IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No CCT 09/2014

In the matter between:

HUGH GLENISTER Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER OF POLICE Second Respondent
(FORMERLY THE MINISTER OF SAFETY
AND SECURITY)

MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT Third Respondent

NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS Fourth Respondent

GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA Fifth Respondent

APPLICANT'S WRITTEN ARGUMENT IN REPLY

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1. This argument is presented in reply to the written submissions belatedly submitted on behalf of the first respondent.

2. Striking out:

   2.1. The first respondent supports the order striking out various passages from the applicant's affidavits and the reports attached thereto on the basis that they were allegedly scandalous or vexatious or irrelevant[1].

   2.2. Save for alleging that the impugned allegations were false, scandalous, vexatious or irrelevant, the first respondent chose not to deal further therewith in his answering

[1] First Respondent's Heads of Argument: paras 2-10

affidavits and did not proffer anything to gainsay or contradict them[2].

2.3. Rule 6(15), in relevant part, provides that:

> 'The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the Applicant will be prejudiced in his case if it be not granted.'

2.4. Two requirements must be satisfied before a striking out application can succeed, *viz*.[3]:

2.4.1. the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; and

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[2] First respondent's answering affidavit: B 10: p1003: para 12-p1006:para 21; p1028: para 83(Ad para 4 of applicant's founding affidavit: B1: p 11/2); pp1028-1029:paras 87-91(Ad para 7.1 of applicant's founding affidavit: B1: p 15; p1023: para 99(Ad paras 7.14/5 of applicant's founding affidavit: B1: p 19); p1034:para109 (Ad para 7.23 of applicant's founding affidavit: B1: p 22); p 1037: para 122/5 (Ad para 8.8 of applicant's founding affidavit: B1: p 24); p 1039: para 129 (Ad para 8.12 of applicant's founding affidavit: B1: p 25); p 1039: para 132 (Ad para 8.14 of applicant's founding affidavit: B1: p 26); p 1041: para 138-142 (Ad para 8.20 of applicant's founding affidavit: B1: p 27); p1042: para143/4 (Ad para 9.1 of applicant's founding affidavit: B1: p 28); p 1042 para 145 (Ad para 9.2 of applicant's founding affidavit: B1: p 29); p 1043: para149(Ad para 9.6/7 of applicant's founding affidavit: B1: p 30); p 1044: para 150(Ad para 9.8/9 of applicant's founding affidavit: B1: p 30/1); p 1044: para 151 (Ad para 9.10 of applicant's founding affidavit: B1: p 31); p 1044- 1047: para 153-161(Ad para 9.11–9.18 of applicant's founding affidavit: B1: p31-33);

[3] Beinash v Wixley 1997 (3) SA 721 (SCA) at 733B; Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd [2001] 3 All SA 15(T); Tshabalala-Msimang v Makhanya [2008] 1 All SA 509 (W) at 516g–h; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 308B

2.4.2. the court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced.

2.5. The meaning of the terms used in the rule was stated as follows[4]:

> 'Scandalous matter- allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.
>
> Vexatious matter- allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.
>
> Irrelevant matter- allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.'

2.6. '*Irrelevant*', for the purposes of the rule, means irrelevant to an issue or issues in the action:[5].

> '(T)he correct test to apply is whether the matter objected to is relevant to an issue in the action. And no particular section can be irrelevant within the meaning of the Rule if it is relevant to the issue raised by the plea of which it forms a part. That plea may eventually be held to be bad, but, until it is excepted to and set aside, it embodies an issue by reference to which the relevancy of the matter which it contains must be judged.[6]'

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4 Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 566C–E; Cf.: Tshabalala-Msimang v Makhanya [2008] 1 All SA 509 (W) at 516e-f; Breedenkamp v Standard Bank of South Africa Ltd 2009 (5) SA 304 (GSJ) at 321C–E

5 Stephens v De Wet 1920 AD 279 at 282; Meintjes v Wallachs Ltd 1913 TPD 278 at 285; Rail Commuters' Action Group v Transnet Ltd 2006 (6) SA 68 (C) at 83E.

6 Stephens v De Wet 1920 AD 279 at 282

2.7. In Golding v Torch Printing and Publishing Co (Pty) Ltd and Others[7] Ogilvie-Thompson AJ, as he then was, said:

> 'A decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.'

2.8. Historical background, even if strictly not relevant, should not be struck out[8]:

> 'For the sake of clarity the history of a case is often permissible as an introduction to allegations founding the cause of action.'

2.9. In Rail Commuters' Action Group v Transnet Ltd[9], this Court held[10]:

> 'In the first place, much of what is pleaded in the allegedly offending passages …is clearly history. Even if some of this may be regarded, strictly speaking, as irrelevant, the pleading of history for the sake of clarification is permissible ….

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7 1948 (3) SA 1067 (C) at 1090. Cf.: Habib v Patel 1917 TPD 230 at 232; Geyser v Geyser 1926 TPD 590 at 594; Weichardt v Argus Printing & Publishing Co Ltd 1941 CPD 133 at 145; Golding v Torch Printing & Publishing Co (Pty) Ltd 1948 (3) SA 1067 (C) at 1090; Rail Commuters' Action Group v Transnet Ltd 2006 (6) SA 68 (C)(supra) at 83H. Stated differently: What concerns the court is whether the passage sought to be struck out is relevant in order to raise an issue on the pleadings: Bosman v Van Vuuren 1911 TPD 825 at 832; Stephens v De Wet 1920 AD 279 at 282; Brown v Bloemfontein Municipality 1924 OPD 226 at 229; Geyser v Geyser 1926 TPD 590 at 593-5; Katz v Saffer and Saffer 1944 WLD 124 at 133; Rail Commuters' Action Group v Transnet Ltd (supra) at 83G-H.

8 Richter v Town Council of Bloemfontein 1920 OPD 172 at 173/4; Ahlers NO v Snoeck 1946 TPD 590 at 594.

9 Supra at 83I-84B.

10 Considering submissions on behalf of an Applicant for the striking out of passages from particulars of claim which contained allegations concerning historical background, extensive references to facts and circumstances which existed in previous decades, the findings of two commissions or committees of enquiry and certain medical research on the basis that they were irrelevant to the relief claimed by the plaintiffs as they added nothing, as a matter of pleading, to the issues between the parties and served only to add 'clutter' to the particulars of claim

In some of the passages under attack… the plaintiffs have pleaded a long history of the conduct and state of knowledge of the first and second defendants and of their precursors in function at various times in the past. ..(The) plaintiffs seek a mandatory interdict, in final form, directing the first and second defendants to take certain steps relating to the provision of proper and adequate safety and security for rail commuters….(The) the plaintiffs seek a declaratory order that…first and second defendants have breached their obligations to take reasonable steps to provide for and ensure the safety and security of rail commuters in that they have failed to take the allegedly reasonable steps ….It seems to me to be open to the plaintiffs, and to be perfectly legitimate, to plead and attempt to prove at the trial, factual matter from which they will, in due course, invite the trial Court to draw certain relevant inferences from the past conduct of the first and second defendants, and of their precursors in function. Whether such conduct was lawful or not is not, to my mind, of any great moment: If certain evidence of past conduct goes to show a likelihood of repetition of the same or similar conduct in the future, it will probably be relevant and consequently admissible as showing a course of conduct. And if the evidence is relevant and therefore admissible, such facts 'cannot be regarded as irrelevant when pleaded' (Golding's case (supra) loc cit).

The same applies… to evidence which goes to show a particular state of mind or knowledge on the part of the first and second defendants or of their precursors in function: In my view, it is open to and legitimate for the plaintiffs to plead and attempt to prove at the trial what the state of mind or knowledge of the first and second defendants (or that of their precursors in function) was at the time when they acted or failed to act in particular ways, in particular circumstances in the past; and to invite the trial Court to draw appropriate inferences from such evidence, including an inference that the same or similar conduct will probably be repeated in the future, if an interdict is not granted.

Much of the matter objected to by the first and second defendants… seems to me to be directed at showing that the attention of the first and second defendants, or of their precursors in function, was repeatedly drawn by various more or less official persons and bodies to certain shortcomings, over a long period, and that they were repeatedly warned of the necessity or desirability of taking certain measures, but that, despite such knowledge and

warnings, the first and second defendants and their precursors in function persisted in their erstwhile conduct, much as before. I do not say for a moment that the plaintiffs will necessarily, or even probably, establish these things: I have no idea whether or not they will succeed in doing so. But, if that is the case which they wish to put up, I fail to see how what they have pleaded can be said to be irrelevant to that case, or how they can be precluded from advancing their case by making the relevant allegations. Indeed, by making the relevant allegations, they are probably laying the foundation for a full and proper formulation of the precise issues which will arise for determination at the trial, something which ought to be welcomed rather than discouraged.

Similarly...it is legitimate and permissible for them to attempt to prove at the trial, and therefore also to plead, that first and second defendants and their precursors in function have, over a long period, acted or failed to act in certain ways, and with a certain state or states of mind or knowledge, and to invite the trial Court to draw appropriate inferences from such conduct relating to the probability or otherwise of it having been persisted in ... Again, I express no view as to the plaintiffs' prospects of success in establishing such a probability: but I am unable to agree … that the allegations concerned are irrelevant to the issues or that the plaintiffs should be precluded, by a striking-out order, from putting forward a case which is based on the above propositions.

As for the attack on section E of the particulars of claim (the first and second defendants' legal obligations and duties): It is true that, in … its order, the Constitutional Court declared that the first and second defendants have an obligation 'to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by respectively, the first and second Respondents'. In … the particulars of claim, the words of this order are pleaded virtually verbatim. There can surely be no valid objection to that. But the order is couched in extremely wide and non-specific terms. Neither from the words of the order itself nor from the content of the judgment of the Constitutional Court is it possible to give precise content to what exactly the obligation resting on the first and second defendants comprises, in concrete, practical terms. In my view, the Constitutional Court did not attempt to codify or to set out in any detail the content of the first and second

> defendants' obligations. It left that to the trial Court, if the then Applicants wished to pursue the matter, as they now do. This, it seems to me, is what the plaintiffs have now set out to do in …their particulars of claim. …(T)hey plead that the first and second defendants have certain statutory obligations arising from the Legal Succession to the South African Transport Services Act 9 of 1989 and also certain obligations and duties at common law. None of these allegations are in conflict with anything that the Constitutional Court has said either in its order or in its judgment, nor do they pretend to qualify or amend anything which that Court has said; they merely seek to add practical detail and concrete content to the order. In my view, there is nothing objectionable in that. It is certainly not irrelevant to the question of what the first and second defendants' obligations comprise and entail.
>
> It is correct… that much of what has been pleaded in the allegedly offending passages is evidence. However, that is insufficient reason, in itself, to justify its being struck out. Nor am I able to apprehend any real prejudice to the defendants if the allegedly objectionable matter is not struck out. Whilst there is perhaps a degree of prolixity in the manner in which it has been formulated and set out in the particulars of claim, it must be borne in mind, … that the matter is a complex one, it is a class action involving a wide range of activities, and the plaintiffs seem to me to wish to plead and prove a course of conduct and a particular state or states of mind and knowledge on the part of the first and second defendants and of their precursors in function at various times. The defendants do not contend that they are unable to plead to or to deal properly or adequately with the relevant allegations. At worst for them, I think, it may possibly be difficult or inconvenient: but that is not a sound basis for a striking-out order.
>
> I am not persuaded that any of the matter under attack is irrelevant to the issues in this case; and no other proper basis has been advanced for its exclusion from the pleadings [11].'

The findings in Glenister II:

2.10. This Honourable Court held that:

[11] At 84D-87A

2.10.1. the State must create an ACE with an adequate or necessary level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political interference so as to fulfil its *'especial duty'* to respect, protect, promote and fulfil the rights entrenched in the Bill of Rights[12];

2.10.2. to create an ACE that is not adequately independent would not constitute a reasonable step as it will be unreasonable for the State, in fulfilling its constitutional obligations to create an ACE that lacks sufficient independence[13].

2.10.3. the State also has an obligation to create an ACE that appears from the reasonable standpoint of the public to be independent[14].

Prejudice:

2.11. The first respondent, apart from bald denials, chose not deal with the impugned allegations[15].

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[12] J163, J177, J189, J194, J197 &J206.
[13] J194
[14] J207

2.12. The material concerned is dispositive of the need for the level of independence in the ACE that is not present in the DPCI as it currently exists or, at the very least, from the reasonable standpoint of the public[16], reasonably perceived not to be present.

2.13. The first respondent was not in any way prejudiced by the impugned allegations and the striking out application should, for this reason alone, be dismissed[17].

<u>The applicant's principle contention on the merits of the striking out application:</u>

2.14. In Glenister II the above Honourable Court pertinently held as follows[18]:

> 'Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that ***<u>a reasonable decision-maker in the circumstances may adopt</u>***…. A range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.' (Emphasis added)

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[15] The inference is that the first respondent has resorted to the striking out route because he is unable to counter the material he wishes to have struck.

[16] J207

[17] The first respondent did not introduce any evidence to gainsay the applicant's allegations and also did not demonstrate that they have suffered any prejudice on account thereof.

[18] J191

2.15. This *dictum* requires or at least allows parties impugning a purported remediation of the legislation struck down, to set out the circumstances on which they rely in impugning the remedial legislation. The applicant was accordingly at large to set out why he contends that *'the circumstances'* that prevail in South Africa are such that the structure and operational capacity of the DPCI in 2013 was inadequately independent to fulfil the function of combating corruption effectively and adequately.

2.16. Moreover, in Rail Commuters Action Group And Others v Transnet Ltd t/a Metrorail And Others[19] the above Honourable Court, per O'Regan J, explained that:

> 'What constitutes reasonable measures will depend on the circumstances of each case[20]. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the

[19] 2005 (2) SA 359 (CC) at para [88]

[20] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para [45]: 'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'. Cf Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A) at 758H; Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC)at para [39]; Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC) at paras [100] - [101].

> range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer - the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities'.

2.17. In interpreting the judgment in Glenister II full effect should be given to the phrase *'in the circumstances'.*

2.18. Furthermore, in the OECD report used as an interpretive tool in the majority judgment in Glenister II, the following is stated under the heading "independence and accountability"[21]:

[21] OECD report 2007: Specialised Anti-corruption Institutions: Review of Models p 24.

> 'The level of "required" independence of a given anti-corruption institution is therefore closely linked with the level of corruption, good governance, rule of law and strength of existing state institutions in a given country. Prosecution of "street corruption" (corruption of rather low level public officials, for instance traffic police officials, with little or no political influence) does not normally require an institution additionally shielded from undue political influence. On the other hand, tackling corruption of high-level officials (capable of distorting the proper administration of justice) or systemic corruption in a country with deficits in good governance and comparatively weak law enforcement and financial control institutions is destined to fail of efforts are not backed by a sufficiently strong and independent anti-corruption institution.'

2.19. Accordingly, the background history and the independence, past performance and integrity of the Executive, the Minister and the National Commissioner are all relevant *'in the circumstances'* to determine whether or not the measures envisaged in the impugned provisions *'fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt'* to create an ACE that appears from the reasonable standpoint of the public to be independent.

<u>The role of context and background in public interest litigation of national significance:</u>

2.20. There has been criticism of the use of two expert witnesses[22] and reference to background and antecedent material by the applicant.

2.21. It is accepted that this evidence is troubling, alarming and discomforting. In Glenister II it was ruled that the common-sense view is that the ACE should be located outside executive control[23]. The applicant presented a summary of relevant circumstances that ought to have guided the legislative drafters, the legislature and the executive[24].

2.22. Even if these are only the fears and apprehensions of the applicant, it was incumbent upon him to provide the relevant contextual background for the court to consider and the respondents to deal with (if they so choose).

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[22] Woods; B4: pp 205-295; Newham: B 5: pp 296-401

[23] The applicant, the respondents and indeed this Honourable Court are bound by this finding.

[24] The applicant submits that executive '*control'* is not the same concept as executive '*accountability'* or '*responsibility'* or '*answerability'* or *'oversight'*. The latter four concepts are acceptable when measuring the independence of an ACE located within the Service; the former is not by reason of the finding in J200. This is public interest litigation of national significance. If the impugned legislation survives these two matters, the DPCI will stand and the rate at which corruption is dealt with will continue to be a small fraction of what was achieved by the DSO. This is according to the NPA's own figures as discussed by Martin Plaut Plaut, M. & Holden, P. 2012 *Who Rules South Africa?* Johannesburg, Jonathan Ball Publishers p299. The slide down the relevant indices is likely to continue and the prognostications of scenario planners will become ever more dire.

2.23. Matters of public interest ought not to be decided in a vacuum. The applicant was entitled to rely on contextual circumstances.

2.24. In Glenister II this Honourable Court asked for the decision of a reasonable decision-maker *'in the circumstances'* to be made by the other branches of government. It was accordingly appropriate to set out the circumstances that are relevant to the choices made in relation to the location, structure, operations, control, management, oversight of, responsibility for and accountabilities of an ACE in this case.

2.25. That is all that applicant did in this matter[25]. This accord with the law as set out above and also in the Rail Commuters[26] case.

2.26. In public interest litigation of this kind it is the approach of the courts to allow a concerned active citizen latitude in relation to the material adduced pursuant to an effort to

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[25] The applicant was allowed to do it by the Western Cape High Court in Glenister II, by the Gauteng North High Court in Glenister I and by this Honourable Court in both Glenister I and II. Not one word of any evidential material placed before the Court in any of those matters has been struck out at any time. The respondents did not attempt to strike out in Glenister I but they did in Glenister II both in the Western Cape High Court and in this Honourable Court,to no avail.

[26] 2003 (5) SA 518 at p 547

require constitutional compliance and to assail that which is regarded as inconsistent with the Constitution[27].

2.27. The applicant placed a factually based interpretation on the phrase *'in the circumstances'* as it is used in the context of a reasonable decision maker coming to a reasonable decision in Glenister II. The methodology of such a decision maker manifestly requires an assessment of the facts that pertain to conquering the scourge of corruption in a manner that is economical, effective and efficient as required by C195(1).

2.28. The circumstances of the Executive, the Service and the DPCI were all obviously matters that required consideration when selecting the place to house and the manner in which to control an ACE[28].

2.29. The striking out applications should accordingly have been dismissed.

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[27] In Glenister I and II much more information was placed before the courts than has been done in this case. Newspaper reports, transcripts of radio interviews and a great deal of expert analysis in relation to the DSO was placed on record and remained on record despite efforts to have it struck out both in the Western Cape High Court and in this Court.

[28] The choice to house the ACE in the Service without insulating it against undue political interference via the type of control and management manifest in the Second Amendment Act, and in the circumstances now prevailing, are open to criticism. In order to do so properly, it is appropriate to set out the circumstances, which is what has been done in a pertinaciously relevant manner. It has only elicited a striking out application because the respondents do not have an answer to the facts put up by the applicant.

2.30. Even if the above submissions are not accepted, there was no indication that the applicant acted in bad faith. Accordingly, even if the striking out order were to be upheld, the applicant should not have been mulcted in costs.

3. Jurisdiction: separation of powers

3.1. The rule of law, which has been described as *'a set of closely interrelated principles that make up the core of the doctrine or theory of constitutionalism*[29] *is a foundational value of our constitutional order*'.[30]

3.2. The principle of the separation of powers is called into service in support of the rule of law, and to give effect to that foundational value of our constitutional order.

3.3. While that principle envisages distinctive functions for the various arms of government, the insistence upon the independence of the judicial arm that is evident in the Constitution is aimed at ensuring that the courts act as *'servants of the constitutional order as a whole rather than*

[29] TRS Allan – Constitutional Justice, Oxford 2001 p 1
[30] C 1(c)

merely as instruments of a majority of elected members of the legislative assembly'[31]*.*

3.4. While there are primary functions that are the prerogative of each of the arms of government, each arm is part of a greater whole – the constitutional order serving the rule of law – and it is better to understand the relationship between those arms of government in terms of what they share *'since their separation is in service of a common set of principles. The powers are all involved in the rule-of-law project.'*[32]

3.5. Rather than portraying the three arms of government as partners in the constitutional project, the approach adopted by the first respondent portrays them as three competing predators in a turf war. That is not the structure of our constitutional order.

3.6. This Honourable Court in Glenister II outlined the constitutional requirements for an ACE, held that Chapter 6A of the SAPS Act was inconsistent with the Constitution

[31] TRS Allan op cit p 3.
[32] D Dyzenhaus – The Constitution of Law, Cambridge 2006, p 5

and invalid to the extent that it failed to secure an adequate degree of independence for the DPCI, and suspended the declaration of constitutional invalidity for 18 months *'in order to give Parliament the opportunity to remedy the defect'*[33].

3.7. The scrutiny of Parliament's efforts at attempting to remedy the defect is what was sought by the applicant in the court *a quo*, and there is nothing improper or unconstitutional about such judicial scrutiny, particularly in the light of the earlier declaration of unconstitutionality. The suggestion that the applicant brought contempt proceedings is misguided – this Honourable Court in Glenister II identified the impugned legislation as a defect, and the applicant contended and continues to contend that that defect has not been remedied.

3.8. While the formulation of policy is the prerogative of the executive authority, that does not excuse it from constitutional compliance, as the judgment in Glenister II makes plain.

[33] J order clause 6 paragraph [251].

3.9. Where the approaches of the first respondent and the applicant are close to accord lies in the proposition that the approach of this Honourable Court in Glenister II is to be preferred to that in the court *a quo*, in that it is not for the court to tinker with unconstitutional legislation, and where the scheme is unconstitutional, the preferred role of the court is to strike down the legislation, and allow the legislature another opportunity to remedy the defect.[34] Where the parties differ lies in the constitutionality of the attempt to remedy the defect.

3.10. Once this Honourable Court had identified the constitutional requirements for an ACE in Glenister II, and the court *a quo* correctly held that there was still not compliance with the constitutional requirements of an adequately independent ACE, it mattered nought that the legislative structure was a matter of policy – it constituted a failure to meet the constitutional obligations in respect of the ACE, and the court was obliged to intervene[35].

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[34] DPP v Minister of Justice and Constitutional Development 2009 (4) SA 222 (CC) at para [183]
[35] Cf DPP v Minister of Justice supra at para [183]

3.11. To the extent that such intervention constitutes an intrusion into the domain of another arm of government, such intrusion is mandated by the Constitution itself,[36] which addresses the first respondent's concern that *'the Constitution cannot be unconstitutional'*.

3.12. While it is correct that this Honourable Court held in Glenister II that the creation of a separate corruption-fighting unit within the South African Police Service was not *in itself* unconstitutional and thus the DPCI legislation cannot be invalidated *on that ground alone*, such finding did not absolve either

(a) the member of Cabinet responsible for policing[37]; or

(b) the Legislative arm of government, once it had been decided to position the DPCI within the police service,

from meeting the other requirements specified in the judgment as being required by the Constitution. For the reasons advanced in the main argument filed on behalf of

[36] Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) para [99]
[37] J214

the applicant, the impugned legislation has not met those requirements, and the mere fact that the positioning of the ACE within the police service is not on its own ground for invalidating the legislation is not enough to allow the legislation to stand without scrutiny.

3.13. The first respondent's disavowal of any requirement to seek to meet international best practice is disconcerting in the extreme. The oath of office of the first respondent exacts from him a promise *inter alia* to promote all that will advance the Republic, and oppose all that may harm it, protect and promote the rights of all South Africans, discharge his duties with all his strength and talents to the best of his knowledge and ability, and to do justice to all[38].

3.14. It was not improper for the court *a quo* to subject the impugned legislation to a section by section scrutiny–in fact, that was a necessary exercise in order to test whether the defect had been remedied. Glenister II was helpful in identifying troublesome areas of the original legislation which required attention. Once that scrutiny had revealed

[38] C Schedule 2 clause 1.

that the legislation had not remedied the defect, it is submitted that the preferable and proper consequence ought to have been the striking down of the scheme in its entirety.

3.15. It is not open to the first respondent to seek subtly to undermine the findings of this Honourable Court in respect of the influence of international treaties if reliance on such attack is expressly disavowed, as it is.

3.16. The suggestion on behalf of the first respondent that, absent executive control, the ACE may turn into a rogue unit, is without any support in evidence, and without any basis in the answering affidavit of the first respondent. To the extent that there was in the papers before the court *a quo* any evidence of untoward conduct, it was in the papers of the applicant in respect of conduct within the DPCI situated as it is within the police service.

3.17. Under the circumstances, and while agreeing that the entire structure of the scheme of the ACE should have

been scrutinised by the court *a quo*, the applicant repeats the arguments advanced in his main argument.

4. Costs:

4.1. The hearing of this matter, which was initially scheduled to take place on 15 May 2014, had to be adjourned as the first respondent's written argument were not timeously delivered to the applicant[39](in fact, the argument peculiar to the applicant's application was only obtained from the registrar after the adjournment).

4.2. Lead counsel for the first respondent conceded that, for this reason, the matter had to be postponed and the first respondent should be ordered to pay the wasted costs occasioned by the postponement, including the costs of three counsel.

4.3. This tender was accepted on behalf of the applicant.

4.4. The tender and the acceptance thereof notwithstanding, the above Honourable Court only allowed the applicant's

[39] Lead counsel for the first respondent conceded this in express terms

costs of two counsel and reserved the issue regarding the costs of a third counsel[40].

4.5. It is respectfully submitted that the applicant is entitled to the costs occasioned by the employment of three counsel:

4.5.1. Having regard to the importance of the matter as well as nature of the issues in dispute it was a *'wise and reasonable precaution'* to employ three counsel[41].

4.5.2. Other parties also employed three counsel:

4.5.2.1. The Helen Suzman Foundation employed three counsel[42]; and

4.5.2.2. Three counsel were employed to represent the second, third and fifth respondents[43].

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[40] Court order: 15 May 2014: para

[41] Compare: e.g. Steenkamp v Steenkamp 1966 (3) SA 294 (T) at 297G; Henry v AA Mutual Insurance Association Ltd 1979 (1) SA 105 (C) at 107A); Enslin v Vereeniging Town Council 1976 (3) SA 443 (T) at 453F; Barlow Motors Investments Ltd v Smart 1993 (1) SA 347 (W) at 352G; Internatio (Pty) Ltd v Lovemore Brothers Transport CC 2000 (2) SA 408 (SE) 413 H -I.

[42] HSF's Heads of Argument: p 50

[43] First, Second & Fifth Respondents' Heads of Argument: B15: p 4148

4.5.3. The postponement was occasioned solely as a result of conduct on the part of the first respondent's attorneys. The applicant cannot be blamed for the postponement. There is no reason why the applicant, who was ready to proceed, should bear the any of the costs occasioned by the postponement.

4.5.4. As the third respondent tendered to pay the applicant's costs attendant on the employment of a third counsel and as such tender was accepted, there is no reason why the above Honourable Court should, in the exercise of its discretion[44], disallow such costs.

5. Concluding Submission:

5.1. The applicant accordingly persists with the relief sought in his application for leave to appeal, and his pursuit of the relief sought before the court *a quo,* together with an order

[44] The basic rule is thatall costs are in the discretion of the court. See e.g. Steynberg v Labuschagne [1998] 3 All SA 384 (O) 390; Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA) 1055F-G; Jonker v Schultz 2002 (2) SA 360 (O) 364

that the wasted costs incurred in respect of the hearing on 15 May 2014 should include the costs of a third counsel.

IJ Smuts SC
DJ Taljaard
G Lloyd Roberts
Counsel for the Applicant
Chambers
May 2014

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