IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case no: **1054/15**

In the matter between:

THE HELEN SUZMAN FOUNDATION	Applicant
and	
MINISTER OF POLICE	First Respondent
LIEUTENANT GENERAL ANWA DRAMAT	Second Respondent
MAJOR-GENERAL BERNING NTLEMEZA	Third Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Fourth Respondent

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SHORT NOTE IN REPLY – HELEN SUZMAN FOUNDATION

INTRODUCTION

1. This note seeks to address issues and arguments raised by the First Respondent ("**the Minister**") in:

1.1 the Answering Affidavit dated (and signed) on 14 January 2015 ("**Answering Affidavit**"); and

1.2 the heads of argument ("**Minister's Heads of Argument**").

delivered to the applicant's attorneys on 15 January 2015 and 16 January 2015, respectively.

2. The majority of the Answering Affidavit and Minister's Heads of Argument are largely irrelevant for the purpose of determining the crisp legal issues before court. Accordingly, the applicant does not intend to repeat the arguments already traversed in its founding affidavit and short heads of argument nor does it seek to address the issue of urgency which has been decided in the applicant's favour. The response to the Answering Affidavit and Minister's Heads of Argument will thus be addressed under the following themes:

2.1 The applicant's *locus standi*;

2.2 Rendition and the Independent Police Investigation Directorate ("**IPID**") report ("**IPID Report**");

2.3 The true meaning of the South African Police Service Act, 1995, as amended ("**SAPS Act**") and the 2014 Constitutional Court Judgment in *Helen Suzman Foundation v President of the Republic of South Africa and Others* [2014] ZACC 32 (27 November 2014) ("**the 2014 Judgment**");

2.4 The misplaced reliance on the Public Service Act and SMS Handbook;

2.5 Hearsay; and

2.6 Declaratory relief.

3. Before proceeding to address the above topics, we point out that the Answering Affidavit was deposed to by the Minister on 14 January 2015, despite the representations made in Court by the counsel for the Minister on 15 January 2015 that the Minister was still considering a draft affidavit and that a signed or final affidavit was not available to be filed in Court on the

morning of 15 January 2015, but would only be available, at best, by close of business. The information provided by the Minister and his representatives was plainly misleading and had a material bearing on the Court's decision regarding postponement. As the Constitutional Court has recently held:

> "*Proper and reliable instruction from clients is indispensable for counsel to fulfil their ethical and legal duty to the Court. [41] All this rings with even greater resonance when an organ of state is one of the litigating parties. The Constitution imposes a positive duty on organs of state to assist courts and to ensure their effectiveness. Section 165(4) of the Constitution provides:*
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> > *"Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."*
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> *[71] This duty echoes obligations of organs of state under section 7(2) of the Constitution to respect, protect, promote, and fulfil the rights in the Bill of Rights, including "the right to have any dispute that can be resolved by the application of law decided in a fair public hearing". Failing to fulfil these obligations falls short of the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not. A court should be able to rely on the submissions of organs of state. Otherwise our very constitutional order would be undermined.*"[1]

4. The Minister's conduct in this matter is deserving of censure. In the circumstances, all wasted costs associated with the postponement must be borne by the Minister on a punitive scale.

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[1] *Zulu and Others v eThekwini Municipality* 2014 (4) SA 590 (CC) ("***Zulu***") at paras [70] - [71].

5. The applicant also notes with concern the assertion by the Minister that he intends to meet so as to "*engage with the second respondent*" "*to find a solution*".[2] This is done with reference to the second respondent's statement in his letter to the effect that he is tired of fighting the interference with his work and would, in that factual context, be prepared to take early retirement on condition that the suspension is lifted and with a view to preventing "any instability within the DPCI".[3] This "offer" to meet, which the Minister now opportunistically seeks to accept, is plainly made under duress in a constitutionally repugnant context. This kind of "dialogue", under the gun of an unlawful suspension, is precisely the kind of interference with the independence of the DPCI which our courts have been at pains to prevent. This simply accentuates the urgency of this matter.

6. As demonstrated below, the Minister simply has no answers to the case made by the applicant in this matter. His version (as set forth in his Answering Affidavit and the Minister's Heads of Argument) corroborates the applicant's version set forth in its founding papers and short heads of argument and provides further bases and cause for this Honourable Court to grant the urgent relief sought in the notice of motion without any further delay. The desperate nature of the Minister's defence is apparent at the outset from his unbecoming efforts to avoid the merits of the case on the basis of a technical argument on standing. The fact that the Minister has disputed the applicant's standing is alone a further basis for concern about the manner in which the Minister conducted himself in the discharge of his

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[2] Answering Affidavit para 53, page 24 [record page 84].

[3] Founding affidavit para 24, page 8 [record page 12]; "FA1" [record page 28].

constitutional duties; seeking to avoid the (public) judicial scrutiny of his conduct by calling in aid a meritless point.

7. The Constitutional Court has stressed that there is no good reason for adopting a narrow approach to the issue of standing in constitutional cases, stating that a broader approach to standing should rather be adopted, as being more consistent with the mandate given to the courts to uphold the Constitution.[4] Indeed, the type of restrictive approach to standing adopted by the Minister has been criticised by the courts.[5] Be that as it may, we deal firstly with the Minister's standing point by reference to various trite principles.

LOCUS STANDI

8. The Minister argues, at paragraph 5 of the Answering Affidavit, that the applicant:

> "*[seeks relief] on behalf of the second respondent in circumstances where the second respondent has not authorised the applicant to bring the application on his behalf, neither has he filed an affidavit supporting the application*. *The applicant has no right in law to bring an application on behalf of the second respondent…when there is no evidence whatsoever in the founding papers to the effect that the second respondent seeks to challenge the suspension in Court*"

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[4] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) ("***Ferreira***") at para [165].

[5] See *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C)at 556F-H; *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) at 625E; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para [16].

and further, that:

> *"[the applicant] has decided to be the guardian of the second respondent when the second respondent has the ability and capacity to act on his behalf and to bring an application to Court on his behalf if he so wishes*".

9. The Minister goes even further to argue, at paragraph 6 of the Answering Affidavit, that the "*applicant cannot act in the public interest when the aggrieved party is present and available to act on his own*" and, that the applicant thus cannot rely on the provisions of section 38 of the Constitution because in order to do so, the applicant would have "*to demonstrate in the founding papers that the second respondent [was] unable to act in his own name and for that reason it was in the public interest that the applicant should so act*".

10. Finally, the Minister avers, at paragraph 8 of the Answering Affidavit, that "*there is no allegation in the founding papers as to why the second respondent is not a co-applicant in the application*".

11. The arguments raised by the Minister, with respect, demonstrate a fundamental misconception of law. The test for determining standing (whether own interest or public interest standing) has been pronounced upon and confirmed by our highest courts on numerous occasions. As will be demonstrated immediately below, the Minister is so far off the mark in his construction of the test of standing that he simply ignores decades of constitutional jurisprudence and a topic which has long been settled. Remarkably, the Minister ignores the very cases before the Constitutional

Court which resulted in the striking down of the legislation upon which he now seeks to rely.

12. First, it is unclear on what basis the applicant was required to obtain the co-operation or consent of the second respondent before bringing this application. It has never been contended that the applicant seeks relief "*on behalf of the Second Respondent*"[6]. This is not a requirement under the law on own-interest standing. Nor is it a requirement that the applicant must demonstrate the Second Respondent "*support[s] the application*".[7] It is, with respect, inconsequential that the Second Respondent is "*present and available to act on his own*". This fact is entirely irrelevant to the objective legal question of whether the Minister has acted in accordance with law in his attempts to remove the second respondent from office. It is telling that in over 20 years of constitutional jurisprudence, our courts have never held that the presence and availability of an individual to bring an application in its own name is a bar for another party to apply to court to protect and vindicate its rights and interests which have been affected by a particular decision.[8] The

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[6] Answering Affidavit para 4, page 2 [record page 62].

[7] Answering Affidavit para 5, page 3 [record page 63].

[8] Instructive in this regard is the decision of the Supreme Court of Appeal in *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA), where, as here, it was argued against Freedom Under Law that it could not pursue a complaint against Judge President Hlophe in circumstances where the Justices of the Constitutional Court had not themselves personally litigated the matter (it being recalled that Freedom Under Law had taken up a complaint which had been instituted, but ultimately not pursued, by the Justices of the Constitutional Court). The Supreme Court of Appeal rejected the standing argument and held as follows (at para [63]):

> "*There is no evidence that the Constitutional Court judges consider it in the interests of justice, the interests of the judiciary, the legal system and the country that the matter should be regarded as finalised. It is alleged that a very high ranking judge, the head of one of the biggest divisions of the high court, attempted to influence two of the judges of another court to decide a matter in a particular way. The allegation was considered to be so serious as to constitute gross misconduct which if established may justify the removal of the judge from office. It cannot be in the interests of the judiciary, the legal system, the country or the public to sweep the allegation under the carpet because it is being denied by the accused judge, or because an investigation will be expensive, or because the matter has continued for a long time.*"

applicant does not, in this application, purport to act on behalf of any other person as contemplated in sections 38(b) and (c) of the Constitution, so the second respondent's consent is irrelevant. The applicant instead relies on own interest and public interest standing, *inter alia* in sections 38(a) and (d) of the Constitution.

Own interest standing

13. The applicant brings this urgent application, firstly, in its own interest.[9] It is trite that our law accords generous rules for standing which permit applicants to seek relief either on their own behalf or on behalf of others.[10] It is further trite that constitutional standing is broader than traditional common-law standing.[11]

14. Cameron J concisely summarises, at paragraph 41 of *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*,[12] the jurisprudential requirements for own-interest standing as follows (footnotes excluded):

> "*1.To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.*

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[9] Founding Affidavit para 9, page 3 [record page 7]. Section 33 of the Constitution enshrines the right to just administrative action. The Promotion of Administrative Justice Act, 2000, was enacted to breathe life into section 33 of the Constitution which confers a right to challenge a decision in the exercise of a public power.

[10] *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others* 2013 (10) BCLR 1180 (CC) at para [1].

[11] *Ibid* at para [29].

[12] (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012 ("***Giant Concerts***")

2. This requirement must be generously and broadly interpreted to accord with constitutional goals.

3. The interest must, however, be real and not hypothetical or academic.

4. Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.

5. Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

6. Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed."

15. Even if the applicant's own interest standing is questionable (which is denied), this may not prohibit a court from hearing the matter, if the interests of justice so demand. As Cameron J held in *Giant Concerts*, "*there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable.*

When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest".[13]

16. The applicant 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 decisions of the Minister to suspend Lt Gen Dramat and to appoint Maj Gen Ntlemeza. In *Zulu*, the Constitutional Court stressed that as to the issue of standing, the Court's approach is to accept the facts set out by the applicant as regards its standing.[14]

17. The Minister has acted unlawfully and, moreover, has failed in his constitutional duty to protect the independence of the DPCI and uphold the rule of law in South Africa. This is a matter of such grave importance that it is undoubtedly in the interests of justice for the applicant to invoke section 38(a) of the Constitution and seek urgent relief from this Honourable Court. This is particularly so in the context of the applicants' involvement in ensuring that the DPCI is properly insulated from political interference and safeguarding the DPCI's independence, through its interventions as an *amicus curiae* in *Glenister II* and as an applicant in the 2014 Judgment.

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[13] *Ibid* at para [34].

[14] See para [32]: "*In determining whether a person has standing in a matter, a court is required to assume that the allegations made by that person in the case are true or correct. Accordingly we must decide this appeal on the basis that the averments by the appellants that they built shacks on the Lamontville property and have lived there since around September 2012 are true. That also means that we must accept, for purposes of this appeal, that the Control Unit has demolished the appellants' shacks or homes on 24 occasions after each of which the appellants rebuilt them*."

Public interest standing

18. It is now accepted in constitutional jurisprudence, and affirmed in section 38(d) of the Constitution, that a party may bring constitutional challenges *"in the public interest"*. This is, potentially, the most far-reaching of the grounds for standing under the Constitution.

19. Chaskalson P in *Ferreira* stated that "*it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of s 7(4) of the Constitution.*" As Cameron J held in *Beukes v Krugersdorp Transitional Local Council*, such a generous approach is not limited to the Constitutional Court, but should be adopted by "*all Courts that are called upon to adjudicate constitutional claims*" and the generous nature of the test applies both in respect of who qualifies as having standing and how that standing may be evidenced.[15]

20. In *Port Elizabeth Municipality v Prut NO & Another*,[16] the Eastern Cape High Court held that a municipality was acting in the public interest, as well as in its own interest, by requesting an order declaring that its differential treatment of ratepayers did not constitute unfair discrimination within the meaning of IC s 8(2). Referring to the broad approach to standing adopted by Chaskalson

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[15] 1996 (3) SA 467 (W) at 474.

[16] 1996 (4) SA 318 (E) ("***Port Elizabeth Municipality***").

P in *Ferreira*, Melunsky J held that a court should be slow to refuse to exercise its jurisdiction in terms of section 7(4) of the interim Constitution where a decision would be in the public interest and where it may put an end to similar disputes.[17]

21. In *Ferreira,* O'Regan J dealt with the issue of *locus standi* to claim relief in the public interest. She identified section 7(4)(v) of the interim Constitution (which is virtually identical to section 38 of the Constitution) as "*the provision in which the expansion of the ordinary rules of standing is most obvious*"[18] and said that the Court should require an applicant "*to show that he or she is genuinely acting in the public interest*". She elaborated on this requirement as follows:

> "*Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court*".[19]

22. Most recently, the Constitutional Court in *Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others* ("***JASA***")[20]

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[17] *Port Elizabeth Municipality (supra)* at [325].
[18] *Ferreira (supra)* at para [233].
[19] *Ferreira (supra)* at para [234].
[20] 2011 (5) SA 388 (CC).

considered a constitutional challenge to the extension of tenure of the then Chief Justice, SS Ngcobo, by the President of the Republic of South Africa and the constitutional validity and interpretation of the underlying legislation.

23. The applicants in *JASA* "*relied variously on certain constitutional or democratic concepts, which may be summarised as follows: the protection of the Constitution; the protection and advancement of the understanding of and respect for the rule of law and the principle of legality; the protection of the administration of justice and the independence of the judiciary; the promotion, protection and advancement of human rights; the strengthening of constitutional democracy; the promotion of social justice and equality; public accountability and open governance*. "

24. The Constitutional Court in *JASA* held that the applicant's standing in that case "*cannot be gainsaid*".[21] The issues in *JASA* are not dissimilar to the issues raised in this urgent application. It is clear that all South Africans have an interest 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. It is astounding that the Minister challenges the applicant's standing especially in light of the fact that he did not dispute such standing in the Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa and others*, heard and decided in 2014.[22] This matter is an outgrowth of the Constitutional Court

[21] *JASA* at para [17]. Similarly, in *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC), there was not even a question before the Constitutional Court that an organisation such as the Democratic Alliance had standing, acting in the public interest, to bring a principle of legality challenge to the appointment of Mr M Simelane as the National Director of Public Prosecutions.

[22] (CCT 07/14, CCT 09/14) [2014] ZACC 32 (27 November 2014).

matter and deals crisply with the question of whether the Minister exercised a power which was unequivocally struck down and no longer exists under the SAPS Act.

25. The Minister posits two unfortunate propositions in his heads of argument. The first is that the public does not have a legally protectable interest in pursuing this litigation where Lt Gen Dramat has sought to apply for early retirement.

26. The conduct or views of Lt Gen Dramat do not in any way affect the public interest in upholding the rule of law and dealing with blatantly unlawful acts by the National Executive in respect of a key public institution. In any event, as stated above, and as is clear from Lt Gen Dramat's letter of 24 December 2014, the offer is made under duress and simply because Lt Gen Dramat is disillusioned with the Minister's inability to act lawfully and with attempts to subvert his office and authority. The interest of the public is, in fact, only heightened and emphasised when unlawful acts (such as the suspension in question) may lead to irreparable consequences (particularly ones, as in this case, desired by the Minister as the wrongdoer).

27. In any event, the second respondent is abiding the decision of this Court and not opposing, and there is no evidence before this Court that the suspension has been lifted or that the second respondent has resigned.

28. The second proposition is that the public does not care who precisely is the National Head of the DPCI and so it should be of no moment to this Court whether the second or third respondent act as the National Head. This may very well be true in totalitarian states not governed by the rule of law. South

Africa is not, however, such a state. It is a constitutional democracy where the principle of legality is paramount and the Constitution is supreme.[23] Any decision which undermines security of tenure of the incumbent National Head is inimical to basic precepts of the rule of law and the public has a manifest interest in such decision being reversed without any delay.

29. By way of comparative analysis, the Supreme Court of India regards any constitutional challenge to legislation or governmental action to be in the public interest, and on this basis allows any citizen to bring such a matter before the court.[24] A similarly liberal rule of standing in constitutional matters has been developed by the Canadian Supreme Court. It has held that a person who is not directly affected by legislation may challenge it, provided that there is a serious issue to be tried in which that person has a genuine interest as a citizen. Given that both of these liberal rules of standing have been developed in the absence of a provision equivalent to section 38(d) of the Constitution, it would be anomalous were South African courts to adopt a more restrictive interpretation.

30. In light of the above, it is simply incomprehensible how the Minister may deny that the applicant, at the very least, has public interest standing.

RENDITION: ALLEGED GROUNDS FOR SUSPENSION

31. The existence or otherwise of any grounds relied upon by the Minister in suspending the second respondent is irrelevant to whether the Minister has a power to suspend the National Head of the DPCI. The second respondent's

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[23] Sections 1 and 2 of the Constitution.

[24] Cheryl Loots *Constitutional Law of South Africa,* Chapter 7.2, page 11.

alleged involvement in the so-called Zimbabwe renditions (which is in any event denied by the second respondent) do not in any way render the suspension decision lawful and all facts and allegations in relation to the alleged grounds are inserted by the Minister, gratuitously, for atmosphere, in circumstances where the Minister has no answer to the legal challenge before this Honourable Court.

32. On his own version, however, when the Minister was appointed in May 2014,[25] he was already aware of the Zimbabwe renditions[26], the matter received media coverage in October 2011 when it first came to light and the second respondent's alleged involvement was publicised as early as October 2013. Even if the Minister was only "*appraised*" of the allegations in September 2014[27] he still, despite being "*deeply disturbed*"[28] by the second respondent's alleged involvement in the Zimbabwe renditions, proceeded to wait several months before taking the suspension decision. As a member of the National Executive responsible for the South African Police Service and a Member of Parliament, and if he believed (as he purports to do) that the allegations are serious and meritorious, one would have expected him to have acted with expedition. Instead, the Minister only took steps after the second respondent called for delivery of various sensitive and high profile dockets.[29]

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[25] Answering Affidavit para 16, page 8 [record page 68].
[26] Answering Affidavit para 17, page 8 [record page 68].
[27] Answering Affidavit para 17, page 8 [record page 68].
[28] Answering Affidavit para 17, page 8 [record page 68].
[29] Founding affidavit para 24, page 8 [record page 12].

33. The Minister himself admits that the independent investigation into the second respondent's conduct by the IPID has cleared the second respondent in respect of the Zimbabwe renditions. The Minister blandly asserts in paragraph 21 of his Answering Affidavit that "*I have noted that it has been mentioned in the media and elsewhere that the second respondent had been exonerated by IPID investigation. These assertions are made without facts or appreciation of why such a conclusion was made by IPID.*"

34. The Minister does not take this Court or the applicant into his confidence to explain precisely what "*facts or appreciation*" would cast a different light on the recommendations of IPID. The Minister has not attached any of the documents on which he relies to ground the suspension in his Answering Affidavit: the IPID report itself,[30] the witness statements,[31] relevant documentation[32] and "*file*"[33] ("**the referenced documents**"). Despite being required to do so under a notice in terms of rule 35(12) dated 15 January 2015, sent two hours after the applicant received the Answering Affidavit, the Minister has not produced the referenced documents ("**the Rule 35(12) documents**"). Instead, in a reply to the notice, transmitted in the late afternoon on 16 January 2015, the Minister refused to hand over the Rule 35(12) documents on the basis that:

34.1 the applicant's case is a narrow legal one (para 3 of that reply); and

34.2 the documents should be "*kept confidential*".

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[30] Answering Affidavit paras 19, 20, 21 and 22, page 9 - 12 [record 69 - 72]
[31] Answering Affidavit para 17, page 8 [record page 68].
[32] Answering Affidavit para 17, page 8 [record page 68].
[33] Answering Affidavit para 20, page 10 [record page 70].

35. The first reason amounts to an admission that the referenced documents on which the Minister places significant reliance in the Answering Affidavit are irrelevant to the issues in these proceedings. If this is the case, then it is difficult to understand why the Minister referred repeatedly to them in his affidavit. In any event, as our courts have held, once a reference to a document is made in an affidavit, it must be produced, and no enquiry into relevance takes place.[34]

36. Confidentiality is also not a defence to disclosure in terms of the Uniform Rules of Court.[35] In any event, even if the information is extremely sensitive, disclosure remains mandatory, but an appropriate confidentiality regime may be put in place.[36]

37. Regardless of the insupportable reasons for failure to disclose, the effect of such failure is clear. Rule 35(12) provides that "*[a]ny party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding*".

38. Therefore, not only are the Zimbabwe rendition allegations and investigation irrelevant to the issue of legality before this Honourable Court, the Minister cannot rely, in these proceedings, on the Rule 35(12) documents which is the sole basis proffered for the second respondent's suspension. In any event, the Answering Affidavit only makes bald references to the referenced

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[34] *Machingawuta v Mogale Alloys (Pty) Ltd* 2012 (4) SA 113 (GSJ) at 117 and 120.

[35] Erasmus *Supreme Court Practice* RS 45, 2014 Rule-B1-p262**;** *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385. Also see *Comair Ltd v Minister for Public Enterprises* 2014 (5) SA 608 (GNP).

[36] *Bridon International GmbH v International Trade Administration Commission* 2013 (3) SA 197 (SCA) at para [31] to [32].

documents (even if some reliance would be placed on them) without explaining how or in what way they justify the suspension decision. This is clearly insufficient to pass the barest threshold of rationality, let alone reasonableness or lawfulness.[37] The suspension decision is thus, for the purposes of these proceedings, completely without even factual foundation.

THE MEANING OF THE LEGISLATION AND RELEVANT CASE LAW

39. In a desperate attempt to try to justify his actions, the Minister seeks to rely on the 2014 Judgment as establishing or corroborating his unilateral power to suspend the National Head: the very power that the Constitutional Court deleted from the SAPS Act in the 2014 Judgment. In this vein, the Minister tries to tease out of the reasoning of the Constitutional Court in the 2014 Judgment some wording which would allow him to retain his unilateral power to suspend.

40. Despite the Minister's ostensible representation that he is aware of the 2014 Judgment and that certain provisions were excised from the SAPS Act with effect from 27 November 2014, he does not seem to appreciate that the only section which permitted him unilateral suspension powers, section 17DA(2) of the SAPS does not exist. There is no and can be no ambiguity about that. The only question is how to interpret what is left in the legislation. The Minister cannot point to any legislative provision which overrides the clear wording of section 17DA(1), and there is none. The absence of such a provision must result in the grant of the relief sought by the applicant. Before

[37] *Walele v City of Cape Town* 2008 (6) SA 129 (CC) at paras [59] - [63].

we extrapolate legislative interpretation, however, we deal briefly with the interpretation of the Order in the 2014 Judgment, as this is an issue raised by the Minister.

41. It is a trite principle of law that the effect of court rulings is in the orders which are granted and not one or other bit of reasoning employed. The basic tenets of interpretation of documents apply with equal force to the interpretation of court orders.[38] The court's intention must be ascertained primarily from the language of the order, which must be read with reasons given for it.[39] In instances of ambiguity, regard may be had to extrinsic circumstances surrounding the judgment.[40]

42. In *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [41] at paras 9 to 11 the Constitutional Court, after a survey of the relevant judicial decisions on interpretation of court orders, set out the appropriate interpretational principles in the following terms:

> "*[9] ... Does the order really leave room for the three possible constructions put on it by the amicus – and possibly the others? In seeking the answer to these questions the logical starting point must be to interpret the order. That would also accord with the precondition to the ambiguity exception identified by Trollip JA in Firestone South Africa– 'if, on a proper interpretation, the meaning ... remains obscure'. In conducting such an interpretation exercise the context is of course*

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[38] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) ("***Firestone South Africa***") at 304D-F.
[39] *Firestone South Africa* (*supra*) at 304E-F.
[40] *Firestone South Africa* (*supra*) at 304G-I.
[41] 2001 (4) SA 1288 (CC) ("*Ex parte Women's Legal Centre*").

crucial. The context here is that the order to be interpreted was issued in proceedings for the confirmation of an order issued by another court, which latter order specified neither the Constitution nor the specific section under which the declaration of constitutional invalidity was being made. Yet the High court's order was not ambiguous. It quite unequivocally related to the Constitution, from which that court derived its power to invalidate and which was alleged in the replication – and found in the judgment – to be inconsistent with the section ...

[10] ... The case therefore involved and resolved a purely procedural issue. So much for the factual context in which the order falls to be interpreted.

[11] Proper interpretation of an order of court also entails determining the legal context within which the words in the order were used. The order in question here related to invalidation in terms of the Constitution of a statutory provision that had been on the statute book before the Constitution came into force ...".

43. Accordingly, it is clear that in interpreting the order of the Constitutional Court in the 2014 Judgment:

43.1 "the context is crucial";

43.2 context includes the "factual context"; that is, what factually the case involved and what the purpose of the order was; and

43.3 context includes the "*legal context*"; that is the legal context in which the words in the order were used.

44. The factual and legal contexts of the order of the Constitutional Court do not permit room for the strained efforts by the Minister at avoiding the import and effect of the Court's ruling.

45. The order which it handed down and its effect are unambiguous. The Minister's attempt to rely on baseless points to obviate the clear import of the legislation and the order of the Constitutional Court, at great expense to the public fiscus, is unbecoming of a servant of State and, in the words of the Western Cape High Court, "*does little to display the appropriate regard for an order of court*".[42] As Kriegler J stated in *S v Mamabolo*,[43] state functionaries have an especial duty not only to display exemplary conduct towards court orders, but the Constitution requires "*active support*" from all organs of state in the implementation of court orders.[44]

46. And the reasoning of the Constitutional Court does not support the Minister's case either, as we demonstrate below.

47. The Constitutional Court, in the 2014 Judgment, declared section 17DA(2) of the SAPS Act unconstitutional and invalid and ordered that section 17DA(2), and reference thereto in section 17DA(1), be deleted from the SAPS Act with effect from 27 November 2014.[45] Section 17DA(1) now provides that the National Head of the Directorate for Priority Crime Investigations ("**DPCI**") "*shall not be suspended or removed from office except in accordance with*

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[42] *Eisenberg & Associates v Director General Department Home Affairs* [2012] ZAWCHC 191 (27 November 2012) at para [19].

[43] 2001 (3) SA 409 (CC).

[44] *Ibid* at para [63].

[45] 2014 Judgment at para [110] and [112].

the provisions of" sections 17DA(3) and 17DA(4) of the SAPS Act. The section could not be stated in clearer or more imperative terms.

48. The powers of suspension and removal are inextricably linked.[46] Our courts have held that suspension is akin to an arrest in criminal terms.[47] A process which could lawfully lead to removal must be initiated and progressed before any power of suspension can legitimately be exercised. The Constitutional Court was clear that the Minister's power of removal should be removed and such power should vest in Parliament, to safeguard the independence of the National Head.[48] As the Constitutional Court has noted, the Minister retains the power of suspension, but only if the prerequisites in sections 17DA(3) to (6) are fulfilled.[49] Under section 17DA(5), the Minister may suspend only after the start of the proceedings of a Committee of the National Assembly for the removal of the National Head.

49. This comports with the necessity for special safeguards for the independence of the DPCI on which the Constitutional Court has extensively pronounced in *Glenister II* and the 2014 Judgment. The Constitutional Court stressed that the DPCI is an indispensable investigative organ which must be given

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[46] Recognised in the 2014 Judgment at para [84]. In fact, the Minister's heads of argument (at para 45) also recognise that the two are closely linked. The power to suspend may only be exercised with a view to a lawful removal and in accordance with empowering provisions. The Minister has no power to remove the National Head (although his heads of argument suggest that he does). The only power to remove is vested in Parliament and the power to suspend must be exercised in accordance with sections 17DA(3) to (6) of the SAPS Act.

[47] *Mogothle v Premier of the Northwest Premier* [2009] 4 BLLR 331 (LC) at para [14].

[48] The 2014 Judgment at paras [87] and [89] to [91].

[49] *Ibid* at para [90].

substantial protections to carry out its mandate and must be insulated from political interference.[50]

50. The Minister in his heads of argument asserts that it would make no sense if he lacked the power to suspend in circumstances other than after the start of proceedings of a Committee of the National Assembly. Yet, as section 194 of the Constitution makes clear, the procedure set forth in section 17DA(5) is precisely the same as the only procedure available for the suspension of other functionaries of institutions which are required by the Constitution to be independent, including the Auditor-General, the Public Protector and members of the Human Rights Commission, the Electoral Commission and the Commission for Gender Equality.

51. The National Head is at the very heart of the DPCI's ability to function effectively to fulfil its constitutional mandate. There are extensive special protections afforded to the National Head in this legislation, particularly insofar as the SAPS Act details carefully circumscribed powers of suspension and removal of the National Head. The previously untrammelled power to suspend and/or remove by the Minister was partly what grounded the Constitutional Court's concerns in the 2014 Judgment.

52. Yet, as was set out in the founding affidavit in this matter, on 10 December 2014, Lt Gen Dramat was informed in a notice from the Minister that the latter contemplated Lt Gen Dramat's suspension ("**notice of suspension**").[51]

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[50] The 2014 Judgment at para [2]; Founding affidavit paras 20 and 21, page 6 - 7 [record 10 - 11].

[51] Founding Affidavit para 31, page 11 [record page 15].

Importantly, the notice of suspension invokes sections 17DA(2)(a)(i) and (iv) of the SAPS Act as the sole basis of the proposed suspension.

53. In his Answering Affidavit, the Minister has perpetuated the reliance he placed on section 17DA(2)(a)(i) and (v).[52]

54. Although he acknowledges that section 17DA(2) has been struck down by the Constitutional Court in the 2014 Judgment,[53] the Minister persists throughout the rest of his Answering Affidavit to assert that he, in fact, retains the power that he had previously had under that section.

55. At paragraph 31 of his Answering Affidavit he states that he does not agree that "*the effect of the striking down of the said section and its deletion from the [SAPS] Act has stripped [him] of the power to suspend the Head of the DPCI, other than in terms of section 17DA(5)*" of the Act.[54] He goes on to explain that "*in striking down section 17DA(2) the Constitutional Court did not explicitly say that as the Minister [he] cannot suspend the Head of the DPCI other than in terms of section 17DA(5).*"[55]

56. The Minister seeks to draw this conclusion from the plainly false premise that if the 2014 Judgment were to be read to imply that the Minister cannot suspend the Head other than in terms of section 17DA(5), his oversight role over the DPCI would have been abrogated.[56] Of course, the very basis of the Constitutional Court striking down the unconstitutional provisions of the

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[52] Answering Affidavit paras 31, page 15 [record page 75].
[53] Answering Affidavit para 31, page 15 [record page 75].
[54] Answering Affidavit para 31, page 15 [record page 75].
[55] Answering Affidavit para 34, pages 16 - 17 [record pages 76 - 77].
[56] Answering Affidavit para 34, page 17 [record page 77].

SAPS Act stemmed from a finding that the DPCI must be more independent than the legislation previously allowed. This would inevitably involve a curtailment of the "*oversight role*" that the Minister seeks to fill. A reduction in his power to interfere, however, is not a complete abrogation of his role – it is simply a warranted curtailment of his power which must, for the reasons clearly articulated by the Constitutional Court, be exercised within constitutionally acceptable parameters. The 2014 Judgment clearly envisaged that there were only two mechanisms for suspension and removal: the ones prescribed in section 17DA(2), and the ones set forth in sections 17DA(3) to (6). It is for this reason that the Constitutional Court stated that the Minister "still" had the power to suspend, but that this would take place in accordance only with sections 17DA(3) to (6).[57]

57. The Minister also rejects the conclusion that parliamentary oversight is required for the suspension and removal of the Head of the DPCI.[58] It is clear from section 17DA in the 2014 Judgment that it would be the Committee of the National Assembly, and not the Minister, that would be responsible for the disciplinary enquiry and proceedings against the National Head. This kind of safeguard is exactly what the Constitutional Court sought to achieve in the 2014 Judgment. The Minister's lament that this curtails his oversight role stems from a failure to recognise that his "oversight" role is not unbounded. The curtailment of the Minister's asserted role is also entirely consistent with, and necessary to give effect to, the fact that the functioning

[57] The 2014 Judgment at para [90].

[58] Answering Affidavit para 35, page 17 [record page 77].

of the DPCI is overseen by Parliament, not the Minister, in terms of section 17K of the SAPS Act.

58. The Minister goes on to assert that the Constitutional Court was only concerned that the impugned section lacked clarity and that it gave the Minister too much discretion to suspend the Head without pay.[59] This is a misreading of the judgment: the very extract from the 2014 Judgment cited by the Minister at paragraph 37 of his Answering Affidavit makes this clear.[60] The Minister quotes paragraph 85 of the 2014 Judgment, which plainly states that it is the Minister's discretion (not only in relation to suspension without pay) that was of concern. The Court's concern plainly was with the broad and untrammelled power to undermine and invade the job security of the Head in relation to both suspension and removal decisions taken by the Minister, and the devastating effect of this on the independence of the DPCI, that required constitutional intervention. Given the constitutional concerns at stake, the anomalous situation now before this Court is striking: the Constitutional Court stressed that in our constitutional democracy the Minister was not empowered to remove the Head without parliamentary oversight – yet in the Minister's world he proclaims a power to suspend the Head at will.

59. The Minister, moreover, strains to argue that because the Constitutional Court in the 2014 Judgment found that the balance of section 17DA passes constitutional muster and should "*continue to guide the suspension and*

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[59] Answering Affidavit para 36, page 17 [record page 77].

[60] Answering Affidavit para 37, page 18 [record page 78].

removal process of the National Head", his power to suspend the Head under 17DA(2) is somehow revived, in spite of its striking down.[61] This conclusion, with respect, beggars belief. The Minister's reading of the Constitutional Court's judgment is to render the Court's order superfluous – it is, with respect, a constitutionally offensive effort, it being recalled that the Minister is under a duty under section 165(5) of the Constitution to obey court orders and to demonstrate through section 165(4) that he is ensuring the independence, impartiality, dignity and effectiveness of the courts. For the Minister to assert that the very power which was of concern to the Constitutional Court under a constitutionally offensive provision is somehow retained in spite of an order of the Court that it be struck from the legislation is nothing less than astonishing. The Constitutional Court in this paragraph was clearly only referring to the portions of the legislation that it was not striking down in its order, ie sections 17DA(1) and (3) to (6).

60. In striking the section down the Constitutional Court made it absolutely clear that the section could not be invoked.

61. The Minister's efforts to reintroduce powers that have been definitively erased from the SAPS Act, and in spite of the clear wording and effect of the 2014 Judgment, borders on the contemptuous.

[61] Answering Affidavit para 46, page 21 [record page 81].

THE MISPLACED RELIANCE ON THE PUBLIC SERVICE ACT AND SMS HANDBOOK

62. The Minister in his 23 December letter[62] asserts that he is empowered to suspend the National Head under the Public Service Act and SMS Handbook. The applicant, in its founding affidavit and heads of argument, clearly shows why these alternative provisions are inapplicable due to section 17DA(1) of the SAPS Act and the provisions of the Public Service Act and the SMS Handbook themselves.[63] The Minister in his Answering Affidavit, however, continues to assert that he is empowered to suspend the National Head under these alternative provisions.[64]

63. The alleged Public Service Act and SMS Handbook powers of the Minister in relation to the National Head did not exist before or after the 2014 Judgment. Before that Judgment, section 17DA(1) provided that the National Head shall not be suspended or removed other than in accordance with the provisions of sections 17DA(2), (3) and (4). The 2014 Judgment simply further narrowed the scope for suspension and removal by deleting any reference to section 17DA(2) and the section itself. The Minister's Answering Affidavit conveniently does not deal with section 17DA(1). This section, however, is fatal to his case.

64. It is, in any event, clear that the SAPS Act was always intended to govern the conduct of all disciplinary action against DPCI members and no other statute would be applicable. Section 17DA applied, to the exclusion of other

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[62] "FA5"; founding affidavit para 34, page 11 [record page 15].

[63] Founding affidavit para 37, pages 12 -13 [record pages 16 - 17] and paras 43 - 48, pages 14 - 15 [record pages 18 -19]; applicant's heads of argument para 20 - 24, pages 9 - 11.

[64] Answering Affidavit para 48 - 50, pages 22 - 23 [record pages 82 - 83].

instruments, to disciplinary steps against the National Head. Section 17CA(19) of the SAPS Act, on the other hand, provided that any disciplinary steps against a Deputy National Head, Provincial Head or any other member or employee of the DPCI shall be considered and finalised, to the exclusion of other instruments, within the DPCI's structures and prescripts.

65. The Minister essentially makes two arguments concerning the applicability of the Public Service Act and the SMS Handbook in his Answering Affidavit. First, he contends that as the Public Service Act does not exclude the National Head from its application it is, along with the SMS Handbook, applicable to him.[65] Secondly, he essentially contends that there is an employment relationship between himself and the National Head for the purposes of the Public Service Act and that this somehow gives him authority to suspend the National Head despite legislation excluding such a power.

66. These contentions are, however, clearly incorrect for the reasons discussed below.

67. A *"member of the services*" is defined under section 1 of the Public Service Act as " *a member of - (b) the South African Police Service appointed, or deemed to have been appointed, in terms of the South African Police Service Act, 1995*". It is thus clear that the National Head is a "*member of the service*" for the purposes of the Public Service Act. Section 2(2) goes on to provide that if the employment of a member of the service, which includes members of the DPCI, is governed by other legislation, such other legislation will

[65] Answering Affidavit para 48, page 22 [record page 82].

apply.[66] This definition and section 2(2) are included to render the Public Service Act inapplicable where there is specific legislation, such as the SAPS Act, governing members of the services.

68. If the Public Service Act is inapplicable the SMS Handbook is then also clearly inapplicable. In any event, the SMS Handbook incorporates a similar provision to section 2(2) of the Public Service Act under paragraph 2.3 of chapter 7 stating that "*this Code and Procedure applies to the employer and all members. It does not, however, apply to the employer and members covered by a disciplinary code and procedure contained in legislation or regulations".* These provisions refer to any other legislation that covers the relevant areas. The Minister's argument seems to be that as the Public Service Act does not specifically exclude the Minister's power to suspend, the Public Service Act and the SMS Handbook are still applicable to him. This argument is clearly incorrect and must be rejected. The SAPS Act, and specifically section 17DA, exclusively deals with the suspension of the Head by virtue of section 17DA(1).

69. The Minister in his Answering Affidavit does not deal at all with section 17DA(1) of the SAPS Act which, as discussed in the applicant's founding affidavit and heads of argument[67], clearly gives primacy to the SAPS Act in regard to the suspension of the National Head by providing unambiguously, that "*[t]he National Head of the Directorate shall not be suspended or*

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[66] Section 2(2) states that "*[w]here members of the services, educators or members of the Intelligence Services are not excluded from the provisions of this Act, those provisions shall, subject to subsection (2A), apply only in so far as they are not contrary to the laws governing their employment*."

[67] Founding affidavit para 37, page 12 [record page 16]; applicant's heads of argument para 23, pages 10 - 11.

removed from office except in accordance with the provisions of subsections (3) and (4)."

70. The Minister contends that under section 3 of the Public Service Act he is "*the employer in the Public Service within the Department to which [he is] the executive authority*".[68] The contention of the Minister in his Answering Affidavit seems to be that he is the employer of the National Head for the purposes of the Public Service Act and is thus entitled to suspend him on this basis alone. This is, however, contrary to the provisions of the Public Service Act – and confirms a startlingly inappropriate understanding by the Minister of security of tenure and the constitutional requirements stipulated by the Constitutional Court in the 2014 Judgment regarding the importance of the Head of DPCI.

71. Section 2 of the Public Service Act deals with the application of the Act, which applies under subsection 1 "*to or in respect of employees*". As stated above subsection (2) states that where "*members of the services … are not excluded from the provisions of the Act, those provisions shall … apply only in so far as they are not contrary to the laws governing their employment*." These provisions make a clear distinction between employees and members of the services for the purposes of the Act. Although a member of the service may be an employee for certain purposes under the Act, the Act excludes members of the services from its application where there is specific legislation governing them. As the SAPS Act governs the suspension of the National Head, this is excluded from the application of the Public Service Act

[68] Answering Affidavit para 48, page 22 [record page 82].

by virtue of the Head being a member of the services. This exclusion further means that he cannot be an employee under the Act for the purposes of suspension. Contrary to what the Minister contends, the Public Service Act is thus wholly inapplicable to the suspension of the National Head.

DECLARATORY RELIEF

72. The applicant seeks an order in terms of section 21(1)(c) of the Superior Courts Act, 2013 declaring that the Minister cannot suspend the National Head other than by way of the mechanism provided in sections 17DA(3) and (4) (read with section 17DA(5).[69] The general principles applicable when declaratory relief is sought were summarised by the Court in *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another*,[70] but must obviously be interpreted in light of the generous approach to jurisdiction in the context of constitutional law.

73. It is clear that the present case plainly satisfies the requirements for the Court to exercise its discretion to order the declaratory relief in question.

74. The applicant has standing and there is clearly an existing, future or contingent right or obligation at issue, which relates to a concrete existing dispute.

75. The general rule that a party is not entitled to approach the Court for what amounts to a legal opinion upon an abstract or academic matter may also be

[69] Founding affidavit para 5.2, page 2 [record page 6].
[70] 1995 (4) SA 120 (T) at 124 - 126.

swiftly addressed.[71] The declaratory relief sought in this instance is to set forth the proper method to be used in the suspension of the National Head and will direct any possible future suspensions of the National Head. It may also have the effect of curtailing any future unlawful suspensions that may be made by the Minister and thus will have a practical effect on future decisions of the Minister in this regard. It is thus not abstract or academic in any sense and does not amount to a legal opinion.

76. It is also clear that the decision will be directly binding on all interested persons, being the Minister, the National Head of the DPCI and the National Commissioner of the SAPS.[72] The declaratory order sought in this matter would have a direct effect on the future actions of the Minister regarding suspension of the National Head.

77. Public policy also clearly favours the certainty which would be brought about by the declaration sought. The Constitutional Court in the 2014 Judgment was at pains to emphasise the need to negate any further uncertainty in the mandate and functioning of the DPCI:[73] the declarator sought in this matter seeks to achieve precisely that result. Moreover, the nature of this case and the public interest that is involved in ensuring that the Minister exercises his power in accordance with the applicable law in all possible future suspensions of the National Head provide compelling reasons for the grant of this declaratory relief.

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[71] *Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance Society* 1977 (3) SA 631 (T) at 635F-636F.
[72] *Ex Parte Nell* 1963 (1) SA 754 (A) at 760B.
[73] The 2014 Judgment at para [108].

78. It is submitted that the declaratory relief in this matter is critical to ensuring the future independence,[74] structural and operational integrity[75] of the DPCI, a constitutional institution tasked with the eradication of corruption.[76]

79. In addition to the above and most importantly in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,[77] O'Regan J explained the value of declarations as follows: "*A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values… declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed*."

HEARSAY

80. The Minister also makes a passing reference to the factual allegations in the "statement" of the second respondent which is attached to the founding papers being hearsay.[78] He does not, however, specify which allegations in which "statement" are at issue. This vagueness renders the reference meaningless and it may safely be disregarded. In any event, the Minister does not deny that such a "statement" was, in fact, made by the second respondent; nor does he deny the factual accuracy of any of the allegations made by the second respondent, but simply avers that any insinuation of

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[74] Founding affidavit para 20, page 6 [record 10]

[75] Founding affidavit para 22, page 7 [record page 11].

[76] Founding affidavit para 11, page 4 [record 8].

[77] 2005 (4) BCLR 301 (CC) paras [107] - [108].

[78] Answering Affidavit para 52, page 23 [record page 83].

political interference as a result of such allegations is denied by him. This does not advance the Minister's case any further.

RELIEF

81. The Minister's heads of argument suggest that the appointment of the third respondent was valid and lawful and he should thus continue in office even if the suspension of the second respondent is found to be unlawful.[79] This is manifestly without foundation. Section 172(1)(a) of the Constitution requires the Court to declare the suspension decision unlawful and invalid to the extent of its inconsistency with the Constitution. Once the declaration is made, it operates retrospectively *ab initio*,[80] although the Court retains a discretion to limit its retrospective effect in appropriate circumstances.[81] The proposition that the third respondent should be retained as the National Head of the DPCI when the second respondent was unlawfully deposed and the Minister had no power, in law, to appoint an Acting National Head is unsustainable. It also flies in the face of clear pronouncements of the Constitutional Court to the effect that legality (apart from very exception circumstances) is always trump and must be enforced:

> "*Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity*

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[79] Para 13, page 9.

[80] *Ex parte Women's Legal Centre* at para [13]; Michael Bishop *Constitutional Law of South Africa* Chapter 9.4, page 129.

[81] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para [65]; *Masiya v Director of Public Prosecutions (Pretoria)* (2007) 124 SALJ 677 at para [48]; Michael Bishop *Constitutional Law of South Africa* Chapter 9.4, page 131.

to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality."[82]

82. No reasons are proffered by the Minister for the proposition that this Court should not set aside the suspension decision. Once the suspension decision is set aside, the second respondent does not have to be "reinstated". The consequence of a setting aside is that he is no longer suspended from his position as the National Head. In those circumstances, the appointment of the third respondent cannot stand, as he is simply, at best, an Acting National Head of the DPCI. There is no place for an Acting National Head once the National Head is in place. The third respondent's appointment must thus be set aside both as there was no legal basis for his appointment by the Minister and as a result of the setting aside of the suspension decision.

CONCLUSION

83. Having regard to the above, the Answering Affidavit not only does not displace the applicant's case, but substantially augments the submissions on unconstitutionality and invalidity and its concerns that the relief sought by the applicant must be granted as a matter of great urgency in this matter to prevent further harm being done to the institution and integrity of the DPCI and to ensure that the Minister's unlawful "interpretation" and designs are effectively and expeditiously curbed.

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[82] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) at para [30].

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19 January 2015