IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 255/2015

In the matter between

ROBERT MCBRIDE Applicant for Confirmation

and

THE MINISTER OF POLICE First Respondent

THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION Second Respondent

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION First *Amicus Curiae*

THE HELEN SUZMAN FOUNDATION Second *Amicus Curiae*

THE MINISTER'S WRITTEN SUBMISSIONS

INTRODUCTION

1. Mr Robert McBride is the current Executive Director of the Independent Police Investigative Directorate ("**IPID**"). He stands accused of several acts of gross misconduct. These acts of misconduct fall into three distinct categories: First it is alleged that his conduct has compromised the independence of IPID; second, he is accused of improperly covering up serious breaches of the law by senior members of the South African Police Service; and third, he is accused of violating provisions of the Public Finance Management Act 1 of 1999 by taking decisions seeking to benefit himself at the expense of the state.

2. The Minister of Police ("**the Minister**") is the first respondent in these proceedings. He has political responsibility to ensure effective policing under the Constitution. He had formed the prima facie view that the allegations of misconduct against Mr McBride rendered him unfit to continue occupying the office of the Executive Director of IPID. The Minister was (and remains) of the view that the constitutionally guaranteed independence of IPID is threatened by the continued presence of Mr McBride in his position. Consequently, the Minister suspended Mr McBride and instituted a disciplinary inquiry before an independent senior advocate of the Johannesburg Bar.[1]

3. Mr McBride is yet to answer to the charges of misconduct against him. Instead, he has launched review proceedings questioning the constitutionality of a series of provisions under which he was suspended and brought to a disciplinary inquiry. In this Court he does not seek to impugn the Minister's

[1] Page 155, Record: Vol. 3, para 10.3, Minister's answering affidavit.

decision on the merits, but contents himself with the claim that the statute under which the Minister acted conflicts with the Constitution.

4. Mr McBride was successful before the High Court in respect of the constitutional challenge to the legislation, but the High Court went considerably beyond the invalidation of the legislation. It also set aside the Minister's decisions to suspend Mr McBride and to set in motion disciplinary proceedings against him. These decisions by the High Court are before this Court for confirmation.

5. The Minister supports paragraph 1 of the High Court order. He accepts that the impugned provisions do not provide for the adequate protection of the independence of IPID. As such the Minister will support the confirmation of paragraph 1 of the order of the High Court.

6. The Minister only opposes this Court's confirmation of paragraphs 3; 4; 5, and 6 of the High Court order, namely those that (i) set aside the Minister's decisions and; (ii) which make the removal provisions under the SAPS Act and in respect of the Head of the DPCI applicable to the Executive Director of IPID.[2] He contends that these orders conflict with the rule of law and the interests of justice and equity.

7. The decisions to suspend and institute disciplinary proceedings against Mr McBride were taken in good faith, on the basis of a prima facie case of gross misconduct, and in accordance with the law at the time. The Minister was duty bound to take appropriate steps to protect the independence and integrity of IPID by suspending Mr McBride and subjecting his conduct to an

[2] Page 68, Record: Vol. 1, para 12 – 19, Notice of Opposition and Counter-Appeal.

independent disciplinary enquiry. He sought to do so on the only basis contemplated, and afforded by Parliament to him, in law.

8. The Minister accordingly submits that a confirmation of the High Court's order setting aside the Minister's decisions will lead to inequitable results that are harmful to the public interest. Furthermore, although an interim arrangement is not in itself called for, recourse in the interim to the removal measures under section 17DA of the SAPS Act will certainly be ineffective, potentially detrimental to the independence of IPID, and will permit Mr McBride to evade justice.

9. This Court should rather forge a remedy that seeks to hold Mr McBride to account and to further safeguard the independence of IPID.

10. The remainder of these submissions are structured as follows:

    10.1. First, we address the effect of the High Court order;

    10.2. Second, we turn to this Court's remedial powers;

    10.3. Third, we demonstrate that justice and equity requires that the Minister's decisions are preserved;

    10.4. Fourthly, the question of an interim remedy is discussed; and

    10.5. Finally, we propose the order that this Court should grant.

THE EFFECT OF THE RELIEF GRANTED BY THE HIGH COURT

11. The High Court's interim order, in essence, deletes section 6(6) of the IPID Act as it stood, and in its place inserts the following wording:

"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".[3]

12. This was a just and equitable remedy said the High Court, because –

12.1. the Executive Director of IPID fulfilled a similar function to that of the National Head of the DPCI and a similar degree of independence would be required;[4]

12.2. it was *"wholly irrelevant"* that in this case Parliament would be presented with a live issue in respect of which is might now be called to act, as opposed to removal provisions considered by this Court *Helen Suzman Foundation* in the abstract.[5] Furthermore, all that was required of Parliament was for it to take a resolution to initiate the removal proceedings in a committee of the National Assembly, and the Minister may then suspend McBride;[6]

12.3. in the circumstances, there was no basis to reserve the grant of a just and equitable interim remedy under section 172(2)(b) of the Constitution pending facts and submissions from Parliament. Further, the court held that it would in any event not be bound by

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[3] The relevant order at paragraphs 3.1 and 3.2 reads:

"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] Page 59, Record: Vol. 1, High Court judgment, para 66.

[5] Page 59, Record: Vol. 1, High Court judgment, para 67

[6] Page 59, Record: Vol. 1, High Court judgment, para 67.

representations of Parliament;[7] and that

12.4. it was satisfied that a temporary reading-in was both permissible and just and equitable and that to leave Parliament without the necessary power, in the interim, to ensure that Mr McBride faced a disciplinary process would, in the view of the Court, not be in the interests of justice or equity.[8]

13. If this Court confirms the High Court's interim remedy the following will occur:

13.1. The Minister's decisions will be set aside;

13.2. Mr McBride's suspension will be held in abeyance for a period of 30 days. Absent Parliamentary action, he must be reinstated as the Executive Director of IPID;

13.3. The disciplinary process initiated by the Minister, commenced, and part heard by the independent Chair, is annulled;

13.4. A Committee of the National Assembly is empowered to start proceedings against Mr McBride for his removal; and

13.5. Only once this occurs, the Minister may suspend Mr McBride.

14. The Minister's principle concern lies in the uncertainty and disconnect in an order that makes the continuation of Mr McBride's disciplinary process and his suspension dependent on the initiation of proceedings by an unknown Committee of Parliament by way of an unknown procedure. Further, no process

[7] Page 59, Record: Vol. 1, High Court judgment, para 67.
[8] Page 60, Record: Vol. 1, High Court judgment, para 68.

or procedure exists, nor is there a clear set of disciplinary rules to be applied. There is no guarantee on the timeframe under which Parliament will start proceedings against Mr McBride for his removal. In the interim, Mr McBride is reinstated as the Executive Director of IPID for an unknown period of time. Yet, as the facts of this case demonstrate, the manner in which Mr McBride has conducted himself amounts to a grave threat to the independence and integrity of IPID.

15. Against this background, we turn briefly to general principles on the crafting of an appropriate, just and equitable remedy.

THE POWERS OF THIS COURT UNDER SECTION 172 OF THE CONSTITUTION

16. The powers of the courts in constitutional matters are provided for in section 172 of the Constitution. That section requires a court to declare law and conduct inconsistent with the Constitution to be invalid, and then to make "*any order that is just and equitable*", including a suspension of the declaration of invalidity.[9]

17. In *Fose*, Ackermann J writing for the majority of this Court stated that courts have–

> *"a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of*

[9] Section 172(1) provides:

"When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including -

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

> *the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal".*[10] (Our emphasis.)

18. In *Hoffmann*, Ngcobo J tabulated the elements of *"appropriate relief"* in terms of section 38 of the Constitution:

> *"The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional rights; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source."*[11] (Our emphasis.)

19. Appropriateness, effectiveness and fairness, together with the assurance that an order can be can be complied with, are what is required. In this present matter this Court is called upon to forge a remedy that vindicates the independence of IPID, ensures that Mr McBride is called to account and guides Parliament as to the functions it must now assume. This takes place against the backdrop that Parliament elected not to reserve these functions for itself.

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[10] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at para 68. See also Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC) at paras 73 to 74.

[11] Hoffmann v South African Airways 2001 (1) SA 1 (CC) at para 45.

20. In this context, two questions arise: first, the legal consequences that flow from a declaration of invalidity of legislation; and second, the question of the just and equitable interim remedy in this case.

21. We address each in turn.

THE MINISTER'S DECISIONS SHOULD BE PRESERVED

Invalidity of legislation does not automatically result in the setting aside of decisions taken under it

22. The applicant proceeds from the assumption that the Minister's decisions to suspend Mr McBride and to initiate disciplinary proceedings against him are invalid automatically because the legislation under which they were taken has been declared unconstitutional. This is wrong as a matter of legal principle.[12]

23. Administrative decisions taken under a valid law subsequently declared to be unconstitutional are not automatically invalid. The rule of law requires their preservation. In at least three analogous decisions, this Court has endorsed this principle.

    23.1. In *Kruger*[13] this Court addressed squarely the question that now arises before this Court: the consequence of the declaration of constitutional invalidity in respect of a subsequent act. In short, the facts were that the President had issued a proclamation bringing into force the

[12] It is plain that Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC), the decision cited by Mr McBride, is distinguishable. That case did not address the consequences that flow from a declaration of an invalid statute.

[13] Kruger v President of the Republic of South Africa and Others 2009 (1) SA 417 (CC) at paras 73 – 75.

incorrect provisions of a statute. The President purported to amend this defect through the issue of a second proclamation. This amendment was similarly unclear and led to further uncertainty. This Court held that both proclamations were invalid. However, considering the disruption that would be caused by the order of invalidity this Court held that –

> *"it will be just and equitable to order that the Fund may continue to act as if sections 1 to 5 of the Amendment Act were brought into force lawfully on 31 July 2006, and to provide that anything done under those provisions from 31 July 2006 to the date 30 days after the issue of this order shall not be invalid on the ground that the provisions of the Amendment Act were not in fact brought into force on 31 July 2006."*

Kruger is authority for the proposition that an act done pursuant to invalid statutory provisions must nonetheless remain valid in the interests of certainty and to avoid disruption.

23.2. In *Van Rooyen*,[14] various provisions of the Magistrate's Court Act were declared to be invalid but the decisions taken under them were preserved. Chaskalson CJ stated:

> *"That does not mean … that magistrates' courts must stop functioning, that all decisions taken by magistrates must now be set aside as nullities, and that the persons convicted by magistrates of criminal offences must be released from jail."*

23.3. In *Democratic Alliance v President of South Africa*[15] a similar question arose. A decision of the President to appoint Mr Simelane as National Director of Public Prosecutions was declared unconstitutional.

[14] S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 at para 260.

[15] Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC) at para 93.

However, decisions flowing from that unconstitutional conduct were also expressly preserved. Yacoob J stated:

> *"However, in these circumstances, we should make an order that the invalidity of Mr Simelane's appointment will not by itself affect the validity of any of the decisions taken by him while in office as National Director. This will mean that all decisions made by him remain challengeable on any ground other than the circumstance that his appointment was invalid."*

24. Finally, the Supreme Court of Appeal has accepted the above principles. In *De Kock*[16] Cameron JA commented that *"[t]he reasoning the Constitutional Court employed in van Rooyen (1) was directly applicable to the critical question of remedy the High Court had to consider*" in that case. Cameron AJ explained that in Van Rooyen (1), "*although s 9(4) and certain other statutory provisions were inconsistent with magistrates' institutional independence*", Chaskalson CJ had reasoned that the decisions taken by magistrates would not be set aside.

25. It is clear from the authorities that there is no general principle of law justifying the invalidation of decisions taken under a valid law which is later declared to be unconstitutional.

26. No authority is cited for the proposition apparently advanced on behalf of Mr McBride that subsidiary decisions taken under a statute which is later declared to be unconstitutional must also be set aside. The principle is clear: administrative decisions taken under a statute which is later declared to be unconstitutional are not liable to be set aside on that account alone.

[16] De Kock NO and Others v Van Rooyen [2006] 2 All SA 227 (SCA) at para 14.

Limitation on retrospectivity

27. Furthermore, the Minister submits that this Court should exercise its remedial discretion under section 172(1)(b) in order to limit the retrospective effect of the order of constitutional invalidity of the removal provisions so as to preserve the Minister's decisions.

28. The principles set out in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[17] *S v Zuma*[18] and *S v Bhulwana; S v Gwadiso*[19] should give guidance to this Court in the exercise of its remedial discretion in this case involving serious allegations of misconduct, and the institution of disciplinary proceedings. In these cases, this Court noted the following policy issues in favour of limiting the retrospective effect of an order of constitutional invalidity and in order to preserve previous decisions:

    28.1. Unqualified retrospective operation of the invalidating provisions could cause severe dislocation to the administration of justice.[20]

    28.2. The police and prosecution have legitimately [and in good faith] relied on the impugned provision, rule or presumption.[21]

    28.3. In some cases the interests of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new.[22]

[17] National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).
[18] S v Zuma 1995 (2) SA 642 (CC).
[19] S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC).
[20] National Coalition at para 95. Stovall v Denno 388 US 293 (1967) at 388.
[21] National Coalition at para 95. S v Zuma at para 43.
[22] S v Zuma at para 43.

29. There are reasons of principle, justice, equity and efficacy which require that the Minister's decisions are preserved either by an order limiting retrospectively, or as part of any order that is just and equitable.

The nature and context of the Minister's decisions

30. In taking the decisions, the Minister acted in good faith, procedurally fairly, and on the basis of a prima facie case of gross misconduct against Mr McBride.

31. Mr McBride initially alleged that the Minister's decision was vitiated by ulterior purpose or improper motive and bad faith, and that it was irrational and unreasonable.[23] He persisted with these claims in the supplementary founding affidavit before the High Court.[24] However, in reply Mr McBride abandoned these grounds of review.

32. The Minister submits that the rule for disputes of fact in motion proceedings must result in the Minister's version being upheld and following relevant findings of fact:

    32.1. Under the removal provisions, Mr McBride was temporarily suspended for misconduct pending the outcome of an independent inquiry into the allegations against him. A Senior Counsel, and member of the Johannesburg Society of Advocates chairs the inquiry;

    32.2. On the objective evidence, Mr McBride's conduct arguably amounted to abuse of power, undermined the integrity, independence and effectiveness of IPID, and amounted to a manifest conflict of interests;

[23] Page 10, Record, para 11.2 and 11.3, McBride's founding affidavit.
[24] Page 123, Record: Vol.2, para 6.1, McBride's supplementary founding affidavit.

32.3. There was, and there remains, a prima facie case of gross misconduct against Mr McBride;

32.4. The Minister's decision was rational and reasonable in the light of the information available to him;

32.5. Political reasons did not actuate the decision of the Minister to suspend Mr McBride. The Minister's decision was made *bona fides*, and not for an ulterior purpose or improper motive;

32.6. The Minister acted in good faith to protect the institutional integrity and autonomy of IPID and to ensure compliance with the Constitution; and

32.7. Neither the fact of the Minister's decision, nor the context of events preceding it, would lead a reasonably informed, reasonable member of the public to conclude that IPID's independence was under threat.

The Minister's decisions were in good faith

33. At the time the Minister took the decisions to suspend and institute disciplinary proceedings against Mr McBride, the Minister considered the removal provisions to be constitutional.[25] No court had pronounced on the constitutionality of section 6(6) of the IPID Act, or declared the removal provisions unconstitutional or invalid.

34. The Minister took the view at the time that the IPID Act as a whole, and properly considered in the light of section 206(6) of the Constitution and the

[25] Page 150, Record, para 6.2, Minister's answering affidavit. Page 152, Record, para 9, Minister's answering affidavit. The Minister took the decisions in terms of the removal provisions: Page 216, Record, paragraph 100 of the Minister's answering Affidavit. The letter of suspension: Page 146, Record, line 20 – 25, annexure RM2 to Supplementary Founding Affidavit.

Minister's constitutional political responsibility for the police, provided adequate protections for the independence of an independent police oversight body, and that the removal power did not infringe the requirements of independence.[26]

35. The Minister has repeatedly indicated his support for the independence of IPID and clearly stated that he did not interfere with the operations of IPID or its independence.[27] The Minister has further consistently maintained that IPID must also be independent from SAPS.[28]

36. The Minister acted to protect IPID from internal threats to its independence by its very own Executive Director.[29] The Minister's decision sought to protect the institutional integrity of IPID and to ensure that there was compliance with the law of the country and the Constitution.[30]

37. The Minister has always been of the view that he was duty-bound to take appropriate steps to protect the independence and integrity of IPID.[31] At that time, the appropriate steps available to the Minister were those set out in the removal provisions.

38. Furthermore, there is no evidence before this Court that the decisions of the Minister were taken for improper reasons. Mr McBride's allegations that there was "*unlawful Ministerial interference*"[32] and an "*abuse of power*"[33] and bad

[26] Page 186, Record, para 49, Minister's answering affidavit. Page 189, Record, para 51, Minister's answering affidavit.

[27] Page 151- 2, Record, para 7-8, Minister's answering affidavit.

[28] Page 200, Record, para 72, Minister's answering affidavit.

[29] Page 154, Record, para 10, Minister's answering affidavit. Page 146, Record, line 14 – 24, applicant's supplementary founding affidavit. Page 147, Record, line 1 – 8, applicant's supplementary founding affidavit.

[30] Page 203, Record, para 67, Minister's answering affidavit.

[31] Page 154, Record: Vol.3, para 10, Minister's answering affidavit.

[32] Page 8, Record, para 8 and 10, McBride's founding affidavit.

faith were unfounded and, as indicated above, rightly abandoned. Indeed, as the Minister pointed out, Mr McBride did not complain of any political interference or lack of adequate independence until he was suspended for gross misconduct.[34]

The decisions were rational and reasonable

39. The Minister took his decision for legitimate and lawful reasons relating to the alleged gross misconduct of Mr McBride and his abuse of authority as the Executive Head of IPID.

40. The Minister had evidence before him to suspend and charge Mr McBride. This included evidence that:

    40.1. Mr McBride attempted to protect senior members of the SAPS from the consequences of their alleged criminal conduct and alleged misconduct. [35]

        40.1.1. In October 2013, a complaint was lodged with IPID relating to the conduct of the police in alleged illegal renditions.[36] In line with its functions and mandate, IPID proceeded to investigate the allegations.

        40.1.2. During the investigations it became apparent that there was strong prima facie evidence that Mr Anwar Dramat and Mr Shadrack Sibiya, senior members of the SAPS, were aware

[33] Page 16, Record, para 27, McBride's founding affidavit.
[34] Page 152, Record: Vol.3, para 9, Minister's answering affidavit.
[35] Page 152, Record: Vol.3, para 8.1, Minister's answering affidavit.
[36] Page 172, Record: Vol. 3, para 23, Minister's answering affidavit.

of and participated in the arrest, detention and rendition of nationals of Zimbabwe by members of the SAPS to the police of Zimbabwe.[37] Some of the nationals arrested by the SAPS, and handed over the Zimbabwean police, were subsequently killed while in the custody of the Zimbabwean police.[38] IPID came to the conclusion that six members of the SAPS, including Mr Dramat and Mr Sibiya be charged with kidnapping and defeating the ends of justice.[39]

40.2. It is alleged that Mr McBride attempted to suppress the evidence that implicates Mr Dramat and Mr Sibiya.[40] He did so by causing IPID to change its report and recommendations regarding the criminal charges against Mr Dramat and Mr Sibiya.[41] It is evident that the IPID report of 22 January 2014 and the later report of 18 March 2014 contained material differences.[42]

40.3. In doing so, Mr McBride gave instructions to junior members of IPID staff to act in manner designed to achieve his improper motives and interfered with the National Prosecuting Agency;[43]

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[37] Page 157, Record: Vol.3, para 14, Minister's answering affidavit. The Minister sets out this evidence in full at pages 158 – 171 of the Record: Vol.3.

[38] Page 156, Record: Vol. 3, para 13, Minister's answering affidavit.

[39] Page 174, Record: Vol. 3, para 26, Minister's answering affidavit.

[40] Page 185, Record: Vol. 3, para 46, Minister's answering affidavit.

[41] Page 157, Record: Vol.3, para 14, Minister's answering affidavit.

[42] See page 77 - 78, Record: Vol.1, Annexure RM3. Cf page 116, Record: Vol.2, Annexure RM4. The differences in the two reports are set out in detail in the Minister's answering affidavit in the High Court. At page 180, Record: Vol.3, para 44.

[43] Page 153, Record: Vol.3, para 8.2, Minister's answering affidavit. See also page 186, Record: Vol. 3. Para 49, Minister's answering affidavit.

40.4. After the suspension of Mr McBride, it was discovered that Mr McBride caused an advance payment in the amount of R500 000.00 to be made to the account of his attorneys of record in the High Court proceedings. This is a conflict of interests and constitutes a violation of the Public Finance Management Act to the extent that the payment was for services which had not been rendered.[44]

41. The Minister appointed Werksmans Attorneys to conduct an independent investigation into the conduct of Mr McBride. Werksmans Attorneys found that there was sufficient prima facie evidence of gross misconduct by Mr McBride.[45]

42. The High Court made no findings on the merits of the charges.[46] But it should have. It was not sufficient for the High Court to overlook the facts, particularly in light of the fact that the decision of a just and equitable remedy depended in part on a consideration of the public interest and the necessity that Mr McBride does not evade justice.

43. The function of IPID is to ensure "*effective, independent oversight*" of the police, and to "*uphold and safeguard the fundamental rights of every person*".[47] The charges against Mr McBride go to the very core of IPID's mandate.

44. Mr McBride also accepted that the allegations against him were manifestly serious, and maintains that he is willing if not eager to face disciplinary proceedings.

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[44] Page 153 and 190, Record: Vol. 3, para 8.3 and para 54, Minister's answering affidavit.

[45] Page 155, Record: Vol.3, para 10.4, Minister's answering affidavit. See also page 237, Record: Vol.3, The Charge Sheet.

[46] Page 20, Record: Vol. 1, High Court Judgment, paragraph 4.

[47] IPID Act 1 of 2011, Preamble.

45. In the circumstances, the only legal conclusion is that the Minister acted rationally and reasonably in the light of the information before him at the time.

Inequity and material prejudice will arise if the decisions are set aside

Impunity for Mr McBride

46. The Minister submits that in the light of the strong case of gross misconduct against Mr McBride, as evidenced on the papers, it would be neither just nor equitable to delay or hinder Mr McBride's disciplinary hearing.

47. Inequity and disruption will result if Mr McBride is reinstated as Executive Head of IPID, pending the National Assembly Committee instituting disciplinary proceedings. In effect, it will allow Mr McBride to escape the consequences of the alleged misconduct.

48. The fact that Mr McBride must face disciplinary proceedings is not contested. Mr McBride has stated that he disputes the lawfulness of the disciplinary proceedings only on the basis that the statutory powers of the Minister were unconstitutional. He did not contest the institution of the disciplinary inquiry into the allegations against him per se, or suggest that he was immune from removal from office.[48] He "*readily accepts*" that he may be called upon to "*explain and account for my conduct at an inquiry that adequately safeguards the independence of IPID and its Executive Director*".[49]

[48] Page 277, Record: Vol.4, para 25, McBride's Replying Affidavit.
[49] Page 277, Record: Vol.4, para 25, McBride's Replying Affidavit.

49. The necessity to discipline Mr McBride and to restore the integrity and independence of IPID requires immediate action. This Court should not allow a cloud of uncertainty as to Mr McBride's conduct, and the integrity of IPID, to perpetuate.

Mr McBride's rights will be protected

50. Mr McBride's primary complaint was that the disciplinary enquiry was instituted exclusively by the Minister, chaired by an appointee of the Minister and its findings to be implemented by the Minister without any Parliamentary oversight and intervention.[50]

51. Mr McBride stressed before the High Court, and maintains as much before this Court, that his case was never that the Executive Director of IPID is not accountable or cannot be subjected to disciplinary action. Rather, Mr McBride stated:

> *"I contend only that disciplinary action against the Executive Director, including suspension, the institution of a disciplinary enquiry and removal, cannot be taken by the Minister unilaterally as the IPID Act currently purports to permit, but must be subject to the guarantees necessary to protect the independence of IPID, including the effective oversight of Parliament."*[51]

52. Mr McBride contends that a lawful decision to suspend the Executive Director requires that it is followed by an inquiry that is sufficiently independent of the Minister, and any removal decision consequent upon suspension and an inquiry

[50] Page 277, Record: Vol.4, para 26, McBride's Replying Affidavit.

[51] Page 277, Record: Vol.4, para 24, McBride's Replying Affidavit. See also para 22 of the Founding affidavit in the Application for leave to appeal.

must be subject to parliamentary oversight, with a clear mechanism for parliamentary intervention.[52]

53. The remedy suggested by the Minister will cure these defects and vindicate Mr McBride's rights. Although the decision to institute a disciplinary inquiry will be the Minister's decision, the process of the disciplinary enquiry and the removal of the Executive Head will be out of the Minister's hands and will be subject to effective oversight by Parliament.

54. There is no reason why Mr McBride should not be subjected to the very process that he argues should have obtained at the time Minster's decisions were taken.

Prejudice to IPID and the public interest

55. The resultant effect of the High Court order is that despite a strong *prima facie* case of gross misconduct against Mr McBride, and decisions taken by the Minister in good faith, there will inevitably be delays and uncertainty in the finalisation of the disciplinary process. This is despite the fact that there is a strong public interest in the expeditious finalisation of disciplinary proceedings.

56. The order proposed on behalf of Mr McBride will spawn confusion and delay in the finalisation of disciplinary proceedings against him.

57. In *Helen Suzman Foundation* Mogoeng CJ asserted the constitutional duty of the state as employer to expedite enquiries in order to avoid lengthy suspensions on pay, such as this matter: *"It is the employer's duty to expedite*

[52] Page 278, Record: Vol.4, para 27, McBride's replying affidavit.

the inquiry to avoid lengthy suspensions on pay."[53] The principle applies with equal force herein. Mr McBride is already on lengthy suspension on pay. A prima facie case of misconduct against him exists.

58. Moreover, public perception and confidence in IPID is a factor that must be taken into account when crafting the appropriate and effective remedy.

59. In all the circumstances, this Court should exercise its discretion to preserve the Minister's decisions.

60. We turn now to the question of interim remedy.

INTERIM READING-IN IS NOT APPROPRIATE

61. We have addressed above the basis upon which this Court should, despite the unconstitutionality of section 6(6) of the IPID Act, preserve the Minister's decisions to suspend and institute disciplinary proceedings against Mr McBride.

62. It is now settled law that courts must show deference to policy choices made by the executive. The content of the duty of deference assumes special significance when the court is faced with a measure to give effect to a constitutional or statutory obligation.

63. This flows from the doctrine of separation of powers, which is integral to our constitutional scheme. Although the courts are the ultimate guardians of the Constitution, it is incumbent upon them "*to observe the limits of their own*

[53] Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at para 85.

power".[54] Courts must "*be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government*."[55]

64. In *SCAW* this Court cautioned that:

> *"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*[56]

65. This Court reminded us in *Bato Star*[57] that:

> *"[T]he court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field."*

66. In *Doctors for Life*,[58] this Court observed, in relation to proceedings of Parliament:

> *"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers*

[54] International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) at para 93

[55] SCAW para 94 quoting Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) at para 38

[56] SCAW at para 95.

[57] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 48.

[58] Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC) at para 37.

between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

67. In the Minister's submission, an interim reading-in is a significant encroachment on Parliament's authority.

68. Recourse to such a remedy arises in limited and carefully circumscribed circumstances.

69. In *Gaertner*,[59] this Court noted that interim reading in as a remedy must be applied "sparingly" because it "*may constitute a possible encroachment by the judiciary on the terrain of the legislature and therefore a violation of the separation of powers*."[60] This does not mean that the remedy is not available. Depending on its "*nature and extent*" the remedy may not unduly interfere with the legislative powers of Parliament.[61]

70. In the Minister's submission, an interim remedy by way of reading-in or otherwise is not just and equitable in this case.

71. It will be recalled that the Minister bears constitutional political responsibility for effective policing. Misconduct by the Executive Director of IPID infringes effective policing. The decision of the Minister to step in when he did, and to

[59] Gaertner and Others v Minister of Finance and Others 2014 (1) SA 442 (CC).

[60] Gaertner at para 82.

[61] Gaertner at para 84. The decision in Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others 2014 (3) SA 106 (CC) was specific to the facts of that case and does not purport to set a principle of when an interim reading-in will be permissible.

suspend Mr McBride and institute disciplinary proceedings against him was intended to safeguard the independence of IPID – which in turn is essential for effective policing.

72. The Minister's responsibilities include ensuring the proper "*functioning of the police*"[62] and "*that police officers are properly trained and carefully screened to avoid the risk that they will behave in a completely improper manner*."[63] The Minister must also ensure that the SAPS, as part of the public administration, promotes the "*(e)fficient, economic and effective use of resources*" and is responsive to the public's needs.[64]

73. It would be contrary to the scheme of section 206 of the Constitution to endorse an approach which nullifies the Minister's ability to take any steps in furtherance of these duties.

74. The correct approach is to balance the Minister's obligations under section 206 with the need for an independent and independently perceived police complaints body.

75. Where the equilibrium between the Minister's constitutional obligations and the constitutional independence of IPID should be struck, is a matter pre-eminently for the legislature. Nothing has been put forward to justify the immediate interference by this Court by the drastic remedy of temporary reading-in. The proper outcome ought to be a suspension of the order of constitutional invalidity for a fixed period to enable Parliament to discharge its constitutional mandate.

[62] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) at para 145.
[63] Minister of Safety & Security v Luiters 2007 (2) SA 106 (CC) at para 34.
[64] Sections 195(1)(b) and (e) of the Constitution.

INTERIM READING-IN OF SECTION 17DA OF THE SAPS ACT IS NOT APPROPRIATE

76. Alternatively, in the event that it is found that a suspension is not a just and equitable outcome, we make the following submissions in relation to any temporary scheme to be put in place.

77. This Court must fashion a remedy that ensures that Parliament is properly seized of the matter, in a position adequately to facilitate a disciplinary process, and that it does in fact do so.

78. The application of section 17DA of the SAPS Act, which was the chosen method of the High Court, will not achieve this constitutional imperative. The Minister submits that recourse to the removal measures that apply to the DPCI under section 17DA of the SAPS Act will be ineffective, potentially detrimental to the independence of IPID, and permit Mr McBride to evade justice.

79. The approach of the High Court – which transposes an entire legislative machinery – is problematic and should be carefully considered by this Court.

    79.1. First, the proposed remedy would permit the Minister to *suspend* the Executive Director of IPID only *after* the start of *removal* proceedings by a committee of the National Assembly;

    79.2. Second, section 17DA of the SAPS Act does not prescribe the actual mechanism to be followed by the National Assembly or a Committee in instituting disciplinary proceedings. In particular, how such proceedings

are triggered, how any investigation should take place, and at what point the resolution must come before the National Assembly.

79.3. Third, these provisions do not take into account the fact that disciplinary proceedings are not part of Parliament's normal functions. Parliament is not structured to operate swiftly in the event of misconduct by the Executive Head of IPID. Any interim order should therefore give guidance to Parliament in order to ensure that the disciplinary process does not drag on unnecessarily, and provide a mechanism for prompt action in cases of misconduct.

80. Precisely how the application of the relevant SAPS Act provisions will be effective is unclear. Indeed the manner in which they are to be applied is vague at best. The proposed remedy says nothing about inter alia:

80.1. The nature of and manner in which any process, investigation or inquiry is to be initiated;

80.2. How or in what form the grounds for removal are to brought to the attention of Parliament;

80.3. The process to be followed in the enquiry;

80.4. The rights to be accorded to the parties, including the right to legal representation;

80.5. The precise manner in which the enquiry is to be conducted, including its chairing and determination of the factual allegations of misconduct; and

80.6. The applicable time periods for the effective resolution of the dispute etc.

81. It is against this backdrop that this Court must assess the just and equitable interim relief to be granted.

Removal prior to suspension is unworkable

82. The proposed remedy would permit the Minister to suspend the Executive Director of IPID only *after* the start of removal proceedings by a committee of the National Assembly.

83. It is the National Assembly, on its own accord, which must determine whether removal proceedings are warranted.

84. The Executive Director has complete autonomy and control over the operational functions and management of IPID. Further, under section 7(12) of the IPID Act, the Executive Director reports on the activities of the Directorate to the Minister and Parliament.

85. How then are allegations of gross misconduct on the part of the Executive Director and in relation to the execution of his mandate to come before Parliament such that it may exercise its removal powers? How is the process to be initiated?

86. The High Court provides no guidance on this score.

87. A suspension is a precautionary measure taken to secure the independence of IPID, pending a final determination of allegations of gross misconduct. In the circumstances of this case, it was a decision to be taken immediately in order,

amongst others, to prevent tampering with evidence, and as a result of legitimate concerns that Mr McBride might interfere with the investigation into him then underway.[65]

88. A failure to act immediately would have had dire consequences for IPID. Further, it would do harm to the public's perception that IPID is independent.

89. The proposed interim remedy, however, will inevitably prevent an immediate response when one is plainly required.

Administrative machinery and disciplinary infrastructure is lacking

90. The above is further aggravated by the fact that, absent effective administrative machinery in Parliament, confusion will likely ensue when Parliament is confronted with an ongoing disciplinary matter. The disciplinary hearing was convened and the proceedings commenced.

91. If this Court is to provide an effective remedy, which must be fair and practical, it must be satisfied that Parliament can in fact execute a disciplinary mandate, which is not envisaged in the current legislative matrix. This court must fashion a remedy which vindicates the independence of IPID; does not result in impunity; and can be complied with.

92. Keeping Mr McBride on suspension for a further 30 days after this court's order to enable Parliament to invoke its removal powers, as ordered by the High Court, is contrary to the rule of law: Parliament cannot comply with such an order without the necessary disciplinary infrastructure in place.

[65] Page 147, Record: Vol.3, Letter of Suspension.

93. The institution of any disciplinary proceedings is contingent on the administrative machinery necessary to operationalise them. This is different to what obtained in *Helen Suzman Foundation*, where this court read-into section 17DA Parliament's removal powers in respect of the head of the DPCI. The reading-in remedy was granted in the absence of a live dispute. It is plainly unreasonable and would add to the delays to expect that Parliament must craft and bring into motion the necessary disciplinary infrastructure within a period of 30 days, as proposed by Mr McBride.

94. When this Court crafts an interim remedy, it should be satisfied that it has the necessary information to ensure the effectiveness of the remedy. The fact of the matter is that Parliament will be required to assume, for the first time, a significant responsibility which it did not have, at least in respect of the head of IPID.

95. The proposed interim remedy assumes in favour of Parliament the ability, capacity and processes immediately to convene some form of disciplinary process. This a duty that this Court, in *Helen Suzman Foundation*, ascribed to Parliament. But it was a duty assigned without information or context as to Parliament's capacities and procedures. The order in *Helen Suzman Foundation* was also granted in the absence of a live and ongoing controversy regarding the propriety of the head of the DPCI to remain in office. In this case the very issue which resulted in the bringing of these proceedings was the legitimate concern of the Minister regarding whether Mr McBride is fit to remain in office in light of his misconduct.

96. Parliament, being the institution responsible for the effective implementation of this Court's order, should be afforded the opportunity to state whether it is *not* in a position do so, or, if it is, to satisfy the court that the procedures put in place will be effective.

97. In the circumstances, the Minister submits that this Court should declare that the relevant Portfolio Committee is deemed to be seized with the disciplinary enquiry into the alleged gross misconduct of Mr McBride. The Committee should be required to report to this Court within 45 days on the procedure it intends to adopt so as to satisfy this Court that the remedy granted, and disciplinary procedure contemplated by this Court's order, will be lawful and effective. If satisfied, this Court should order that the enquiry be commenced and be concluded within 60 days.

CONCLUSION

98. In all the circumstances, the Minister submits that this Court should:

98.1. Confirm the declaration of constitutional invalidity in respect of sections 6(3)(a) and 6(6) of the IPID Act, and Regulation 13 of the IPID Regulations. The declaration of invalidity should be suspended for a period of 18 months.

98.2. Declare that the relevant Portfolio Committee is deemed to be seized with the disciplinary proceedings already instituted against Mr McBride;

98.3. Direct the Minister immediately to transmit all documents of record before the stayed disciplinary enquiry to the Chairperson of the relevant Portfolio Committee;

98.4. Direct the relevant Portfolio Committee to report to this Court within 45 days of its order on the procedure and rules it intends to adopt so as to satisfy this Court that the remedy granted, and disciplinary procedure contemplated by this Court's order, will be lawful and effective.

98.5. If satisfied, this Court should order that the enquiry be commenced and be concluded with 60 days.

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12 April 2016

TABLE OF AUTHORITES

1. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).

2. De Kock NO and Others v Van Rooyen [2006] 2 All SA 227 (SCA).

3. Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC).

4. Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC).

5. Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

6. Gaertner and Others v Minister of Finance and Others 2014 (1) SA 442 (CC).

7. Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC).

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

9. Hoffmann v South African Airways 2001 (1) SA 1 (CC).

10. International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC).

11. Kruger v President of the Republic of South Africa and Others 2009 (1) SA 417 (CC).

12. Minister of Safety & Security v Luiters 2007 (2) SA 106 (CC).

13. S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC).