IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG 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

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HELEN SUZMAN FOUNDATION'S HEADS OF ARGUMENT

INTRODUCTION

1. These proceedings are centrally concerned with the correct interpretation of section 6(3)(b) of the Independent Police Investigative Directorate Act, 2011 ("**IPID Act**").

2. The Constitutional Court has already had occasion to consider the independence of IPID, and held as follows:

> "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary*

according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."[1]

3. The Court went on to turn its face against "*conduct [that] has the potential to expose IPID to constitutionally impermissible executive or political control*".[2] Said the Court:

"*That action is not consonant with the notion of operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution*."

4. Even more vigilance is required in the case of renewals. The Constitutional Court has held that renewals left to the discretion of political actors strike at the very heart of independence and are inconsistent with the Constitution.[3]

5. The applicants and the respondents put up differing interpretations of section 6(3)(b). Common to these interpretations, however, is that the renewal power vests in a political actor, and the failure timeously to exercise this power will allow for an appointment of an acting Executive Director without the safeguards which apply for permanent appointments.

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1 *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) ("***McBride***") para [35], quoting a report by the Organisation for Economic Co-operation and Development titled: "*Specialised Anti-corruption Institutions: Review of Models*", which was cited with approval by the Constitutional Court in *Glenister.*

2 *McBride* at para [40].

3 *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) ("***JASA***"), para [73]; and *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) ("***Helen Suzman Foundation***"), paras [78] to [82].

6. With respect, and as will be demonstrated by the HSF (should it be granted leave to intervene in these proceedings), none of these interpretations of section 6(3)(b) is correct or constitutionally compliant.

7. Should it be admitted as *amicus curiae*, the HSF intends to place before this Court what it contends is the correct interpretation of section 6(3)(b), seen in its proper constitutional context. The HSF's interpretation is the only interpretation which vindicates the Constitution and is consistent with Constitutional Court precedent.

8. 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.

9. The HSF thus brings its 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 and any proposed order that might be agreed between the parties or adopted by the Court.

10. Accordingly, the HSF's admission as *amicus curiae* will, it is submitted, greatly benefit the Court in considering the correct, constitutionally compliant interpretation of section 6(3)(b) of the IPID Act. The HSF's admission is not opposed by any of the parties.

STANDING AND THE TEST FOR ADMISSION AS *AMICUS CURIAE*

Standing

11. 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, the rule of law, as well as South Africa's constitutional and international law obligations, all of which are implicated in this matter.

12. The Applicants seek an order in these 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 and directing the second respondent, the parliamentary Portfolio Committee on Police, to decide on Mr McBride's renewal. 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 independence of IPID. Moreover, not only must IPID in fact be independent, but it must be seen to be independent.

13. 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 section 6(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 case law and international best practice.

14. 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.

15. 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.

16. 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 (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).

17. The HSF thus seeks to intervene as *amicus curiae* in the Proceedings, in its own interest and in the public interest,[4] 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.

18. The HSF has sufficiently demonstrated that as an organisation which is primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law, its rights and interests are affected by the unlawful decision of the Minister as well as the incorrect interpretation proffered by the parties in relation to section 6(3)(b) of the IPID Act. In addition, the public interest in this case is not found in whether or not the public is interested in who the head of IPID is, but rather the interest that all South Africans have in the rule of law, the requirements for a properly functioning constitutional democracy and, in particular, the urgent steps necessary to root out corruption in our nascent democracy.

19. If effect were to be given to the parties' conceptualisation of the legislative framework, IPID would be insufficiently insulated from executive interference with

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[4] Cameron J concisely summarises, at paragraph [41] of *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) the jurisprudential requirements for own-interest standing. In relation to public interest standing, see *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para [233] - [234]; *Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others.*

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 parties' interpretations also fall short of the requirements of South Africa's international treaty obligations.

20. The submissions by the HSF are relevant and will assist the Court as such submissions have not been advanced by the parties in 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.

21. 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.

22. Should the HSF be admitted as *amicus curiae*, it will advance the submissions set out in these heads of argument.

Test for amicus intervention

23. 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 has also not been opposed.

24. The test of intervention as an amicus curiae has been espoused clearly by the Supreme Court of Appeal in the matter of *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) more famously known as the Al-Bashir judgment ("***Al-Bashir***").[5]

25. While *Al-Bashir* set out the test of admission as *amicus curiae* in terms of Rule 16 of the Supreme Court of Appeal Rules, it is clear from a reading of Rule 16A of the High Court Rules (applicable in this case) that the same principles would apply. In terms of both Rule 16 and 16A, an applicant for admission as *amicus curiae* must:

25.1 briefly describe the interest of the *amicus curiae* in the proceedings;

25.2 briefly identify the position to be adopted by the *amicus curiae* in the proceedings; and

25.3 clearly and succinctly set out the submissions which will be advanced by the amicus curiae; the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties.

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[5] Paragraph 26 to 30.

26. The Court in Al Bashir held[6] that in making submissions, an *amicus* is not permitted to traverse ground already proffered by the parties, but is confined to making submission on the new contentions that it wishes to place before the Court. In addition, these new and different contentions must be clearly stated.

27. Most importantly, the Court in *Al-Bashir* held[7] that new contentions are those which materially affect the outcome of the case. The Court reasoned that whilst it is not possible to be prescriptive in this regard, prospective *amici* must start by considering the nature and scope of the dispute between the parties and, on that basis, determine whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of a matter.

28. For the reasons set forth above, the HSF satisfies the test to be admitted as *amicus curiae*.

STATUTORY INTERPRETATION PRINCIPLES

29. Section 39(2) of the Constitution provides as follows:

> *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."*

30. The advent of our constitutional democracy with the principle of the supremacy of the Constitution that it introduced requires a fundamental change to the way in which the

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6 At paragraph [29].

7 At paragraph [30].

task of statutory interpretation is carried out.[8] The effect of the supremacy of the Constitution is that the Constitution permeates every corner of the law. This means the starting point is no longer what the statutory provision says but what the Constitution says.

31. This is particularly so in the context of a statute which is a direct product of a constitutional injunction or seeks to give effect to the Constitution.

32. Where a statutory provision is reasonably capable of a construction that would bring it in line with the Constitution, it is that construction which must be preferred. This means that a court interpreting a statute has a duty to first consider whether the statute is capable of a construction that will bring it within constitutional bounds. In addition, when faced with the choice of several possible interpretations, the interpretation which is most constitutionally compliant must be the one which is followed by the Court.

33. This duty was set out by the Constitutional Court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors and Others v Smit NO and Others*[9] ("**Hyundai**") as follows:

> *"[22] The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to*

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8 *Marshall and Others v Commissioner, South African Revenue Service* 2018 (7) BCLR 830 (CC) ("***Marshall***"), para [10].

9 2001 (1) SA 545 (CC).

examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

[23] In De Lange v Smuts NO and Others, Ackermann J stated that the principle of reading in conformity does —

> *"no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution."*

Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.

[24] Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in

conformity with the Constitution". Such an interpretation should not, however, be unduly strained."[10]

34. In *Tshwane City v Link Africa*,[11] the Constitutional Court held as follows:

"*Section 39(2) tells courts they must interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. That is our first duty in interpreting legislation. All legislation must be enacted, and all public power must be exercised, in accordance with the Bill of Rights. The Bill of Rights applies to all law. It is pivotal to the interpretation of all legislation and to the development of customary law and the common law. It bears directly on disputes that are subject to legislation and other laws connected with constitutional rights.*

This is what this court has always understood s 39(2) to demand: that judges read legislation, where reasonably possible, in ways that give effect to the Constitution's fundamental values. …

When this court interprets legislation, it must avoid conflicts with the Constitution where reasonably possible. We must give preference to interpretations that fall within constitutional bounds. Our only constraint is the lawyer's daily tool: language. The ordinary, elementary, meaning of words must not be strained."

35. Moreover, "*statutory provisions should always be interpreted purposively*" and "*the relevant statutory provision must be properly contextualised*".[12]

36. It is further trite that legislation must be understood holistically and interpreted within the relevant framework of constitutional rights and norms,[13] paying heed to the

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10 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) paras [22] - [24]

11 2015 (6) SA 440 (CC), paras [114] to [117].

12 *Ibid*, para [115].

language used as well as the purpose and context of the statute, and judicial officers must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant.[14]

37. Sections 39(1)(b) and 233 of the Constitution reinforce the importance of international law. In terms of section 233, "*[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*". Section 39(1)(b), on the other hand, requires the Court to take account of international law when interpreting the Bill of Rights.

STATUTORY INTERPRETATION IN THE CONTEXT OF THIS CASE

IPID's constitutional and statutory mandate

38. Section 206(6) of the Constitution requires that "*an independent police complaints body [must be] established by national legislation [to] investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.*" Section 205 of the Constitution reinforces the central role that the SAPS plays in law enforcement and the protection and fulfilment of the rights in the Bill of Rights: "*The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*"

39. The IPID Act recognises its constitutional underpinnings, the critical role played by IPID and the peremptory requirements of independence. The Preamble to the Act

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13 *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), para [18].

14 *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (6) SA 115 (CC), para [12] (see also paras [13] and [14]).

states that that legislation is enacted in recognition of section 206(6) of the Constitution and the fact that "*Chapter 2 of the Constitution provides for the upholding and safe-guarding of fundamental rights of every person*".

40. The objects of the IPID Act include:[15]

40.1 "*to give effect to the provision of section 206(6) of the Constitution establishing and assigning functions to the Directorate on national and provincial level*";

40.2 "*to ensure independent oversight of the South African Police Service and Municipal Police Services*";

40.3 "*to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service and Municipal Police Services*" and

40.4 "*to enhance accountability and transparency by the South African Police Service and Municipal Police Services in accordance with the principles of the Constitution*".

41. Section 4 of the IPID Act expressly refers to the requirement of independence and impartiality and places positive obligations on all organs of state to ensure that IPID remains independent and impartial at all times: "*The Directorate functions independently from the South African Police Service*" and "*[e]ach organ of state must assist the Directorate to maintain its impartiality and to perform its functions effectively.*"

42. IPID has an especial role in our constitutional framework given its constitutional objective to investigate and eradicate corruption and other abuses of power, and its

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[15] Sections 2(a), (b), (d) and (g) of the IPID Act.

unique mandate to guard the guardians of our criminal justice system. It is plain, so as effectively to fulfil the mandate of IPID, that its head must be sufficiently insulated from political interference and discretion. The safeguards in the context of IPID should be even more rigorous than in the case of other independent bodies, given that IPID has direct oversight functions over the SAPS.

Independent institutions under the Constitution

43. In *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) ("***Glenister***"), the Constitutional Court emphasised that the protections which the Constitution requires for an independent constitutional body must be seen within the broader context of that body's mandate and purpose, and the rights which it seeks to safeguard.

44. The Constitutional Court recognised that corruption is a scourge that must be rooted out of our society and that it has the potential to undermine the ability of the state to deliver on many of its obligations in the Bill of Rights, notably those relating to social and economic rights.[16]

45. The Constitutional Court in *Glenister* also recognised an obligation arising out of the Constitution for the government to establish effective mechanisms for battling corruption, including the Directorate for Priority Crime Investigation ("**DPCI**").[17] It accepted that corruption has a deleterious impact on a number of rights in the Bill of Rights and that the state has a positive duty under section 7(2) to prevent and combat corruption and organised crime and that, in giving content to the obligations

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16 *Glenister* para 83.

17 *Glenister* para 84.

of the state in section 7(2), a court must consider international law as an interpretive tool.[18]

46. The Court held that for the DPCI effectively to discharge its responsibilities as an independent institution under the Constitution, it must not be subject to undue influence.[19] The Court held that what is crucial, in relation to an anti-corruption agency, is whether it enjoys an adequate level of structural and operational autonomy, secured through institutional and other legal mechanisms aimed at preventing undue influence.[20]

Role of international law

47. In *JASA,* which dealt with the issues of judicial independence, the Constitutional Court stated that:

> "*The constitutional and statutory provisions at the core of this matter must be interpreted within the context of the Constitution and its values as a whole. International law is relevant. Section 233 of the Constitution requires courts to draw guidance from international law in the interpretation of legislation. In terms of section 39(1), international law must and foreign law may be considered in the interpretation of the Bill of Rights.*"[21]

48. As stated in the recent judgment of the Constitutional judgment in *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51 (11 December 2018) ("***Law Society***"), citing section 233 of the Constitution, *"[o]ur Constitution also insists that [the courts] not only give a*

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18 *Glenister* para 106

19 *Glenister* para 116.

20 *Glenister* para 124.

21 JASA para [37].

reasonable interpretation to legislation but also that the interpretation accords with international law."

49. That case, referring to para 178 of *Glenister*, stated that the Constitutional Court "*spoke poignantly about the legal and constitutional implications of Parliament's resolution to approve an international agreement:*

> *"[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measures of the State's conduct in fulfilling its obligations in relation to the Bill of Rights*.""[22]

50. Thus, as confirmed by the Constitutional Court, our courts are enjoined by the Constitution to interpret legislation in light of and to give effect to international law. When interpreting legislation, a Court must thus prefer an interpretation that accords with international law. This is both a direct requirement of the Constitution[23] and required to render a constitutionally compliant interpretation.

51. Relevant international law to be considered, includes both binding as well as non-binding sources of law. In *Glenister* at para 178, the Constitutional Court "*made it plain that [the Court] is entitled to consider both binding and non-binding instruments of international law.*"[24]

<u>The relevant international instruments</u>

52. There are a number of international instruments that require states to take measures to ensure anti-corruption bodies are adequately independent by, *inter alia*, de-

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22 *Law Society* at para [74].

23 Law Society at para [6].

24 *Glenister* para [178] fn 28.

politicising decisions when required to ensure that officials are shielded from undue influence.

53. Article 9(2) of the United Nations Convention against Transnational Organized Crime (to which South Africa is a State Party)[25] states that "*[e]ach State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions*" (emphasis added). This provision places duties on states to ensure independence, which must include measures to ensure officials of anti-corruption bodies cannot be subjected to undue influence.

54. Article 6(2) of the United Nations Convention against Corruption (to which South Africa is a State Party)[26] states that "*[e]ach State Party shall grant [anti-corruption bodies] the necessary independence, in accordance with the fundamental principles of its legal system, to enable the [bodies] to carry out its functions effectively and free from any undue influence*." This provision requires legislation that ensures necessary independence of anti-corruption bodies such as IPID, by ensuring that they operate free of undue influence. In addition, it states that such measures must be in accordance with the fundamental principles of our legal system ie the Constitution.[27]

55. The Organisation for Economic Co-Operation and Development ("**OECD**") undertook a review of the models of the various specialised anti-corruption institutions internationally and delivered a 2008 report in that regard, titled *Specialised Anti-*

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25 Adopted by the UN General Assembly on 15 November 2000, by resolution A/RES/55/25 and in force from 29 September 2003. Signed by South Africa on 14 December 2000 and ratified on 20 February 2004.

26 Adopted by the UN General Assembly on 31 October 2003, by resolution 58/4 and in force from 14 December 2005. Signed by South Africa on 9 December 2003 and ratified on 22 November 2004.

27 This was confirmed in *Glenister* at para [123].

corruption Institutions: Review of Models ("**the OECD Report**").[28] The following are extracts from the OECD Report that reflect international experience and best practice:

> "*Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body. …Transparent procedures for appointment and removal of the director together with proper human resource management and internal controls are important elements to prevent undue interference*.[29]
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> …
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> *In short, independence, first of all entails de-politicisation of anti-corruption institutions. …Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge with preventive functions. …In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case*" (emphasis added)

56. The OECD Report supports the view that independence requires the de-politicisation of anti-corruption institutions in relation to aspects where risks of undue influence are manifest, such as renewals. This is why non-renewable terms of office of heads of anti-corruption bodies are considered the best option.

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[28] In compiling the Report, the OECD drew criteria from the UN Convention Against Corruption, and considered best practices from the 35 OECD countries. South Africa is one of seven non-OECD member countries that is party to it.

[29] OECD Report at p10

57. Importantly, the OECD Report stressed that "*it is the responsibility of individual countries to find the most effective and suitable institutional solution to the local context and level of corruption*",[30] since "*[t]he level of required independence is therefore closely linked with the level of corruption in a given country*".[31]

58. The Constitutional Court endorsed these observations by the OECD in *Glenister*, even though the report is considered non-binding. It held that courts may have regard to reports prepared by international bodies, such as the OECD Report, on the basis that although "*the OECD report is not itself binding in international law, [it] can be used to interpret and give content to the obligations in the conventions that we've described [referring to the two conventions above]*."[32]

59. This means that when a South African court considers what the Constitutional Court described as the "adequacy of independence", it must be alive to the nature and prevalence of corruption – it must be responsive to context. And in that context, it must consider the risks attendant to independence where undue influence is most likely to manifest or be perceived to manifest, such as renewals.

<u>Renewability of the type contended for by the applicants and respondents is plainly unconstitutional</u>

60. In *Glenister*, the Constitutional Court, when assessing whether certain provisions of the legislation governing the DPCI adequately protected the independence of the institution, relied on the above international conventions (read with the OECD report) in concluding that certain sections of that legislation were unconstitutional on the basis of the following:

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30 OECD Report p 26.

31 OECD Report p 17.

32 *Glenister* para [178].

"*[w]e have concluded that the absence of specially secured conditions of employment, the imposition of oversight by the 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*"[33]

and

"*we 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.*"[34]

61. In the case of the DPCI, with which the *Glenister* case was concerned, the legislation provided that the National Head of the DPCI would be required to retire at the age of 60, unless retained by the Minister of Police.

62. The section in question was not substantially modified in the amending legislation, which still allowed the Minister and Parliament to decide whether and for what period, the tenure of the National Head should be extended.[35]

63. This led the Constitutional Court to hold as follows in *Helen Suzman Foundation*:[36]

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33 *Glenister* para [248].

34 *Glenister* para [249]. The international law referred to in *Glenister* was also relied *Helen Suzman Foundation*.

35 The relevant legislative provisions were as follows:

"(15) The Minister shall with the consent of the National Head or Deputy National Head of the Directorate, *retain* the National Head, or the Deputy National Head of the Directorate, as may be applicable, *in his or her office* beyond the age of 60 years for such period which shall not—

(a) exceed the period determined in section 17(CA); and

(b) exceed two years, except with the approval of Parliament granted by resolution.

(16) The National Head or Deputy National Head of the Directorate *may only be retained* as contemplated in subsection (15) if—

(a) he or she wishes *to continue to serve in such office*; and

(b) *the mental and physical health of the person concerned enables him or her so to continue*." (emphases added)"

"*[78] Subsections (15) and (16) apply to a National Head or Deputy National Head who would have reached the age of 60 years and would thus be expected to retire. The possibility of a continuation in an office by an incumbent, who is mentally and physically healthy and willing to continue beyond the age of 60 years, would only arise when that age has already been reached. No one can tell reliably whether her health permits continuation beyond 60 years, seven years in advance. This continuation is renewal or extension of tenure by another name. It would obviously happen if the Minister is inclined to allow continuity. After all she has the countervailing discretion to renew or not to renew. But for factors like health and willingness that would inform the Minister's decision to allow or not allow the National Head or the Deputy National Head to continue in office, no guidelines for renewal are set out in the section. And that is how virtually unfettered the Minister's discretion is.*

[79] The words "retain", "may only be retained" and "continue to serve in such office" and the requirement that one could serve beyond the age of 60 years if the "mental and physical health of the person concerned enables him or her so to continue", all suggest that subsections (15) and (16) are about the extension of the term of office when the incumbent reaches the age of 60 years but not at the time of the assumption of office. One cannot be retained in an office before she assumes that position. Similarly, to continue in an office presupposes that one would have been working in that office before.

[80] This favour, extendable to these functionaries on undisclosed bases, has great potential to compromise the independence of the affected official and by extension the DPCI. The incumbent would have known at the time of

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[36] Paragraphs [78] to [82] (emphases added, except where indicated otherwise).

appointment that she might, by reason of age, require an extension at the age of 60 years. And that could affect the independence of the incumbent. It is for this reason that the Court in Glenister II observed that—

> *"[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."*

While dealing with conditions of service, Glenister II remarked as follows on the impact of the renewability of terms of office on independence:

> *"[T]he lack of employment security,* including the existence of renewable terms of office *. . . are incompatible with adequate independence." (Emphasis added.)*

[81] The danger of renewability was also dealt with in JASA. Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to "behave" herself in anticipation of renewal.

[82] The extension of the term of office of the National Head and the Deputy National Head in terms of section 17CA(15) and (16) has in a way been decided by Glenister II and is inimical to the adequacy of the independence of the DPCI. It is incompatible with the independence necessary for the National Head and Deputy National Head to be faithful to their mandate. These subsections are constitutionally invalid."

64. Terms of office of independent institutions which are renewable in the hands, or at the instance, of any political actors (including Parliament) or third parties are incompatible with the requirements of adequate independence. The Constitutional Court could not have been clearer. This Court, just as the Constitutional Court in *Helen Suzman Foundation*, is bound by that finding.[37]

65. These findings are also consistent with other Constitutional Court dicta. By way of example, in *JASA*, the Constitutional Court had the following to say:

> "*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.*"[38] (emphasis added)

66. They are also fully supported by the international law instruments set forth above.

67. Ultimately, terms of office which are renewable at the instance of third party political actors invite or give the impression of rent-seeking and irremediably undermine independence. They are unconstitutional.

68. The interpretations which are advanced by the applicants and the respondents would render the IPID Act inconsistent with the Constitution and invalid.

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37 *Camps Bay Ratepayers' & Residents' Association v Harrison* 2011 (4) SA 42 (CC), para [28].

38 *JASA* para [73].

69. This Court has a duty, under the Constitution, to avoid that result, by giving the legislation a constitutionally compliant meaning, which does not unduly strain the language used in the legislation.

70. This is clearly possible, as we set forth below.

THE PARTIES' INTERPRETATION OF SECTION 6(3)(b)

71. 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.

72. 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 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.

73. The Portfolio Committee also favours an interpretation whereby it, after considering the Minister's recommendation, decides the issue.

74. Each of the interpretations advanced by the parties faces the insuperable obstacle of binding Constitutional Court authority, and the Constitution itself. In addition to what is set forth above, the following is noteworthy about the parties' interpretations.

The Minister's interpretation

75. 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.

76. This contradiction is telling.

77. 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: the Minister's recommendation, on his version, lays the foundation for the decision of the Portfolio Committee on renewal.[39] 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). The Minister's efforts to small-draw his role by describing it as a preliminary decision is thus of no assistance. As the Constitutional Court explained in *New Clicks*, (dealing with a challenge to recommendations that underpinned

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[39] See *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) at 718B/C-J and *Oosthuizen's Transport (Pty) Limited & others v MEC, Road Traffic Matters, Mpumalanga & others* 2008 (2) SA 570 (T).

subsequent regulations) any attempt to separate the recommendation of the Pricing Committee and the decision of the Minister would put "*form above substance*".[40]

78. 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 prerequisite for a consideration on renewal, then plainly it creates the possibility that an incumbent Executive Director who wished 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.

79. Even if this possibility does not arise in practice, the mere possibility itself gives rise to the perception of diminished independence. The Constitutional Court has stressed as follows in *Glenister II*:

> "*While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously*".[41]

80. The susceptibility to, and possibility of, undue influence is substantially enhanced in the context of a renewal as compared to the initial appointment. The Minister may, for ulterior purposes such as the incumbent's particularly effective campaign against

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[40] See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)* 2006 (2) SA 311 (CC) at para [137]); see also Ngcobo J at paras [440] to [442] in which he describes the recommendation and the Regulations as "*interlinked*", and states that "*[o]nce the process is complete, in the sense that the regulations are made, they become inseparable. They must therefore be seen as a single process.*"

[41] At para 222. See also paras 234 – 236.

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.

81. This is plainly 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.

82. 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).

83. The Minister's interpretation also creates a logical difficulty - if the Minister's recommendation is not to renew, and the Portfolio Committee does not endorse this, what then? Does a renewal occur? It is unclear whether, in such instances, a renewal would be automatic or whether a vacancy would then be created for the Minister to fill. The Minister’s interpretation may still not mean that any decision to affirm the renewal exists.

84. The above plainly illustrates why the Minister's interpretation cannot be a proper interpretation of section 6(3)(b) of the IPID Act.

The Applicants' interpretation still places power at a political level

85. 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 judgement,

without any guidelines, on the security of tenure of the Executive Director. This is precisely the kind of power that the Constitutional Court held to be unconstitutional in *Glenister*, *Helen Suzman Foundation* and *JASA*.

The Portfolio Committee's interpretation combines the worst of the two above interpretations

86. The Portfolio Committee contends that the Minister must first make a recommendation (which seemingly carries some weight) before it takes a decision, after seeking input from "*the various party structures that each member represents*".[42] This Committee, moreover, comprises a majority from the same political party as the Minister.[43] Given that the Committee records, on its own version, that its members seek input from the political parties to which they belong, it is plain that the decision whether to renew will be substantially informed by political considerations of the kind which directly undermine the independence and efficacy of an institution such as IPID. The possibility, and perception, of untoward political influence is palpable.

THE CORRECT INTERPRETATION

87. As stated above, the Constitutional Court has recognised that non-renewable terms of office of functionaries in independent public institutions are a central feature of independence.[44]

88. Terms which are renewable in the hands of the National Executive or a parliamentary committee are unconstitutional.

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42 2nd respondent's answering affidavit para 33.

43 *Ibid* para 66.

44 *JASA* para [73].

89. Where an individual is placed in high office with enormous powers, the prospect of renewal at the discretion of an individual or body should not exist as this has the possibility to shape how the incumbent exercises his or her powers, in the hope of securing a discretionary renewal. Even if this scenario does not play out in fact, the mere existence of such a renewal power will suffice to affect the perception of independence of that institution, which cannot be permitted.

90. The Constitutional Court held in *Glenister* that when determining the adequate independence of the Directorate for Priority Crime Investigations, the public perception of independence was an additional factor to consider beyond the actual structural and operational autonomy of the institution. To this end, the court held that "*public confidence that an institution is independent is a component of, or is constitutive of, its independence*," and that "*public confidence in mechanisms that are designed to secure independence is indispensible*."[45]

91. In this case, while the legislation refers to the term being renewable, it does not indicate at whose instance the term is renewed. This is left to interpretation.

92. In such an instance, the interpretation which gives effect to constitutional requirements and values must be favoured. And this interpretation is one that protects IPID's independence and ensures that renewal is not left to the discretion of politicians, for all the reasons set forth above.

93. In this context, it is important to recall the purpose of IPID and role of the Executive Director, as interpreted by the Constitutional Court:

> "*IPID is an independent police complaints body established in terms of section 206(6) of the Constitution. Section 4(1) of the IPID Act requires it to function*

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[45] *Glenister* at para [207] citing *S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) at para [32].

independently of SAPS. This is to ensure that IPID is able to investigate cases or complaints against the police without any fear, favour or prejudice or undue external influence. Section 4(2) of the IPID Act requires that each organ of state assist the Directorate to maintain its impartiality and to perform its functions effectively. Importantly, section 2 of the IPID Act requires IPID to play an oversight role over SAPS and Municipal Police Services. Given the nature, scope and importance of the role played by police in preventing, combating and investigating crime, IPID's oversight role is of cardinal importance. This is aimed at ensuring accountability and transparency by SAPS and Municipal Police Services in accordance with the principles of the Constitution.

IPID is headed by an Executive Director who is nominated by the Minister in terms of section 6(1) of the IPID Act. This nomination must be either confirmed or rejected by the Parliamentary Committee within a period of 30 parliamentary working days.

The Executive Director's responsibilities are set out in section 7 of the IPID Act. They include: providing strategic leadership to the Directorate;[27] appointing provincial heads of each province;[28] appointing such staff as may be necessary to enable the Directorate to perform its functions in terms of the Act;[29] giving guidelines concerning the investigation and management of cases by officials within the respective provincial offices, the administration of national and provincial offices and, the training of staff at national and provincial levels; referring criminal cases revealed as a result of an investigation to the NPA for criminal prosecution and notifying the Minister of such referral; ensuring that complaints regarding disciplinary matters are referred to the National Commissioner and where appropriate, the Provincial Commissioner; once a month submitting a summary of disciplinary matters to the Minister and

providing the Secretary with a copy thereof; and keeping proper records of all financial transactions, assets and liabilities of the Directorate, ensuring that the Directorate's financial affairs comply with the Public Finance Management Act and, preparing an annual report in the manner contemplated in section 32. The Executive Director is also the accounting officer of the Directorate. Evidently, his duties are extensive and wide."[46]

94. IPID, headed by its Executive Director, is thus of immense national importance. It is an essential organisation which gives effect to chapter 2 of the Constitution of the Republic of South Africa, 1996, by "*provid[ing] for the upholding and safe-guarding of fundamental rights of every person*".[47]

95. IPID's importance in our constitutional project is concretised by its corruption fighting function, particularly where that corruption may be in the ranks of those who have sworn to protect and serve the public, being the South African Police Service and Municipal Police Services. These bodies, in turn, house essential corruption fighting organisation themselves, including, for example, the "Hawks" (the DPCI).

96. IPID is thus the constitutional answer to the query *quis custodiet ipsos custodies*, ensuring that those who are mandated to root out corruption, uphold the law and prevent crime are not themselves guilty of corruption or unlawful conduct.

97. Given that members of the police, most particularly the DPCI, are charged with fighting corruption, often at an executive level, it is essential that not only are these bodies sufficiently independent, but the body which exercises oversight over them - namely IPID - is itself independent.

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46 *McBride* paras [24] - [26].

47 IPID Act preamble.

98. In assessing independence, the Constitutional Court has already grappled with the question as to "*[w]hat then does the independence of IPID mean?".* Paragraphs 31 to 39 of *McBride* traverse this issue, and it is telling that the following was described as useful and illuminating in trying to define and delineate the contours of independence as it pertains to the independence of IPID:

> "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference*."[48]

99. In *McBride*, the Constitutional Court decried the involvement of the Minister, adjudging the Minister's power of removal as being "*antithetical to the entrenched independence of IPID envisaged by the Constitution as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being*

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[48] *McBride* para [35], quoting the OECD Report referenced above, which was cited with approval by the Constitutional Court in *Glenister*.

manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not."[49]

100. In short, IPID and its Executive Director are of paramount national and constitutional importance, they must be independent and be seen to be independent, and independence is defrayed through any political interference or the possibility therefor.

101. In light of this, section 6(3)(b) plainly cannot be interpreted to afford the Minister or the Portfolio Committee any role in the renewal process.[50] This is particularly so where there are no objective criteria for renewal.

102. IPID must enjoy sufficient structural and operational autonomy so as to shield it from undue political influence; this can only be achieved by removing the option to renew from any political actor. Of course, the Portfolio Committee and Parliament are, similarly, political actors. Indeed, members thereof may even be the subject of DPCI investigations, with IPID in turn exercising oversight over the DPCI.

103. It is true that the Minister and the relevant Parliamentary Committee play a part in appointing the Executive Director. A renewal of a term of office is, as the Constitutional Court held, qualitatively different from an initial appointment, as there is a greater opportunity for political favouritism and perverse incentives and disincentives. 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.

104. The renewal thus cannot, as a matter of constitutional principle, be left to political happenstance.

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49 *McBride* para [38].

50 See, too, *McBride* para [39].

105. For this reason, the only constitutionally compliant interpretation which safeguards independence and the perception thereof is 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.

106. A different reading, which places that decision in the hands of <u>any</u> political actor, would not promote or fulfil constitutional rights or requirements, and would open the door to undue political interference, or the risk or apprehension of such interference.

107. The Executive Director would, of course, still remain subject to constitutionally compliant oversight through the mechanisms established in the Constitution and the removal powers under the IPID Act.

THE PARTIES' INTERPRETATIONS CARRY NO ADDITIONAL WEIGHT SIMPLY BY VIRTUE OF THEIR DESIGNATIONS

108. It may be argued that, as the Parties have views on the correct interpretation of section 6(3)(b) of the IPID Act and are, potentially, the actors thereunder, their understanding must carry some additional weight. This approach has expressly been rejected by the Constitutional Court on multiple occasions.

109. For example, in JASA it was held that "*The contention is faulty for yet another reason. It implies that the way in which Parliament understood the constitutional amendment that it approved is binding on the manner in which this Court must interpret the amendment. It cannot be so. Even if it were possible to arrive at this result, <u>we are obliged to determine objectively the meaning of the constitutional</u>*

provision irrespective of the meaning as perceived by Parliament"[51] (emphasis added).

110. Similarly, in dealing with whether the tax authorities' understanding and implementation of tax legislation would "*tip the balance in cases of ambiguous legislation*", such an approach was soundly rejected. As stated by the Constitutional Court, "*Missing from this reformulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided*."[52]

THE PROPOSED SETTLEMENT ORDER

111. On 6 February 2019, the applicants circulated a proposed settlement order ("**the settlement order**") in terms of which it was to be declared that the decision taken by the Minister not to renew the appointment of Mr McBride is a preliminary decision which must be confirmed or rejected by the Portfolio Committee. In addition, in terms of the settlement order, the Portfolio Committee is directed either to confirm or reject

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51 *JASA*, para [60].

52 *Marshall*, para [10].

the Minister's decision not to renew the appointment of Mr McBride on or before 28 February 2019.

112. It appears that the respondents have not accepted the applicants' settlement order.

113. Any settlement agreement to be made an order of court must not be objectionable, its terms must accord with both the Constitution and the law and its terms must not be at odds with public policy.[53] Any settlement order in this matter will necessarily amount to a pronouncement on rights *in rem*, determining the objective status of the Minister's decision and the rights and duties of the Portfolio Committee, and entail a consideration of the correct interpretation of section 6(3)(b) of the IPID Act. Any such order by a court, as confirmed by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others*,[54] requires argument in open court, must accord with and be justified by the merits of the matter and the relevant judge is required to produce a written judgment setting forth reasons for the decision. Such an order, unlike orders bearing simply on rights *in personam*, cannot simply be taken by agreement.

114. The parties thus cannot get away from the constitutional and interpretive merits of the case. As set forth in these heads of argument, in the HSF's submission, the proposed settlement terms do not accord with the requirements of the IPID Act and the Constitution.

CONCLUSION

115. The only constitutionally compliant interpretation is the one advanced by the HSF.

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[53] *Eke v Parsons* 2016 (3) SA 37 (CC) at paras [25] and [26].

[54] [2018] ZACC 33 (27 September 2018), paras [1] to [4].

116. The renewal of the term of office of the Executive Director of IPID must be at his instance, and his alone.

117. HSF prays to be admitted as *amicus curiae*. It submits that the Court should adopt HSF's interpretation of the IPID Act and for that reason grant the relief sought in paragraph 2 of the Applicants' notice of motion.

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11 February 2019