IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 07/14
WCC CASE NO: 23874/12

In the matter between:

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

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APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. In *Glenister v President of the Republic of South Africa and Others*,[1] Chapter 6A of the South African Police Service Act 68 of 1995 ("**the SAPS Act**") was declared by the Constitutional Court to be unconstitutional and invalid to the extent that it failed to secure an adequate degree of independence for the State's anti-corruption unit, the Directorate for Priority Crime Investigation ("**DPCI**").

2. This Court, however, suspended the declaration of invalidity for 18 months to afford Parliament an opportunity to remedy the constitutional defects in the SAPS

[1] 2011 (3) SA 347 (CC) ("***Glenister***").

Act.

3. In purported compliance with *Glenister*, Parliament enacted the South African Police Service Amendment Act, 2012 ("**the SAPS Amendment Act**"), which amended the SAPS Act.

4. However, the various provisions of the SAPS Act, as amended, did not remedy the constitutional defects identified by this Court in *Glenister*.

5. The applicant therefore challenged the constitutionality of the SAPS Act, as amended, in the Western Cape Division of the High Court, Cape Town ("**High Court**") (WCC Case No. 23874/12).

6. The applicant was largely successful in the High Court. On 13 December 2013, the High Court handed down a judgment ("**High Court Judgment**") providing reasons for an order of constitutional invalidity in which it declared sections 16, 17A, 17CA, 17D, 17DA and 17K(4) to (9) of the SAPS Act, as amended by the SAPS Amendment Act,[2] inconsistent with the Constitution and invalid to the extent that they failed to secure an adequate degree of independence for the DPCI ("**High Court Order**").

7. The applicant now approaches this Court:

7.1 in terms of Rule 16(4) of the Constitutional Court Rules, seeking confirmation of the High Court Order; and

[2] Hereinafter referred to as "**the SAPS Act**", unless the context indicates otherwise.

7.2 in terms of Rule 19 of the Constitutional Court Rules, seeking leave to appeal against certain portions of the High Court Judgment and, in particular, the High Court's failure to declare unconstitutional and invalid sections 17E(8), 17(G), 17H, 17I and 17K(1) to (2B) of the SAPS Act ("**the impugned provisions**") to the extent that those sections also fail to secure an adequate degree of independence for the DPCI.

STRUCTURE OF THESE SUBMISSIONS

8. The respondents attempt, as they did in the High Court, to reargue issues which have already been ventilated and pronounced upon by this Court in *Glenister*. This betrays a fundamental misconception by the respondents of the crisp legal issues currently before this Court.

9. These submissions are structured as follows:

9.1 **Preliminary points**:

9.1.1 the constitutional requirements of independence, as explicated in *Glenister*, and the proper characterisation of the present constitutional challenge; and

9.1.2 the recurring issue of the non-joinder of parliament;

9.2 **PART A**: Confirmation of the High Court's order of constitutional invalidity and the State's application for leave to appeal in terms of the following categories:

9.2.1 Appointment of members of the DPCI;[3]

9.2.2 Extension of tenure of the Head of the DPCI;[4]

9.2.3 Suspension or removal of the Head of the DPCI;[5]

9.2.4 Jurisdiction of the DPCI, and political control of the DPCI by the National Executive, including the making of policy guidelines;[6] and

9.3 **PART B**: The application for leave to appeal:

9.3.1 financial control;[7]

9.3.2 integrity testing;[8]

9.3.3 conditions of service;[9] and

9.3.4 Co-ordination by Cabinet.[10]

WHAT IS REQUIRED BY THE CONSTITUTION AND THE AMBIT OF THE APPLICANT'S CHALLENGE

10. In *Glenister*, the majority of the Constitutional Court considered and decided two questions. First, whether the Constitution imposes an obligation on the State to establish and maintain an independent body to combat corruption and organised crime. Second, whether the DPCI meets the level of independence, as required by

[3] Section 17CA of the SAPS Act.
[4] Section 17CA(15) of the SAPS Act.
[5] Section 17DA of the SAPS Act.
[6] Section 16 of the SAPS Act. See also section 17D read with section 17K of the SAPS Act and section 17I of the SAPS Act.
[7] Sections 17H and 17K(1) to (2B) of the SAPS Act.
[8] Section 17E(8) of the SAPS Act.
[9] Section 17G of the SAPS Act.
[10] Section 17I of the SAPS Act.

the Constitution for such a body.[11]

11. In relation to the first question, it was held that:[12]

11.1 The State has a duty to fight corruption by setting up concrete and effective mechanisms to prevent and root out corruption and cognate corrupt practices.

11.2 The statutory framework in place must ensure that the corruption fighting unit is sufficiently independent; and that it has adequate structural and operational autonomy, which is secured through institutional and legal mechanisms, to prevent undue political interference.

11.3 Whatever mechanisms are put in place must ensure both that the corruption fighting unit is in fact adequately independent and that it is also reasonably perceived by the public as being adequately independent.

12. Having outlined the standard required by the Constitution, the Court then considered the SAPS Act and whether <u>particular</u> provisions of the Act complied with this requirement. After examining the content of the SAPS Act, the Court summarised its key grounds for finding certain provisions of the SAPS Act unconstitutional as follows:

> "*I have concluded that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political Executives, and the subordination of the DPCI's power to investigate at the hands of members of the Executive, who control the DPCI's policy guidelines, are inimical to the degree of independence that is required. . . .*

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[11] *Glenister* supra note 1 at para [163].
[12] *Glenister* supra note 1 at paras [175]-[207]. See also *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) ("***JASA***") at para [68].

> *Regarding the entity's conditions of service, I have found that the lack of employment security, including the existence of renewable terms of office and of flexible grounds for dismissal that do not rest on objectively verifiable grounds like misconduct or ill-health, are incompatible with adequate independence. So too is the absence of statutorily secured remuneration levels. I have further found that the appointment of its members is not sufficiently shielded from political influence…Regarding oversight, I have concluded that the untrammelled power of the Ministerial Committee to determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences, is incompatible with the necessary independence. . . . I have also found that the mechanisms to protect against interference are inadequate, in that Parliament's oversight function is undermined by the level of involvement of the Ministerial Committee, and in that the complaints system involving a retired judge regarding past incidents does not afford sufficient protection against future interference.*"[13]

13. The respondents urge this Court to agree with their argument that the High Court misdirected itself, for various superficial and untenable reasons, in declaring sections 16, 17A, 17CA, 17D, 17DA and 17K(4) to (9) unconstitutional and invalid to the extent that these sections fail to secure an adequate degree of independence for the DPCI.

14. This, however, demonstrates a fundamental misunderstanding of the constitutional requirements of independence and of *Glenister*. The SAPS Act was declared unconstitutional because certain of its features were antithetical to the requirement of independence. These deficiencies were not remedied adequately, or at all, by Parliament via the SAPS Amendment Act and, therefore, it simply cannot be argued that the DPCI is adequately independent. It is to these deficiencies that the applicant's challenge is directed.

15. The respondents before this Court present a united front in their arguments in opposing confirmation of the High Court Order. This is surprising, not least because they adopted divergent and often contradictory positions in the High

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[13] *Glenister* supra note 1 at paras [248]-[250].

Court. These contradictions are set out in more detail below.

NON-JOINDER OF PARLIAMENT

16. The respondents jointly argue in this Court that Parliament ought to have been joined to these proceedings as a matter of necessity, and that the citation of the fourth respondent, the Government of the Republic of South Africa ("**the Government**"), neither notifies Parliament nor incorporates it in the proceedings.

17. This joining of hands is astounding: since in the High Court only the second respondent ("**the Minister**") pressed this line of argument. In fact, counsel for the Government expressly disagreed with the Minister's counsel, contending that since the parliamentary process was not being challenged, there was no need to join parliament, and that, to the extent that Parliament's participation was required, it was enveloped in the Government.

18. In any event, the respondents' newfound common enthusiasm for the argument is misguided. It is contradicted by the clear pronouncement by this Court in *Langeberg*,[14] that

> "*the national sphere of government comprises at least Parliament, the President and the Cabinet all of which must exercise national legislative and executive authority within the functional areas to which the national sphere of government is limited. These state organs comprise the national sphere of government and are within it.*"

19. The Government includes Parliament, and the involvement of the former thus includes the involvement of the latter.

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[14] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 25.

20. More importantly, this debate misses clear authority that Parliament need not be joined in proceedings of this nature, discussed below.

21. In the High Court, the Minister relied on *Mabaso*,[15] where this Court held that, in a constitutional democracy, a court should not declare the acts of another arm of government unconstitutional without the latter having a proper opportunity to consider the constitutional challenge and to make representations.[16]

22. This argument finds its way into the present proceedings. It is, however, misplaced as *Mabaso* concerned only the failure to join a member of the executive responsible for the administration of the impugned statute, in that case the Minister of Justice. Notably, the Court in *Mabaso* did not take issue with the absence of Parliament from the proceedings, despite the fact that an Act of Parliament - its own "*work*", as the Minister terms it - was under challenge.

23. Rule 10A of the Uniform Rules of Court is consistent with the above position, and unambiguously provides as follows:

> *"If in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings."* (emphasis added)

24. The omission of the relevant legislative authority from Rule 10A is clear and, we submit, correct. The applicant has scrupulously adhered to Rule 10A, the correctness and constitutionality of which the Minister has not questioned.

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[15] *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC) ("***Mabaso***") at para 13.
[16] The Minister's note at para 6 and the application for leave to appeal to this Court at para 66.

Certainly, we submit, it cannot be expected of a litigant to read into Rule 10A any requirement that is neither expressed nor implied in its language.

25. Further, in the High Court, the Minister placed reliance on *Doctors for Life*[17] as well as the judgment of Ngcobo CJ in *Glenister*, as authority for the submission that Parliament must be joined whenever it has a direct and substantial interest in the outcome of a challenge. The reliance on *Doctors for Life* seems to have been abandoned in this Court but the respondents persist with their reliance on the minority judgment in *Glenister*. Their position is nevertheless misconceived.

26. Both *Doctors for Life* and the cited passages of *Glenister* concerned a constitutional challenge based only on the alleged failure of Parliament to facilitate public involvement in the legislative process. Clearly, Parliament has an interest in defending its own procedural conduct, over which its principal officers - the Speaker of the National Assembly and the Chairperson of the National Council of Provinces - have authority and responsibility. It is for that reason that those officers and only those officers are required to be cited when the procedural conduct of Parliament is impugned. There is a difference, however, between procedure and substance. The officers of Parliament are not responsible for substance, which is deliberated and adopted collectively by the Members of Parliament, yet is researched, initiated, introduced and - after adoption - administered by the Executive.

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[17] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) ("***Doctors for Life***").

27. In these proceedings (current or in the High Court), the applicant has at no point impugned the procedure followed by Parliament when amending the SAPS Act through the SAPS Amendment Act. Rather, the applicant challenges only the content of the impugned provisions, in the same way that the substance of any statute may be constitutionally challenged.

28. It is notable that, in almost twenty years of constitutional litigation, our courts have never required Parliament to be joined where only the substantive constitutionality of a statute is challenged.

29. For these reasons, the applicant submits that the High Court correctly found that Parliament need not be joined to these proceedings.

PART A: CONFIRMATION OF THE HIGH COURT DECLARATION OF CONSTITUTIONAL INVALIDITY

30. The respects in which the SAPS Act fail to ensure that the DPCI is adequately independent, are as follows:

30.1 appointment of members of the DPCI (section 17CA);

30.2 extension of tenure of the Head of the DPCI (section 17CA(15));

30.3 suspension or removal of the Head of the DPCI (section 17DA);

30.4 jurisdiction of the DPCI, and political control of the management and functioning of the DPCI by the National Executive, including the making of policy guidelines (section 16 and section 17D read with section 17K and 17I);

30.5 financial control of the DPCI (section 17H); and

30.6 integrity testing of members of the DPCI (section 17E(8)).

31. Each of the deficiencies, even in isolation, renders the relevant provisions of the SAPS Act unconstitutional to the extent of that deficiency. Thus, while the cumulative mass of deficiencies is particularly egregious, and heightens the importance of remedying each, the constitutional challenge against any one deficiency subsists independently of all of the others.

32. The applicant respectfully submits that the High Court was correct in declaring sections 16, 17A, 17CA, 17D, 17DA and 17K(4) to (9) unconstitutional and invalid to the extent that they fail to secure and adequate degree of independence for the DPCI and requests that this Court confirm the High Court Order.

33. To the extent that the applicant was (a) not successful in its challenge to certain other provisions of the SAPS Act or (b) the High Court failed to deal with certain other provisions of the SAPS Act which were challenged by the applicant in the High Court, such provisions form part of the applicant's application for leave to appeal and are dealt with below.

A. APPOINTMENT[18]

The Head

34. In terms of section 17CA(1) of the SAPS Act, the National Head of the DPCI ("**the Head**") is appointed by the Minister with the concurrence of the Cabinet. The

[18] The High Court held, at paragraph 122.1, that the "*appointment process of the Head lacks adequate criteria for such appointment and vests an unacceptable degree of political control in the Minister and Cabinet, which is also in conflict with the standard of international best practice*".

appointment is for a term of at least seven years and not exceeding ten years, and his or her pay scale is in line with that of the highest paid Deputy National Commissioner.[19] The appointment is required to be reported to Parliament.[20]

35. First, there are no specific criteria for the appointment of the Head. Section 17CA(1) merely requires that the appointee be a "*South African citizen; and a fit and proper person, with due regard to his experience, conscientiousness and integrity to be entrusted with the responsibilities of the office concerned*". This is unjustifiably broad; it does not provide sufficient guidelines to the delegee (in this case, the Minister, with the concurrence of the Cabinet) in compliance with the requirements of lawful delegation under the Constitution.

36. The importance of adequate criteria has been emphasised by our courts in a number of situations.[21]

37. In *Freedom of Expression Institute and Others v President, Ordinary Court Martial NO and Others*,[22] which involved a constitutional challenge to provisions of the Defence Act, 1957, a Full Bench of the Cape High Court held:

> "*There are other considerations which, in my view, indicate that the ordinary court martial in its present form is unconstitutional. In terms of rule 42 of the rules issued in terms of the Defence Act, the appointment of the prosecutor is made by the convening authority. There are no criteria laid down as to what a fit and proper person would be to be so appointed. More particularly, the appointee is not required to have any legal qualifications whatsoever. The convening authority is therefore at large to appoint*

[19] Section 17CA(8)(b)(i).
[20] Section 17CA(3).
[21] See for instance the decision of *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) at paras [54]-[57], in relation to the importance of the Legislature providing guidance to officials who must exercise discretion, which involved a challenge to sections of the Aliens Control Act, 1991.
[22] 1999 (2) SA 471 (C).

> *anybody that it wants to. But the convening authority does not only appoint the prosecutor, his discretion is limited by their powers. For example, he may not withdraw any charge preferred against an accused without the permission and consent of the convening authority. (Rule 85.) It is therefore self-evident that not only is the convening authority able to appoint somebody who is ill-equipped to perform the function of a prosecutor, but that such prosecutor does not exercise an independent discretion and judgment. The law as it stands invites arbitrariness as it allows executive interference into judicial process.*"[23]

38. The Constitutional Court reiterated this principle in *Affordable Medicines Trust v Minister of Health*,[24] when it said the following:

> *"[T]he delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute.*"

39. Secondly, the fact that the Minister, with the Cabinet, appoints the Head, does not sufficiently insulate her or him from political interference. Having regard to the constitutional mandate of an anti-corruption unit and the imperative for its independence, the appointment of its Head cannot be entrusted to the Executive alone, even more so where the legislation sets out inadequate guidelines for the delegee to exercise his statutory power.

40. In this regard, this Court in *Glenister* held that the public perception of independence is an important criterion in assessing whether the anti-corruption unit is sufficiently independent.

41. To fulfil the constitutional obligation of combatting corruption, the DPCI must be

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[23] Id at para [19].
[24] 2006 (3) SA 247 (CC) at para [34].

able to investigate corruption at all levels of government without fear or favour, and without creating the public perception that the Head may be less inclined to investigate senior officials in the National Executive. The ordinary, reasonable citizen cannot trust the DPCI to investigate government corruption fully and fearlessly, if the Head is appointed, without any meaningful guidelines or constraints, by the Cabinet. Indeed, the Cabinet comprises the political heads of all the government departments that the DPCI must investigate.

42. It is a primary and essential safeguard of independence that Parliament plays a more meaningful role in the appointment of the Head. More specifically, requiring the appointment of the Head to be approved by Parliament (rather than only reported to Parliament) would ensure that such appointment is subject to sufficient scrutiny by a transparent and representative institution, to safeguard the actual and perceived independence of the Head of the DPCI.

43. The importance of Parliament's meaningful involvement in appointment, as an essential element of the independence of the appointee, is illustrated well by section 193 of the Constitution, which provides for the appointment of the Public Protector and the Auditor-General:

> *"(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General . . .*
>
> *(5) The National Assembly must recommend persons -*
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> *(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and*
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> *(b)* ***approved by the Assembly by a resolution adopted with a supporting vote*** *-*
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> *(i)* ***of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General****; or*

> *(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.*" (Emphasis added)

44. When compared with the above provisions, it is apparent that the SAPS Act does not provide adequate safeguards of independence in the appointment of the Head.

45. If anything, the Head of the constitutionally-mandated independent corruption-fighting unit should be, and should be seen to be, at least as independent as the Public Protector and the Auditor-General. There is no rational reason why the Head's independence, as regards his appointment, should be any less than that of the Public Protector or the Auditor-General. In view of their role as guardians of constitutional democracy and bulwarks against abuses of public power, the Auditor General and the Public Protector provide the paradigm comparators in this respect.

46. Because the corruption-fighting unit's mandate is no less important than either of these institutions, the nature of that mandate requires a strong-form of institutional independence. Indeed, its constitutional mandate to investigate corruption will require it to investigate this country's politicians, elected officials and public servants.[25] As the Court stressed in *Glenister*, "*on a common-sense approach, our law demands a body outside executive control to deal effectively with corruption*."[26] That body cannot hope to carry out its mandate, or be reasonably perceived by the public to be effectively carrying out such mandate, without fear, favour, or prejudice, without proper independence from political influence and interference.

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[25] *Glenister* supra note 1 at para [232].
[26] *Glenister* supra note 1 at para [200].

47. Moreover, this Court itself has invited this comparison with Chapter 9 institutions, precisely because of the need to ground and understand the requisite institutional independence of the DPCI within the context of our own, "native", constitutional conception of such independence:

> *"[T]he international instruments require independence within our legal conceptions. Hence it is necessary to look at how our own constitutionally created institutions manifest independence. To understand our native conception of institutional independence, we must look to the courts, to Ch 9 institutions, to the NDPP, and in this context also to the now defunct DSO. All these institutions adequately embody or embodied the degree of independence appropriate to their constitutional role and functioning. Without applying a requirement of full judicial independence, all these institutions indicate how far the DPCI structure falls short in failing to attain adequate independence.*"[27]

The Deputy Head and Provincial Heads

48. Under sections 17CA(4) and (6), the Deputy National Head ("**the Deputy Head**") and the Provincial Heads are appointed by the Minister, in consultation with the Head, and with the concurrence of Cabinet. These appointments are for non-renewable fixed terms not shorter than seven years and not exceeding 10 years.

49. For similar reasons to those discussed above in relation to the appointment of the Head, the effectively unfettered power of the Executive makes the appointment of the DPCI leadership the prerogative of precisely the officials whose departments the DPCI is expected and required to investigate. Even though consultation with the Head is required, her input may be ignored.

50. The State is constitutionally obliged to put in place measures that go towards eliminating the risk of undue Executive influence in the composition of the DPCI.

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[27] *Glenister* supra note 1 at para [211].

The SAPS Act, as it stands, fails totally in this regard. We note that it is the objective existence of the opportunity for abuse, not the probability of such abuse, that determines whether the DPCI is sufficiently insulated from interference.

51. It is plainly incompatible with the constitutional requirement of adequate independence for the Executive to have the full and final say in the appointment of the leadership of the DPCI. The constitutionally mandated independence of the DPCI requires, at least, that the leadership of the DPCI be composed through an appointment process that is insulated from excessive Executive involvement to ensure both actual independence and a reasonable apprehension of independence.

52. Adequate insulation could be achieved by ensuring that the Deputy Head and Provincial Heads be appointed by the Head, after consultation with the Minister. This would ensure that the independent Head is insulated from insubordination and that the DPCI is accorded appropriate autonomy in the exercise of its powers and functions.

53. In light of the above, the applicant submits that this Court should confirm the High Court's declaration of constitutional invalidity in this regard.

B. EXTENSION OF TENURE[28]

54. The Constitutional Court held in *Glenister* that:

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[28] The High Court held, at paragraph [122.2] of the High Court Judgment, that section 17CA(15) is specifically inconsistent with the Constitution and invalid to the extent that *"[t]he power vested in the Minister to extend the tenure of the head and Deputy Head is intrinsically inimical to the requirement of independence*".

> "*A renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures*."[29]

55. The Head is ordinarily required to retire from the SAPS at the age of 60.[30] Under section 17CA(15), however, the Minister may extend the tenure of the Head for up to two years after the Head has reached the retirement age, and even beyond two years with the approval of Parliament. This kind of untrammelled power granted to the Minister to extend the period of office strikes at the very heart of the requirement of independence, and is plainly unlawful.[31]

56. In *JASA*, considering the extension of the term of office of the Chief Justice, the Constitutional Court held as follows:

> "*It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal. . . .*
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> *In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in s 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious institutional attribute of impartiality and the public confidence that goes with it*."[32]

57. In the High Court, the first respondent ("**the President**") argued that the power of the Minister to extend the Head's term of office is not unfettered, as it is subject,

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[29] *Glenister* supra note 1 at para [223].
[30] Section 45(1)(a).
[31] *JASA* supra note 12 at paras [66]-[68] and [75].
[32] Id at paras [73] and [75].

firstly, to the consent of the Head herself and, secondly, to a period of two years, unless otherwise approved by Parliament. It is argued that such extension is necessary for an effective DPCI.

58. The Minister submitted in the High Court that the exercise of the power could not be construed as a benefit capable of impairing the constitutional independence of the DPCI, as it is necessary, in light of the statutorily prescribed maximum age of retirement of 60 years, for the Minister to be permitted to consider deserving candidates for appointment for the prescribed non-renewable term who are older than 53 at the time of appointment.

59. In their application for leave to appeal to this Court, both the President and the Minister maintain similar misconceived arguments that the purpose of section 17CA(15) is to accommodate retirement provisions which appear elsewhere in the SAPS Act, for example, section 45(1)(a) which provides that a member must retire on the date when he or she attains the age of 60 years.

60. These submissions miss the mark. Whatever the practical advantages of the power to extend the Head's tenure, the renewability of her term at the behest of the Minister is intrinsically inimical to independence. It is clear from this Court's judgments in *Glenister* and *JASA* that it is renewability as such, rather than the insufficiency of conditions or constraints imposed on renewability, which jeopardises independence, and thus has no valid place in the design of a body that

is constitutionally required to be independent.[33] It is also unacceptable for the majority in Parliament, which is also a political body, to decide on any extension of the term of office beyond two years. On what basis does Parliament decide that one Head should have her tenure extended and the other not? The provision allowing renewal introduces perverse incentives and invites the situation where compliance or pliability of the Head to political objectives is achieved or is perceived to have been achieved through extension of political patronage. This, the applicant submits, is constitutionally impermissible.

61. In light of the above, the applicant submits that this Court should confirm the High Court's declaration of constitutional invalidity in this regard.

C. SUSPENSION AND REMOVAL[34]

62. In *Glenister* this Court held that "*adequate independence requires special measures entrenching [DPCI members'] employment security to enable them to carry out their duties vigorously*."[35] The SAPS Act, however, particularly in relation to the removal of the Head, does not provide sufficient security of tenure to ensure independence.

63. Section 17DA, which deals with the Head, is constitutionally invalid to the extent that:

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[33] *Glenister* supra note 1 at paras [223] and [249]; *JASA* supra note 12 at paras [73]-[75].

[34] The High Court held, at paragraph [122.3] of the High Court Judgment, that section 17DA is inconsistent with the Constitution and invalid to the extent that *"[t]he suspension and removal 'process' not only vests an inappropriate degree of control in the Minister, but also allows for two separate and distinct processes, determined on the basis of arbitrary criteria, each able to find application without any reference to the other*".

[35] *Glenister* supra note 1 at para [222].

63.1 it permits the Minister to suspend the Head without a hearing and without specific grounds for doing so, pending a disciplinary inquiry initiated by the Minister himself;

63.2 the Minister is given discretion to decide whether to suspend the Head with or without pay, since whatever procedural safeguards may be put in place in relation to the inquiry and prior to any ultimate dismissal, the Head could still be threatened - or could feel threatened - with suspension without pay for failing to yield to pressure in a politically unpopular investigation or prosecution;

63.3 the Minister is granted the power to remove the Head, after an inquiry conducted by a judge or retired judge, the terms of reference for which are not specified and may be dictated by the Minister, and the findings of which are not binding on the Minister, whose decision is final and not subject to approval by Parliament; and

63.4 the Head may be removed on the basis that she is unable to carry out her duties "*efficiently*", a term which is not defined, and affords the Minister an unduly subjective and broad discretion.

64. The respondents assert that the power of the Minister to remove the Head is constrained by the requirement that the inquiry into the fitness of the Head to hold that office must be conducted by a judge and, further, that such inquiry is subject to the procedural fairness requirements under the Promotion of Administrative Justice

Act, 2000.

65. First, this Court in *Glenister* explicitly held that review after the fact is no substitute for sufficient safeguards upfront:

> *"**[A]n ex post facto review, rather than insisting on a structure that ab initio prevents interference, has in our view serious and obvious limitations.** In some cases, irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking."*[36]

66. Second, the power to remove is plainly vested in the Minister who determines the scope of the inquiry, appoints the person presiding at the inquiry and ultimately is not bound by its findings. Instead, the Minister is given the discretion to decide whether one of the grounds set out in section 17DA(2)(a) is applicable.

67. Third, the provision in section 17DA(2)(a)(iii) for removal of the Head if she cannot carry out her duties "*efficiently*" is unacceptably vague and not "*objectively verifiable*", as the respondents argue. It is, in any event, contemptuous of the explicit reasoning in *Glenister*.[37]

68. Fourth, where broad powers are afforded to the Executive to remove an independent official, the enabling statute must include guarantees against arbitrariness, such as the power of Parliament to overturn any dismissal of the National Director of Public Prosecutions.

69. *Glenister* again provides pertinent authority:

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[36] *Glenister* supra note 1 at para 247 (emphasis added).
[37] *Glenister* supra note 1 at paras [220] and [249].

"*The contrast with the position under the now defunct DSO is signal. Previously, under the NPA Act, the DSO was established in the office of the NDPP, and fell within the NPA. In terms of s 179(1) of the Constitution, the NDPP is appointed by the President as head of the national Executive. The head of the DSO was a deputy NDPP, assigned from the ranks of deputy NDPPs by the NDPP, and reporting to the NDPP. The NPA Act provides that a deputy NDPP may be removed from office only by the President, on grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office.* ***And Parliament holds a veto over the removal of a deputy NDPP****. The reason for the removal, and the representations of the deputy NDPP, must be communicated to Parliament, which may resolve to restore the deputy NDPP to office…These protections applied also to investigating directors within the DSO.* ***The special protection afforded the members of the DSO served to reduce the possibility that an individual member could be threatened - or could feel threatened - with removal for failing to yield to pressure in a politically unpopular investigation or prosecution***."[38] (Emphasis added)

70. Section 194 of the Constitution, in relation to the removal of the independent Public Protector and Auditor-General, is also instructive in this respect:

> *"(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on -*
>
> *(a) the ground of misconduct, incapacity or incompetence;*
>
> *(b) a finding to that effect by a committee of the National Assembly; and*
>
> *(c) the adoption by the Assembly of a resolution calling for that person's removal from office.*
>
> *(2)* ***A resolution of the National Assembly concerning the removal from office of -***
>
> ***(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or***
>
> *(b)* ***a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly****.*
>
> *(3) The President -*
>
> *(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and*
>
> *(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.*" (Emphasis added)

71. The independence of the Public Protector and Auditor-General is secured, in the context of removal, first, by excluding the Executive from the decision to remove; second, by entrusting the decision only to Parliament; and, third, by requiring that

[38] *Glenister* supra note 1 at para [225]-[226].

the removal be supported by a special majority of two thirds of the National Assembly.

72. The third safeguard was held to be an essential element of independence by the Constitutional Court, as a pre-condition for certifying the Constitution, in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*.[39]

73. In measuring the draft final Constitution against the requirement in Constitutional Principle XXIX that the Auditor-General and Public Protector be independent and impartial, the Court held:

> "*The question which then arises is whether the requirements of CP XXIX have been satisfied. The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The office inherently entails investigation of sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing the removal of the Public Protector from office do not meet the standard demanded by CP XXIX. NT [New Text, adopted by the Constitution Assembly] 194 does require that a majority of the NA resolve to remove him or her, but a simple majority will suffice. We accept that the NA would not take such a resolution lightly, particularly because there may be considerable public outcry if it is perceived that the resolution has been wrongly taken. These considerations themselves suggest that NT 194 does provide some protection to ensure the independence of the office of the Public Protector. Nevertheless we do not think it is sufficient in the light of the emphatic wording of CP XXIX, which requires both provision for and safeguarding of independence and impartiality. We cannot certify that the terms of CP XXIX have been met in respect of the Public Protector. . . .*
>
> *Like the Public Protector, the Auditor-General is to be a watch-dog over the government. . . . .Against the background of the purpose of the office, it is our view that the dismissal provisions, which are identical to those that apply to the office of Public Protector, are not sufficient to meet the requirements of CP XXIX. The function of the Auditor-General is central to ensuring that there is openness, accountability and propriety in the use of public funds. Such a role requires a high level of independence and impartiality, as is recognised by CP XXIX. In the circumstances, it is our view that for the reasons we have given concerning the Public Protector, the prescripts of CP XXIX have not been achieved in the*

[39] 1996 (4) SA 744 (CC) ("***First Certification***").

NT."[40]

74. The reasoning of this Court in the *First Certification* judgment and the subsequent inclusion of a two-thirds majority provision in section 194 of the Constitution is an instructive indicator of the essential safeguards of the constitutional requirement of independence, and an important yardstick against which the independence of the DPCI may be measured.

75. It is important to note that confusingly section 17DA(3) separately provides for removal of the Head by the National Assembly after a finding of misconduct, incapacity, or incompetence by a Committee. In such a case, a resolution of the National Assembly is required with a supporting vote of at least two thirds of the members. This provision clearly underscores the importance of firmly securing the tenure of the Head, and by comparison highlights how subversive section 17DA(2) (removal by the Minister) is of such security.

76. The President argued in the High Court that section 17DA should be interpreted such that "*the Minister's decision to remove the Head of the DPCI is subject to the further requirement of a resolution by Parliament, which must enjoy [the support of] two thirds of the members in the National Assembly*."[41] However, the only interpretation that the section is reasonably capable of bearing is that there are two separate removal provisions: section 17DA(2) provides for removal by the Minister and section 17DA(3) and (4) provides for removal by Parliament. The

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[40] Id at paras [163] and [165].
[41] First Respondent's answering affidavit in the High Court at para 121; see also para 115 (Pages 216 - 218 of the Record).

interpretation proffered by the President was not even supported by the Minister, who interprets section 17DA(3) and (4) as providing Parliament with a separate power of removal, quite apart from the Minister's power to remove.[42]

77. The Minister argued in the High Court that it is a sufficient safeguard to require that the removal, the reasons therefor and any representations made by the Head, be communicated in writing to Parliament within a prescribed period. However, in the absence of meaningful involvement by Parliament, such as that required by section 194 of the Constitution and the *First Certification* judgment, the removal of the Head remains the unrestrained prerogative of the Minister, which is fatal to any notion of independence.[43]

78. In the High Court the President compared the position of the Head with that of the National Commissioner, arguing that, if the applicant is correct that the Head is insufficiently insulated from undue influence, then so is the National Commissioner, commenting that currently "*removal of the Head of the DPCI has been made more difficult than even that of the National Commissioner*".[44]

79. First, it is precisely the point of a constitutionally-mandated anti-corruption unit that its independence should be specially secured, indeed more so than other

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[42] Second Respondent's answering affidavit in the High Court at para 135.3 (Page 108 of the Record).

[43] In contradistinction, the Minister states (paragraph 135.3 of his answering affidavit) under oath in the High Court, that they are separate removal powers and, hence, there is no question of endorsement by the National Assembly for the Minister's decision to be operative.

[44] First Respondent's answering affidavit in the High Court at para 125 (Page 219 of the Record). The President, on affidavit in the High Court (paragraph 121 of his answering affidavit) stated that the two removal provisions in section 17DA (one which empowers the Minister to remove the Head, and the other of which empowers the National Assembly to remove the Head) should be read together as forming part of one process.

officials engaged in policing. Second, this comparison is misplaced, as the SAPS is meant to combat crime as such, committed by ordinary persons, for which independence from the Executive is not a specific institutional requirement. The DPCI, on the other hand, is specifically required to combat corruption, for which independence from political influence is inherently indispensable. Any inadequacy in the independence of the National Commissioner only amplifies the need for strong safeguards of independence for the DPCI. [45]

80. Despite what was advanced for the President on oath, the President's counsel accepted in oral argument that properly interpreted, the section envisaged two completely separate removal provisions: one by the Minister and one by Parliament. The High Court found that *"[d]uring the course of argument the respondents conceded that s 17DA, in its current form, provides for two separate and distinct processes for the removal from office of the Head.*"[46]

81. It is clear that not even the respondents are *at idem* with each other on the correct interpretation of this provision of the SAPS Act.

82. In light of the above as well as the High Court's conclusion, the applicant submits that this Court should confirm the High Court's declaration of constitutional invalidity in this regard.

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[45] See paras [80]-[83] and [87]-[88] of the High Court Judgment for the High Court's finding in this regard.
[46] High Court Judgment at para [75].

D. JURISDICTION AND POLITICAL CONTROL[47]

83. Section 16(1) sets out some of the offences over which the DPCI may, subject to the policy guidelines, have jurisdiction. The SAPS Act, however, does not provide that the DPCI's jurisdiction is exclusive or primary, or even that certain key crimes, such as corruption and organised crime, must be referred to the DPCI by the SAPS if they are perpetrated in more than one province. Indeed, under the SAPS Act, there is nothing to prevent the SAPS from investigating such crimes without the involvement or even knowledge of the DPCI.

84. As was held in *Glenister*, the Constitution requires that corruption is investigated by an institutionally and functionally independent body. In particular this Court held that there must be "*insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the [DPCI]*".[48]

85. Accordingly, in evaluating the role given to the Executive in the functioning of the DPCI under the previous Chapter 6A of the SAPS Act, the Court held that:

> "*we should not assume, and I do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence. ... These provisions afford the political Executive the power directly to manage the decision-making and policy-making of the DPCI.*"[49]

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[47] The High Court held, at para [122.4] of the High Court Judgment, that *"[t]here is an unacceptable degree of political oversight in the jurisdiction of the DPCI, and the relevant provisions are themselves so vague that not even those responsible for their implementation are able to agree on how they should be applied*". Further, the High Court struck down section 17A of the SAPS Act, correctly in our opinion, as it is intrinsically linked to sections 16, 17D and 17K(4) to (9) in its definition of "*national priority offences*".

[48] *Glenister* supra note 1 at para [216].

[49] *Glenister* supra note 1 at paras [234]-[235] (emphasis added).

86. Amended section 17D(1) now provides as follows:

> "(*1) The functions of the Directorate are to prevent, combat and investigate* —
>
> *(a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Minister and approved by Parliament;*
>
> *(aA) selected offences not limited to offences referred to in Chapter 2 of section 34 of the Prevention and Combating of Corrupt Activities Act 2004 (Act No. 12 of 2004); and*
>
> *(b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament.*"

87. Now only one member of the Executive, as opposed to a ministerial committee, is empowered to impose guidelines as to how, where and when the DPCI should act. This remains, in the words of the Constitutional Court, "*inimical to independence*".[50]

88. The precise purpose of providing for these "*guidelines*" is not clear from the legislation. The manner in which the requirement of the guidelines is framed, however, has the very real potential to constrain the DPCI's work or even to direct the DPCI towards or away from particular targets. For instance, whilst the DPCI's work may cover all or some aspects of corruption or organised crime, the guidelines could limit the type of persons that could be investigated or the precise offences which should be prioritised for investigation. Also, under section 16(3) of the SAPS Act, the determination by the Head as to whether the DPCI has jurisdiction only prevails insofar as such determination is in accordance with the guidelines.

89. Hence, the guidelines, however innocuous they may appear to be on paper, have

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[50] *Glenister s*upra note 1 at para [234].

the potential severely to limit the independence and work of the DPCI.

90. This is antithetical to the very purpose of the DPCI and the constitutional requirement for an independent corruption and organised crime fighting unit,[51] and one that is also reasonably apprehended to be independent.

91. The fact that Parliament, by a simple majority, must approve the guidelines does not salvage this provision.[52] After all, Parliament is also a political body and it should not be tasked with deciding what cases the DPCI should or should not pursue. The DPCI's jurisdiction in investigating corruption and organised crime must not be capable of being whittled away by political arbitrage. The nub of the matter is this: the DPCI's mandate, to fight corruption, is a constitutional requirement, rather than something which may be left to politicians to determine.

92. It is necessary to emphasise, here, that it is one thing for the Executive and Parliament to play a role in the appointment and removal of DPCI officials (subject to the need to ensure adequate independence, as set out above) - that is a necessary and appropriate feature of a constitutional state, subject to checks and balances among the branches of government, and is essential for the democratic legitimacy of the DPCI. However, it is an entirely different proposition for the Executive and Parliament to have a direct say in what matters the DPCI may or may not investigate, let alone how they should investigate them. This is the very type of political interference that the Court in *Glenister* considered unconstitutional.

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[51] *Glenister* supra note 1 at para [229].
[52] *Glenister* supra note 1 at para [231].

93. It is submitted that what the Court held in *Glenister* in relation to the inhibitory effect of empowering a ministerial committee to issue policy guidelines under the previous version of the SAPS Act, is still instructive where the current SAPS Act proposes to concentrate that self-same power in the hands of one particular member of the Executive,

> "*The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They 'oversee' an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory*."[53]

94. The statutes governing the work of the NDPP, the Auditor-General and the Public Protector do not permit similar external interference by political actors.

95. Section 17D(1)(a), read with 17K(4), facilitates unacceptable political control and potential interference which go beyond constitutionally acceptable limits.

96. The respondents recognising the constitutional deficiencies of section 17D(1)(a), focus in their notice of appeal on the mandate to investigate "*selected offences*" under section 17D(1)(aA), to argue that "*the national priority offences selected by the Head in terms of s.17D(1)(a) are subject to policy guidelines issued by the Minister, whereas offences selected by the Head under s.17D(1)(aA), including corruption, are not subjected to any policy guidelines*".[54]

97. Section 17D(1)(aA) provides that the DPCI is to investigate "*selected offences*

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[53] *Glenister* supra note 1 at para [232].
[54] First to Fourth Respondents' notice of appeal Record 487 para 49.

contemplated not limited to offences referred to in Chapter 2 of section 34 of the Prevention and Combating of Corrupt Activities Act".

98. The first problem for the respondents is that there is no definition in the Act for what this category will entail. Yet, corruption must be a national priority offence. National priority offences are already covered by section 17D(1)(a), and then subject to the guidelines. If for argument's sake DPCI tried to assert under subsection (aA) that corruption, or a particular type of corruption, was a "selected offence", and the National Commissioner disagreed, then it would be determined by the Head but, once again, in accordance with the approved guidelines (as required by section 16(3)). So, whether it is a priority offence is determined by statute in accordance with the on-going primacy of the guidelines.

99. The second problem for the respondents is that if corruption is not a national priority offence, and it is to be brought within DPCI's remit by it being selected as a "selected offence", then there is no clarity on whether it will be selected as an offence for DPCI's attention (since subsection (aA) does not state that selected offences must include corruption, only that they may), or by whom (since subsection (aA) is silent as to the selector).

100. The High Court therefore correctly held, in relation to subsection (aA), that "*[i]t is not clear by whom, when and on what basis the selection is to be made."*[55]

[55] High Court Judgment at para [102].

101. While the respondents in their notice of appeal now seem to suggest that it will be the Head that will make the selection, this view is not one they shared in the High Court.

102. The President submitted on affidavit in the High Court that the selection of offences which would fall under the mandate of the DPCI under section 17D(1)(aA) of the SAPS Act will be made by the Minister.[56] This is not compatible with the Constitution, which requires the creation of a dedicated independent anti-corruption entity.

103. The Minister, on the other hand, averred in his affidavit in the High Court that the Head of the DPCI will make the selection.[57] During oral argument, however, the Minister's counsel adopted a different approach. Counsel for the Minister suggested that the Minister (his own client) is wrong and that, in fact, the selection is done by the legislation itself – a view which has now apparently been abandoned before this Court. [58]

104. Given these contradictory positions, the High Court found that *"[t]he position therefore is that in relation to this crucial aspect of the legislation - the very mandate of the DPCI to investigate corruption - not even the respondents are at one with each other*."

105. Returning to the pervasive and unconstitutional control exerted by the guidelines,

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[56] First Respondent's answering affidavit in the High Court at para 144 (Page 225 of the Record).
[57] Second Respondent's answering affidavit in the High Court at para 267 (Page 158 of the Record).
[58] High Court Judgment at paras [100] – [105].

section 17D(1A) provides that, "*[t]he National Head of the Directorate shall ensure that the Directorate observe the policy guidelines referred to in subsection (1).*" This clearly represents the ultimate subjection of the Head's independence, control, management, and oversight of the DPCI to policies determined effectively by the Minister.

106. The Constitutional Court held as follows in relation to the previous version of Chapter 6A of the SAPS Act, which vested the power to set policy guidelines with a Ministerial Committee:

> "*It is true that the policy guidelines the Ministerial Committee may issue could be broad and thus harmless. But they might not be broad and harmless. Nothing in the statute requires that they be. Indeed, the power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate — or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating.*
>
> *This may be far-fetched. Perhaps. The Minister for Police must submit any policy guidelines the committee determines to Parliament for approval. This is a safeguard against far-fetched conduct. But if Parliament does nothing, the guidelines are deemed to be approved. The point is that the legislation does not rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open. This is in our view plainly at odds with a structure designed to secure effective independence. It underscores our conclusion that the legislation does too little - indeed, far too little - to secure the DPCI from interference*."[59]

107. Ultimately, what the Constitutional Court held in *Glenister* is still, regrettably, apposite to the shortcomings inherent in the structure of the SAPS Act even after amendment:

> "*The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a discretion, outside the confines of the legislation itself. This cannot be conducive to independence, or to efficacy*."[60]

108. The guidelines of an independent institution should not be issued by a person

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[59] *Glenister* supra note 1 at paras [230]-[231] (emphasis added).
[60] *Glenister* supra note 1 at para [233].

extrinsic to that institution, particularly when such person could be subject to investigation by such institution.[61]

109. The issue is illuminated by the draft policy guidelines recently tabled before Parliament by the Minister, under section 17K(4)(a).[62] While these are only draft guidelines and apparently have not yet been approved by Parliament as required by section 17K(4)(a), they represent a clear and concrete expression of the Minister's interpretation of his power to prepare policy guidelines, and thus highlight, in a practical manner, the concerns the applicant has already expressed.

110. The draft guidelines demonstrate that, under the SAPS Act, the Minister, with Parliament's concurrence, can effectively curtail the scope of the DPCI's investigations simply by issuing guidelines or by amending those already issued. While one must not assume "*far-fetched*" or abusive conduct from the Minister in setting the guidelines, nevertheless as this Court held in *Glenister*:

> "*The point is that the legislation does not rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open. This is in our view plainly at odds with a structure designed to secure effective independence. It underscores our conclusion that the legislation does too little — indeed, far too little — to secure the DPCI from interference*."[63]

111. In the circumstances, it is evident that the DPCI's investigative remit is capable of dilution or direction through policy guidelines framed by the Executive, which at a structural level negatively affects the DPCI's ability to be the independent

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[61] *Glenister* supra note 1 at para [232].
[62] Annex "RA1" to the Applicant's Replying Affidavit in the High Court (Page 375 of the Record).
[63] Para [231].

corruption fighting entity required by the Constitution.

112. The fact that the SAPS Act still allows politicians, in this case the Minister with the concurrence of Parliament, to determine what offences the DPCI may or should investigate, means that the amendments to the SAPS Act fail to deal with one of the key issues expressly found by this Court in *Glenister* to be inimical to DPCI's independence. The Court pertinently held that:

> *"We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of 'priority offences'. What those crimes might be depends on the opinion of the head of the Directorate, as to national-priority offences — and this is in turn subject to the Ministerial Committee's policy guidelines. The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a discretion, outside the confines of the legislation itself. This cannot be conducive to independence, or to efficacy.*
>
> *Again, we should not assume, and we do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence.*"[64]

113. Under the SAPS Act, offences relating to corruption and organised crime, even in the absence of guidelines, may not be referred to the DPCI. By way of example, under section 16(4)(a) of the SAPS Act, offences which do not take place in more than one province may be kept entirely within the remit of the provincial SAPS, excluding the DPCI from investigation altogether. Section 16(4) trumps any determination of jurisdiction by the Head under section 16(3) of the SAPS Act.

114. The President argues that because the DPCI is located within the SAPS and will be responsible for specific and specialised crimes, there is nothing dubious about other units of the SAPS conducting investigations into crimes over which the DPCI

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[64] *Glenister* supra note 1 at paras [233]-[234].

may have jurisdiction, as long as their efforts are coordinated. He further argues that exclusive jurisdiction over specific crimes is not necessary for the effectiveness and independence of the DPCI. What is necessary, so the argument goes, is cooperation and coordination.

115. These arguments fail to address the fact that, if the DPCI is not given at least primary authority over the offences it is required, by the Constitution, independently to investigate (including corruption and organised crime), it is possible that other units of the SAPS (which lack the requisite independence) may assume jurisdiction over such offences either concurrently with or to the exclusion of the DPCI. This presents an opportunity for other units of the SAPS to obstruct the DPCI in the discharge of its functions, whether deliberately or inadvertently, by withholding information from the DPCI or otherwise; or for such units to investigate serious corruption and organised crime offences where they do not have the institutional or operational autonomy required by the Constitution to do so.

116. The Constitution requires that corruption be investigated by a dedicated entity with sufficient institutional and operational independence to do so effectively. The provisions of the SAPS Act plainly fall foul of that requirement.

117. That senior politicians are still given competence to determine the limits, outlines and contents of the DPCI's work, and how this is inimical to the constitutionally-required independent corruption fighting unit's mandate, are further demonstrated by the draft guidelines already tabled by the Minister, for at least the following reasons:

117.1 While corruption and related offences are left for selection by the Head of the DPCI under paragraph 6 or referral to the DPCI by the National Commissioner under paragraph 9, the selection or referral in each case "*must be aligned with the strategic operational priorities of the Department of Police and the National Commissioner*". Moreover, despite section 17D(1)(aA) of the SAPS Act specifically mandating the DPCI to investigate offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004, paragraph 10 of the guidelines envisages that the Head may abdicate responsibility for "*any*" of those offences to other units of the SAPS.

117.2 In respect of both selection by the Head and referral by the National Commissioner, each decision is to be made, respectively, after "*taking into account*" (paragraph 10.2, seventh bullet point) or giving "*due consideration*" (paragraph 9.3) to the DPCI's exclusive jurisdiction set out in paragraph 7. It is apparent from a holistic reading of these provisions that the guidelines envisage that corruption and related offences will be of lesser priority to the DPCI than the offences listed in paragraph 7, and particularly that corruption and related offences will not be selected by or referred to the DPCI if it is sufficiently occupied with paragraph 7 offences.

117.3 The guidelines envisage that the DPCI will bear only secondary and indeed conditional jurisdiction over corruption. They proceed from the point that the DPCI <u>may</u> investigate corruption <u>if</u> it has capacity to do so (and if the

strategic priorities of the Department of Police and the National Commissioner permit it to do so). The proper point of departure, however, which flows from the constitutional imperative of a dedicated independent corruption combating entity and the findings of the Court in *Glenister* about the scourge of corruption, its heavy implications for our democracy and the promises of the Bill of Rights, is that the DPCI must investigate corruption and organised crime; that only an adequately independent agency may do so; and that the entity investigating corruption and organised crime must be provided with the resources to do so.

118. The draft guidelines[65], therefore, amply demonstrate not only the importance of ensuring that the DPCI's jurisdiction over corruption is adequately set out in the SAPS Act itself and that inadequately independent entities should not be permitted to investigate corruption, but also the potential for policy guidelines to be used as a tool to manipulate the jurisdiction, capacity and priorities of the DPCI.

119. We emphasise, however, that the applicant's challenge is not aimed at these draft guidelines *per se*, nor would its challenge be met if the proposed guidelines were less restrictive. The challenge is squarely aimed at the relevant sections of the SAPS Act. These draft guidelines nevertheless helpfully illustrate the type of power afforded to the Minister and Parliament by the impugned provisions of the

[65] We note that the NCOP Committee for Security and Constitutional Development approved the guidelines in their current form at a meeting on 11 September 2013. See http://www.pmg.org.za/report/20130911-policy-guidelines-for-directorate-for-priority-crimes-investigation-in-terms-section-17k-south-african-police (accessed on 31 March 2014).

Act. The Minister, with Parliament's concurrence, can effectively curtail the scope of the DPCI's investigations by the simple expediency of issuing guidelines or by amending those already issued. As the Court held in *Glenister*:

> *"[t]he point is that the legislation does not rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open. This is in our view plainly at odds with a structure designed to secure effective independence. It underscores our conclusion that the legislation does too little — indeed, far too little — to secure the DPCI from interference*."[66]

120. In light of the above, the applicant submits that this Court should confirm the High Court's declaration of constitutional invalidity in this regard.

PART B: THE APPLICATION FOR LEAVE TO APPEAL

A. FINANCIAL CONTROL[67]

121. The National Commissioner has direct financial oversight over the DPCI. Pursuant to section 17H of the SAPS Act, the Head is required to "*prepare and provide the National Commissioner with the necessary estimate of revenue and expenditure of the Directorate for incorporation on the estimate and expenditure of the [SAPS]*". If the Commissioner and Head are unable to agree on the estimate of revenue and expenditure for the DPCI, the SAPS Act provides that the Minister shall mediate between the two. It is unclear how the matter will be resolved if mediation is unsuccessful.

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[66] *Glenister* supra note 1 at para [231].

[67] Section 17H and 17K(1) to (2B). The High Court held, at para [117] of the High Court Judgment, that "*The Head provides the National Commissioner with its estimate for incorporation in the SAPS estimate. The Commissioner does not have the final say. The Head must agree with him. If they cannot agree, the Minister mediates. If the mediation is, unsuccessful, the Minister does not have the final say. The dispute has to go before Parliament. Section 17K(2B) explicitly provides that the Head shall make a presentation to Parliament on the budget of the DPCI. Accordingly, the DPCI is now afforded an adequate opportunity to defend its budgetary requirements before Parliament in accordance with the requirements for independence referred to in the New National Party case*".

122. In order to ensure independence, the budget of the DPCI must be sufficient for it to fulfil all its statutory and constitutional functions. It should not be dependent on the grace of, hand-outs or agreement from the SAPS or the Executive. Parliament must appropriate the funds specifically for the DPCI on the DPCI's own submissions as to its requirements.

123. In any event, the Commissioner remains the accounting officer of the DPCI under section 17H(4)(a) of the SAPS Act. In this light, and under the provisions of the Public Finance Management Act, 1999, the Commissioner is the only party who may procure goods and services on behalf of the SAPS, including the DPCI.

124. Therefore, the purpose and effect of section 17H(6) is rendered contradictory and unclear, as control over the monies would not mean that the DPCI retains control over what goods or services precisely are procured, and to whom monies are expended. Moreover, in terms of section 17H(4)(b), the Commissioner must simply "*involve*" the Head in consultations relating to estimates of revenue and expenditure of the DPCI, including consultations with the National Treasury, but the Head is in no way in control of the budgeting process. Such financial dependence on the SAPS and the Executive is incompatible with the independence required of the DPCI under the Constitution.

125. The President argued in the High Court that the Commissioner is responsible for the financial management and control of the police, including the DPCI. The argument went further to say that the Commissioner will exercise his financial powers in consultation with the Head of the DPCI. The Minister argued that

section 17H of the SAPS Act adequately insulates the DPCI from financial control and interference by virtue of the fact that the Head is responsible for preparing and providing the Commissioner with the necessary estimate of revenue and expenditure of the DPCI and, further, that monies appropriated by Parliament for purposes of the DPCI's expenses must be regarded as appropriated specifically and exclusively for that purpose and may only be utilised for that purpose.

126. These arguments, however, do not address the absence of safeguards in the SAPS Act itself, which contains no guarantee that the monies appropriated for the DPCI will be sufficient to cover its core mandate, or how precisely they will be spent in respect of procurement of goods and services. Moreover, and more importantly, the DPCI enjoys no financial autonomy from the Commissioner, who retains overall control of the DPCI's budget and procurement. To render the DPCI dependent of the National Commissioner in this manner clearly and unacceptably undermines its independence.

127. The respondents, in this Court, cite the judgment of the Constitutional Court in *New National Party v Government of the Republic of South Africa and Others*[68] in support of their position, quoting the following extract:

> "*In dealing with the independence of the [Independent Electoral] Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to 'independence'. The first is 'financial independence'. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the*

[68] 1999 (3) SA 191 (CC) ("***NNP***").

> *Commission and deal with requests for funding rationally, in light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.*"[69]

128. This is authority, however, contrary to the Minister's argument, for the applicant's submission that it is indispensable to an institution's independence that its budget be allocated by Parliament directly, after that institution itself has had the opportunity to present and defend its own budgetary estimates before Parliament directly, and not at any time through the medium of the Executive.

129. Thus, the pronouncement in *NNP* helpfully elucidates how and why it is anathema to independence for the DPCI to be required to request and receive its budget through the National Commissioner.

130. There is no reason why the Head should not be the accounting officer of the DPCI and formulate the DPCI's budget for parliamentary approval. Indeed, the Independent Police Investigative Directorate ("**IPID**"), which similarly exercises policing functions under Chapter 11 of the Constitution and is required to do so independently, is directly "*financed from money appropriated by Parliament*",[70] and its Executive Director (not the National Commissioner) is its accounting officer.[71]

131. The financial autonomy of IPID clearly is not considered to do any violence to the constitutional vision of a single police service. It is thus unclear why the

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[69] Id at paras [98]-[99].
[70] Section 3(3) of the Independent Police Investigative Directorate Act, 2011 ("**the IPID Act**").
[71] Section 31 of the IPID Act.

respondents regard a similar dispensation for the DPCI as incompatible with Chapter 11 of the Constitution.

132. Section 17K(2B) does not assist in this regard. It vaguely states that the Head "*shall make a presentation to Parliament on the budget*" of the DPCI. The budget in question would, however, already have been discussed, determined and mediated.

133. The purpose of a presentation on the budget in Parliament of any public body is to defend and answer questions about the budget laid before Parliament by the National Commissioner. It is not an opportunity for the Head to distance himself from the budget actually presented to Parliament to argue for allocations which deviate materially from those proposed in the SAPS budget, of which the DPCI's budget forms part. The fact that the DPCI's budget is "*exclusive*" or "*specific*", as provided in sections 17K(2A), does not in any way cure the defect that there is substantial executive involvement in the formulation and determination of any budget presented to Parliament.

134. Section 17K(2B) is, at best, an unhelpful afterthought inserted into section 17K of the SAPS Act which does little to insulate the DPCI adequately from financial control by the National Commissioner and the Minister, and simply places the Head in the untenable position where she is expected to defend and explain the contents of a budget for which she may not have been responsible and with which she may not agree.

135. In light of the above, the applicant respectfully requests this Court to grant leave to appeal and to uphold this ground of appeal.

B. INTEGRITY TESTING[72]

136. Section 17E(8) of the SAPS Act provides that the Minister may prescribe measures to test the "*integrity*" of the members of the DPCI, including random entrapment, use of polygraph and testing for alcohol and drug abuse. This may also entail the use of interception of communication devices against DPCI members at every level, including the Head.

137. It is unclear why a member of the National Executive should be given this enormous power and responsibility over an independent agency. This provision clearly has the potential to be used as an intimidation tactic and its implications are ominous. If any integrity testing is to be done, it must be conducted under the auspices of the DPCI or an independent third party and not by an individual with a quintessentially political role.

138. In the High Court, the President argued that the power to decide whether a member of the DPCI should undergo an integrity test ultimately vests in the Minister, as the member of the Executive who is responsible for national security. Importantly, the President argued further that the measures for integrity testing are determined by the Minister in the national policing policy. The Minister argued in the High Court that his powers are limited to prescribing "*measures*" for integrity testing rather

[72] The High Court made no pronouncement on the constitutional validity of this section despite the applicant challenging the section at paragraph 100 of the founding affidavit in the High Court.

than implementing specific measures such as those listed in section 17E(8) of the SAPS Act.

139. Both the President and the Minister fail to appreciate that the unqualified powers of the Minister to institute an integrity-testing regime for members of the DPCI may be abused where there are no clear guidelines as to when and where this testing may occur. What is required is the provision of checks and balances, as opposed to an existing system which currently provides for an open-ended discretionary exercise of power. A lack of clear guidelines results in a serious risk of abuse of this power with the potential of intimidating members of the DPCI.

140. The applicant respectfully requests this Court to grant leave to appeal and to uphold this ground of appeal.

C. CONDITIONS OF SERVICE

141. Despite the clear pronouncements of this Court in relation to the need for secure conditions of service, including secure levels of remuneration, in *Glenister* (at paras [208], [227] and [249]), Parliament has elected to make no changes at all to section 17G.

142. At paragraph 101 of its founding affidavit in the High Court, the applicant submitted that it is the Minister who determines the conditions of service of members of the DPCI under sections 17G and 24 of the SAPS Act. There are no guarantees in respect of these conditions, except (to some extent) in the cases of the Head, the Deputy Head and the Provincial Heads of the DPCI. The remuneration guarantees even for those persons are extremely limited and their

remuneration can even be decreased with the concurrence of a simple parliamentary majority (section 17CA(9)).

143. The High Court held at paragraph 110 of the High Court Judgment that the applicant does not take issue with the remuneration provisions now incorporated into the SAPS Act. This is not the case.

144. The fact that there are no guarantees in respect of the conditions of service under section 17G read with section 24 of the SAPS Act and that all conditions of service are at the grace of the Minister are clearly unacceptable further incursions on DPCI's independence. This much was said in the applicant's founding papers in the High Court.

145. In light of the above, the applicant respectfully requests this Honourable Court to grant leave to appeal and to uphold this ground of appeal.

D. CO-ORDINATION BY CABINET

146. Section 17I of the SAPS Act is a provision which, at first glance, is benign in its impact on the independence of the DPCI. On deeper scrutiny, however, this provision is impermissibly malignant when read with sections 16 (National prevention and investigation of crime), 17D(1) (Functions of the Directorate to prevent, combat and investigate, *inter alia*, national priority offences and selected offences subject to any policy guidelines) and 17K(4) (determination by the Minister of policy guidelines), all of which were held to be constitutionally invalid by the High Court.

147. At paragraph 92 of its founding affidavit in the High Court (in the context of section 17D(1A) of the SAPS Act and the broader discussion of political involvement, oversight and potential interference) it was submitted that it is unclear why there is a need for the DPCI's co-operation with other State bodies (including the prosecutorial service and intelligence) to be done through the medium of and procedures determined by a Ministerial Committee contemplated in section 17I(2) of the SAPS Act. The DPCI should, as an independent body, be able to liaise with any other organ of state or functionary as circumstances require and not be dictated to by the National Executive.

148. The "*co-ordination*" of activities in the manner envisaged by section 17I is inimical to the constitutionally required structural and operational independence of the DPCI. Such co-ordination was specifically identified by this Court in *Glenister* as an unacceptable incursion into the independence of the DPCI (para [228]).

149. It is clear that when read in the context of sections 16, 17D and 17K, section 17I(2) has the potential to undermine the independence of the DPCI to the extent that the members of the National Executive, who are extrinsic to the DPCI and may have political reasons to interfere with its functioning, co-ordinate the activities of the DPCI in relation to other government departments or institutions, which may stifle effective investigation of corruption or organised crime.

150. In *Glenister*, this Court held at paragraphs [233]-[234] that:

> "*We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of 'priority offences'. What those crimes might be depends on the opinion of the head of the Directorate, as to national-priority offences*

— and this is in turn subject to the Ministerial Committee's policy guidelines. The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a discretion, outside the confines of the legislation itself. This cannot be conducive to independence, or to efficacy.

Again, we should not assume, and we do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence."

151. For essentially the same reasons that sections 16, 17D and 17K(4) to (9) were held to be constitutionally invalid, it is respectfully submitted that section 17I should also be declared unconstitutional and invalid**.**

RELIEF

152. In the circumstances, all of the above provisions of the SAPS Act are incompatible with the Constitution and must, therefore, be declared to be inconsistent under s 172(1)(a) of the Constitution.

153. It is appropriate in the present circumstances for the Court to exercise its powers under s 172(1)(b) of the Constitution to suspend the declaration of invalidity for 12 months, so as to allow Parliament sufficient time to make the necessary amendments to the SAPS Act.

154. Given the on-going failure by the respondents to fulfil their constitutional obligation to create an adequately independent unit to fight corruption, and the lengthy delays that have already been occasioned, it is submitted that the suspension should not be extended beyond 12 months. If the amendment of the SAPS Act is prioritised, as it should be, there is no reason to believe that such amendments as are necessary consequent upon this Court’s judgment and order cannot be expeditiously implemented.

155. The applicant therefore submits that it is entitled to the relief sought in its notice of motion.

COSTS

156. The applicant has pursued these proceedings in an attempt to ensure compliance with fundamental constitutional principles and rights and to determine issues of grave public importance. If it is substantially successful in its challenge to the SAPS Act, it is entitled to a costs order in its favour. Having regard to the complexity of this matter and accounting for the fact that the respondents are now represented by four counsel, the applicant submits that it is appropriate to order the respondents to pay the costs of three counsel.

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31 March 2014