Sesoko's prosecutorial experience, Mr Khuba and Mr Sesoko proceeded to review the totality of the evidence in the docket (including the evidence obtained by Mr Khuba since preparing the preliminary January 2014 report) and to interrogate its credibility.[19]

12.5 Mr Khuba and Mr Sesoko concluded that there was no credible evidence to support recommendations that criminal charges be brought against Maj-Gen Dramat and Lt-Gen Sibiya.[20] The final March 2014 report accordingly contained no recommendation that criminal charges be prosecuted against them.

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[17] RA volume 4, pp. 285 at para 43.3, volume 4, pp. 289-293 paras 48-49.

[18] RA volume 4, pp. 284-287 at paras 40-44.

[19] RA volume 4, pp. 296-298 at paras 53-57. Khuba's supporting affidavit volume 4, p. 381 paras 21-23.

[20] Khuba's supporting affidavit volume 4, pp. 381 at paras 21-23. See also Khuba's explanation of the material differences between the January 2014 and March 2014 report, volume 4 pp. 382-390 at paras 26-55.

12.6 The recommendations in the final March 2014 report, Mr Khuba avers, were based on "*a thorough, critical and objective review of the totality of the evidence*" and were *"supported by credible evidence"*.[21]

12.7 Mr Khuba and Mr Sesoko completed and signed the final report on 18 March 2014, and Mr McBride authorised and signed it on 9 April 2014.[22]

12.8 The final March 2014 report was submitted directly to the NDPP on 13 April 2014. It was sent together with the complete docket of IPID's investigation, including all the statements and evidence summarised in IPID's report. The NPA was accordingly furnished with all the collected information, to enable it to conduct an independent analysis of the evidence and to assess the appropriateness of the findings and recommendations in the final March 2014 report. [23]

[21] Khuba's supporting affidavit volume 4, pp. 381 at para 23.

[22] RA volume 4, p. 298 at para 56.

[23] RA volume 4, p. 298 at para 57 and volume 4, p. 304 at paras 71-72.

The political issue and the Minister's response

13 In December 2014, the question of the two reports became politically charged. This was because it was at that stage that the Minister relied in Parliament on the recommendations in the preliminary January 2014 report to suspend Maj-Gen Dramat as Head of the DPCI.

14 Notably, the Minister relied on the preliminary January 2014 report in Parliament even though he was by that stage already in possession of the final March 2014, which reached different conclusions.[24]

15 Despite this, the preliminary January 2014 report was used as a basis to take action against both Maj-Gen Dramat and Lt-Gen Sibiya.

15.1 On 23 December 2014, the Minister proceeded to suspend Maj-Gen Dramat, and appointed Maj-Gen Ntlemeza as the Acting National Head of the DPCI.[25]

[24] FA volume 1 p. 29 para 52.

[25] FA volume 1, pp. 15-17 at paras 25 to 28 and volume 1, pp. 29-31 at para 52.

15.2 On 20 January 2015, Maj-Gen Ntlemeza, in his new capacity, suspended Lt-Gen Sibiya.[26]

15.3 The suspensions of both Maj-Gen Dramat and Lt-Gen Sibiya were based on the allegation of their involvement in the illegal renditions, relying on the findings and recommendations in the preliminary January 2014 report and without furnishing any particulars or evidence to support these allegations.[27]

15.4 The Minister has adopted the same approach in this application.[28]

16 Against the background of this public controversy, the Minister purported to have serious concerns regarding the March 2014 report.

17 In February 2015, the Minister commissioned Werksmans Attorneys to conduct an investigation on the production of the two IPID reports. The terms of reference of the Minister's investigation

[26] Lt-Gen Sibiya successfully launched an urgent application in the High Court to challenge his suspension. See the judgment of Matojane J in *Sibiya v Minister of Police and Others* [2015] ZAGPPHC 135 (20 February 2015).

[27] The Minister and Maj-Gen Ntlemeza's failure to furnish particulars and evidence has been noted repeatedly in judgments addressing the suspension of Maj-Gen Dramat and Lt-Gen Sibiya. See *Sibiya v Minister of Police and Others* [2015] ZAGPPHC 135 at paras 14-15, 23-24 and 28; and *Helen Suzman Foundation v Minister of Police and Others* [2015] ZAGPPHC 4 (23 January 2015) at para 13. These judgments are available at www.saflii.org/za.

[28] AA volume 3, pp. 158-171 at paras 15-20.

conferred on Werksmans Attorneys a wide discretion to scrutinise the conduct of IPID's investigation of the illegal renditions and, effectively, to usurp IPID's function by making their own findings on the subject-matter of IPID's investigation.

18 On 24 March 2015, the Minister suspended Mr McBride. This was just over a year after he took office.[29]

19 On 6 May 2015, McBride received notice from the Minister to attend a disciplinary inquiry on charges of misconduct.[30]

20 Those disciplinary proceedings were ultimately stayed by an order of the Labour Court, pending the outcome of the present constitutional challenge. This stay was granted despite the vigorous opposition of the Minister, who appeared intent on removing Mr McBride at any cost. Indeed, that appears to remain the Minister's stance.

[29] SA volume 2, p. 124 at para 10.

[30] RA volume 4, pp. 270-1 at para 7. The charge sheet appears at volume 3, pp. 237-243.

THE CONSTITUTIONAL REQUIREMENT OF AN INDEPENDENT IPID

The constitutional guarantee of IPID's independence

21 The independence of IPID is expressly guaranteed and required by section 206(6) of the Constitution. It provides:

> "*On receipt of a complaint lodged by a provincial executive, an <u>independent</u> police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province."* (emphasis added)

22 The express constitutional entrenchment of the independence of IPID is significant. In ***Van Rooyen****,* Chaskalson CJ emphasised that the Constitution, and the differentiations it makes, must guide the assessment of whether a particular institution is adequately independent.[31]

23 While this Court has not yet been called upon to consider the independence requirement in respect of IPID, it has of course dealt in detail with the independence requirement of the DPCI.

[31] *S v Van Rooyen* 2002 (5) SA 246 (CC) at paras 34-35.

24 The effect of the constitutional entrenchment of the independence of IPID, we submit, is that the operational and structural independence of IPID must be at least as strongly protected as that of the DPCI.

24.1 Unlike for IPID, there is no express entrenchment of the independence of the DPCI in the Constitution. Nevertheless, in ***Glenister II***, this Court found that the independence of the DPCI was an implicit constitutional requirement.[32]

24.2 This Court's recognition of the implied necessity of an independent corruption-fighting agency in *Glenister II* – for the protection of the rights in the Bill of Rights and to meet South Africa's international commitment to combat corruption – applies with equal force to IPID. Like the DPCI, IPID's mandate encompasses anti-corruption investigations. IPID's mandate under s 28 of the IPID Act includes investigating systemic corruption involving the police, as well as corruption matters within the police.[33]

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[32] *Glenister II* at paras 175 to 202.

[33] Section 28(1)(g) of the IPID Act provides that IPID must investigate "*corruption matters within the police initiated by the Executive Director on his or her own, or after receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be*". Section 28(2) provides further that IPID may investigate *"matters relating to systemic corruption involving the police".*

25 In an effort to avoid the effects of ***Glenister II*** and ***Helen Suzman Foundation***, the Minister contends that IPID's mandate is not similar – or not "materially similar" – to the mandate of the DPCI.[34] This is difficult to understand.

25.1 In recognising the devastating impact of corruption on the state's capacity to protect and promote the rights in the Bill of Rights, this Court has recognised the necessity of effectively preventing *"all types of corruption"*, wherever it manifests in the state and society.[35]

25.2 This Court has also recognised the need for an "*integrated and comprehensive response*" to corruption through the various anti-corruption mechanisms, including the SAPS and the NPA.[36]

25.3 The fact that the DPCI is mandated to investigate the corruption of politicians, while IPID is mandated to investigate the corruption of the police – who may well be charged with investigating the corruption of politicians – can be of no legal consequence. The ability of both investigative bodies to

[34] Notice of Opposition and Cross-Appeal, paras 1.2-1.4.

[35] *Glenister II* at paras 166-174.

[36] *Glenister II* at paras 175 to 177.

effectively discharge their mandates in fighting corruption within the state demands that they be independent. Further, the inevitable possibility of overlap in the subject of their investigations requires that the independence of both the DPCI and IPID be protected.

25.4 The mandates of IPID and the DPCI are not only overlapping, but are also interconnected by virtue of IPID's oversight of the DPCI. Since the DPCI is situated within the SAPS, IPID's mandate (under s 28 of the IPID Act) includes investigating serious crimes and corruption within the DPCI. Section 17L of the SAPS Act[37] also provides for the referral of complaints against the DPCI to IPID for investigation. IPID's oversight in respect of the DPCI means that the independence of IPID is important not only for its own effectiveness as an anti-corruption body, but is also necessary to ensure the effective and independent functioning of the DPCI.[38]

25.5 IPID and the DPCI are also functionally similar, as a result of the investigative nature of their work. The effective functioning of IPID, like the DPCI, depends fundamentally on the

[37] South African Police Service Act 68 of 1995.
[38] See High Court judgment paras 22 and 24.

confidence of its members and the public in its independence and freedom from political influence. Such confidence is essential to encouraging members of the public and the SAPS to report complaints to IPID and to cooperate in IPID's investigations. This point was pertinently addressed by Mr Bruce, the expert whose evidence was led by the Council for the Advancement of the South African Constitution (CASAC) and admitted by the High Court. Mr Bruce's evidence is summarised in the High Court's judgment at paragraphs 31 to 34, and is obviously relevant and admissible.

26 We therefore submit that IPID is constitutionally required to be independent and that this independence must be protected at least as strongly as that of DPCI.

The Minister's "political responsibility" argument

27 In an effort to avoid or dilute the independence requirement for IPID, a core focus of the Minister's argument is section 206(1) of the Constitution. It provides:

> *"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."*

28 The Minister contends that the High Court erred in failing to take account of *"the deliberate choice by the drafters of the Constitution to vest the constitutional responsibility for effective policing and the oversight of police functions in the Minister of Police*".[39]

29 This submission is however unsustainable for two reasons.

30 First, the High Court did indeed consider s 206(1).[40] It followed this Court's judgment in ***Glenister II*** to distinguish between the executive's "*political responsibility*" for an institution on the one hand, and the executive's undue political influence in the institution's functioning on the other.[41]

31 Discussing the interplay between the Minister's political responsibility under s 206(1) of the Constitution and the independence of the DPCI, this Court held in ***Glenister II*** that the DPCI is not required to be absolutely independent, but must be *"adequately independent*". This means the following:

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[39] Notice of Opposition and Cross-Appeal, para 1.1.

[40] The High Court recorded the Minister's same argument at paras 12-14 and 21 of its judgment.

[41] High Court judgment para 23.

31.1 The agency must have "*sufficient structural and operational autonomy to protect it from political influence"* and *"to ensure that it discharges its responsibilities effectively*".[42]

31.2 Adequate independence does not mean "*insulation from political accountability*", but it does require *"insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit*."[43]

31.3 The "*overriding consideration*" is whether the autonomy-protecting features in the legislation enable the members of the investigative unit to carry out their duties vigorously, without any inhibitions or fear of reprisals.[44]

32 Thus, even if it is accepted that IPID – like the DPCI – is subject to the political responsibility of the Minister under s 206(1), this does not assist the Minister. This Court has already explained how the constitutional guarantee of an independent policing agency is to be

[42] *Glenister II* majority judgment, para 206; and the judgment of Ngcobo CJ, paras 124-125; *Helen Suzman Foundation* paras 9-10.

[43] *Glenister II* majority judgment, paras 215-216.

[44] *Helen Suzman Foundation* para 32; *Glenister II* majority judgment, para 222. The Supreme Court of Canada held similarly in *Hickman v MacKeigan* [1989] 2 S.C.R. 796 at 827 that the principle of independence did not rest on the assumption of a complete separation between the courts, the legislature and the executive, but required "the *avoidance of incidents and relationships which could affect the independence of the judiciary in relation to the two critical judicial functions – judicial impartiality in adjudication and the judiciary's role as arbiter and protector of the Constitution."*

reconciled with the Minister's political responsibility for policing under s 206(1), and the High Court correctly followed its approach.

33 Second, and in any event, the Minister's argument misinterprets section 206(1). That provision extends to the Minister political responsibility *"for policing"*. While the DPCI is situated within the SAPS (and is thus undoubtedly subject to s 206(1)), the same is not the case for IPID. As an independent police complaints body, IPID is not engaged in "*policing*" and is required to be institutionally and functionally independent of the SAPS.[45]

34 IPID must, likewise, be institutionally and functionally independent of the member of Cabinet responsible for the delivery of policing services. The Minister of Police is politically implicated by the misconduct of the SAPS and the investigations performed by IPID. There is consequently an inherent risk of a conflict of interest between the Minister of Police and IPID in respect of the performance of IPID's functions.

[45] This is expressly stipulated in s 4(1) of the IPID Act, which provides that *"The Directorate functions independently from the South African Police Service"*. See also the acknowledgement in the Minister's AA volume 3, pp. 199-200 at para 72. Notably, the IPID Act makes no mention of s 206(1) of the Constitution.

35 This was recognised by IPID's predecessor institution, the Independent Complaints Directorate (ICD).

35.1 A research report compiled jointly by the ICD and the Institute for Security Studies in 2007 on SAPS' Compliance with Recommendations by the ICD found that:[46]

> *"Based on the views expressed during some of the structured interviews, it would seem that the independence and credibility of the ICD is compromised by its location within the Department of Safety and Security and having to report to the Minister who is also the Minister responsible for the police (viz. conflict of interest).*" (page 17)

35.2 The report contained the following recommendation by the ICD:

> *"For the purposes of independence and credibility, the ICD should report to a Minister who is not also the Minister responsible for the police. Alternatively, the ICD should report directly to parliament (a special parliamentary committee or, alternatively, the Portfolio Committee for Safety and Security)"* (page 20).

36 The problem of requiring a police complaints body to account to the executive member responsible for the police – as opposed to parliament or a civilian body – has also been recognised internationally.

[46] Annexure RJM21 volume 4 at pp. 336-368, emphasis added.

36.1 Following a comparative study on police oversight bodies, the UN Special Rapporteur has noted that:

> *"An effective police accountability system should include an independent body that has complete discretion in the exercise of its functions and powers, has a statutory underpinning and independent and sufficient funding, reports directly to parliament and whose commissioners and staff are transparently appointed based on merit rather than any affiliation, such as affiliation with a political party."*[47]

36.2 The UN Special Rapporteur specifically recognised that independence is compromised when the police and the police oversight body report to the same Minister. It stated:

> "*Independence can be threatened at a deeper structural level where the agency has the same reporting lines as the police force (e.g. where both the police and the external agency report to the government's minister for security)".*[48]

36.3 The United Nations' Handbook on Police Accountability, Oversight and Integrity, 2011 (a compilation of best practices by the UN Office on Drugs and Crime), explained and encapsulated the "*criteria for independence*" for independent police complaints bodies as follows:

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[47] Findings of the UN Special Rapporteur Study on Police Oversight Mechanisms (A/HRC/14/24/Add.8), cited in United Nations' Handbook on Police Accountability, Oversight and Integrity, 2011 at 70. Emphasis added.

[48] UN Special Rapporteur Study on Police Oversight Mechanisms (A/HRC/14/24/Add.8) at para 53.

> *"For police accountability to be fully effective, it must involve multiple actors and institutions performing multiple roles, to ensure that police operate in the public interest. As these actors and institutions often represent particular interests, it is crucial to have a complementary independent institution overseeing the entire system.…*
>
> *The United Nations Convention against Corruption calls for independent bodies or persons (specialized in combating corruption through law enforcement) that can "carry out their functions effectively and without any undue influence" (article 36). For this, the independent body should have complete discretion in the performance or exercise of its functions and not be subject to the direction or control of a minister or any other party. In principle, it should give an account after its work has been performed, when it reports to parliament (rather than the executive)."*[49]

36.4 The Council of Europe's Commissioner for Human Rights' Opinion on the Independent and Effective Determination of Complaints against the Police (2009), similarly found that:

> *"An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as a fundamental protection against ill-treatment and misconduct. An independent police complaints body (IPCB) should form a pivotal part of such a system."*[50]
>
> *…*
>
> *"The IPCB must be transparent in its operations and accountable. Each Police Ombudsman or Police*

[49] United Nations' Handbook on Police Accountability, Oversight and Integrity, 2011 at 49-50.

[50] Council of Europe, 'Opinion of The Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police', 12 March 2009, CommDH(2009)4, at para 29.

> *Complaints Commissioner should be appointed by and answerable to a legislative assembly or a committee of elected representatives that does not have express responsibilities for the delivery of policing services."*[51]

36.5 The AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, 2006 also calls upon State Parties "*to establish independent civilian policing oversight mechanism, where they do not exist, which shall include civilian participation"*.[52]

37 Thus even if IPID is subject to the political responsibility of the Minister by virtue of section 206(1) – which we do not accept – this does not assist the Minister's defence. At the very least, the conflict of interest between the police and its oversight body requires that *more stringent* protection of IPID's independence from the Minister of Police is required than that of the DPCI. Such independence is required not only because IPID's mandate entails fighting corruption and systemic corruption in the police, but to enable IPID to fulfil its mandate of investigating offences committed by the SAPS more generally, without fear of political interference by the executive and the Minister of Police.

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[51] At para 36.

[52] At para 3.

Security of tenure and Parliamentary oversight

38 Security of tenure is an essential condition of institutional independence. While security of tenure may be achieved by a variety of legislative schemes, it requires that "*the decision-maker be removable only for just cause, secure against interference by the executive or other appointing authority*".[53]

39 Indeed, the Minister is driven to acknowledge that security of tenure is a recognised requirement for independent police oversight bodies under international law, and recognises that the Court must have regard to international law.[54] The international law referred to above (and cited by the High Court at paragraphs 35 to 37 of its judgment) confirms that the Minister's admission is correctly made.[55]

40 As we proceed to explain, security of tenure and parliamentary oversight in the removal from office of the office bearers or national head is an essential and common feature of numerous independent institutions in South Africa generally. Yet, the IPID Act fails to live up to this standard.

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[53] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 70, citing the Supreme Court of Canada in *R v Valente* (1985) 24 DLR (4th) 161.

[54] Notice of Opposition and Cross-Appeal para 4.3.

[55] See also the foreign law cited in footnote 59 of the High Court judgment.

41 In ***Glenister II***, the majority of this Court explained that adequate independence requires *"special measures entrenching employment security"* to ensure that the members of the independent institution (in that case, members of the DPCI) *"can carry out their investigations vigorously and fearlessly".* The majority emphasised that the requirement of security of tenure does not assume that executive powers will be abused. Rather, it recognises the need for a statutory scheme that, viewed objectively, instils confidence in the members of the independent institution to carry out their duties vigorously and not to yield to political pressure.[56]

42 Security of tenure is also required to instil public confidence in the independence of the institution. The importance of public perception for the effective functioning of independent institutions has been recognised by this Court and other apex courts. This Court has repeatedly held that:

> *"[P]ublic confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to*

[56] *Glenister II* majority judgment, paras 222 and 226.

> *meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."*[57]

43 In ***Glenister II***, the majority found that the lack of adequate independence of the DPCI *"was reflected […] most signally in the absence of secure tenure protecting the employment of the members of the entity and in the provisions for direct political oversight of the entity's functioning."*[58] The majority contrasted the lack of security of tenure of the Head of the DPCI with the protections afforded to the Head of the former DSO. The majority observed that the national head of the DSO had enjoyed security of tenure in that:[59]

43.1 The grounds for removal were objectively defined and limited to grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office; and

43.2 Parliament held a veto over the removal of the Head of the DSO. The reasons for the removal, and the representations of

[57] *Glenister II* majority judgment, para 207, with reference to *S v Van Rooyen* 2002 (5) SA 246 (CC) at para 32; and *Valente v The Queen* [1986] 24 DLR (4th) 161 (SCC) at 172. See restated in *Helen Suzman Foundation* at para 31.

[58] *Glenister II* majority judgment, para 213.

[59] *Glenister II* majority judgment, para 225-226.

the office-holder, had to be communicated to Parliament, which could resolve to restore the Head to his or her office.

44 The majority emphasised the special importance of the parliamentary oversight that protected the independence of the DSO, and which was lacking in respect of the DPCI. It highlighted the difference between such civilian oversight and the political oversight of the executive:

> *"Under our constitutional scheme, Parliament operates as a counter-weight to the executive, and its committee system, in which diverse voices and views are represented across the spectrum of political views, assists in ensuring that questions are asked, that conduct is scrutinised and that motives are questioned."*[60]
>
> *…*
>
> *"… [P]arliamentary committees comprise members of a diversity of political parties and views. No consolidated or hegemonic view, or interest, is likely to preponderate to the exclusion of other views. As importantly, parliamentary committees function in public. The questions they ask of those reporting to them aim at achieving public accountability. The Ministerial Committee by contrast comprises political executives who function out of the public gaze. The accountability they seek to exact is political accountability. It is inimical to an adequately independent functioning of the DPCI."*[61]

[60] *Glenister II* majority judgment, para 239.

[61] *Glenister II* majority judgment, para 243.

45 In ***Helen Suzman Foundation***, this Court underscored the necessity of parliamentary oversight specifically in the removal from office of the national head of the DPCI. This Court found that Parliament's amendments to the SAPS Act (which were directed at remedying the constitutional defects found in *Glenister II)* were inadequate, *inter alia,* because the amended SAPS Act permitted the removal of the Head of the DPCI without any effective parliamentary oversight.

46 This Court held (unanimously on this point) that the Minister's power to remove the national head from office in terms of s 17DA(1) and (2) of the SAPS Act threatened the head's security of tenure. This was despite the fact that:

46.1 The removal process was initiated by the Minister's appointment of a Judge to conduct the disciplinary inquiry;

46.2 The Minister could remove the head only on the recommendation of the Judge; and

46.3 The fact of the removal, the reason therefor and the representations of the national head, if any, were to be conveyed to Parliament within 14 days of the removal.

47 This Court found that this removal scheme did not adequately protect the job security of the national head, because Parliament "*has no meaningful role to play*" and no powers of intervention (which *"would ordinarily entail an assessment of the propriety of the finding of wrongdoing and the punishment meted out to the National Head")*. Instead, Parliament was required *"merely to note the decision"* of the Minister. The result, this Court concluded, was that the SAPS Act afforded the Minister an "*almost untrammelled power to axe the National Head of the anti-corruption entity*," which was "*inimical to job security*".[62]

48 We submit that the same reasoning must apply to IPID, to require effective parliamentary oversight of the removal from office of the Executive Director.

49 Moreover, what is striking is that the drafters of the Constitution and Parliament itself have recognised that independence can only be achieved by means of security of tenure, including parliamentary oversight in the removal process.

[62] At paras 87 to 89.

49.1 For the sake of convenience, we attach to these submissions, marked "**HOA1**", a table that compares the relevant constitutional and statutory provisions applicable to the following independent bodies: the various Chapter 9 institutions, the Public Service Commission, judicial officers and magistrates, the National Director of Public Prosecutions and the Independent Communications Authority of South Africa.

49.2 The removal of the office bearers from every one of these institutions is subject to parliamentary oversight and powers of intervention by the National Assembly in the removal process.

49.3 As we demonstrate in what follows, the IPID Act is a clear outlier in this regard.

THE IMPUGNED PROVISIONS ARE UNCONSTITUTIONAL

50 In the preceding sections of these heads of argument, we have demonstrated that:

50.1 IPID is constitutionally required to be independent; and

50.2 A core feature of this independence is the need for security of tenure of the Executive Director of IPID, including the involvement of the National Assembly in the removal process.

51 The only remaining question is whether the IPID Act and other impugned provisions measure up to this standard. For the reasons that follow, they plainly do not.

52 The legislative provisions that empower the Minister to suspend, discipline and remove the Executive Director from office are not subject to any parliamentary oversight. They afford the Minister of Police unilateral power and the sole discretion to terminate the Executive Director's tenure. The Minister is also empowered to discipline the Executive Director on the same basis as any head of department in the public service, without any special protections or oversight.

53 In particular, section 6(6) of the IPID Act provides that –

> *"The Minister may remove the Executive Director from office on account of –*
>
> *(a) misconduct;*
>
> *(b) ill-health; or*
>
> *(c) inability to perform the duties of that office effectively."*

54 Far from safeguarding the security of tenure of the Executive Director of IPID, section 6(6) allows the Minister to remove the Executive Director himself, without any form of Parliamentary oversight at all.

55 This problem is exacerbated by two further provisions.

56 First, section 6(4) of the IPID Act allows the Minister, upon removing the Executive Director and at his complete discretion, to appoint any other person to perform the functions of the Executive Director. Section 6(4) reads:

> *"When the Executive Director is unable to perform the functions of office, or during a vacancy in the Directorate, the Minister may designate another person to act as Executive Director until the Executive Director returns to perform the functions of office or the vacancy is filled."*

57 Second, section 6(3)(a) provides that the Executive Director will be "*subject to the laws governing the public service".* This is confirmed by Regulation 13 of the IPID Regulations.[63] This means that the Minister is empowered to discipline the Executive Director on the

[63] It provides:

"The Public Service Disciplinary Code applies in the case of disciplinary proceedings initiated against a member of the Directorate as a result of the alleged misconduct of such member or failure to comply with a lawful command, order or instruction".

same basis as any head of department in the public service, without any special protections or oversight. In particular, it renders the following general public service provisions applicable to the Executive Director:

57.1 Sections 16A(1) and 16B of the Public Service Act, which empower the Minister, as the relevant "*executive authority*", to take disciplinary action against the Executive Director.[64]

57.2 Sections 17(1) and (2) of the Public Service Act, which empowers the Minister to terminate the Executive Director's employment in the public service.[65]

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[64] They provide as follows:

"16A Failure to comply with Act

(1) An executive authority shall-

(a) immediately take appropriate disciplinary steps against a head of department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;

(b) immediately report to the Minister [of Public Service and Administration] the particulars of such non-compliance; and

(c) as soon as possible report to the Minister the particulars of the disciplinary steps taken."

"16B Discipline

(1) Subject to subsection (2), when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:

(a) In the case of a head of department, the relevant executive authority;"

[65] They provide as follows:

"(1)(a) Subject to paragraph (b), the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act.

(b) The power to dismiss an employee on account of misconduct in terms of subsection (2) (d) shall be exercised as provided for in section 16B (1).

57.3 The Public Service Disciplinary Code,[66] which incorporates the provisions of chapter 7 of the Senior Management Service Handbook.[67] These provisions empower the Minister (as the "employer") to initiate a disciplinary enquiry; to appoint a person, from within or from outside the public service, as chairperson of the disciplinary enquiry; to place an employee on precautionary suspension with pay; and to hold a disciplinary hearing within 60 days of such suspension, subject to postponement by the chair.

58 None of these provisions involve any role for Parliament. It is plain that it is the Minister who is empowered to suspend, discipline and remove the Executive Director. This is not consistent with the requirement of security of tenure applicable in respect of the head of an independent institution.

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(2) An employee of a department, other than a member of the services, an educator or a member of the Intelligence Services, may be dismissed on account of-

(a) incapacity due to ill health or injury;

(b) operational requirements of the department as provided for in the Labour Relations Act;

(c) incapacity due to poor work performance; or

(d) misconduct."

[66] The "Public Service Disciplinary Code" is defined in the IPID Regulations to mean "the Disciplinary Code and Procedures for the Public Service as contained in Public Service Coordinating Bargaining Council (PSCBC) Resolution 2 of 1999, as amended".

[67] The SMS Handbook is available online at:

http://www.dpsa.gov.za/dpsa2g/documents/sms/publications/smshb2003.pdf

59 The Minister, however, contends that the Court must "*reason through the internal structure of the IPID Act"* to determine whether IPID has adequate independence.[68] We accept that this Court must consider the IPID Act as a whole, but this does not assist the Minister. While the IPID Act confirms the importance of independence, and contains some safeguards, it does not adequately protect the independence of IPID – especially because it fails to ensure that the Executive Director has security of tenure.

59.1 The IPID Act provides that IPID must function independently of SAPS,[69] and requires all organs of state to assist IPID to maintain its impartiality and to function effectively.[70] IPID is independently financed from money appropriated by Parliament.[71] The objects of the IPID Act also emphasise the importance of the independence of the Directorate.[72]

59.2 The IPID Act contains some provisions that are evidently designed to prevent undue political and executive influence,

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[68] Notice of Opposition and Cross-Appeal para 2.

[69] Section 4(1).

[70] Section 4(2).

[71] Section 3(3).

[72] Section 2. These are, inter alia: *"(b) to ensure independent oversight of the South African Police Service and Municipal Police Services;… (d) to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service and Municipal Police Services; … (g) to enhance accountability and transparency by the South African Police Service and Municipal Police Services in accordance with the principles of the Constitution."* Emphasis added.

including in the office of the Executive Director. Section 6(2) and (3) provide that the Executive Director of IPID is appointed only on confirmation by the relevant Parliamentary Committee; and section 7(12) provides for reporting by the Executive Director to Parliament (as well as to the Minister) on the activities of the Directorate.

59.3 The IPID Act thus recognises that IPID must be independent, and that Parliament must play an oversight role. However the IPID Act fails adequately to achieve these ends – in particular because it affords the Minister the unilateral power to suspend, discipline and remove the Executive Director from office and does not provide for any oversight or intervention by Parliament whatsoever in this regard.[73]

60 Indeed, a consideration of the IPID Act as a whole confirms magnitude of the constitutional defect – because it demonstrates that the Executive Director is at the very heart of IPID's ability to function effectively to fulfil its constitutional mandate. The importance of the Executive Director's security of tenure for the independence and effective functioning of IPID as a whole can thus

[73] Section 6(6) of the IPID Act.

be appreciated by considering the powers and functions of the Executive Director under the Act.

60.1 Under section 7 of the IPID Act (read together with sections 22(1), 24(1), 28(1)(g) and (h)), the Executive Director manages and directs IPID; controls the Directorate's funds and expenditure; appoints the staff; controls and directs the investigation and management of cases; is responsible for referring criminal matters to the National Prosecuting Authority or other responsible authority; and provides strategic leadership to the Directorate.

60.2 IPID's independence depends on the Executive Director being sufficiently insulated from undue political interference:

60.2.1 The Executive Director provides strategic leadership to IPID and is also its accounting officer, giving the Executive Director powers to determine IPID's priorities and how its resources will be allocated in pursuit of its aims. Without sufficient insulation from political interference, the Executive Director may be pressured into channelling IPID's efforts and resources away from areas that may harm the interests of powerful, politically connected members of the police.

60.2.2 The Executive Director is responsible for staffing IPID, including appointing the provincial directors. There is the risk that if the Executive Director is subject to undue political interference, all staffing decisions could be tainted. IPID's ability to attract and retain independent-minded investigators would also be compromised if it is perceived that the Executive Director lacks sufficient independence from political control.

60.2.3 The Executive Director assumes a primary role in managing investigations. Under section 28(1)(g) and (h), the Executive Director may initiate investigations into corruption or any other matter. Where a complaint has been received, the Executive Director, or the relevant provincial head, decides on which investigators to assign to the case. The Executive Director is also responsible for setting guidelines for investigations and case management. As a consequence, the absence of sufficient protection from improper political interference could significantly undermine investigations.

60.2.4 The Executive Director is also responsible for ensuring that further action is taken where investigations reveal evidence of wrongdoing. Where an investigation reveals evidence of criminal conduct, the Executive Director must refer this to the National Director of Public Prosecutions. Similarly, evidence of disciplinary infractions must be referred to the National Police Commissioner or the relevant Provincial Commissioner for further action. Without adequate guarantees of independence, there is the risk that the Executive Director may be pressured into delaying or obstructing these referrals.

61 In all the circumstances, the impugned provisions do not comply with the constitutional requirement of independence and are invalid to this extent.

AN APPROPRIATE REMEDY

62 The High Court granted the following substantive orders:

"1. It is declared that the following provisions are unconstitutional and unlawful to the extent that they purport to authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director of the Independent Police Investigative Directorate:

1.1. sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act, No. 1 of 2011;

1.2. sections 16A(1), 168, 17(1) and 17(2) of the Public Service Act, 1994;

1.3. Regulation 13 of the IPID Regulations…

2. The declaration of invalidity in paragraph 1 is suspended for a period of 12 months from the date of the order to enable Parliament to correct the constitutional defect(s).

3. Pending the correction of the defect(s), or the expiry of the 12-month period, whichever occurs first:

3.1. Section 6(6) of the Independent Police Investigative Directorate Act, No. 1 of 2011 is to be read as providing as follows:

> *"Sub-sections 17DA(3) to 17DA(7) of the SAPS Act apply to the suspension and removal of the Executive Director of IPID, with such changes as may be required by the context"; and*

3.2. Sections 16A(1), 168, 17(1) and 17(2) of the Public Service Act, 1994 and regulation 13 of the IPID Regulations, shall be read as having no application to the Executive Director of the Independent Police Investigative Directorate.

4. It is declared that the decision of the Minister of Police to suspend the Applicant from his position as Executive Director of the Independent Police Investigative Directorate is unlawful and invalid and the decision is set aside.

5. *It is declared that the decision of the Minister of Police to institute the disciplinary inquiry against the Applicant, which was to commence on 21 May 2015, is unlawful and invalid and the decision is set aside.*

6. *The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.6. The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.*"

63 The effect of the order, therefore, is that:

63.1 The relevant provisions are declared invalid, but the declaration of invalidity is suspended for a year.

63.2 During that period of suspension, there will be an interim reading-in, based on this Court's order in ***Helen Suzman Foundation***. In terms of that reading-in, the National Assembly (not the Minister) will have the power to remove the Executive Director of IPID and the Minister will only have the power to suspend the Executive Director after the National Assembly has instituted removal proceedings.

63.3 The decisions of the Minister to suspend Mr McBride and institute disciplinary proceedings against him are set aside.

63.4 However, Mr McBride will remain suspended for 30 days from the date of the confirmation of the order. This will allow the National Assembly to decide whether to begin removal proceedings against him and, if so, for the Minister to suspend him.

64 We submit that the order is appropriate, just and equitable and should be confirmed.

64.1 The interim reading-in order is not be a significant encroachment on Parliament's authority. It makes use of Parliament's chosen method of removal and suspension for the head of an independent corruption-fighting body of a similar status to IPID. Moreover, it does so in a manner approved by this Court in ***Helen Suzman Foundation***.

64.2 The order leaves it open to Parliament to adopt a different method for resolving the constitutional defect, provided that it guarantees a similar level of structural and operational independence.

64.3 It ensures that if Mr McBride is to face disciplinary proceedings, this will be done in a constitutionally compliant manner.

65 However, the Minister raises two substantive objections to the order.

66 First, the Minister contends objects to the High Court setting aside the Minister's decision to suspend and institute disciplinary proceedings against Mr McBride.[74] There is no basis for this contention.

66.1 The simple fact of the matter is that the Minister's decisions were made in terms of provisions which are unconstitutional and invalid. It would require the most compelling case of prejudice to the public for them not to be set aside. As this Court has explained:

> *"Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality."*[75]

[74] Notice of Opposition and Cross-Appeal para 13.

[75] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC) at para 30.

66.2 In the present case, there has been no showing of prejudice to the public or Minister at all. This is despite the fact that it was for the Minister to place such information before the Court.[76]

66.3 Moreover, it is difficult to discern what possible prejudice could result. The High Court order keeps Mr McBride on suspension for thirty days while the National Assembly and Minister consider whether to exercise their powers under the interim reading-in to suspend or seek to remove him.

66.4 In addition, there is no "*strong prima facie case*" against Mr McBride. This is apparent from the affidavits filed in this matter, in particular the replying affidavit and Khuba's supporting affidavit which explains (comprehensively and in detail) the provenance of the two IPID reports, Mr McBride's role in the production of the March 2014 report, and the reasons for its findings and recommendations.

66.5 Lastly, the Minister's suggestion that proceeding with an unconstitutional disciplinary process is in the public interest and in the interests of the independence of IPID is, frankly,

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[76] *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC) at para 30; *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) at para 102.

startling. Undoubtedly, the interests of justice and the public interests favours the finalisation of lawful disciplinary proceedings. Mr McBride has confirmed that he does not seek to avoid disciplinary proceedings, but insists that any such proceedings must occur in a manner that protects the independence of IPID as the Constitution requires.[77] The High Court's order achieves this.

67 Second, the Minister objects to the High Court reading-in the provisions of s 17DA(3)-(7) of the SAPS Act as an interim order.[78] The Minister complains that sections 17DA(3) to (7) of the SAPS Act do not specify *"the administrative machinery necessary to operationalise [the disciplinary proceedings]*", and there is no *"clear set of disciplinary rules"* to be applied.[79]

67.1 This complaint is contrived, as the High Court correctly observed.[80]

67.2 It is not necessary for this Court to prescribe, in any more detail than is already contained in s 17DA(3)-(7) the

[77] RA volume 4, pp. 277 at paras 24-26.

[78] Notice of Opposition and Cross-Appeal para 14-17.

[79] Notice of Opposition and Cross-Appeal paras 16 and 17.

[80] High Court judgment para 71.

"administrative machinery" or "rules" that the National Assembly must employ to conduct the disciplinary proceedings. Sub-sections 17DA(3)-(5) already provide for the removal of the National Head of the DPCI, and read as follows:

> *"(3) (a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.*
>
> *(b) The adoption by the National Assembly of a resolution calling for that person's removal from office.*
>
> *(4) A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with a supporting vote of at least two thirds of the members of the National Assembly.*
>
> *(5) The Minister-*
>
> *(a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and*
>
> *(b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal."*

67.3 As we have indicated, it is not unusual for constitutional and legislative provisions to empower the National Assembly, or a

committee of the National Assembly, to conduct an enquiry and make findings on whether an office-holder should be removed on grounds of misconduct, incapacity or incompetence. These include, for example, s 194(1) of the Constitution, in respect of the Public Protector, Auditor-General and other Chapter 9 institutions; s 196(11) of the Constitution, in respect of the Public Service Commission; and section 8(2) of the Independent Communications Authority of South Africa Act 13 of 2000.

67.4 Parliament is empowered under s 57 of the Constitution to regulate its own internal procedures. The National Assembly has promulgated detailed rules, which govern its committees, including committees established in terms of legislation and ad hoc committees.[81] The Minister has not contended that the application of these rules would prejudice him in any way.

[81] See Chapter 12 of the National Assembly Rules. Rule 123 stipulates that: "These Rules also apply to a committee or subcommittee established in terms of legislation, and in such application the committee or subcommittee must be regarded as having been established in terms of these Rules."

CONCLUSION

68 We therefore submit that:

68.1 The High Court's order should be confirmed; and

68.2 The Minister should be directed to pay Mr McBride's costs in this Court, including the costs of two counsel. [82]

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4 April 2016

[82] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

TABLE OF AUTHORITIES

Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2) 2014 (4) SA 179 (CC)

Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC).

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC)

Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC)

Glenister v President of the Republic of South Africa 2011 (3) SA 347

(CC)

Helen Suzman Foundation v Minister of Police and Others [2015] ZAGPPHC 4 (23 January 2015)

Helen Suzman Foundation v President of the Republic of South Africa 2015 (2) SA 1 (CC)

Hickman v MacKeigan [1989] 2 S.C.R. 796

Justice Alliance of South Africa v President of Republic of South Africa 2011 (5) SA 388 (CC)

Mistry v Interim National Medical and Dental Council 1998 (4) SA 1127 (CC)

S v Van Rooyen 2002 (5) SA 246 (CC) at paras 34-35

Shaik v Minister of Justice & Constitutional Development 2004 (3) SA 599 (CC) at para 27

Sibiya v Minister of Police and Others [2015] ZAGPPHC 135