IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 142/21

SUPREME COURT OF APPEAL CASE NO 1065/19

GP CASE NO 6175/19

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
ROBERT McBRIDE	First Respondent
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	Second Respondent
MINISTER OF POLICE	Third Respondent
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Fourth Respondent

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CONDITIONAL REPLYING AFFIDAVIT: APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"), situated at 6 Sherborne Road, Parktown, Johannesburg, a non-governmental organisation whose objectives are to defend the values that underpin our constitutional democracy, to defend the rule of law and to promote respect for human rights.

2. I am duly authorised to depose to this affidavit and bring this application on behalf of the HSF. I deposed to the founding affidavit before this Court in the leave to appeal application.

3. The facts contained in this affidavit are to the best of my knowledge both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. Where I make any legal submissions, I do so on the advice of the HSF's legal representatives. Unless otherwise indicated, I adopt the definitions used in the founding affidavit.

NATURE OF THIS AFFIDAVIT AND APPLICATION

4. As the Court will be aware, the HSF has sought leave to appeal to this Court to address a matter of grave constitutional import, namely the structural, operational and perceived independence of the Independent Police Investigative Directorate ("**IPID**") – an institution mandated to be independent in terms of section 206(6) of the Constitution.

5. The HSF argues that the Minister, the Committee and the erstwhile Executive Director of IPID privately agreed on a constitutionally impermissible mechanism for the renewal of the Executive Director's tenure, and the High Court and the Supreme Court of Appeal endorsed it, thus putting the imprimatur of judicial authority behind it. Moreover, the High Court endorsed this regime without entertaining any argument in open court in relation to it, or considering written submissions on that score, thus – separately – committing a constitutional irregularity, contrary to this Court's jurisprudence.

6. These submissions have been detailed in the founding affidavit.

7. Despite the nature of this litigation, the Committee has, in its answering papers, motivated for an adverse costs award against the HSF, arguing that the litigation is so

frivolous or vexatious that it warrants a departure from the well-established *Biowatch*[1] principles.

8. The HSF seeks leave to file this replying affidavit only if this Honourable Court is

8.1 minded to dismiss the HSF's leave to appeal application without hearing argument; and

8.2 is contemplating, in ordering such dismissal, whether a departure from *Biowatch* is warranted such that HSF would be mulcted in costs.

LEAVE TO FILE

9. I have been advised that this Court's Rules do not make provision for the filing of a replying affidavit in an application for leave to appeal. I have further been advised that it is within this Court's discretion to permit the filing of a replying affidavit where it is in the interests of justice to do so.

10. The HSF respectfully seeks this Court's leave to file this replying affidavit in order to respond to the request for an adverse costs order against it made by the Portfolio Committee in its answering affidavit. The HSF has limited its reply to this narrow issue in light of this Court's Rules.

11. It is submitted that it would be in the interests of justice to permit the HSF to file this brief affidavit dealing with the issue of costs as:

11.1 this issue was – in relation the leave to appeal application – only raised in answer by the Committee, and the HSF has not been an afforded an opportunity to address these – somewhat surprising – attacks. This Court has previously granted leave to file a replying affidavit where new argument was raised in an

[1] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

answering affidavit, because it was in the interests of justice to grant the applicant an opportunity to respond thereto;[2]

11.2 it has not been suggested by the SCA that there was any untoward behaviour on the part of HSF;

11.3 the effect of a costs order would be significant and would stand to create the very chilling effect on constitutional litigation which *Biowatch* sought to avoid. The HSF is not a revenue generating enterprise and does not litigate for commercial gain (and is not doing so in this matter); any costs order – even if relatively insignificant for the State or a profit generating commercial enterprise – would be hard felt by the HSF (and, importantly, other NGO's or constitutional litigants in a similar position);

11.4 the Committee has made strident allegations against the HSF, not stating simply that the HSF has got it wrong, but rather that the HSF is litigating in a frivolous and vexatious matter, and that this matter has no purpose or value. These are serious allegations which the HSF should be afforded an opportunity to address; and

11.5 this affidavit will be filed shortly after the Committee's answering affidavit was received, and will not prejudice the determination of this matter from a timing perspective (and, in any event, the HSF respectfully contends that leave falls to be granted, such that this affidavit is not required).

[2] *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC)at para 12.

THE *BIOWATCH* PRINCIPLE

12. In *Biowatch* this Court dealt with the question of costs in constitutional litigation against the state. This Court endorsed the finding in *Affordable Medicines Trust*[3] that, as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs.

13. As held by this Court:

> *"In litigation between the government and a private party seeking to assert a constitutional right, Affordable Medicines established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.*
>
> *The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."*[4]

14. Where courts have departed from the *Biowatch* principle, this Court (among others) has permitted appeals solely on this basis, so as to uphold this principle. Simply by

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[3] *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA247 (CC)

[4] *Biowatch* paras 22 and 23.

way of example, I refer to this Court's rulings in *Hotz v University of Cape Town*[5], *Ferguson v Rhodes University*[6] and *Limpopo Legal Solutions v Vhembe District Municipality*.[7]

THE COMMITTEE'S (MIS)CHARACTERISATION OF THE HSF'S CASE

15. The Committee makes a number of strident allegations regarding the HSF's case, most notably (in relation to costs) that the case is frivolous and vexatious, in that it has no serious purpose or value, and the HSF has no legal interest in the relief.

16. The HSF accepts that the Committee – as is its right – disagrees with the HSF's arguments. Even if the HSF is wholly incorrect, however, this does not permit a deviation from the *Biowatch* principle: constitutional litigants are allowed to be incorrect (although the HSF contends that it is correct in its submissions, as supported by the library of domestic and international law referenced in its submissions).

17. It is difficult to understand the Committee's submissions as being anything other than an attempt by the Committee to punish the HSF for challenging the Committee in court proceedings, given that the Committee's costs arguments are so strained and unsustainable that they simply cannot apply to this matter.

18. Assuming, hypothetically, that the HSF is incorrect on the merits (and this is denied), can it nonetheless be said that this case had no purpose at all, lacked any serious value or was vexatious, such that the *Biowatch* principle falls to be departed from?

19. Respectfully, the answer can only be no.

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[5] 2018 (1) SA 369 (CC)

[6] 2018 (1) BCLR 1 (CC) (7 November 2017)

[7] 2017 (9) BCLR 1216 (CC) (18 May 2017)

20. The case had – and continues to have – significant constitutional value. It deals with the structural and operational independence of the high office of the Executive Head of IPID. The importance of this and similar institutions has been emphasised by this Court in prior cases. Independence was at the heart of the debate. Tellingly, the HSF played a pivotal role in at least some of these cases.

21. The trigger for this case was that Mr McBride had applied for a renewal of his tenure as Executive Head, and the Minister of Police had denied this (which decision was later, somewhat desperately, recast as something else).

22. The one aspect which was perhaps common cause amongst all the lower courts and even the parties is that the IPID Act is silent as to who may take the renewal decision and how it may be taken.

23. Against that legislative uncertainty and the actions taken by the Minister, Mr McBride took the other respondents to Court. On the steps of Court, a private agreement was reached which fixed an interpretation of the IPID Act renewal provisions.

24. This privately agreed interpretation of section 6(3)(b) of the IPID Act concentrates the power of renewal in the Minister and the Committee, thus exposing IPID to political interference or the perception of such interference. It is plainly an unlawful interpretation.

25. The HSF properly sought to intervene in the matter and was admitted as *amicus*. The Committee did not oppose its admission. Given the eleventh hour agreement, however, the landscape of the case did change. Not only were there problems with the interpretation privately preferred, but – based on this Court's own precedent – that interpretation was required to be ventilated in open court and considered by a judge, with reference to the parties' submissions thereon.

26. At no stage did this happen, leading to three miscarriages of justice:

26.1 first, the unconstitutional renewal interpretation being reached;

26.2 this then being judicially endorsed; and

26.3 finally, the manner of endorsement, comprising the procedural mis-steps in "*rubber stamping*" the private agreement and treating it akin to private settlement of a *lis*.

27. The SCA – although initially indicating that it too had reservations regarding the approach adopted by the court *a quo* (a transcript of the first SCA hearing will be provided if sourced) – then failed properly to address these central issues.

28. It is against that backdrop that this leave to appeal application falls to be seen.

29. The matter is plainly not one without a serious purpose or value – it speaks to the vindication of the independence of the Executive Head of IPID and of IPID itself. The need for such independence is hardly controversial and has been thoroughly traversed in the founding affidavit. To argue, as the Committee does, that the subject matter of the litigation is without purpose or value simply because it disagrees with HSF's contentions is simply not sustainable.

30. The authorities indicate that it is a high bar that falls to be met to constitute vexatious or frivolous constitutional litigation:

30.1 This Court in *Harrielall*[8] took cognisance to the exceptions to the *Biowatch* principles.

> "*In* Affordable Medicines *this Court laid down exceptions to the rule. Ngcobo J said:*
>
> *"*There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the

[8] *Harrielall v University of KwaZuluNatal* 2018 (1) BCLR 12 (CC) par 12 and 13

part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs."

This Court takes active cognisance of these limitations on the Biowatch principle, which it recently applied in Lawyers for Human Rights.

In yet another Lawyers for Human Rights, *this Court defined the exceptions to the Biowatch rule. It stated:*

"What is 'vexatious'? In *Bisset* the Court said this was litigation that was 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'. And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious." "

31. There is no sustainable basis to allege that the HSF is acting *mala fide* (and no case to this end has been made out) or is litigating for the purpose of annoying or embarrassing an opponent. This is a proper constitutional case, brought legitimately by an interested but independent non-governmental organisation, which has a history of litigating in relation to similar matters with substantial success. The independence of IPID and its Executive Head are manifestly important constitutional matters. The HSF contends that the previous courts erred in holding that it is constitutionally permissible for the term of office of the Executive Director of IPID to be renewable at the discretion of a Parliamentary Portfolio Committee.

32. The application is brought to ensure that the constitutional validity of section 6(3)(b) of the IPID Act is properly determined and pronounced upon by the High Court. It seeks this relief because an interpretation of section 6(3)(b) permitting renewal of the Executive Director of IPID's term of office at the discretion the Portfolio Committee has received a stamp of approval as being consistent with the Constitution without the issue being properly ventilated or considered – despite it having enormous implications for the operation of IPID.

33. Moreover, the HSF has pursued this litigation out of genuine constitutional concern and it cannot be contended that the constitutional arguments it has raised are of a "*specious or opportunistic*" character.[9]

34. As such, to allege that the HSF's case meets the high bar of being vexatious or frivolous is unsustainable.

35. Similarly, the statement that HSF lacks any legal interest in the matter is without merit. A comparison is sought to be drawn to the position of Solidarity in the Ministerial language policy case which ultimately served before this Court.[10] This comparison is inapposite.

36. In that case, Solidarity was, as described by this Court:

> "*a trade union whose obvious mandate is to advance the interests of its members in the labour sphere. As correctly observed by the SCA, its members do not have the right to be instructed in Afrikaans. That right is available to students and possibly their parents to assert, none of whom was said to be their members. Neither Solidarity nor its members have any legal or material interest in the matter to support their assumed legal standing. And Solidarity does not claim to act in the public or any other constitutionally recognised interest but its own… Solidarity has failed to explain its interest and that of its members to meet the standing requirements.*"[11]

37. HSF is not in an analogous position. It was admitted as *amicus curiae* because it had explained its interest in the subject matter, satisfied a court that it had a legal interest in the matter and satisfied the court that it could meaningfully contribute to the debate (which ultimately was never held given the private settlement of the dispute).

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[9] *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) at para 83.

[10] *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC)

[11] *Ibid* paras 27 - 29

Moreover, unlike Solidarity, HSF does not litigate for the interests of its membership: instead, it litigates in the public interest, given the national interest in having an independent IPID and Executive Head. I annex an extract from the HSF'S *amicus* application as "**RA1**", which sets out the basis for the HSF's intervention and interest in this case. I pray that this be incorporated by reference.

38. Finally, it is not insignificant that the SCA – although finding against the HSF on the merits – held that the *Biowatch* principle applied to the entire thread of litigation (going so far as to set aside a costs order granted by the court *a quo* in the *a quo* leave to appeal proceedings).[12]

THE COMMITTEE'S ALLEGATION OF CASE-SWITCHING

39. The Portfolio Committee says that the HSF should be mulcted with costs because it has engaged in "*case-switching*" by asking this Court to set aside the SCA and High Court Orders and remit the matter to the High Court so that the constitutional validity of section 6(3)(b) of the IPID Act can be determined and pronounced upon, when the HSF did not challenge the constitutionality of the section in the courts below.[13]

40. The HSF did not bring a frontal challenge to section 6(3)(b) before the High Court. It must be recalled, as set out in my founding affidavit, that the proceedings before the High Court were urgent and that the HSF did not have the luxury of time in deciding how to respond to the settlement agreement reached by the parties. Moreover, the HSF was not required to bring a frontal challenge, not least given this Court's pronouncements that a statutory provision should rather be interpreted in a

[12] *Helen Suzman Foundation v Robert McBride and Others* (1065/2019) [2021] ZASCA 36 (7 April 2021) par 68

[13] Portfolio Committee answering affidavit at 136 at page 42.

constitutionally permissible manner (even if this may be argued by some to be somewhat strained) as opposed to being struck down for unconstitutionality.[14]

41. The HSF certainly should not be mulcted with costs for this. This Court has held that a litigant does not forfeit its "*Biowatch shield*" because of "*adventitious mistakes*".[15] In *Gelyke Kanse*, this Court intervened to set aside a separate costs award made by the High Court against a litigant for its attempt to introduce an entirely new case in reply, because this could be characterised as an adventitious mistake.[16] At worst, the HSF's failure to bring a frontal challenge before the High Court qualifies as an adventitious mistake. Properly viewed, it is not a mistake at all, however, given that a constitutionally complaint interpretation was available as per the HSF's interpretation.

42. The HSF does not seek to ambush the State respondents with a new case on appeal. The contention of the Portfolio Committee that the State respondents have suffered prejudice as a result of the HSF's so-called "*case-switching*" is entirely without merit. Although there was no frontal challenge to section 6(3) of the IPID Act before the High Court, the crux of the HSF's contentions has always been about the constitutionality of the renewable term of office for the Executive Director of IPID.

43. The HSF contended from the outset that the reading of section 6(3)(b) adopted by the parties in the settlement agreement and endorsed by the High Court, and now the SCA, is inconsistent with the Constitution. The HSF argued that section 6(3) should be read consistently with the constitutional requirement of adequate independence, and that the section was reasonably capable of a constitutionally compliant reading. However, it was a necessary implication of the HSF's contentions before the High

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[14] Chisuse and Others v Director-General , Department of Home Affairs and Another 2020 (6) SA 14 (CC)

[15] *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38; 2019 (12) BCLR 1479 (CC); 2020 (1) SA 368 (CC).

[16] *Gelyke Kanse* at para 50 read with paras 18 and 19.

Court and the SCA that if section 6(3)(b) is not reasonably capable of being read in the manner suggested by the HSF, it is inconsistent with the Constitution.

44. Although in the context of a dispute about the constitutionally compliant interpretation of section 6(3)(b) rather than a frontal challenge to the section, clear submissions were made by the HSF about the constitutional impermissibility of a term of office of a head of an independent entity being renewable at the discretion of a Parliamentary Portfolio Committee. The state respondents, therefore, have not been confronted with a new case to meet in this Court.

45. Moreover, the HSF does not introduce a frontal challenge to section 6(3)(b) before this Court. It has not sought any declaratory relief from this Court. Rather it asks for an order clearing the decks and remitting the matter to ensure that the constitutional validity of the section is properly ventilated, considered, determined and pronounced upon by the High Court. It also asks in its notice of motion that the State respondents be permitted to lodge further submissions before the High Court as they may consider appropriate.[17]

46. Moreover, the absence of the possibility of a frontal challenge weighs heavily against the awarding of an adverse costs order against the HSF for seeking the clearing-the-decks and remittal relief which it does in this application. The Portfolio Committee incorrectly contends that a frontal challenge remains open to the HSF.[18]

47. The import of the High Court Order is clear. The High Court granted declaratory relief setting out the procedure to be followed for the renewal of the Executive Director's term of office, including declaring that the Portfolio Committee is the actor empowered to take the final renewal decision.[19] This declaratory relief necessarily relates to the

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[17] HSF Notice of Motion at para 4.

[18] Portfolio Committee answering affidavit at paras 14-5 at page 6.

[19] Paragraph 1 of the High Court Order reproduced at para 27 of the SCA judgment.

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proper interpretation of section 6(3)(b) of the IPID Act, as the legislative provision that provides for renewal and empowers the taking of the renewal decision – notwithstanding that the Order does not expressly refer to section 6(3)(b).

48. It is also clear from the SCA's judgment that its holding concerning the constitutional permissibility of the Legislature being involved in the renewal decision is the basis for the decision reached and the order made. The SCA itself describes this conclusion as the reason why the HSF's interpretation is untenable, which was "the one central issue" in the appeal according to the SCA.[20] The holding forms part of the *ratio decidendi* of the SCA judgment and is binding – precluding any frontal challenge to section 6(3)(b) of the IPID Act before the High Court.

49. The only avenue available to the HSF to uphold the jurisprudence of this Court on adequate independence, security of tenure and renewable terms of office and to ensure the proper safeguarding of the adequate independence of IPID was, thus, to approach this Court for the relief sought. The HSF should not be saddled with costs for doing so.

50. The approach of the Portfolio Committee – in attempting to prevent the proper ventilation and determination of constitutional issues of great import – places "*formalism ahead of what the interests of justice dictate*".[21] In the absence of this application by the HSF, the High Court Order and SCA judgment and Order will stand, this Court's jurisprudence on the requirements of adequate independence will have been rolled back, and the independence of IPID undermined.

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[20] SCA judgment at paras 42 and 54-5.

[21] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC).

51. The Portfolio Committee itself concedes – using the HSF's arguments on *JASA* – that renewable terms of office "*may be a problem*" and that "*the State respondents may want to review their position after being faced with a proper frontal challenge*."[22] This is precisely what the relief sought by the HSF gives the State respondents an opportunity to do – in circumstances where proper ventilation of the issue is not impeded by the extant High Court and SCA Orders.

CONCLUSION

52. For the reasons set out in the founding affidavit, the HSF respectfully submits that the matters raised in its application fall within the constitutional jurisdiction of this Court and that the interests of justice clearly require the granting of the application.

53. If this Court disagrees, however, and if the two conditions in paragraph 8 above apply, then leave is sought to file this affidavit. Should this be the case, the HSF submits that it is in the interests of justice to admit this affidavit, that the *Biowatch* principle applies and that the HSF does not fall to be mulcted in costs.

DEPONENT

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Parkview SAPS on 2021-06-02 2021, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.

53.1

2021 -06- 02
CLIENT SERVICE CENTRE
PARKVIEW

16/3/2009

COMMISSIONER OF OATHS
Full names: ROXETTE RUTTICKEN
Address: 11 DUNDALK AVENUE
Capacity: SERGEANT
011 067 6000

[22] Portfolio Committee answering affidavit para 45 at page 16. Emphasis is that of the Portfolio Committee.

"RA1"

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

Case No: 6175/19

In the application of:

HELEN SUZMAN FOUNDATION	Applicant for admission as *amicus curiae*

In re:

ROBERT McBRIDE	First Applicant
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE	Second Applicant

and

MINISTER OF POLICE	First Respondent
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Second Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:

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

JM

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

16. The HSF thus now makes this application in terms of Rule 16A(6) of the Uniform Rules of Court.

17. It is respectfully submitted that the HSF should be admitted as *amicus curiae* in the Proceedings for the reasons set forth below.

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

18. The HSF is a non-governmental organisation whose objectives are to "*defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".

19. The HSF is an organisation primarily concerned with the principles of democracy and constitutionalism, the rule of law, as well as South Africa's constitutional and international law obligations, all of which are implicated in this matter.

20. The Applicants seek an order in the Proceedings reviewing, invalidating and setting aside the decision of the Minister not to renew the appointment of Mr McBride as the Executive Director of the IPID. Whilst the decision not to renew Mr McBride's term of office as Executive Director raises important questions, the issues at stake in the Proceedings go far beyond the renewal of Mr McBride's term of office and this Court's decision may, and probably will, have significant repercussions for South Africa in relation to its constitutional and international law framework for ensuring the protection of the structural, operational and institutional

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

21. Further, this Court's decision may have an important influence on how other courts interpret and apply domestic and international law in relation to IPID and the exercise of public power in the context of other independent institutions. The correct interpretation of s6(3)(b) of the IPID Act is integral to ensuring the structural, operational and institutional independence of IPID. The failure to apply an interpretation which best vindicates the Constitution may also result in the appointment (on either a temporary or even permanent basis) of the Executive Director of IPID pursuant to a procedurally flawed process. The dangers of such unlawful appointments - even of acting heads / directors - are clearly illustrated in domestic and international case law.

22. The central issue in the Proceedings is the interpretation of legislation. It is trite that legislation should be interpreted insofar as is reasonably possible to promote and fulfil the rights and requirements set forth in the Constitution. In the context of IPID, HSF submits that the case law is clear that legislation must be interpreted to ensure that IPID and its staff are sufficiently insulated from undue political interference and other such threats which have the potential to undermine the structural, operational and institutional independence of IPID and, more broadly speaking, the rule of law.

23. The HSF will contend that the interpretation placed on the legislation by the Applicants and the Minister falls short of the level of adequate independence demanded by the Constitution and international law. The HSF contends that the appointment of the Executive Director of IPID is renewable at his instance and not at the instance of either of the respondents. These submissions are materially

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

24. The HSF has an interest in the Proceedings owing to the fact that the IPID is an indispensable body in the fight against, *inter alia*, corruption and organised crime. The need carefully to protect IPID's independence is reinforced by the fact that IPID is tasked with watching over and investigating the guardians of our criminal justice system, the South African Police Service ("**SAPS**"). The scourge of corruption and organised crime currently rampant in the country undermines the rights enshrined in our Bill of Rights, endangers the stability and security of our society, and jeopardises sustainable development, the institutions and values of democracy and ethical values, morality, the rule of law and the credibility of our government. These human rights and social and ethical values that are entrenched in our constitutional law, are those which the HSF actively seeks to promote, and must be ventilated fully before this Honourable Court.

25. The HSF has a longstanding history of promoting South Africa's domestic and international law commitments in the realm of upholding democracy and the rule of law, constitutionalism and human rights. The HSF has specialised expertise and interest in national, regional and international law standards in relation to the issues before this Honourable Court.

26. In addition, the HSF was granted leave to intervene as *amicus curiae* in the matter of *McBride v Minister of Police and Another* 2016 (2) SACR 585 (CC). Not only does this matter interact with that judgment, but the HSF played a central role in at least three other matters concerning constitutional requirements pertaining to the institutional and operational independence of key state institutions: *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1

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

27. The HSF thus seeks to intervene as *amicus curiae* in the Proceedings (in its own interest and in the public interest) in order to advance the submission that constitutional principle, including the constitutionally required structural, operational and institutional independence of the IPID, which is critical to the ability of that body to fulfil its constitutional and legislative mandate as well as the Republic's obligations under international law, requires an interpretation of legislation which places the renewal of the Executive Director's tenure beyond the remit of political actors.

28. If effect were to be given to either the Applicants' or the Minister's conceptualisation of the legislative framework, IPID would be insufficiently insulated from executive interference with regard to renewal of terms of office of the Executive Director. This, in turn, would unacceptably undermine (a) the unit's ability to fulfil its constitutional mandate and (b) public confidence in the institution of IPID. The Applicants' and the Minister's interpretation also falls short of the requirements of South Africa's international treaty obligations.

29. The submissions by the HSF are relevant and will assist the Court as such submissions have not been advanced by the other parties to the Proceedings. When considered against the core function of IPID, which exists to curb rampant organised crime and corruption threatening the political and economic integrity of the country, it is apparent that the issues raised in this application are of paramount public interest to a young and fledgling democracy.

JM

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

31. Should the HSF be admitted as *amicus curiae*, it will advance, *inter alia*, the submissions set out below.

THE HSF'S SUBMISSIONS

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

32. In its founding papers, the Applicants submit that the decision to renew the appointment of the Executive Director is one which must be taken by the Portfolio Committee, and not the Minister, and seeks an order directing the Portfolio Committee to take this decision on or before the expiry of Mr McBride's term in office on 28 February 2019.

33. On the Minister's interpretation, the provision on renewals in section 6(3)(b) of the IPID Act ought to be interpreted comparably to the provisions on appointments contained in sections 6(1) and (2), in that the Minister must make a

FRANCIS ANTONIE

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

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Cpt
COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIEDIENS
COMMANDER / DETECTIVE BRANCH
WYNBERG KP/CP
2019 -02- 06

Full names: Johan Muller.
Business address: SAPS churchstreet klynberg
Designation: Captain.
Capacity: Captain

JM