IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT48/2009

In the matter between:

GLENISTER, HUGH	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF SAFETY AND SECURITY	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Fifth Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

---

HEADS OF ARGUMENT ON BEHALF OF THE FIRST, SECOND AND THIRD RESPONDENTS

Analysis of the present proceedings

1. The application before this Court has four components.

1.1 An application for condonation (notice of application, para 1);

1.2 An application for leave to appeal (para 2);

1.3 An appeal, as if leave to appeal has already been granted (para 3);

1.4 Alternatively to the order sought as if on appeal, direct access to this Court, and, pursuant thereto, the relief in para 2 (para 4).

2. In substance, there are two main components, namely –

2.1 An application for leave to appeal against the judgment and order of the Western Cape High Court, Cape Town (the WCC);

2.2 An application for direct access to this Court.

3. Logically, the application for direct access should be treated as an alternative to the application for leave to appeal, and not as an alternative to para 3 of the Notice of Application.

4. The leave to appeal component involves two aspects:

4.1 the WCC's finding that it did not have jurisdiction to decide whether Parliament or the President failed to fulfil their constitutional obligations (Reasons paras [7]-[8]);

4.2 the question of rationality.

5. The direct access component of the case presupposes that the WCC was correct in respect of the jurisdictional aspect under s 167(4)(e) of the Constitution, otherwise there would be no need for direct access to this Court. However, there is no jurisdictional issue in relation to the rationality attack on SAPS Amendment Act and the NPA Amendment Act ("the two Acts").

6. It would therefore appear that logically the application must be regarded as –

6.1 An application for leave to appeal against –

6.1.1 the decision of the WCC that it did not have jurisdiction in respect of the grounds on which the Acts were sought to be impugned as set out in para [3](a) to (f) of the WCC's Reasons and;

6.1.2 the decision of the WCC that the applicant had failed to show that the establishment of the Directorate of Priority Crime Investigation and the de-establishment of the DSO by means of the two Acts, was irrational and did not serve a legitimate governmental purpose.

6.2 Alternatively to 7.1.1 above, an acceptance that the WCC lacked jurisdiction in respect of the relevant issues, and an application for direct access in respect of those issues.

7. The application for leave to appeal therefore involves the issues of jurisdiction and rationality, but not the issues underlying the jurisdiction question, i.e. whether the President and Parliament failed to discharge constitutional obligations.

8. These heads of argument will address –

8.1 The application for condonation;

8.2 The jurisdiction issue;

8.3 The rationality issue and its components.

9. The latter category encompasses most of the aspects mentioned in sub-paragraphs 4.1 to 4.5 of the notice of application for leave to appeal. It is not clear whether the applicant persists with the other grounds on which it relied in the WCC, but for present purposes it is assumed that he does not.

Condonation

10. In terms of paragraph 1 of the notice of application the applicant seeks condonation for the late filing of the application for leave to appeal. The

relevant factors in applications for condonation were set out in *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532 as follows:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case."*

11. The circumstances in which this court will grant applications for condonation for special leave to appeal were set out in the case of *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) at 839 E-G.

> *" … an application for leave to appeal will be granted if it is in the interests of justice do so … The interests of justice must be determined by reference to all the relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."*

12. In *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at 477 E-F the court held that an applicant for condonation must give a full explanation for

the delay. The explanation must cover the entire period of the delay. Moreover, the explanation must be reasonable.

13. The applicant's explanation for the delay is unsatisfactory. The applicant has furnished no particulars of the dates and times he was out of the country nor why he was unable to pass on an instruction to his legal representatives in writing, by e-mail, fax or cellular phone.

14. There is no information as to when consultations with the applicant's lawyers took place or instructions given and received. The applicant is seeking a very substantial indulgence from this Court but has failed to demonstrate any vigilance or urgency on his part in finalising the application, and has left lengthy delays entirely unexplained.

15. The application for direct access to this court highlights a further aspect of delay. As recorded in para [6] of the WCC's Reasons, it was conceded on the applicant's behalf that six of the seven grounds relied upon in the WCC concerned alleged failures by Parliament and the President to fulfil constitutional obligations. The scope and effect of s 167(4)(e) of the Constitution were fully canvassed at the time. There was no reason for the applicant to delay for one day with an application for direct access to this Court, where such application is premised on the grounds established so clearly at the hearing. Indeed, the applicant need not have waited for the order of 18 June 2009, but cannot possibly justify any delay thereafter in bringing an application for direct access to this Court.

16. In terms of Constitutional Court Rule 19(2) the applicant was to have lodged an application for leave to appeal within 15 days of receiving the order. Although reasons were furnished on 26 February 2010 the order was made on 18 June 2009. Thus the application for leave to appeal was due by 9 July 2009. The applicant only filed the application on 19 May 2010, more than 10 months later, and some 65 days after the reasons were furnished. These, it is submitted are both inordinate delays.

17. In the application it is contended that leave to appeal could not be applied for before the reasons were obtained (para 41.2). This approach is fallacious for two reasons: -

17.1 It ignores the fact that this Court's Rules require the application to be brought within 15 days of the order. It may be noted that this Court's Rules do not contain a provision similar to the first [pronto] to High Court Rule 49(1)(b), which postpones the commencement of the period within which leave to appeal must be sought until the reasons have been delivered.

17.2 Neither in the application nor the heads of argument did the applicant engage with the WCC's Reasons. The jurisdiction issue is mentioned in para 12 of the heads of argument without dealing with the WCC's Reasons or findings at all. In the section headed "Irrationality" (heads of argument paras 41 to 54) there is no reference to the WCC's Reasons, nor is it suggested why or in what respects that Court's approach was wrong.

17.3 It is therefore submitted that the delay in delivering the reasons was irrelevant to the applicant's preparation.

18. The further explanations advanced for the delay is that in order to formulate the appeal, the applicant's counsel had to peruse the lengthy record from the proceedings of the court a quo; the applicant is a businessman who travels widely and is not readily available to give instructions to his counsel and attorney who reside in different provinces. However, had the application been brought timeously, the time needed for re-perusing the record would have been greatly reduced; the applicant's travels do not excuse compliance with the Rules; no explanation is given as to why communications could not be conducted electronically or telephonically; and the fact that the applicant's legal team is spread across the Country is a circumstance of his own choosing.

19. In the context of the present case, the question of delay, and the explanation, for it is very important. It was common knowledge at the hearing that the proposed implementation dated for the DPCI unit was 1 July 2009 (see the affidavit of Manoko Nchwe para 12, p 2007).

20. The imminent full implementation of the two Acts was relied upon by the applicant as a basis for securing an urgent hearing, and it was urged on the WCC that it should deal with the matter before that date. This factor was also relied upon by the applicant in seeking an interim interdict in the WCC,

as appears from paragraphs 168–170 of his heads of argument in that Court (pp 107–108).

21. By delaying, as it did, the applicant has increased the harm that would be suffered not only by persons who changed their jobs and careers by reason of the implementation of the Acts after the application was dismissed, but by the Republic as a whole.

22. The applicant's fear in June 2009 was that the process was well-nigh irreversible, and had to be stopped by means of an interdict pending this Court's (hoped for) confirmation of constitutional invalidity of the two Acts.

23. In these circumstances the mere fact of a substantial delay in lodging the application for direct access should be reason enough for it to be dismissed.

24. It is submitted that the applicant has not furnished a satisfactory or reasonable explanation for his delay. In the present case that is reason enough to dismiss the application for condonation, as well as those for leave to appeal and direct access.

Jurisdiction

25. The submissions on behalf of the respondents regarding jurisdiction are set out in the heads of argument (volume 3, pp 111 to 115, paras 3 to

13). For reasons stated in the WCC's Reasons, paras 8 and 13 of those submissions are not persisted in.

26. The aforementioned submissions were upheld by the WCC (Reasons, paras [3] to [9]). In view of the applicant's concession recorded in para [6] of the Reasons, any dispute regarding the characterisation of the grounds relied upon by the applicant, fell away, and it is common cause that (save for the irrationality issue) they concerned matters that fell under s 167(4)(e) of the Constitution.

27. Save for re-stating an argument rejected by the WCC in para [8] of the Reasons, without any attempt to motivate it, the applicant has not dealt with the jurisdiction aspect in its papers at all. The logic of the finding in para [8] is, it is submitted, plain and has not been criticised by the applicant.

28. In the premises it is submitted that no basis has been shown for interfering with the WCC's finding on jurisdiction.

Irrationality

29. Under this heading the applicant has largely re-stated and re-arranged the contentions advanced before the WCC. It has added a new argument, namely that the two Acts could not have been passed without the approval of the NDPP. This later argument will be addressed separately below.

30. The applicant's contentions were analysed and addressed in the respondents' heads of argument in the WCC from para 14 to 125 (volume 3, pp 115–161).

31. In addition, supplementary heads of argument and written submissions in respect of the application to strike out inadmissible evidence in the founding papers were delivered, which were not included in the papers now before this Court. The respondents' attorneys will attend to the delivery of those documents to this Court's Registrar.

32. In this Court, as in the WCC, the applicant has often repeated the same submissions under different headings. The respondents have sought to identify the main arguments and deal with them thematically rather than under the applicant's headings.

Scope of the inquiry

33. It is clear from the applicant's heads of argument in this Court as well as in the WCC that it is not contended that any specific provisions of the two Amendment Acts are in themselves inconsistent with the Constitution. The applicant complains of various supposed deficiencies in the "scheme comprising the enactment of the two Acts", but has not suggested that any of the specific provisions of those Acts violate the Constitution.

34. The matter can therefore be approached on the basis that neither the SAPS Amendment Act nor the NPA Amendment Act are said to contain provisions which are in themselves inconsistent with the Constitution.

Creation of the DSO and Section 179 (4) of the Constitution

35. The applicant contends at various places in its present heads of argument (as it did before the WCC) that the DSO was created pursuant to the provisions of s 179 (2) and (4) of the Constitution, and that it was necessary to retain it within the NPA structure, failing which the requirements of those provisions of the Constitution were not satisfied.

36. It is submitted that these assertions on behalf of the Application are factually and legally incorrect, for the reasons that follow:

36.1 S 179 (4) requires national legislation to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. That was achieved in the NPA Act, 32 of 1998, in s 20 and s 32, well before the DSO was established in 2001;

36.2 The Khampepe Commission report, on which the applicant places much reliance, addressed the rationale behind establishment of the DSO (paragraph 9, pp 334 – 335). In paragraph 9.5 it was reported that –

> *"The rationale for the establishment of the DSO, that is, to create a multi-disciplinary structure using the troika*

principle as a methodology to address organised crime was precipitated by intolerable levels of crime".

36.3 Neither S 179 (4) nor the principle it reflects is mentioned in the findings of the Khampepe report as being part of the rationale for the establishment of the DSO;

36.4 There is no requirement in s 179 (4) that an investigative body be created in the NPA or as part of the Courts' structure in terms of Chapter 8 of the Constitution. There is no sense in which the creation of the DSO was "pursuant to" s 179 (4);

36.5 It is submitted that the subject matter and context of chapter 8 rather weigh against an investigative body being accommodated under its provisions. Chapter 8 deals with Courts and the administration of justice. Whilst many an investigation may result in a prosecution, that does not mean or imply that the investigative function – as opposed to the institution of criminal proceedings – properly belongs within the Court structures;

36.6 The proposition that s 179 (2) "prescribes" that the DSO had to be created at all, or embodied such a requirement, is without any merit, let alone that s 179 (2) prescribes that it had to be created under chapter 8 of the Constitution. S 179 (2) provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to the institution of criminal proceedings. It

can hardly be submitted that carrying out investigations is a function "incidental to" the institution of criminal proceedings.

37. In paragraph 11 of applicant's heads of argument the essence of the applicant's case is summarised as follows:

> *"At the micro level the case is about the constitutionality of the scheme of the two Acts encompassing the dissolution of the Directorate of Special Operations (DSO) and the transfer of its investigative personnel to the new Directorate of Priority Crime Investigation (DPCI) in the South African Police Service (SAPS); at the macro level it is about the preservation of the rule of law and the independent ability of the National Prosecution Authority (NPA) to continue to function in the manner required by the Constitution: 'without fear, favour or prejudice' ".*

38. This summary demonstrates some of the misconceptions inherent in the applicant's case. The only part of it which correctly reflects the position brought about by the two Amendment Acts is that there will no longer be a unit known as the DSO located within the National Prosecuting Authority. The remainder of the summary is patently incorrect.

38.1 Neither of the Amendment Acts nor the two read together provide for the transfer of the DSO's investigative personnel to the DPCI;

38.2 The independent ability of the NPA to function without fear, favour or prejudice is unaffected by either Amendment Act or the two read together.

39. As to the transfer of investigative personnel the applicable provisions are to be found in s 13 of the NPA Amendment Act, which substitutes s 43 A of the principal Act (the NPA Act, 32 of 1998).

40. Whilst the amendments to the NPA Act therefore provide for the transfer of investigative personnel from the DSO, they do not provide for their transfer to the DPCI. Personnel for that directorate are to be selected as provided for in s 7 of the SAPS Amendment Act. In terms of s 7 (1) persons may be selected for appointment in the DPCI from the following five categories:

40.1 Former special investigators of the DSO who transferred to the SAPS;

40.2 Members who served in the organised crime component of the SAPS;

40.3 Members who served in the commercial crime component of the SAPS;

40.4 Any other member of the SAPS; and

40.5 Any administrative and support personnel employed at the fixed date by the DSO and the SAPS.

41. In terms of s 7 (2) the selection criteria must be advised by the National Commissioner to the Head of the DPCI and those criteria shall be determined with reference, amongst others, to experience, training, skills, competence or knowledge (s 7 (3)).

42. S 17E of the SAPS Amendment Act provides for security, screening and integrity measures in respect of those considered for appointment in the DPCI.

43. The overall scheme of the two Acts, read together, is to consolidate crime investigation powers within the SAPS. The investigative powers under s 7 and chapter 3A are simultaneously removed from the NPA Act.

44. However, none of the provisions of the NPA Act dealing with prosecutors and prosecutions, nor the investigative powers provided for in s 24 of that Act are affected.

45. The proposition that the scheme of the Acts is to render the NPA unable to function independently without fear, favour or prejudice, is plainly wrong.

45.1 S 20 of the NPA Act provides that the power contemplated in s 179 (2) and all other relevant sections of the Constitution, to institute and

conduct criminal proceedings on behalf of the State, to carry out any necessary functions incidental to instituting and conducting such criminal proceedings and discontinuing criminal proceedings, vests in the prosecuting authority;

45.2 Whatever the scope of the functions encompassed by the expression “incidental to” instituting such criminal proceedings, they are vested in the NPA;

45.3 S 20 of the NPA Act is not amended by the NPA Amendment Act;

45.4 S 20 is supported by s 32 of the NPA Act.

45.4.1 S 32 (1) (a) provides that a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith without fear, favour or prejudice and subject only to the Constitution and the law;

45.4.2 S 32 (1) (b) provides that subject to the Constitution and the NPA Act itself, “no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in their exercise, carrying out or performance of its, his or her powers, duties and functions”;

45.4.3 In terms of s 32 (2) all members of the prosecuting authority are required to take an oath of office in which they swear or solemnly affirm that they will uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the law of the Republic without fear, favour or prejudice and as the circumstances of any particular case may require, in accordance with the Constitution and the law.

46. These are the provisions that give effect to s 179 (4) of the Constitution, which provides that "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice".

47. Sections 20 and 32 of the NPA Act are entirely unaffected by the NPA Amendment Act. The national legislation contemplated are required by s 179 (4) thus remains perfectly intact.

48. It is submitted that the consolidation of primary investigative functions within the SAPS and their removal from the NPA is consistent with the Constitution. S 179 provides for a single National Prosecuting Authority in the Republic (subs (1)), which has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings (subs (2)). Whilst it may not be unconstitutional to also confer limited investigative powers on the National Prosecuting Authority, s 179 refers only to the power to institute criminal proceedings on behalf of the State. As far as the constitutional mandate or

function of the NPA is concerned, it is limited to the institution of criminal proceedings and does not include the investigation of crime.

49. Regardless of whether it is competent to confer investigative powers on the NPA, it is plainly not inconsistent with the Constitution to limit its powers to those concerned with the institution of criminal proceedings on behalf of the State, and matters incidental thereto.

50. Similarly, the location of investigative powers within the SAPS is plainly perfectly consistent with the Constitution. S 205 (3) provides that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

51. There is thus no merit in a case that the location of an investigating directorate within the SAPS is inconsistent with the Constitution in any way.

52. From the inception of the DSO its mandate overlapped with that of the SAPS. This is explained in the terms of the reference of the Khampepe Commission of enquiry (p 319). The overlap arises from s 16 of the SAPS Act read with s 7 of the (unamended) NPA Act, both of which deal with the investigation of organised crime at a national level.

53. It is accordingly submitted that the establishment of the DPCI as set out in the SAPS Amendment Act is not in any way inconsistent with the

Constitution or the statutory framework applicable to the South African Police Service.

54. Thus neither the removal of the investigative powers of the NPA under s 7 and chapter 3A from the NPA Act, nor the establishment of the DPCI within the SAPS is inconsistent with any of the provisions of the Constitution in any respect.

55. It is accordingly submitted that there is nothing in the scheme of either of the Amendment Acts read separately, or the two Amendment Acts read together with is inconsistent with the Constitution. Indeed sections 179 and 205 of the Constitution support the relocation of the primary investigative functions previously associated with the DSO, to the SAPS. It is, however, unnecessary to make a finding in that regard. It is sufficient for present purposes that the scheme and effect of the Amendment Acts is not inconsistent with the Constitution.

A policy choice

56. Both sections 179 and 205 require the enactment of national legislation to give effect to their provisions. The Constitution does not prescribe that the relevant provisions must necessarily be contained in separate Acts, nor in which Acts they must be placed. The design of the necessary statutory measures is left up to the executive (which initiates legislation; s 85 (2) (d)) and, ultimately, Parliament. The conceptualisation, design and formulation of

such enactments and the organisational, financial and political ramifications thereof involve a range of policy choices and decisions over a broad front.

57. This was recognised in the report of the Khampepe Commission where the following was said in relation to a finding that there was nothing unconstitutional in the DSO sharing a mandate with the SAPS:

> *"Should Government consider it appropriate to discharge its agenda within the legal framework as now pertains, it can certainly do so provided that such action is not inconsistent with the Constitution".*

(Par 12.4, p 351).

58. Until the time that the DSO was established the NPA exercised the prosecutorial function envisaged in s 179 of the Constitution and the SAPS the investigative and other functions contemplated in s 205. Save for the limited investigative functions of the NPA under s 24 and s28 of the NPA Act, there was no overlap. The introduction of the DSO in 2001 and placing it within the NPA broadened the investigative powers of the DSO. Doing so involved a policy choice, as much as the one which has now been made.

59. The applicant himself refers to what he terms "an abrupt about – turn in respect of previous Government policy" (par 3, p 7). The parties are ad idem that the debate is fundamentally about a policy choice.

60. The law in this regard has been crystallised in a series of decisions. Policy decisions are generally recognised as the preserve of the Executive and the Legislature, not the Courts. This has been recognised by this Court in many cases.

(See e.g. *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at paragraph [36]; *S v Lawrence (and other related cases)* 1997 (4) SA 1176 (CC) para [42]; *Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) paragraph [90]; *Bel Porto School Governing Body v Premier Western Cape* 2002 (3) SA 265 (CC), paragraph [45] (p 282).)

61. In the present case it is submitted that the choice made by the Executive and Parliament is entirely consistent with sections 179 and 205 of the Constitution. The establishment of the DPCI within the framework of the SAPS Amendment Act is manifestly designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority and other crimes. That is a legitimate and valid governmental purpose and the means by which it is sought to be achieved are logical, rational and consistent with the Constitution.

62. The contention that the true purpose of the Acts is to shield high-ranking ANC members from prosecution is an inference the applicant seeks to draw from certain evidence (whether admissible or not). Such an inference can only be drawn in a civil case (such as this) if it is consistent with all the

proved facts (*Govan v Skidmore* 1952 (1) SA 732 (N) at 734; *Ocean Accident and Guarantee Corp v Koch* 1963 (4) SA 147 (A) at 159).

63. Such an inference is, however, inconsistent with a number of vital facts.

63.1 The first is that the Acts carefully provide for the continuation of any investigations and prosecutions that were under way when they were enacted;

63.2 The second is that the vast majority of those investigations and prosecutions have been finalised, as recorded in the judgment of Yekiso J in the application brought by the same applicant in this Division in October 2008;

63.3 The third is that the re-alignment of the DSO's investigative functions and the resolution of the problems inherent in the fact that its mandate overlapped with that of the SAPS, was a concern from very early on. The concern was based on the applicable provisions of the Constitution and high level governance legislation such as the Public Finance Management Act, as is evident from the Khampepe Commission report and the references to the Hefer Commission.

Khampepe Commission Report

64. The applicant deals with the report of the Khampepe Commission (paragraph 46 to 51 of the founding affidavit (p 32 to 35)). He relies on a recommendation that the DSO should be retained within the NPA. That recommendation is contained in paragraph 47.4 of the report (p 416).

65. It is, however, necessary also to refer to paragraph 47.5 of the report, which reads as follows:

> *"I have considered the totality of the evidence and argument and am satisfied that the DSO should remain within the NPA but certainly with such adjustments as are recommended in the body of the report including the recommendation relating to the power of the President under s 97 (b) of the Constitution to transfer political oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security in order to clear the anomaly already alluded to herein".*

66. Earlier in the report the Commissioner says the following in her recommendations in relation to the evaluation of the implementation of the legislative mandate of the DSO:

> *"I am a mindful of the myriad of problems comprehensively dealt with by other submitters, with regard to the shared mandate*

> *(DSO – SAPS) and the conflicts and further potential conflicts that the shared mandate presents. Notwithstanding, I hold the view that tinkering with the legal mandate of the DSO is not likely to fundamentally eliminate these problems".* (Emphasis added).

(Par 16.3, p 359).

67. Some of the findings of the Commission show that a lack of adequate control over the DSO's activities gave cause for serious concern.

67.1 In par 18.3 (p 336) reference is made to "a disturbing complaint that some of the members of the DSO have not been vetted by the NIA (the National Intelligence Agency) as is required by law". It goes on to state that "there can be little debate that the practice is unacceptable and may ultimately prove to undermine the security of the state".

67.2 In par 20.5 (p 371 to 372) further concerns are raised which reflect on a failure of governance and control. The Commissioner there stated as follows:

> *"Furthermore, I find that there is merit in the concern raised in evidence relating to the alleged abuse by the DSO with regard to the manner in which it publicises its work in the media. This alleged conduct has attracted*

> *public criticism against the DSO of being 'FBI style', meaning that the DSO conducts its operations as though it were a law unto itself. There is indeed merit to this complaint".*

68. The Commission was sharp in its criticism of this conduct in paragraph 21.6 (p 372):

> *"I venture to opine that I find such conduct to be out of kilter with our constitution, reprehensible, unprofessional and corroding (sic: erroding?) the public's confidence in the law enforcement agencies".*

69. The report as a whole makes it plain that the DSO was not able to perform its statutory mandate, as interpreted by itself, without engaging in intelligence gathering (seen as part of its function under s 7 (1) (a) (ii) of the NPA Act before amendment). The Commission referred to this (para 24.1 p 378) and then made the following finding in paragraph 24.2 (p 378 to 379):

> *"The welter of evidence before the Commission as well as the on site visit to the DSO revealed that the DSO has established intelligence gathering capabilities. This goes beyond the ambit of its information gathering mandate set out in s 7 of the NPA Act".*

70. In the next paragraph the anomalous position of the DSO is portrayed in disturbing terms. In para 24.3 (p 379) the finding of the Commission is formulated as follows:

> *"The Minister who exercises final responsibility over the work of the NPA is the Minister for Justice and Constitutional Development. She performs this function as a responsible political head under which the administration of the NPA Act falls. She does not, however, have practical, effective political oversight responsibility in respect of the law enforcement elements of the work of the DSO".*

71. The report continues as follows:

> *"24.4 The Minister who exercises final responsibility for law enforcement is the Minister of Safety and Security. He does not have political responsibility in respect of the investigative element of the work of the DSO.*
>
> 24.5 *The disjunction in political accountability for the entire work of the DSO, in part explains the discord regarding the effective political oversight over and accountability for the DSO".*

72. Financial governance of the DSO is equally anomalous. In paras 24.6 to 24.7 (p 379) the Khampepe Commission reported as follows:

> *"24.6 The CEO of the DSO is, in terms of the Act, responsible for the financial accountability of the DSO. At the same time, the Director-General: Justice is the accounting officer for the Department of Justice to which the NPA (read DSO) fall (sic). As a result, there are technically two financial heads responsible for the financial accountability of the DSO.*
>
> *24.7 Under the PFMA (the Public Finance Management Act) the accounting responsibility who will lie with the Director-General: Justice in respect of matters failing under the NPA and at the same time, the CEO in the DSO would equally have the accounting responsibilities under the PFMA".*

73. In paragraph 24.8 it is noted that some of the most important threats relating to organised crime operationally fell beyond the command and control of the Minister of Safety and Security because of the DSO's role in that regard. In paragraph 24.9 reference is made to an SAPS argument that the arrangement did not reflect sound principles of governance and that the DSO was, also in this respect, a law unto itself and capable of unilateral action. "The DSO was even able to determine crime threats and priorities

outside the ambit of the Safety and Security Ministry, and without any input by the latter".

74. In paragraph 24.10 the Khampepe Commission said that:

> *"This argument is, in my view, compelling. It is both untenable and anomalous that the Minister of Safety and Security who has the responsibility to address the overall policing / investigative needs and priorities of the Republic should not exercise any control over the investigative component of the DSO considering the wide and permissive mandate of the DSO relating to organised crime".*

75. In paragraph 24.11 it went on to say the following:

> *"The anomaly arises because the Minister for Justice and Constitutional Development does not account to Parliament in respect of the law enforcement aspects of the work of the DSO. Whereas the Minister of Safety and Security accounts to Parliament in respect of law enforcement aspect activities of the SAPS, he does not do so in respect of the law enforcement of the DSO. There is thus a dichotomy regarding which Minister should ultimately take responsibility for the profoundly significant law enforcement component of the work of the DSO".*

76. These passages of the report show that there were real and very serious concerns about many important aspects of the DSO. Confusion about political responsibility for its activities, uncertainty about financial governance, its operation outside the overall policing structures, and the fact that it acted "as a law unto itself" could not be overlooked and allowed to continue.

77. The intelligence gathering activities of the DSO give rise to important constitutional concerns. In terms of the Constitution, intelligence services resort under chapter 11, which deals with security services. This is reflected in s 199 (1).

78. In terms of s 209 an intelligence service, other than an intelligence division of the defence force or police service, may be established only by the President as head of the national executive and only in terms of national legislation.

79. This makes it impossible for legislation or a proclamation or other "tinkering" with s 7 of the NPA Act to validly establish the NPA as an intelligence service. This is an intractable obstacle to the location of the DSO within the NPA.

80. The Khampepe Commission recognised this difficulty (paragraph 24.12, 24.13 (pp 381)). It drew a distinction between "intelligence gathering" and "information gathering" in paragraph 24.14 (p 381), but without defining the difference. It proceeded to make the following finding, which again is

important in the context of dealing with appropriate control and governance of the DSO, in paragraph 24.15 (p 381):

> *"Having considered the information placed before the Commission and the evidence tendered before me, I have been left with an impression that it is more than probable that the DSO has gone to establish, for itself, intelligence gathering capabilities and in fact gathers intelligence in a pursuit of its mandate. This, if correct, would be unlawful".* (Emphasis added).

81. Reference is then made to the need for the DSO's information gathering activities (presumably as distinct from its intelligence gathering activities) to "ultimately filter through to NICOC" (the National Intelligence Co-ordinating Committee). In paragraph 24.17 Justice Khampepe reported that she was however not persuaded that the argument that the DSO should be included in the intelligence structure of the NICOC cures the difficulty of it being an (unlawful) intelligence gathering agency. She remarked that s 199 (1) of the Constitution does not permit of the interpretation that the DSO is an intelligence agency contemplated in that provision.

82. In the recommendations under this section, the Khampepe Commission reported as follows in paragraph 25.1 (p 383):

> *"There is a compelling reason to harmonise the political oversight over the activities of the DSO".*

83. The paragraph goes on to repeat much of what has been referred to above in relation to the findings, and concludes in the last sentence as follows:

> *"This has to be addressed through the invocation of s 97 (b) of the Constitution".*

84. This is then the context in which the recommendations in paragraphs 47.4 and 47.5 of the report must be understood. The Khampepe Commission's support for retention of the DSO within the NPA was heavily qualified by the recommendation in paragraph 47.5. That qualification is consistently ignored by the applicant.

85. In accordance with the Khampepe Commission recommendations to retain the DSO within the NPA the anomaly set out above had to be addressed. That requires reference to s 97 (b) of the Constitution as the provision proposed by the Commission under which that could be achieved. That section provides as follows:

> *"The President by proclamation may transfer to a member of the Cabinet –*
>
> (*a*) *…*
>
> *(b) any power or function entrusted by legislation to another member".*

86. At first blush this may seem to be an appropriate provision to address this problem. Once the provisions of the NPA Act, in particularly s 7, are scrutinised however, and the constitutional constraints in s 209 (1) are considered, it is evident that no proclamation under s 97 (b) can resolve the problems identified in the Commission's report.

87. In her affidavit Ms Nchwe makes the point in para 19 (p 2011) that the recommendation for resolving the dysfunction in the political responsibility of the investigative unit of the DSO could not legally be implemented. She says that furthermore, the transfer of political oversight over the investigative unit of the DSO could not confer any intelligence mandate on its members purely by way of proclamation. It is submitted that those statements are entirely borne out by the provisions referred to above.

(See also Nchwe para 22, (p 2012); para 25 to 26, (p 2013 to 2015)).

88. It is submitted that the recommendations of the Khampepe Commission were also contradictory and inconsistent. On the one hand, the Commission stressed the importance of harmonising the political oversight over the activities of the DSO (para 25.1, p 383), but on the other hand, made a recommendation in paragraph 47.5 that would have deepened the dysfunction between the law enforcement and prosecutorial functions of the DSO.

89. These aspects demonstrate the need for careful assessment of the weight and status of the Khampepe Commission report. It contained recommendations that were intended to serve as guidelines. It is not legislation, nor does it supplant or modify the Constitution. Its recommendations were not entirely harmonious, and, at least in the respect referred to above, could not legally or practically be put into effect.

90. It is therefore not surprising that although Cabinet approved the report in principle, it was ultimately not able to give effect to all of its recommendations. It could not retain the DSO within the NPA, and at the same time harmonise the political oversight over the activities of the DSO; nor could it legitimise the intelligence gathering capability of a body performing the functions of the DSO; nor could it resolve the confused issues of financial accountability for the DSO.

91. It is submitted that in this regard the Executive and Parliament were faced with a choice as to which of the recommendations of the Khampepe Commission to implement or modify. Retaining the DSO within the NPA with full knowledge of the operational and functional issues addressed in the Khampepe Commission report would have been dangerous. Once it was known that the DSO was acting unlawfully in its intelligence gathering function, it would have been unlawful and irresponsible for the Executive and Parliament to permit it to continue in that fashion. Awareness of the “myriad

of problems" arising from the shared mandate, without taking positive steps to resolve them, would have been equally irresponsible.

92. The chosen solution was to place the functionality of the DSO within the SAPS, which had a constitutionally sanctioned intelligence service (see s 209), where the directorate could function within the priorities identified by the National Commissioner of Police and within sound and conventional financial and operational governance structures.

93. When the findings and recommendations of the Khampepe Commission were known and analysed, the DSO simply could not be permitted to continue with its operations as before and within the structure and framework that had existed hitherto.

94. Once this is realised, it becomes clear that the foundation of the applicant's case is fallacious. His case rests on the proposition that the DSO can and should continue as had before, whereas it is plain from the Khampepe Commission report that it would be inconsistent with the Constitution – and utterly irresponsible – to permit it to do so.

Independence of the NPA and DPCI

95. In the applicant's heads of argument far-reaching and speculative submissions are made about the manner in which the DPCI will conduct itself

in future (para 48). The applicant contends that under the dispensation contemplated by the two Acts, the Minister and the governing party or alliance or coalition will henceforth “legally” have the final decision on who will and who will not be investigated by the DPCI unit of the SAPS. Emotive submissions regarding “royal game” are also bandied about (para 52).

96. These submissions are apparently intended to suggest that the Minister and the governing party de facto and de jure have the final say on who is investigated by the SAPS. It is also apparently a plea for a criminal investigation service that is free from any political control in the sense that there is no Minister who is a member of the governing party who may have political responsibility for it.

97. The concept that 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, is ordained by s 206 of the Constitution.

98. That does not mean that the police service is under the control of the governing party. But even if it does, that is what the Constitution requires.

99. The applicant argues in paragraph 50 that the DSO operatives are effectively “demoted” to the ranks of DPCI because they cannot act independently as they have done hitherto in the NPA, and that such

"demotion" undermines the right of all citizens to equality before the law, to dignity and to freedom from violence and other infringements of the human rights.

100. It is submitted that this argument is startling in its disregard for the Constitution and the laws involved. Both Amendment Acts make it patently clear that there will be no demotion. Moreover, no "DSO operatives" were lawfully entitled "to act independently". They had no right to independence; they had an obligation in discharging their prosecutorial functions to act without fear or favour. That obligation remains encumbent upon them.

101. The Khampepe Commission report demonstrates graphically the dangers of a DSO acting "as a law unto itself" i.e. independently and without recognition of the statutory and constitutional constraints on its functions.

102. The submission on behalf of the applicant inter alia in paragraphs 49 and 101 of the heads of argument that the NPA will be incapable of acting without fear, favour or prejudice for lack of investigative capacity, is without any foundation.

103. S 28 of the NPA Act has not been repealed.

103.1 In terms of s 28 (1) (a) if the investigative director has reason to suspect that a specified offence has been or is being committed or that an attempt has been made to commit such an offence, he or she may conduct

an investigation of the matter in question whether or not it has been reported to him or her in terms of s 27.

103.2 Moreover, in terms of s 28 (1) (b), if the NDDP refers a matter in relation to the alleged commission or attempted commission of a specified offence to the investigating director, the latter is obliged to conduct an investigation or a preparatory investigation as referred to in subs 28 (13).

103.3 S 8 of the NPA Amendment Act substitutes s 28 (2) (a) of the NPA Act and provides for the designation of any person in the amended s 7 (4) to conduct the investigation required.

104. These provisions preserve an investigative competency for the NPA. It is simply wrong to assume that the NPA will no longer have any investigative capacity.

105. It should also be noted that in terms of s 17 D (3) of the SAPS Act the head of the DPCI may, if he has reason to suspect that a national priority offence has been or is being committed, request the NDPP to designate a director of public prosecutions to exercise the powers of s 28 of the NPA Act.

106. The applicant's contention that the NPA is deprived of its investigative powers by the Amendment Act also overlooks the provisions of s 24 of the NPA Act. These provisions existed before the 2001 amendment introducing the DSO, and are unaffected by the NPA Amendment Act.

107. It is inherent in the applicant's submissions that –

107.1 Investigative powers are incidental to the power to institute criminal proceedings;

107.2 That the power to institute criminal proceedings is somehow undermined where the prosecutor himself cannot undertake an investigation and must get someone else to do it.

108. It is submitted that these underlying premises of the argument are not valid. Reference has already been made to the retention of the NPA's investigative powers insofar as they are relevant to prosecutions. More fundamentally, however, the heart of the DSO issue, even before the appointment of the Khampepe Commission lay in the difference between general investigative functions and those relating to the institution and prosecution of criminal proceedings. The notion that wide and general powers of investigation are "incidental" to the power to institute criminal proceeding is fallacious. Certainly within the constitutional scheme, powers of investigation are not merely regarded as incidental to powers of prosecution. Otherwise there would be no need for the distinction between the prosecuting authority in s 179 and the provisions dealing with investigations in s 205.

<u>The ANC's Polokwane resolution</u>

109. Much is sought to be made by the applicant of the decision taken at the African National Congress' national conference in 2007 to disband the DSO. In paragraph 44 of the applicant's heads of argument the proposition is put in these words:

> *"The Cabinet and Parliament were not constitutionally entitled merely to dance to the tune of the ANC. They ought to have weighed and considered the Polokwane resolution against the requirements of the Constitution, recognised that both the express and implicit rationale for the resolution were fatally flawed and found the resolution incapable of being acted upon in a manner consistent with the requirements".*

110. There are a number of fallacies inherent in this submission.

110.1 Firstly, the Constitutional Court held in *Glenister v President of the RSA* 2009 (1) SA 287 (CC) in para [54] that there was nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party;

110.2 It is apparent that the Executive did carefully weigh the Polokwane decision and considered it against the requirements of the Constitution. This is evident from the affidavits of Nchwe and Simelane. The Cabinet came to a different conclusion to that proposed by the applicant, but that does not make its conduct unlawful;

110.3 It is also evident from the affidavit of Carrim that Parliament considered the matter through its various structures, in a wide-ranging and intensive process;

110.4 Lastly, the difficulties arising from the recommendations of the Khampepe Commission have already been referred to. Removal of the DSO from the NPA was certainly one way of harmonising the governance of the DSO. The fact that that is also what the ANC resolved is immaterial.

111. It is instructive to compare the terms of the ANC resolution (para 8, p 514), which merely provided that "the directorate of special operations (scorpions) be dissolved", with the Draft Bills (at p 539 and p 549) and with the Amendment Acts (at 2048 and 2059 of the record). Such a comparison disproves the notion that either the Cabinet or Parliament merely acted as a rubber stamp for the ANC's decision or "merely danced to the tune of the ANC".

112. In paragraph 46 of the applicant's heads of argument it is submitted that no other credible rationale for the scheme of the two Acts has been proffered.

113. That is not correct. The issues identified by the Khampepe Commission have been addressed above. The fact that the ANC resolution proposed a means of resolving the difficulties that have been discussed before, albeit in

blunt and unattenuated terms, certainly does not make it unlawful for Cabinet and Parliament to give effect thereto in the form of the Amendment Acts.

International Obligations

114. The applicant has sought to suggest that by passing the Amendment Acts, South Africa has violated its international obligations. The applicant's allegations are at p 86 to 89 of the papers.

115. In response, Ms Nchwe pointed out that in terms of s 34 of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004, there is an obligation to report corruption to the SAPS, not the DSO. To the extent that the Republic has international "obligations" to have bodies or persons dealing with corruption through law enforcement, that body is the SAPS. It never was the DSO.

116. In the applicant's heads of argument (para 79) this answer is characterised as "nonsensical". Unless the applicant can show that the investigation of corruption fell only within the constitutional and statutory mandate of the DSO, the answer is perfectly valid. As a matter of fact and law the DSO simply was never the body by means of which South Africa

sought to comply with any obligations it might have had pursuant to the UN Convention or the African Union Convention.

117. For this reason it is submitted that the arguments concerning the alleged violation of international obligations is based on a fallacy.

Public participation process

118. The public participation process is described in the affidavit of Mr Yunus Carrim, p 2146 and following.

119. The applicant's case, according to paragraph 90 of its heads of argument, is set out in paragraphs 82 to 84 of the founding papers, at pages 47 to 49.

120. The submission in paragraph 90 of the heads of argument is remarkable for its overstatement of the applicant's case. It goes beyond any evidence (let alone any admissible evidence) on the papers. The applicant places reliance on media reports of the events as corroboration, but these also plainly do not render the allegations admissible.

121. In any event, the public participation issue cannot be decisive in this case. The present case should be distinguished from *Matatiele Municipality v President of the RSA* 2006 (5) SA 47 (CC) which was concerned with the

passing of legislation affecting provincial boundaries, to which s 74 (8) and (perhaps) s 118 (1) (a) of the Constitution were applicable (paragraphs [71] to [73]). Those provisions and the processes they deal with are not applicable in casu.

Human resource management issues

122. The applicant's case on this aspect is now dealt with under the heading of "Unfairness" rather than as a failure by Parliament to comply with a constitutional obligation.

123. The argument is, in essence, that because there are "investigators (sic: not prosecutors) in the DSO who become displaced, demoted and disabled by their transfer to DPCI", both the Acts should be set aside.

124. The submissions necessarily imply that had the process been managed in a different and satisfactory way, the Acts would not be impeachable on this basis.

125. It is submitted that the applicant's contentions in this regard do not afford a valid legal or logical basis for impeaching either the two Acts. The evidence of Groeneveldt and the complaints of unfair labour practices are patently irrelevant and should be struck out.

The application to strike out

126. The WCC did not deal with the application to strike because it was not necessary to do so. The respondents persist in their objection to the evidence identified in the application to strike out, on the basis set out therein.

The applicant's new argument

127. The applicant's new argument is that the DSO was introduced as a matter of prosecution policy under sections 179(2) and (4) of the Constitution and cannot now be "disbanded without the *imprimatur* of the NDPP" whom it submits has sole policy-making power regarding national prosecuting policy under s 179(5). (applicant's summary, para 2, 3, heads of argument para 111–112 (pp 50–51, para 119 (pp 53–54)). The applicant argues that *"the power to initiate the disbandment of the DSO is that of the NDPP alone"* (heads of argument para 43).

128. This argument is not foreshadowed in the papers, and no evidence regarding this aspect was put before the Court *a quo*, or this Court. For present purposes, the respondents' submissions are thus limited to an evaluation of the legal basis of the applicant's argument.

129. The applicant apparently bases this argument on s 179 of the Constitution. It is submitted that the applicant's interpretation of s 179, is clearly wrong.

129.1 S 179(1) requires the national prosecuting authority to be structured in terms of an Act of Parliament. That Act is the NPA Act, 32 of 1998;

129.2 The DSO was established under s 7 of the NPA Act;

129.3 The NDPP holds office under that Act. He did not initiate it and was not its author;

129.4 The power to initiate legislation vests in the President together with the other members of Cabinet (s 85(2)(3) of the Constitution). The NDPP is not a member of the Cabinet and has now power to initiate legislation;

129.5 S 21 of the NPA Act deals with the determination of prosecution policy and the issuing of policy directives contemplated by s 179(5)(a) and (b) of the Constitution;

129.6 Under both sets of provisions national prosecuting policy is determined not by the NDPP alone, but *"with the concurrence of"* the relevant Minister;

129.7 The prosecution policy and directives in question apply *"in the prosecution process"* (s 179(5)(a), (b); s 21(1) of the NPA Act);

129.8 The establishment and de-establishment of the DSO involve matters of policy at a vastly different level to matters of prosecution policy. They are policy decisions regarding the structure and organisation of organs of state, unlike prosecution policy which deals with the operational conduct of prosecutors;

129.9 The establishment of the DSO required amendments to the NPA Act, as the recent creation of the DPCI required amendments to both the NPA Act and the SAPS Act. It is far-fetched to suggest that the NDPP has any constitutional role to play in initiating or approving any such legislation;

129.10 The prosecution policy in respect of which the NDPP has the qualified powers conferred by s 179(5) are limited to the conduct of prosecutions. That does not give the NDPP the power to make or veto the making of any laws.

130. Although the DSO was established under the NPA Act, it led to prosecutors being involved in investigations, rather than the prosecution process itself (see the Khampepe Commission Report, para 8.6, p 390). This lay at the root of the organisational *"dichotomy"* and *"dysfunction"* referred to in the Khampepe Commission Report (eg para 24, pp 378–382; para 25, pp

383–385). The system used by the DSO (the so-called *"troika"* system) is described as *"prosecution-led investigations"* (para 8.10, p 392). It is clear from the Commission's description of the DSO's methodology (pp 419–424) that the prosecutors' involvement with the investigation teams were as legal advisors, leaders and co-ordinators but not as prosecutors in the prosecution process as such (see para 52.3, p 420; para 52.8, 52.9, p 421; 52.11 p 422).

131. It is therefore plainly wrong to contend that the de-establishment of the DSO has anything to do with prosecution policy under s 179(5). There is no sense in which the establishment of the DPCI by the SAPS Amendment Act can be regarded as involving prosecution policy. It is submitted that s 179(5) is clearly not applicable and affords no grounds for an attack on that Act.

132. It is therefore submitted that the applicant's new argument based on s 179(5) is not valid.

Costs

133. This Court recently revisited the issue of costs in constitutional litigation in *Chonco v President of the Republic of South Africa* 2010 (6) BCLR 511 (CC). In that case the following principles were reconfirmed:

133.1 It is trite that costs are a matter within the discretion of the court, which must be exercised judicially having regard to all the relevant circumstances of the case;[1]

[1] Para [6], p 514.

133.2 Those circumstances include the conduct of the parties and their legal representatives, whether a party has had only technical success, the nature of the litigants and the proceedings, the complexity of the issues and whether the litigation is considered frivolous or vexatious;[2]

133.3 In constitutional matters there is also the question whether a costs order will hinder or advance constitutional justice. Ultimately the court has to decide what is a just and equitable order in the circumstances of the case;[3]

133.4 What is just and equitable includes a determination of the reasonableness of the conduct of the parties in relation to the proceedings.[4]

134. It is submitted that in the present case none of the considerations that might persuade the Court to treat an unsuccessful litigant more leniently when it comes to costs, are present. The applicant is not an indigent person and there is no suggestion that, in his case, an adverse costs order would hinder the attainment of constitutional justice.

135. It is also relevant that the applicant has persisted with aspects of his case that are plainly irrelevant and founded on inadmissible evidence. The matter is less of a constitutional cause than a political crusade by the applicant to 'save' the DSO in its pre-existent form. In these circumstances it

---

[2] *Ibid.*
[3] *Ibid.*
[4] Para [7], p 514.

is submitted that the applicant cannot claim the protection against costs afforded to those genuinely seeking to advance constitutional justice.

136. In these circumstances it is submitted that the application should be dismissed with costs, including the costs of two counsel.

Conclusion

137. For the reasons set out above, it is submitted that –

137.1 Condonation should be refused;

137.2 The application for leave to appeal should be dismissed;

137.3 Alternatively, leave to appeal should be granted, but the appeal dismissed;

137.4 On the basis that the application for direct access is limited to the issues canvassed in the applicant's notice of application and heads of argument, direct access should be granted, but the substantive application dismissed;

137.5 The applicant should be directed to pay the costs, including those of two counsel.

W R E DUMINY, SC

S POSWA-LEROTHOLI

Chambers, Cape Town

21 July 2010