IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
(BLOEMFONTEIN)

APPEAL CASE NO 1065/19
GP CASE NO 6175/19

In the matter between:

HELEN SUZMAN FOUNDATION	Appellant
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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FILING SHEET

PRESENTED FOR SERVICE AND FILING:

1. Appellant's supplementary submissions.

Dated at **Johannesburg** on this the **23rd October 2020.**

REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN
2020 -10- 23
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REGISTRAR'S CLERK

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Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty
Subject: Helen Suzman Foundation // Robert McBride and Others (SCA case no: 1065/19)
Attachments: Supplementary heads of argument (final) 23102020.pdf

Dear all

We refer to the above matter.

Please find attached the appellant's supplementary submissions.

Yours faithfully

Lavanya Pillay | Associate
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We have a dedicated website page to help our clients navigate through all of the legal & commercial challenges that arise from the COVID-19 outbreak, as well as government regulations to contain it.

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Dear Lavanya

We acknowledge receipt of your supplementary submissions.

Kind regards
Thando

Sent from my iPhone

From: Lavanya Pillay <Lavanya.Pillay@webberwentzel.com>
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Subject: Helen Suzman Foundation // Robert McBride and Others (SCA case no: 1065/19)

Dear all

We refer to the above matter.

Please find attached the appellant's supplementary submissions.

Yours faithfully

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ROBERT McBRIDE	First Respondent
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MINISTER OF POLICE	Third Respondent
PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY	Fourth Respondent

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APPELLANT'S SUPPLEMENTARY SUBMISSIONS

INTRODUCTION

1. On 20 October 2020, the Court issued a directive ("**the 20 October directive**") calling on the parties to file additional submissions on the following issues:

1.1 whether the appellant ("**HSF**") has standing to appeal; whether this Court has jurisdiction to hear the appeal; and whether the appeal will have any practical effect.

2. In these submissions, the HSF will respond to each of these issues in turn.

THE HSF'S STANDING IN THE APPEAL

3. Even though the HSF was an *amicus curiae*, and not a party, before the court *a quo*, it contends that it has standing to appeal the order of court handed down by the Honourable Madam Justice Hughes on 12 February 2019 ("**the Hughes Order**").

4. It is now trite that an *amicus* may seek leave to appeal and prosecute an appeal despite not being a cited party,[1] in appropriate circumstances.

5. In *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC), the Constitutional Court held the following:

> *"[20] Given the broad provisions of s 38 of the Constitution, the fact that the Campus Law Clinic was not a party to the proceedings in any of the three courts mentioned above is not an absolute bar to it being accorded standing to bring an application for leave to appeal.*
>
> *[…]*
>
> *[21] The factors that would be relevant would be: Whether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; 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; the degree of vulnerability of the people affected; the nature of the rights said to be infringed; as well as the consequences of the infringement. The list of factors is not closed. In the circumstances of that case the possibility that the people affected by the provisions concerned would challenge their constitutionality was remote. They may well have left the country before the constitutional challenge could or would materialise, even if it were assumed that they would have the resources, knowledge or will to*

[1] See, for example, *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) paras 19 - 22, and *University of Witwatersrand Law Clinic v Minister of Home Affairs and Others* 2008 (1) SA 447 (CC) para 6. See also *Psychological Society of South Africa v Qwelane and Others* (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) at paras 26 to 29.

> *institute appropriate proceedings. Accordingly, objectively speaking, Yacoob J held that it was in the public interest for the proceedings to be brought.*
>
> *[22] In the present matter the Campus Law Clinic points to what it calls the exceptional circumstances of the case. The proceedings from the start were essentially driven by judicial concern to ensure that, in enforcing warrants for sales in execution of properties where mortgage debtors were in default, constitutional rights concerning access to adequate housing be considered. The individual debtors did not actively pursue the matter themselves nor did they instruct counsel to appear. Counsel acting as amici curiae appeared at the request of the respective Courts. Once the appeal by Standard Bank succeeded in the SCA, there was no litigant willing and able to take the matter further. The applicant contends that, since the SCA decision will be binding on the High Court, and would be followed by the SCA itself, fresh proceedings would serve no useful purpose, and only involve unnecessary delay and expense. In the light of these considerations, we accept that the applicant has standing to bring an application for leave to appeal in this case*." (own emphasis)

6. The present case has undergone a paradigm shift since the HSF first decided to apply for intervention as an *amicus* before the court *a quo*. Initially, the first respondent ("**Mr McBride**") was seeking to set aside the decision of the third respondent ("**the Minister**") not to renew his tenure as Executive Director of the Independent Police Investigative Directorate ("**IPID**"). The HSF made common cause with that relief, not least as the Minister has no role to play pertaining to the renewal decision, but advanced that the correct basis for doing so was that on the correct interpretation of section 6(3)(b) of the Independent Police Investigative Directorate Act, 2011 ("**the IPID Act**"), renewal was at the instance only of the Executive Director of the IPID and not at the instance of the Minister, a parliamentary committee or the Executive. Thus any decision by the Minister to refuse to renew, or concerning the renewal, was unlawful.

7. For the court to come to a decision on any of the relief sought or to grant any relief in respect of the renewal process, it had to consider section 6(3)(b) and come to a conclusion on its proper interpretation, with the aid of, *inter alios*, the HSF's submissions.

8. But that never came to pass, with the Hughes Order being granted by agreement between the parties and the Court entertaining no debate on the interpretation of section 6(3)(b) of the IPID Act, even though the Hughes Order gave credence and effect to a particular interpretation. Under the doctrine of objective constitutional invalidity, the Hughes Order cannot co-exist with the proper interpretation of section 6(3)(b), as HSF sets forth in its written submissions in this Court. Important for the point of standing, however, is that given that the content of the Hughes Order was agreed between the parties, the parties would not be pursuing an appeal against it.

9. Accordingly, if proper effect were to be given to the Constitution and the proper interpretation of section 6(3)(b), it was left to the HSF to pursue this issue on appeal. The Constitutional Court has confirmed that "*an amicus curiae would ordinarily be permitted to appeal against an order of another court only where the actual parties to that litigation were not seeking to pursue an appeal and there was a clear public interest requiring it to be permitted to lodge the appeal*"[2] - this is precisely the case in this matter. Not only will the cited parties to the application before the court *a quo* not pursue an appeal, but this matter raises issues of manifest public importance that affect this case and the future. The Constitutional Court has held that where a matter concerns the constitutionality of a law the need for certainty may require the court to decide the matter irrespective of whether or not the party advancing the challenge had standing.[3]

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[2] *University of Witwatersrand Law Clinic v Minister of Home Affairs and Others* 2008 (1) SA 447 (CC) at para 6.

[3] See *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 24.

10. As the HSF has demonstrated in its pleadings and heads of argument before this Court, the Hughes Order was obtained in a constitutionally impermissible manner. The Constitutional Court held in *Tasima* that courts have an exclusive and vital constitutional role regarding the validity of the exercise of public power:

> ***"****When confronted with unconstitutionality, courts are bound by the Constitution to make a declaration of invalidity. No constitutional principle allows an unlawful administrative decision to 'morph into a valid act'. However, for the reasons developed through a long string of this Court's judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality."*[4]

11. This means *only* the courts can determine whether laws or conduct are inconsistent with the Constitution and invalid. Only the courts can determine the constitutional meaning of laws. Section 172(1) embodies an injunction. *"When confronted with unconstitutionality, courts are bound by the Constitution to make a declaration of invalidity."*[5] So not only are the courts the *only* bodies that may perform this function, they are also always obliged to do so.[6] When determining an issue of constitutionality, like whether the renewal of IPID's head has occurred lawfully, the court *must* determine whether the conduct is unconstitutional. It cannot allow private parties to usurp its exclusive role as sole arbiter of legality by effectively making this decision, and then elevating the agreement to an order of court.

12. The appointment of the head of IPID is a critical constitutional process. It is important for this Court to resolve whether the High Court can simply sanction the

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[4] *Department of Transport and Others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) at para 147.

[5] *Tasima* at para 147.

[6] *Tasima* at para 147 – courts are the sole arbiters of legality.

private agreements of functionaries and the incumbent head, or whether it ought to reach a decision on the merits through the prism of a constitutional interpretation of the statutory powers involved. HSF argues that the approach followed in this case has resulted in an unconstitutional interpretation of section 6(3)(b) of the IPID Act and an unconstitutional process, which erodes the independence of a crucial and constitutionally mandated corruption and other crime fighting unit, and both allows and invites interference in its operations by the political arms of government. This is plainly inconsistent with applicable constitutional and international law requirements as to independence.

13. The issues at stake thus go far beyond the renewal of Mr McBride's term of office. They engage the proper approach of our courts to the sanctioning of private agreements impacting on fundamentally important public powers. And the issues 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. Further, this Court's decision will not only give effect to the renewal of Mr McBride's term, but lay down an authoritative interpretation of section 6(3)(b) and the requirements of independence in circumstances where the executive and the legislature have already repeatedly flouted those requirements, and there is every basis to believe they will do so again, given that the Hughes Order expressly carves out a substantive role for both the third and fourth respondents. The correct interpretation of section 6(3)(b) of the IPID Act is integral to ensuring the structural, operational and institutional independence of IPID. The case properly made out before this Court directly engages that issue at its core.

14. 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 SAPS.

15. The HSF has thus brought this appeal in order to advance these constitutional principles.

16. Moreover, given the improper manner in which the Hughes Order was granted, and substantial implications which that Order and the Reasons have for the role of *amici* in constitutional litigation, the rule of law and the grant of orders and judgments *in rem*, it is imperative that the place of *amici*, the rights of parties and the responsibilities of courts are set forth clearly in this case.

17. Thus, even though the HSF was an *amicus curiae*, and not a party, before Madam Justice Hughes, it respectfully submits that it has standing to appeal the Hughes Order given all the circumstances.

18. Absent an appeal by the HSF, the Republic will be burdened with an order, ostensibly binding IPID, the National Executive and Parliament, which was improperly reached, which applies an unconstitutional interpretation to the IPID Act, and which directs high ranking officials to participate in and implement an unconstitutional process.

19. This issue is thus of national importance and immense public interest; will likely not be revisited outside of the appeal process and plainly has immense constitutional ramifications.

THIS COURT'S JURISDICTION TO HEAR THIS APPEAL

20. In its directive, the Court directed the parties to file submissions on "*whether, in the absence of a lis between the disputants and reasons on the substantive issues, this court has jurisdiction*".

21. This appeal will determine the separate and objectively fundamental question of the constitutionality and lawfulness of the interpretation of the IPID Act given effect by the Hughes Order and Reasons. What the HSF seeks by way of relief is for the prayers sought in the notice of motion in the court *a quo*[7]. That, together with the reasons set forth by this Court, would definitively dispose of the renewal issue and result in the renewal having been effected.[8]

22. The fact that one or other party does not appeal is not a reason for an unconstitutional result and order to remain, particularly, as in this case, it concerns an issue *in rem*. The Constitutional Court held in *ACSA*[9] that judgments *in rem* require the Court to apply its own mind to the question, to come to the correct conclusion on the basis of legal principle (irrespective of the parties' agreement), and to hand down reasons for having done so. Hughes J failed on all fronts – demonstrated most critically by the fact, as this Court's directive notes, that "*the order by agreement in the court below does not provide any reasons in relation to the substantive issues*". Indeed, the order simply gave effect to an unconstitutional order which was a product of the parties' agreement.

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[7] Appeal record ("**AR**") volume 1 pages 1 - 4.

[8] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC) 69 - 75.

[9] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (2) BCLR 165 (CC) ("***ACSA***") paras [1] to [4].

23. The absence of reasons by Hughes J is not a basis to reward the parties who achieved that unconstitutional result by their private agreement. Nor is it a basis for this Court not to engage upon the interpretative exercise. As the Constitutional Court held in *ACSA*, weighing against (in that case) the lack of a reasoned judgment by the Full Court and the SCA on the merits of their orders, is the fact that "*courts are often called upon to interpret agreements and orders on the only available information placed on record before them*".[10] As demonstrated above and in the HSF's pleadings before this Court, the Hughes Order has far-reaching effects. The Hughes Order declared that the Minister had a role in the renewal process and could take a preliminary decision in this regard. It also held that the Minister's preliminary decision on the renewal of Mr McBride's term of office had to be confirmed or rejected by the Portfolio Committee and thus expressly endorsed a statutory role for the Portfolio Committee and its interface with the Minister's decision. In so doing, the court *a quo* endorsed the underlying interpretation of the IPID Act, as chosen by the respondents – and vigorously defended that interpretation in their heads before this Court, thus confirming the live nature of the constitutional dispute. The constitutionality of this interpretation, however, was never ventilated in open court and no argument on the merits of the matter was advanced by the parties, despite the HSF's submissions to the contrary.

24. The effect of the Hughes Order was not simply a settlement of a private dispute, but the interpretation of legislation at the heart of an essential institution of national importance. The Constitutional Court held in *Eke v Parsons* 2016 (3) SA 37 (CC) ("***Eke***"), any settlement agreement to be made an order of court was required to

[10] *ACSA* para [26].

be unobjectionable, its terms must accord with both the Constitution and the law and its terms must not be at odds with public policy.[11] The HSF stressed that any settlement order in this matter will necessarily amount to a pronouncement on rights *in rem*, determining the objective status of the Minister's decision and the rights and duties of the Committee, and entail a consideration of the correct interpretation of section 6(3)(b) of the IPID Act. Any such order by a court, as confirmed in *ACSA*,[12] requires argument in open court, must accord with and be justified by the merits of the matter and the relevant judge is required to produce a written judgment setting forth reasons for the decision. Such an order, unlike orders bearing simply on rights *in personam*, cannot simply be taken by agreement between the parties.

25. Further, it has been stressed in *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) (6 September 2016) at footnote 25, that:

> "*Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality*."

26. The HSF thus argued before the court *a quo* that, as a first stage, the settlement order at least had to be debated in open court, argument on the interpretation of section 6(3)(b) of the IPID Act had to be heard by Madam Justice Hughes and she had to deliver a written judgment setting forth the Court's interpretation of this section.

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

[12] *ACSA* paras [1] to [4].

27. Contrary to the order sought by Mr McBride in the review brought before Hughes J (which was to set aside the Minister's decision and remove his involvement from the renewal process)[13], there is now judicial precedent - and sanction - through the Hughes Order that the Minister (an individual political actor) plays an important part in the renewal process, being afforded the power (if not responsibility) to make a preliminary decision. It is this preliminary decision which then falls to be considered by the Portfolio Committee. That judicial precedent had and has live practical effects – since on the basis thereof, the Portfolio Committee then considered the Minister's "preliminary" decision and came to the view similarly not to renew the tenure of the head of IPID.

28. So, the fact that the Hughes Order was in line with what the parties agreed does not mean that there is no longer a live dispute. There is a live dispute about whether it was permissible for the court *a quo* to sanction the agreement (in the same way there was a live dispute in *ACSA* where the Constitutional Court explained that it was sufficient for the Court to determine that appeal where "[t]he dispute in this case revolves around the meaning and effect of a settlement agreement and the import of sanctioning it as an order of court"[14]); there is a live dispute about the proper interpretation of section 6(3) of the IPID Act borne out by the competing and detailed submissions of the parties as to the meaning of the Constitutional Court's jurisprudence on independence in respect of this very office; and there is a live dispute that will bear very clearly on the lawfulness or otherwise of a predicate High Court order that stands (unless overturned, varied or abandoned on appeal) and which formed the basis for the non-renewal decision

[13] AR volume 1 pages 1 - 4.

[14] See *ACSA* at para 5.

that followed by the Portfolio Committee. That order would stand – and does stand – independently of any review (or non-review) of the Portfolio Committee's decision.

29. In the 20 October directive, the Court directed the parties to the cases of *Komape and Others v Minister of Basic Education and Others* [2019] ZASCA 192; and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

30. In both of those cases the applicants for admission as *amicus curiae* were denied admission as they were not objective and sought to further an interest of their own. With respect, these cases are entirely distinguishable from the HSF's appeal:

30.1 The HSF was already admitted as an *amicus curiae* before the court *a quo* after all the parties consented to its admission.

30.2 In this appeal, the HSF advances substantially similar arguments to those which it made before the court *a quo* upon its admission as an *amicus*.

30.3 The HSF has no personal interest or agenda which it seeks to advance in bringing this appeal. The HSF is not gaining any personal or political benefit in this litigation, nor is it allied to any of the parties or advancing any party's particular cause by bringing this appeal.

30.4 As demonstrated above, the Hughes Order sanctions an interpretation of section 6(3)(b) of the IPID Act which is not constitutionally compliant as it exposes IPID to actual or perceived political interference in respect of the Head (whoever that may be). Ultimately, terms of office which are renewable at the instance of third party political actors invite or give the impression of

rent-seeking and irremediably undermine independence. They are unconstitutional. The Hughes Order permits, however, of that unconstitutionality. The HSF's argument is that the only constitutionally compliant interpretation which safeguards independence and the perception thereof is that the term contemplated in section 6(3)(b) of the IPID Act is renewable at the instance only of the Executive Director of the IPID and not at the instance of the Minister, a parliamentary committee or the Executive. Should the HSF's appeal succeed, this will correct the unconstitutionality of the Hughes Order, the effects of which are far-reaching as demonstrated above and in the main heads, and ensure that the IPID Act is given a constitutionally compliant interpretation which protects the independence of IPID. This is the purpose of the appeal and the only outcome which the HSF seeks. The HSF has no interest in ensuring that a particular candidate occupies the office of Executive Director of IPID.

31. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), the Constitutional Court held the following:

> "*an amicus must make submissions that will be useful to the court, and which differ from those of the parties. In other words, the submissions must be directed at assisting the court to arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant. This does not mean an amicus may not urge upon a court to reach a particular outcome. However, it may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation.*" (own emphasis)

32. While the HSF has argued before this Court, as it did before the court *a quo*, what the constitutionally compliant interpretation of the section 6(3)(b) of the IPID Act ought to be, it does so for the purpose of ensuring that the interpretation which

gives effect to constitutional requirements and values and protects IPID's independence, is favoured. This argument does not serve any particular personal or partisan interest. It serves the Constitution's interest. And it is, with respect, the only just outcome in this matter and thus the outcome which ought to succeed.

THE PRACTICAL EFFECT OF THE APPEAL

33. On 28 February 2019, the Portfolio Committee made a final decision not to renew Mr McBride's term. Mr McBride has taken the Portfolio Committee's decision not to renew his term on review. With respect, Mr McBride's review of the Portfolio Committee's decision is entirely irrelevant to the appeal proceedings before this Honourable Court. Mr McBride's review application presupposes that the Portfolio Committee was entitled to make any decision in the first place – a presupposition that is predicated on the Hughes Order itself, which sanctions such involvement, including formalising the Minister's interfacing with the Committee as to his views on renewal. It does not deal with the interpretation of s6(3)(b) of the IPID Act - this issue too having already been decided by the Court *a quo* in rubberstamping the private settlement agreement reached by the respondents. Mr McBride's review thus proceeds on the premise that the Portfolio Committee and the Minister have a substantive role to play in the renewal process. That is a common cause position among the parties, including each of the respondents.

34. This appeal will determine the separate and objectively fundamental question of the constitutionality and lawfulness of the interpretation endorsed by the Hughes Order and process by which that Order was granted and its compliance with Constitutional Court authority. In other words, the issues raised in Mr McBride's

review of the Portfolio Committee's decision are thus different and entirely irrelevant to the question of law on appeal before this Honourable Court.

35. Furthermore, the review only considers the Portfolio Committee's decision after the fact, whereas the HSF's contentions are anterior thereto. Given that those anterior issues (both as to the manner by which the Hughes Order was made, and the fact that the Hughes Order permits and promotes the Minister's involvement in the renewal process alongside the Portfolio Committee) have already been determined by Hughes J, there is every likelihood that were HSF to try and raise those matters before the High Court, it will be met with a res judicata or issue estoppel defence.[15]

36. In short, because there is a predicate Order which blew (unconstitutional) life into the renewal process, the Order must be dealt with on appeal – which is the only place for that to happen, given that none of the respondents are willing to abandon the Order, strenuously defend it (in bracingly strident language) and the interpretation they say justifies it, and have proceeded to exercise their powers upon its edifice. The review court cannot undo that Order, only this Court can.

37. The gravamen of what is at stake in this appeal, however, means that it will have a practical effect not only on the current case but potentially on Mr McBride's review. This is so as, if this Court decides the interpretative question in the manner contended by the HSF, that will render the review proceedings unnecessary as the rationality or otherwise of the Portfolio Committee's final decision becomes irrelevant in view of it having no role to play in the renewal process. That is an

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[15] *Prinsloo NO & others v Goldex 15 (Pty) Ltd & Another* 2014 (5) SA 297 (SCA) at para 10; *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC) at para 69 - 71; *Jiyana and Another v Absa Bank Limited and Others* (1424/2018) [2020] ZASCA 12 (19 March 2020).

effect of the Constitution's principle of constitutional invalidity regarding the exercise of public power.[16]

38. Moreover, and as set forth above, the legal conclusions by this Court will guide ongoing and future conduct by the Minister, the Portfolio Committee and IPID. The impact on the independence of IPID and its Executive Director will be immediate, given that an important incentive or disincentive in acting in a manner which would please the executive or the legislature will be immediately removed, and IPID can do its job independently.

39. In any event, this Court – on account of the stance adopted by the court *a quo* – is faced directly with an unconstitutional order of court. The jurisprudence on section 172(1)(a) of the Constitution is well settled – a court faced with an unconstitutionality must declare it so, irrespective of what other relief may flow from it.[17]

40. An unconstitutional interpretation of the IPID Act cannot stand. Not only is the Hughes Order now a public pronouncement on the renewal process, but it will also likely affect the functioning of IPID. IPID's officials will now have to consider themselves – or be perceived to be – beholden to the political branches, whatever the decision of the Committee.

41. Moreover, given the improper manner in which the Hughes Order was granted, and substantial implications which that Order and the Reasons have for the role of *amici* in constitutional litigation, it is plain that this appeal will provide clarity on the

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[16] See *ACSA*, para 2.

[17] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para 52.

place of *amici*, quite aside from the rights of parties and responsibilities of courts in relation to settlement orders reached by agreement. This appeal therefore has substantial implications for the administration of justice.

42. If successful, the appeal will thus have an important effect on the functioning and independence of IPID as the appeal court will have to consider, in its reasoning, the correct interpretation of the IPID Act.

43. This appeal is thus not moot as it will have a very clear practical effect - it will not only affect the review proceedings but will also - fundamentally - determine the manner by which the Executive Director of IPID is to be appointed or replaced.

44. Additionally, the Constitutional Court has held that "*to the extent that it may be argued that this dispute is moot . . . this Court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this Court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear the matter".*[18] It is in the interests of justice, for all the reasons mentioned above, that the appeal be heard (even if it is moot, which the HSF denies).

45. There is, moreover, an entirely separate basis for the appeal to be heard. That is on account of the order of costs made by Hughes J. Hughes J awarded costs to the Minister and Committee as a result of resisting the HSF's application for leave to appeal in the court *a quo*, despite no party seeking costs against the HSF in the leave to appeal application. Such an award is entirely contrary to *Biowatch*[19] for the reasons set forth in the HSF's main heads of argument before this Court dated

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[18] *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) at para 27. See also *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC).

[19] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

17 March 2020. Leave to appeal has been granted on several occasions by the Constitutional Court on this basis alone.[20]

CONCLUSION

46. In the light of the above, HSF submits that it has standing to bring this appeal, the Court has jurisdiction to hear the appeal and the appeal will have practical effect.

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23 October 2020

[20] *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC); *Limpopo Legal Solutions and Others v Vhembe District Municipality and Others* 2017 (9) BCLR 1216 (CC); *Ferguson and Others v Rhodes University* 2018 (1) BCLR 1 (CC).