

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

Case No: 6175/19

In the application of:

HELEN SUZMAN FOUNDATION

Applicant for admission as *amicus curiae*

In re:

ROBERT McBRIDE

First Applicant

**THE INDEPENDENT POLICE INVESTIGATIVE
DIRECTORATE**

Second Applicant

and

MINISTER OF POLICE

First Respondent

**PORTFOLIO COMMITTEE ON POLICE:
NATIONAL ASSEMBLY**

Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

1. I am an adult male director of the applicant for admission as *amicus curiae*, the Helen Suzman Foundation ("**HSF**"), situated at 6 Sherborne Road, Parktown, Johannesburg, a non-governmental organisation whose objectives are to defend


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the values that underpin our liberal democracy and to promote respect for human rights.

2. I am duly authorised to depose to this affidavit and bring this application on behalf of the HSF.
3. The facts contained in this affidavit are to the best of my knowledge both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.

INTRODUCTION AND PURPOSE OF THIS APPLICATION

4. This is an application in terms of rule 16A of the Uniform Rules of Court for the admission of the HSF as *amicus curiae* in the proceedings instituted by Robert McBride ("**Mr McBride**") and the Independent Police Investigative Directorate ("**IPID**") (together, "**the Applicants**") against the Minister of Police ("**the Minister**") and the Portfolio Committee on Police: National Assembly ("**Portfolio Committee**") ("**the Proceedings**").
5. The Applicants have consented to the admission of the HSF as an *amicus curiae*, on the basis that such admission does not jeopardise the hearing of this matter; the Minister and the Portfolio Committee have indicated that they will not oppose the HSF's application to be admitted as *amicus curiae*. This application is thus unopposed.
6. This affidavit is made in support of the HSF's application for leave to be admitted as *amicus curiae* in the Proceedings and is structured as follows:
 - 6.1 factual background;
 - 6.2 the interest of the HSF in the Proceedings; and

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- 6.3 the submissions which the HSF seeks to make in the Proceedings should it be admitted as *amicus curiae*; the relevance of these submissions and how they will assist the above Honourable Court in determining the issues before it; and how these submissions differ from those of the Applicants and the Minister.
7. The HSF has had sight of the Applicants' founding papers and the Minister's answering affidavit in the Proceedings. At the time of filing this application, the Portfolio Committee had not filed any answering papers.
8. The Proceedings are concerned with, *inter alia*, the correct interpretation of section 6(3)(b) of the IPID Act 1 of 2011 ("**IPID Act**"). In their affidavits, both the applicants and the Minister propose a particular interpretation of section 6(3)(b) of the IPID Act. With respect, and as will be demonstrated by the HSF should it be granted leave to intervene in these Proceedings, neither interpretation of section 6(3)(b) is correct or constitutionally compliant. Should it be admitted as *amicus curiae*, the HSF intends to place before this Court a third interpretation of section 6(3)(b). The HSF's interpretation best vindicates the constitutional imperatives and is, it submits, the interpretation which should be adopted by this Court.
9. Interpretation of legislation is an objective enquiry, which must be performed within the context of the overarching principle of supremacy of the Constitution. In interpreting legislation, it is the Court that ultimately must apply its mind to the correct constitutionally compliant interpretation of legislation; to this end, the different interpretations by the actual or potential actors implicated by it are not dispositive and cannot limit the interpretative exercise.


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10. The HSF accordingly brings this application to intervene as *amicus curiae* in order to ensure that the Court has the benefit of its submissions on the correct interpretation of the legislation before it in order properly to determine this matter.
11. The submissions which the HSF intends to make are purely legal in nature and will not require the placing of contentious factual material before the Court. The HSF further undertakes to deliver, on a conditional basis, heads of argument detailing its legal submissions to the parties by midday on Monday, 11 February 2019.
12. Accordingly, the HSF's admission as *amicus curiae* will not prejudice the parties or the truncated timelines for the hearing of this matter, and will, it is submitted, greatly benefit the Court in considering the correct, constitutionally compliant interpretation of section 6(3)(b) of the IPID Act.

FACTUAL BACKGROUND

13. Once the HSF became aware of these proceedings and had the opportunity meaningfully to analyse the full extent of the complex and intricate legal issues raised by the Applicants in their founding papers, it became clear that they raised important constitutional issues, involved interpretation of the IPID Act and that the HSF has a substantial interest in the Proceedings.
14. After considering the founding papers, the HSF took all necessary steps as expeditiously as possible in order to begin the process of being admitted as *amicus curiae*.
15. The HSF then took steps to obtain the parties' consent to its admission as *amicus curiae*. The HSF wrote a letter to the parties, dated 5 February 2019, requesting the parties to consent to its admission as *amicus curiae* ("**the 5 February 2019 letter**"). The 5 February 2019 letter is attached marked "**FA1**". Both the

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Applicants and the respondents answered the HSF's admission as *amicus curiae* on the same day, in the terms set out above. These responses are annexed marked "FA2" and "FA3" respectively.

16. The HSF thus now makes this application in terms of Rule 16A(6) of the Uniform Rules of Court.
17. It is respectfully submitted that the HSF should be admitted as *amicus curiae* in the Proceedings for the reasons set forth below.

THE HSF'S INTEREST IN THE PROCEEDINGS AND THE IMPORTANCE OF THIS LITIGATION IN THE CONTEXT OF OUR CONSTITUTIONAL DEMOCRACY

18. The HSF is a non-governmental organisation whose objectives are to "*defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".
19. The HSF is an organisation primarily concerned with the principles of democracy and constitutionalism, the rule of law, as well as South Africa's constitutional and international law obligations, all of which are implicated in this matter.
20. The Applicants seek an order in the Proceedings reviewing, invalidating and setting aside the decision of the Minister not to renew the appointment of Mr McBride as the Executive Director of the IPID. Whilst the decision not to renew Mr McBride's term of office as Executive Director raises important questions, the issues at stake in the Proceedings go far beyond the renewal of Mr McBride's term of office and this Court's decision may, and probably will, have significant repercussions for South Africa in relation to its constitutional and international law framework for ensuring the protection of the structural, operational and institutional

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independence of IPID. Moreover, not only must IPID in fact be independent, but it must be seen to be independent.


21. Further, this Court's decision may have an important influence on how other courts interpret and apply domestic and international law in relation to IPID and the exercise of public power in the context of other independent institutions. The correct interpretation of s6(3)(b) of the IPID Act is integral to ensuring the structural, operational and institutional independence of IPID. The failure to apply an interpretation which best vindicates the Constitution may also result in the appointment (on either a temporary or even permanent basis) of the Executive Director of IPID pursuant to a procedurally flawed process. The dangers of such unlawful appointments - even of acting heads / directors - are clearly illustrated in domestic and international case law.
22. The central issue in the Proceedings is the interpretation of legislation. It is trite that legislation should be interpreted insofar as is reasonably possible to promote and fulfil the rights and requirements set forth in the Constitution. In the context of IPID, HSF submits that the case law is clear that legislation must be interpreted to ensure that IPID and its staff are sufficiently insulated from undue political interference and other such threats which have the potential to undermine the structural, operational and institutional independence of IPID and, more broadly speaking, the rule of law.
23. The HSF will contend that the interpretation placed on the legislation by the Applicants and the Minister falls short of the level of adequate independence demanded by the Constitution and international law. The HSF contends that the appointment of the Executive Director of IPID is renewable at his instance and not at the instance of either of the respondents. These submissions are materially

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different to the submissions made by the Applicants and the Minister but are integral to the determination of the issues raised by the parties in the Proceedings.

24. The HSF has an interest in the Proceedings owing to the fact that the IPID is an indispensable body in the fight against, *inter alia*, corruption and organised crime. The need carefully to protect IPID's independence is reinforced by the fact that IPID is tasked with watching over and investigating the guardians of our criminal justice system, the South African Police Service ("**SAPS**"). The scourge of corruption and organised crime currently rampant in the country undermines the rights enshrined in our Bill of Rights, endangers the stability and security of our society, and jeopardises sustainable development, the institutions and values of democracy and ethical values, morality, the rule of law and the credibility of our government. These human rights and social and ethical values that are entrenched in our constitutional law, are those which the HSF actively seeks to promote, and must be ventilated fully before this Honourable Court.
25. The HSF has a longstanding history of promoting South Africa's domestic and international law commitments in the realm of upholding democracy and the rule of law, constitutionalism and human rights. The HSF has specialised expertise and interest in national, regional and international law standards in relation to the issues before this Honourable Court.
26. In addition, the HSF was granted leave to intervene as *amicus curiae* in the matter of *McBride v Minister of Police and Another* 2016 (2) SACR 585 (CC). Not only does this matter interact with that judgment, but the HSF played a central role in at least three other matters concerning constitutional requirements pertaining to the institutional and operational independence of key state institutions: *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1

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(CC), *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) and *Helen Suzman Foundation and Another v Minister of Police and Others* 2017 (1) SACR 683 (GP).

27. The HSF thus seeks to intervene as *amicus curiae* in the Proceedings (in its own interest and in the public interest) in order to advance the submission that constitutional principle, including the constitutionally required structural, operational and institutional independence of the IPID, which is critical to the ability of that body to fulfil its constitutional and legislative mandate as well as the Republic's obligations under international law, requires an interpretation of legislation which places the renewal of the Executive Director's tenure beyond the remit of political actors.
28. If effect were to be given to either the Applicants' or the Minister's conceptualisation of the legislative framework, IPID would be insufficiently insulated from executive interference with regard to renewal of terms of office of the Executive Director. This, in turn, would unacceptably undermine (a) the unit's ability to fulfil its constitutional mandate and (b) public confidence in the institution of IPID. The Applicants' and the Minister's interpretation also falls short of the requirements of South Africa's international treaty obligations.
29. The submissions by the HSF are relevant and will assist the Court as such submissions have not been advanced by the other parties to the Proceedings. When considered against the core function of IPID, which exists to curb rampant organised crime and corruption threatening the political and economic integrity of the country, it is apparent that the issues raised in this application are of paramount public interest to a young and fledgling democracy.

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30. In particular, the HSF's submissions will provide critical insight into why the decision to renew a term of office should not be taken by any political actor. This is necessary to ensure adequate protection of the structural, operational and institutional independence of IPID against political, executive and other interference, which is paramount to the proper functioning of IPID, IPID's ability to fulfil its constitutional mandate and, in doing so, to respect, protect, promote and fulfil the rights in the Bill of Rights and to ensure public confidence in the institution. The HSF's submissions will thus assist the Court by demonstrating why granting the decision-making power to renew a term of office of the Executive Director of IPID to a political actor, including members of the Executive or Parliamentary Portfolio Committees, unlawfully infringes the independence of the IPID.
31. Should the HSF be admitted as *amicus curiae*, it will advance, *inter alia*, the submissions set out below.

THE HSF'S SUBMISSIONS

The Applicants' and Minister's interpretation of section 6(3)(b):

32. In its founding papers, the Applicants submit that the decision to renew the appointment of the Executive Director is one which must be taken by the Portfolio Committee, and not the Minister, and seeks an order directing the Portfolio Committee to take this decision on or before the expiry of Mr McBride's term in office on 28 February 2019.
33. On the Minister's interpretation, the provision on renewals in section 6(3)(b) of the IPID Act ought to be interpreted comparably to the provisions on appointments contained in sections 6(1) and (2), in that the Minister must make a

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recommendation on whether to renew an Executive Director's term of office which recommendation is then to be confirmed or rejected by the Portfolio Committee and then the National Assembly.

34. Both interpretations are incorrect, however, and do damage to the constitutionally required safeguards of independence.

The Minister's interpretation erodes independence

35. The Minister seeks to place his office at the centre of the renewal process. Simultaneously, he seeks to distance himself from the importance of such role, arguing that his decision is merely a preliminary recommendation.
36. This contradiction is telling.
37. Based on the Minister's interpretation, it is his recommendation which serves before the Portfolio Committee, and then the National Assembly, and these bodies cannot proceed without a recommendation (either to renew or not to renew). The question of renewal thus cannot be considered *mero motu* by such bodies. The Minister's recommendation, on his version, is thus the jurisdictional prerequisite for a renewal to be considered. Indeed, as appears from the Speaker of the National Assembly's letter, dated 4 February 2019, "*You [the Minister] are therefore welcome to make any recommendations to the [National] Assembly, and that such recommendations are to be addressed to me for onward referral to the Committee in terms of the rules for consideration and report. As such, the matter cannot be considered by the Committee at this stage*" (see annex "AA4" to the Minister's affidavit).
38. This manifestly erodes the independence of the institution of IPID, however. On the Minister's version, if his recommendation is to carry any weight at all, or is the

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prerequisite for a consideration on renewal, then plainly it creates the possibility that an incumbent Executive Director who wishes to have his or her term renewed would seek to curry the favour of the Minister. In plain terms, it allows a single political actor to wield at least some influence over the tenure of the head of a critical, independent constitutional institution. Even if this possibility does not arise in practice, the mere possibility itself gives rise to the perception of diminished independence. The susceptibility to, and possibility of, undue influence is substantially enhanced in the context of renewals as compared to the initial appointment. The Minister may, for ulterior purposes such as the incumbent's particularly effective campaign against corruption of political actors, be inclined not to renew (or recommend renewal), and no-one will ever be able to prove, or even know, such purposes. Conversely, the incumbent may, in the fulfilment of his office seek to curry favour to secure renewal. The impairment, and perception of impairment, of constitutionally required independence is palpable in both instances.

39. This is, it will be submitted, contrary to the rule of law and constitutional requirements of independence. For this reason alone, the legislation should be interpreted to afford no power or role to the Minister in respect of renewals.
40. Further, by impermissibly elevating his role to one essential to or informing renewal, the Minister creates the potential where he can, simply through delay, artificially create a vacancy which would then allow the Minister - unilaterally - to graft an acting Executive Director of IPID for up to a year (under section 6(4) of the IPID Act).
41. Simply by way of example:

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- 41.1 The Minister cannot be invested with the sole power of appointment of the Executive Director of IPID.
- 41.2 If the Minister is the trigger for renewal, however, then if he is dilatory in making such recommendation, it may be that the Portfolio Committee and the National Assembly are given insufficient time properly to consider such recommendation. This is particularly so where a skeletal recommendation is made, without any substantiation. The incumbent Executive Director may also wish to make representations in this regard - as such, a process requiring some time is likely practically required.
- 41.3 If this process is not finalised come the end of the Executive Director's tenure, however, then it is plain that the Minister believes that a vacancy is created, which allows the Minister, in terms of sections 6(4) and 6(5) of the IPID Act, unilaterally to place a candidate in the position of acting Executive Director without the typical safeguards of appointment.
- 41.4 A Minister could thus deliberately delay making his or her recommendation, thus creating a vacancy which would concentrate the power of temporary appointment in the Minister's hands alone. This would plainly be contrary to all safeguards of independence, and at least creates the perception of a lack of independence.
- 41.5 To this end, without suggesting that the Minister is seeking to appoint anyone improperly, it is telling that the Minister's recommendation to the Portfolio Committee and the Speaker was communicated to these entities only on 24 January 2019, and his formal recommendation for consideration was transmitted only on 5 February 2019. It is also noteworthy that the recommendations contained no reasons.

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- 41.6 The Portfolio Committee thus have only 16 working days to make a decision of significant national importance (and have, moreover, been provided with no underlying material in this regard).
- 41.7 If a vacancy arises, it is in large part attributable to the conduct of the Minister himself.
42. Further, the Minister's interpretation creates a logical difficulty - if the Minister's recommendation is not to renew, and the Portfolio Committee does not endorse this, this may still not mean that any decision to affirm the renewal exists.
43. The above plainly illustrates why the Minister's interpretation cannot be a proper interpretation of section 6(3)(b) of the IPID Act.
44. The Minister appears, rather late in the day, to have realised these difficulties. His initial correspondence to Mr McBride on 16 January 2019 indicates unequivocally that he had *"decided not to renew or extend your employment contract as Executive Director of IPD. You are hereby advised that your last official working day will be on Thursday, 28 February 2019"* (see annex RM2.1 to the Applicants' founding affidavit). This was plainly a decision. At no point in the 16 January letter does the Minister indicate that this is a mere recommendation which is still to be confirmed by Parliament or that this decision will even be communicated to Parliament.
45. In fact, it was only once Mr McBride pointed out (in a letter dated 22 January 2019 attached as annex "RM2.2" to the founding affidavit) that such a unilateral decision was unlawful and unconstitutional did the Minister then ask the Portfolio Committee (in a letter dated 24 January 2019 attached as annex "AA3" to the Minister's answering affidavit ("**the 24 January letter**")) to confirm or reject his

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decision. The Minister states in the 24 January letter that the Portfolio Committee is requested to confirm or reject his decision "*in light of*" Mr McBride's 22 January letter and in order to "*avoid protracted litigation*".

46. The Minister now goes further by simply characterising his decision as a recommendation.
47. This, however, does not assist the Minister. If the preliminary decision has any weight, all of the above concerns as to the Minister having undue influence over the Executive Director's tenure arise.
48. And if the recommendation has no weight, then it is wholly superfluous, and the insertion of the Minister in the renewal process gives rise to the prospect of the Minister creating delay, which triggers the above concerns as to the filling of a self-created vacancy.
49. The Minister's interpretation seeks to conflate the appointment process with that of renewal, arguing that it is the same process. The IPID Act expressly does not provide for this, and the Minister's role in appointing is a limited one, lacking any logical overlap with that of renewal.
50. In the appointment process, the Minister is charged with sourcing and vetting candidates for the high position of Executive Director. These candidates are, to some extent, unknown quantities, and are subjected to a rigorous process of assessment to determine who would be suitably qualified to lead IPID, an institution of significant national importance. The Minister then recommends a candidate - presumably with some substantiation - and the Portfolio Committee then either endorses or rejects such recommendation.

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51. Renewal, however, has none of the above hallmarks. There is an incumbent and that person is the only candidate for renewal. The incumbent will also have a five year track record, and, throughout, the National Assembly has the power to remove him for cause. There is simply no reason for the Minister to be involved, and the legislation does not require this.
52. In all the circumstances, the Minister's interpretation is not constitutionally sound; erodes the independence of IPID and, at the very least, creates the perception that there may be political interference with the high office of the Executive Director.

The Applicants' interpretation still places power at a political level

53. The Applicants' interpretation still involves substantial political oversight over renewal, which is constitutionally unacceptable. It allows a select committee of the National Assembly (and not even the National Assembly itself) to pass judgment on whether a specific Executive Director should have his or her tenure extended. The Constitution recoils at this type of political judgement. Such idiosyncratic extension of tenure has been soundly rejected by the Constitutional Court in the context of another independent institution under the Constitution, the judiciary.
54. The HSF contends that the correct interpretation - traversed below - removes this incursion.

The correct interpretation of section 6(3)(b)

55. The Constitutional Court has recognised that non-renewable terms of office of functionaries in independent public institutions are a central feature of independence. This is thus the judicially sanctioned standard of independence which should be applied.

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56. In this case, plainly the term of office of the Executive Director does allow for renewability. The legislation does not, however, indicate at whose instance the term is renewable. This is left to interpretation. In such an instance, the interpretation which gives best effect to constitutional requirements must be favoured. This is settled law. The renewal provisions must thus be interpreted in light of the above constitutional standard set forth in the preceding paragraph.
57. To the extent that renewable terms are permitted, as is the case in the renewable term of office of the Executive Director of the IPID, the decision to renew the term of office should not depend on political judgement or lie with any political actor, including members of the Executive or Parliamentary Portfolio Committees. This is necessary in order sufficiently to protect independent policing bodies from political interference. These constitutional imperatives are reinforced by international jurisprudence. And to the extent that there are any grounds for removing the Executive Director, there are separate, rigorous removal provisions in the IPID Act, which are subject to objective legal standards.
58. A renewal of a term of office is qualitatively different from an initial appointment, as there is a greater opportunity for political favouritism and perverse incentives and disincentives in the former - once invested with significant power, there should be no external influences which should sway - or have the potential to sway - the incumbent to abuse such power for ulterior purposes. The actions of the independent body may be impermissibly influenced by the potential for renewal or non-renewal if the decision to renew is left to the discretion of a political actor.
59. In any event, no political body should be passing judgement implicitly or explicitly on the office of the Executive Director. He is subject to control through the

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mechanisms established in the Constitution and the removal powers under the IPID Act.

60. The renewal thus cannot, as a matter of constitutional principle, be left to political happenstance. Instead, section 6(3)(b) ought to be interpreted in a manner which does not make a renewal subject to potential political influence and which sufficiently ensures the independence and stability of the institution.
61. For this reason, the HSF intends to make written and oral submissions that the term contemplated in section 6(3)(b) of the IPID Act is renewable at the instance only of the Executive Director of the IPID and not at the instance of the Minister, a parliamentary committee or the Executive. This would result in a constitutionally compliant reading of section 6(3)(b). A different reading, which places that decision in the hands of any political actor, would not promote or fulfil constitutional rights or requirements, and would open the door to undue political interference, or the risk of an apprehension of such interference.
62. In light of the above, the HSF intends to make written submissions on the constitutional and international law requirements of renewable terms of office and adequate independence of a body such as IPID and why adequate protection to the structural, operational and institutional independence of IPID against political, executive and other interference (especially, but not limited to, the security of tenure of its highest officers) is indispensable to the proper functioning of the IPID and public confidence in the institution itself.
63. In terms of section 233 of the Constitution (as reinforced by section 39(1)(b) of the Constitution), "*[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*". It is

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thus plain that the court must give effect to the following international law instruments:

- 63.1 United Nations Convention against Transnational Organized Crime;
 - 63.2 United Nations Convention against Corruption;
 - 63.3 The Organisation for Economic Co-Operation and Development report titled *Specialised Anti-corruption Institutions: Review of Models*.
64. Any steps taken or conduct by the State which have the retrogressive effect of weakening or undermining the effectiveness of independent institutions combatting corruption is inconsistent with South Africa's international obligations and a failure of the rule of law.
65. In the light of the relevant constitutional and international law principles, in the HSF's submission, it would be constitutionally inappropriate and strike at the very heart of the independence of the IPID for the Court to allow any political actor to take the decision to renew the term of office of the Executive Director. There is no prejudice in interpreting the legislation for the renewal to be at the instance of the Executive Director, and there is every reason of constitutional propriety to ensure that the renewal process is shielded from any form of political interference.
66. The removal provisions, of course, would remain, and thus the Executive Director would never be placed above the law or removed from constitutionally compliant oversight.
67. The HSF thus fully supports the relief sought in paragraph 2 of the Applicants' notice of motion in this matter.

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ALTERNATIVE - JUST AND EQUITABLE RELIEF

68. In the alternative, and in the event that the Applicants succeed in their interpretation, the HSF intends to make written and oral submissions on the need for broader just and equitable relief, in the exercise of the Court's power under section 172 of the Constitution, to ensure that:
- 68.1 the Minister is prevented from appointing a new acting Executive Director;
 - 68.2 the Minister is prevented from recommending the appointment of a new Executive Director; and
 - 68.3 Mr McBride's tenure is maintained until a decision to renew Mr McBride's term of office is taken by the Portfolio Committee on Police.
69. Such relief is necessary to protect the integrity of the office of the Executive Director, the independence of IPID and the perception of the independence of both IPID and the Executive Director thereof.
70. If the Minister is permitted to appoint an acting Executive Director, or commence the process to appoint a new Executive Director, this process may very well result in the unlawful appointment of a candidate, thus jeopardising the administration of justice, IPID and the Republic, and it may create the perception that the Minister has deliberately dragged his heels in failing to renew Mr McBride's term so as to allow the Minister to appoint his own preferred candidate.
71. It is trite that heads of important corruption-busting institutions wield enormous power, are central to the proper administration of justice and, daily, make (or fail to make) dozens of decisions of national importance which may be incapable of

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reversal. Immense harm may thus be suffered if relief is not granted for the interim period.

RESERVATION OF RIGHTS

72. The HSF reserves its rights in relation to the constitutionality of sections 6(3), 6(4) and 6(5) of the IPID Act, and nothing in these papers is to detract from the HSF's ability later to challenge such aspects in due course.

CONCLUSIONS

73. The HSF submits that the submissions it wishes to advance are relevant and will be of assistance to the court, not least because such submissions have not been advanced by the other parties to the Proceedings.

74. Accordingly, the HSF seeks leave of this Honourable Court to be admitted as *amicus curiae* in the Proceedings. The HSF requests that this Honourable Court issue directions to regulate the participation of the HSF in these proceedings. The HSF will, in any event, so as to further this matter, deliver its written submissions to the Court and the parties by 12:00 on Monday, 11 February 2019 (which will, of course, be conditional on the HSF being admitted as *amicus curiae*).

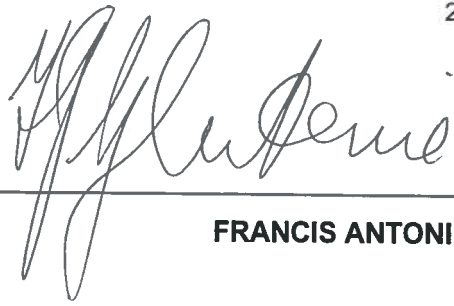
75. The HSF seeks an order giving it leave to:

75.1 lodge written submissions in this matter; and

75.2 present oral submissions at the hearing of this matter.

WHEREFORE, the HSF seeks the relief in the notice of application to which this affidavit is attached.

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FRANCIS ANTONIE

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to before me at Klynburg on this the 6 day of February 2019, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



 06190388
Cpt
COMMISSIONER OF OATHS

Full names: Johan Muller.

Business address: SAPS churchstreet klynburg

Designation: captain.

Capacity: Captain



WEBBER WENTZEL

in alliance with > Linklaters

JS Marais
Adams & Adams
 Applicants' Attorneys
 4 Daventry Street
 Pretoria

By email: jac.marais@adams.africa;
Thando.manentsa@adams.africa;
moya.vaughan-williams@adams.africa;
Mpumelelo.ndlela@adams.africa

State Attorney
 Respondents' Attorneys
 316 SALU Building
 Corner Francis Baard & Thabo Sehume Streets
 Pretoria

By email: rsebelemetsa@justice.gov.za

90 Rivonia Road, Sandton
 Johannesburg, 2196
 PO Box 61771, Marshalltown
 Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
 F +27 11 530 5111

www.webberwentzel.com

Your reference

Our reference

Date

V Movshovich / P Dela / D Cron /
 D Rafferty / L Pillay

5 February 2019

Dear Sirs

Robert McBride and Another ("the applicants") // Minister of Police ("Minister") and another (GP case no 6175/19) ("the application")

1. We refer to the application and confirm that we act for the Helen Suzman Foundation ("HSF").
2. The HSF only recently became aware of the application. After taking legal advice as quickly as it was able, the HSF is of the view that it has a substantial interest in these proceedings on the basis of what is set forth below. In the circumstances, the HSF seeks the parties' consent to intervene as *amicus curiae* in the application.
3. The HSF is a non-governmental organisation whose objectives are to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights. The HSF is an organisation primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law, all of which are implicated in this matter.

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: RB Africa NG Alp OA Ampofo Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink S Browne M5 Burger RI Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley KZ Dlothi G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman MM Gibson SJ Gilmour H Goolam CI Gouws JP Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Holfeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CH Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok MD Kota J Lamb L Marais S McCafferty V McFarlane MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Molo NP Mngomezulu S Mogale VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips HK Potgieter S Rajah D Ramjettan GI Rapson NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Straeuli U Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Heulen M van der Walt N van Dyk A van Riekerk JE Veeran D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson M Yudaken Chief Operating Officer: SA Boyd



4. In addition, the HSF was granted leave to intervene as *amicus curiae* in the matter of *McBride v Minister of Police and Another* 2016 (2) SACR 585 (CC). Not only does the application rely heavily on that judgment, but also at least two other matters concerning constitutional requirements pertaining to the institutional and operational independence of key state institutions, where the HSF played a central role: *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) and *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).
5. The submissions which the HSF intends to make may be broadly outlined as follows:
 - 5.1 Independent policing bodies ie bodies which are sufficiently protected from executive, political and other interference are indispensable in the fight against, *inter alia*, corruption and organised crime. This is particularly so in the context of an organisation such as Independent Police Investigative Directorate ("IPID"), which is constitutionally mandated to investigate the guardians of our constitutional democracy. Where these bodies' independence is undermined, it will in turn impact on the capacity of these bodies to effectively and efficiently combat these vices and fulfil their constitutional and legislative mandates, as fortified by international law.
 - 5.2 The Constitutional Court has recognised non-renewable terms of office of such bodies as a central feature of independence. To the extent that renewable terms are permitted however, as is the case in the renewable term of office of the Executive Director of the IPID, the decision to renew the term of office should not depend on political judgement or lie with any political actor, including members of the Executive or Parliamentary Portfolio Committees. This is necessary in order sufficiently to protect independent policing bodies from political interference. These constitutional imperatives are reinforced by international jurisprudence.
 - 5.3 A renewal of a term of office is qualitatively different from an initial appointment, as there is a greater opportunity for political favouritism and perverse incentives and disincentives in the former. The actions of the independent body may be impermissibly influenced by the potential for renewal or non-renewal if the decision to renew is left to the discretion, and in this case completely unguided discretion, of a political actor. The renewal thus cannot, as a matter of constitutional principle, be left to political happenstance.
 - 5.4 For this reason, the HSF intends to make written and oral submissions that the term contemplated in section 6(3) of the IPID Act is renewable at the instance only of the Executive Director of the IPID and not the Minister (or a parliamentary committee). This would result in a constitutionally compliant reading of that section. A different reading, which places that decision in the hands of a political actor, would not promote or fulfil constitutional rights or requirements, and would open the door to undue political interference, or the risk of an apprehension of such interference.
 - 5.5 In the alternative, and in the event that the applicants succeed in having the Portfolio Committee on Police directed to take the decision on whether to renew Mr McBride's term of office, the HSF intends to make written and oral submissions on the need for broader just and equitable relief, in the exercise of the Court's power under section 172 of the Constitution, to ensure that the Minister is interdicted from appointing a new Executive Director, and that Mr McBride's tenure is maintained



until a decision to renew Mr McBride's term of office is taken by the Portfolio Committee on Police. Such relief is necessary to protect the integrity of the office of the Executive Director and to ensure that Mr McBride's ability to be restored to his position is not irreparably harmed by the appointment of a new Executive Director in the period during which the Portfolio Committee must take this decision.

6. The HSF has a clear interest in these proceedings and believes that its submissions will be of material benefit to the Honourable Court hearing the matter. Its submissions will, in substance, differ from the submissions of the applicants and respondents.
7. Given that the application is set down for hearing on 12 February 2019, please let us know by no later than 17:00 on 5 February 2019 and in writing whether your respective clients consent to the HSF being admitted as *amicus curiae* in this matter. For that purpose, please direct correspondence directly to the writer at vlad.movshovich@webberwentzel.com

Yours faithfully



R

WEBBER WENTZEL

V Movshovich

Direct tel: +27 11 530 5867

Direct fax: +27 11 530 6867

Email: vlad.movshovich@webberwentzel.com



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COMMERCIAL, PROPERTY & LITIGATION ATTORNEYS

Adams & Adams

EMAIL MESSAGE

To: vlad.movshovich@webberwentzel.com

From: jac.marais@adams.africa

Cc: Thando.manentsa@adams.africa
Moya.vaughan-williams@adams.africa
Mpumelelo.ndlela@adams.africa

PRETORIA OFFICE: Lynnwood Bridge, 4 Davenport St,
Lynnwood Manor, Pretoria, South Africa

PO BOX 1014, Pretoria 0001, South Africa
DOCEX 81 Pretoria

PHONE +27 12 432 6000
FAX +27 12 432 6599
EMAIL mail@adams.africa
WEB www.adams.africa

Our Reference: JSM/TDM/MV-W/mnn/
LT4287

Your Reference: V Movshovich

Date: 5 February 2019

WEBBER WENTZEL
Johannesburg

ATTENTION: V MOVSHOVICH

Dear Sirs

ROBERT MCBRIDE & THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE // MINISTER OF POLICE & PORTFOLIO COMMITTEE ON POLICE
CASE NO: 6175/19

1. Your letter of earlier today bears reference.
2. Our clients consent to the Helen Suzman Foundation being admitted as *amicus curiae*, subject thereto that, this does not jeopardise the timelines for the hearing of the application on 12 February 2019.

Yours faithfully
ADAMS & ADAMS

J MARAIS

Checked and signed by author and sent electronically

OFFICES: Pretoria | Johannesburg | Cape Town | Durban ASSOCIATE OFFICES: Angola | Botswana | Burundi | Cameroon (OAPI) | Cape Verde | Egypt | Ethiopia | Ghana | Kenya | Lesotho | Liberia | Libya | Mozambique (ARIPO) | Namibia | Nigeria | Sierra Leone | São Tomé and Príncipe | Swaziland | Tanzania (including Zanzibar) | The Gambia | Zimbabwe
Partners: Dario Tantiari | Johan du Preez | Colin MacKenzie | Nelia Hickman | Mariëtte du Plessis | Samantha Copeling | Gérard du Plessis | Phil Pia | Louis van der Walt | Russell Bagnall | Simon Brown | Grégor Waller
Joseph Goedhals | Blain de Villiers | André Visser | Eugene Honey | Darren Olivier | Nolwazi Gcoba | David Scheepers | Megan Moerdijk | Kelly Thompson | Nolo Khechane | Janice Galvad | Nishi Chetty | Lucy Signorelli
Steven Yeates | Johnny Fiandeiro | Leander Oppelman | Jenny Pienaar | Danie Dohmen | Alexis Apostolidis | Bilkis Daby | Debbie Marriott | Lauren Ross | Dale Healy | Mandy Swanepoel | Roelof Grové | Nicolette Koch
James Davies | Nicky Garnett | Vishen Pillay | Godfrey Budell | Jac Marais | Nthabisheng Phaswana | Nishan Singh | Pieter Visagie | Dieter Welthagen | Ferdi Myburg | Somayya Khan | Danie Strachan | Weirna Griffiths
Senior Consultants: Chris Job | Craig Forbes | Gavin Kotze | Ilse Dijkstra
Associates: Deborah Marsicano | Therése Davis | Claire Bothma | Udi Pillay | Amina Suliman | Nicole Smalberger | Nandumiso Msimang | Wynand Fourie | Wensel Britz | Kim Rampersadh | Lila-Mili Gamala
Jan-Harm Swanepoel | Dakalo Luvhimi | Kerry Wiers | Richard Wiers | Kareema Shaik | Femke Van Dyk | Jean-Louis La Grange | Vuyokazi Ndamse | Nicole Hawarth | Jevonne Le Roux | Tayyiba Nalla
Lisa Van Zuydam | Thando Manentsa | Alisa Nayanah | Helgard Janse Van Rensburg | Ishaad Savant | Jeanette Visagie | Misha Van Niekerk | Melissa Dreyer | Nazi Naidoo | Nevashni Pillay | Robyn Müller-Mabuza
Ramon Pereira | Julie-Anne Tazer | Jean-Francois Brunecu | Shani Van Niekerk | Lieke-Mari Van Dyk | Alicia Heyneke | Thembu Khoza | Lavashnee Mandy | Delia Veeran | Shmuel Moch | Donald Makgelle
Sophia Smallbones | Danni Pretorius | Christoff Pretorius | Jameel Hamid | Shaina Steyn | Charleen Rupnarain | Nicholas Rosslee | Michael Lamont | Aslam Patel | Neale Christy | Maureen Makoko | Tamlynn Avis
Robyn Adams | Yingxani Ndhlalose | Lebohlang Mosala | Denel Campbell | Esmé Voogt | Nolo Gungubele | Khanyisa Mapipa | Hugo Biermann | Thapelo Montang | Daniëlle van Rooyen | Gabriela Dzaha
Sisipho Ngama | Mthokozisi Maphumulo | Sbangakanke Khumalo | Jessica-Jade Faint | Sibusise Khusi | Melissa Scorer | Leane Voerman | Wilhan Meinljes | Thandeka Mhlongo | Masimbonge Mshali | Anke Olivier-Kok
Lelthabo Moloto | Raphael Pswa
Chief Operating Officer: Dave Forbes

Level 4 BBBEE Contributor rating



From: Sebelemetsa Ramathiti <RSebelemetsa@justice.gov.za>
Sent: 05 February 2019 18:05
To: Lavanya Pillay; Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty
Cc: jac.marais@adams.africa; Thando.manentsa@adams.africa; moya.vaughan-williams@adams.africa; Mpumelelo.ndlela@adams.africa
Subject: RE: McBride and Another // Minister of Police and Another (GP case no 6175/19)
Importance: High

Afternoon

Be informed that the Respondents' will not oppose the admission of the HSF as *amicus curiae*.

Trusting you find the above in order.

Best,

Ramathiti Joseph Sebelemetsa
Senior Assistant State Attorney
Office of the State Attorney – Pretoria
Tel: 012 309 1623
Direct Fax: 086 507 1910
Cell: 071 870 2442
Email: rsebelemetsa@justice.gov.za
Alternative Email: ramatics@gmail.com
Website: www.justice.gov.za

"Vanhu I Swivumbiwa Swo Hlamarisa."

From: Lavanya Pillay [<mailto:Lavanya.Pillay@webberwentzel.com>]
Sent: 05 February 2019 10:08 AM
To: jac.marais@adams.africa; Thando.manentsa@adams.africa; moya.vaughan-williams@adams.africa; Mpumelelo.ndlela@adams.africa; Sebelemetsa Ramathiti
Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty
Subject: McBride and Another // Minister of Police and Another (GP case no 6175/19)
Importance: High

Dear all

Please find attached correspondence for your urgent attention.

Yours faithfully



JM

Lavanya Pillay
Trainee Attorney

WEBBER WENTZEL

in alliance with > Linklaters

T: +27115305078 M: +27737729947

E: lavanya.pillay@webberwentzel.com
www.webberwentzel.com

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Handwritten signature and initials, possibly 'JM', located in the bottom right corner of the page.