IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 7798/2009

In the matter between:

GLENISTER, HUGH Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE MINISTER OF SAFETY AND SECURITY Second Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent

THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Fourth Respondent

THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS Fifth Respondent

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Sixth Respondent

FOR HEARING ON 2 JUNE 2009

HEADS OF ARGUMENT ON BEHALF OF THE FIRST, SECOND AND THIRD RESPONDENTS

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1. In terms of prayer 4 of the Notice of Motion the Applicant seeks a declaration of invalidity of the National Prosecuting Authority Amendment Act, 56 of 2008 ("the NPA Amendment Act") and the South African Police Services Amendment Act, 57 of 2008 ("the SAPS Amendment Act") together

referred to as “the Acts”). In paragraph 1 (b) of the Applicant’s Heads of Argument it is averred that the Applicant also seeks a temporary interdict restraining the Respondents from implementing and enforcing the Acts pending confirmation of the order of invalidity by the Constitutional Court. Such relief is not foreshadowed in the Notice of Motion, and will be addressed separately in these Heads of Argument.

2. The order sought in prayer 4 is presumably claimed pursuant to s 172 (1) (a) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) (sections of the Constitution are cited by number only; where sections of other Acts are referred to, they will be specified). Neither the Applicant’s affidavits nor heads of argument refer to this provision at all, s 167 (5) being the only one mentioned in this regard (paragraph 7). That section must be read with s 172 (1) and s 172 (2).

JURISDICTIONAL LIMITATION

3. The Applicant’s case is largely based on the contention that either Parliament or the President failed to fulfil a range of constitutional obligations.

4. In paragraph 108 and following of the founding affidavit the Applicant explains “the legal bases” upon which he seeks the relief set out in the notice of motion. All but the first of those “legal bases” involves allegations that Parliament or the President failed to fulfil their constitutional obligations, and will require a decision on those matters.

5. The first of the Applicant's alleged legal bases is that the Acts are not rationally connected to a legitimate governmental purpose (para 112, p 67). This aspect does not fall within the scope of s 167 (4) (e) and will be addressed below.

6. The remaining complaints are these:

6.1 In paragraph 113 (p 70) the submission is made that the Cabinet and members of Parliament have breached the "injunction" in s 41 (1), i.e. that it failed to fulfil the relevant constitutional obligation;

6.2 In paragraph 114 (p 71) the contention is raised that "Mbeki, the First Respondent, the Cabinet and Parliament" all failed to fulfil an obligation imposed by s 198 (a);

6.3 In paragraph 115 (p 72) it is argued that the First Respondent, the Cabinet and Parliament failed to fulfil a constitutional obligation imposed by s 179 (2);

6.4 In paragraph 116 it is submitted that the First Respondent, other members of Cabinet and Parliament have failed to "comply with obligations of accountability" allegedly derived from s 1 (d), s 41 (1) (c) and s 195 (a) (b) read with s 195 (2) of the Constitution.

7. S 167 (4) (e) provides that it is only the Constitutional Court that may decide that Parliament or the President has failed to fulfil a constitutional obligation.

8. The wording of s 167 (4) (e) is open to the interpretation that only the Constitutional Court has jurisdiction to decide whether there has been a failure to fulfil a constitutional obligation by Parliament or the President, but this requires substitution of the word "whether" for the word "that". According to its wording it is only a positive decision that there has been such a failure which is reserved for the exclusive jurisdiction of the Constitutional Court. Another Court, including this Court, would accordingly not be precluded from deciding that Parliament or the President has not failed to fulfil a Constitutional obligation.

9. This wording of s 167 (4) (e) may be contrasted with that of subs (a), (b), (c) and (d). Subs (a) provides that only the Constitutional Court may "decide disputes between Organs of State", subs (b) and (d) make it the exclusive preserve of the Constitutional Court to "decide on" the constitutionality of Parliamentary or Provincial Bills or Amendments to the Constitution, implying that the subject matter itself may not be considered by any other Court. Subs (c) provides that applications envisaged in s 80 or 122 may only be decided by the Constitutional Court, and this is therefore also a limitation linked to the subject matter of the application.

10. By contrast, subs (e) uses the words "decide that", which indicates a limitation not on subject matter, but on the kind of order that may be made by any Court other than the Constitutional Court.

11. Put differently, in terms of subs 167 (4) (a) to (d) cases concerning the subject matter referred to therein are entirely removed from the jurisdiction of Courts other than the Constitutional Court. In terms of s 167 (4) (e) it is only a positive decision on the issue that is removed from the jurisdiction of other Courts.

12. However the case may be, before the Applicant can succeed, there will have to be a decision that Parliament or the President has failed to fulfil the constitutional obligations referred above. Such a finding, on any reading of s 167 (4) (e), can only be made by the Constitutional Court and not by this Court.

13. By contrast, this Court can validly find that there has not been a failure to fulfil a constitutional obligation and therefore it has the power to dismiss the application. It is not a case in which this Court is limited to following the course indicated in s 172 (2) (b), namely to adjourn the proceedings pending a decision of the Constitutional Court on the question whether there has been a failure by Parliament or the President to fulfil their constitutional obligations. It is not that this Court does not have jurisdiction to entertain the matter; the limitation is that it is not permitted to decide that there has been a failure to fulfil a constitutional obligation by either of those bodies.

SCOPE OF THE INQUIRY RE CONSTITUTIONALITY

14. It has now been made clear in the Applicant's heads of argument that it is not being contended that any of the specific provisions of the Amendment Act are in themselves inconsistent with the Constitution. This is apparent from paragraphs 44 and 69 of the Applicant's heads of argument. Paragraphs 5.3 and 5.4 of the affidavit of Ms Nchwe (p 2002) must therefore be taken as correct, as must paragraph 8.7 of the affidavit of Mr Simelane (p 2074).

15. It is accordingly common cause that both the SAPS Amendment Act and the NPA Amendment Act do not contain provisions which are in themselves inconsistent with the Constitution.

16. In paragraph 44 of the heads of argument it is said to be the Applicant's case –

> *"that the entire scheme of the two Acts is fundamentally and hopelessly inconsistent with the Constitution. This is because it involves the dissolution of the DSO which was created pursuant to the requirements to s 179 (4) as an entity under chapter 8 with the functions associated with it, all constitutionally prescribed in s 179 (2), and the transfer of its vital functions to a chapter 11 unit, DPCI, located within SAPS".*

17. It is submitted that these assertions on behalf of the Application are factually and legally incorrect, for the reasons that follow:

17.1 S 179 (4) requires national legislation to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. That was achieved in the NPA Act, 32 of 1998, in s 20 and s 32, well before the DSO was established in 2001;

17.2 The Khampepe Commission report, on which the Applicant places much reliance, addressed the rationale behind establishment of the DSO (paragraph 9, pp 334 – 335). In paragraph 9.5 it was reported that –

> *"The rationale for the establishment of the DSO, that is, to create a multi-disciplinary structure using the troika principle as a methodology to address organised crime was precipitated by intolerable levels of crime".*

17.3 Neither S 179 (4) nor the principle it reflects is mentioned in the findings of the Khampepe report as being part of the rationale for the establishment of the DSO;

17.4 There is no requirement in s 179 (4) that an investigative body be created in the NPA or as part of the Courts' structure in terms of Chapter 8 of the Constitution. There is no sense in which the creation of the DSO was "pursuant to" s 179 (4);

17.5 It is submitted that the subject matter and context of chapter 8 rather weigh against an investigative body being accommodated under its provisions. Chapter 8 deals with Courts and the administration of justice. Whilst many an investigation may result in a prosecution, that does not mean or imply that the investigative function – as opposed to the institution of criminal proceedings – properly belongs within the Court structures;

17.6 The proposition that s 179 (2) *"prescribes"* that the DSO had to be created at all, is without any merit, let alone that s 179 (2) prescribes that it had to be created under chapter 8 of the Constitution. S 179 (2) simply provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to the institution of criminal proceedings. It can hardly be submitted that carrying out investigations is a function "incidental to" the institution of criminal proceedings. Further submissions on this point are made below.

18. In paragraph 25 of Applicant's heads of argument the essence of the Applicant's case is summarised as follows:

> *"At the micro level the case is about the constitutionality of the scheme of the two Acts encompassing the dissolution of the Directorate of Special Operations (DSO) and the transfer of its investigative personnel to the new Directorate of Priority Crime Investigation (DPCI) in the South African Police Service (SAPS); at the macro level it is about the preservation of the rule*

of law and the independent ability of the National Prosecution Authority (NPA) to continue to function in the manner required by the Constitution: 'without fear, favour or prejudice' ".

19. This summary demonstrates that the Applicant's case is misconceived. The only part of it which correctly reflects the position brought about by the Acts, is that there will no longer be a unit known as the DSO located within the National Prosecuting Authority. The remainder of the summary is not correct.

19.1 Neither of the Amendment Acts nor the two read together provide for the transfer of the DSO's investigative personnel to the DPCI;

19.2 The independent ability of the NPA to function without fear, favour or prejudice is unaffected by either Amendment Act or the two read together.

20. As to the transfer of investigative personnel the applicable provisions are to be found in s 13 of the NPA Amendment Act, which substitutes s 43 A of the principal Act (the NPA Act, 32 of 1998). Regarding personnel, it provides for the following process:

20.1 Employees of the DSO are required to inform the NDPP whether they consent to be transferred to the SAPS before a date determined by the NDPP (s 43 A (2)). In paragraph 11.4 of the affidavit of Ms Nchwe (p

2006) it is recorded that a total of 138 of the 221 special investigators employed by the DSO have agreed to be transferred to the SAPS, 51 before the fixed date and 87 on the fixed date. A further 37 have agreed in principle to be transferred to the SAPS subject to the outcome of negotiations on conditions of service. As at the date of her affidavit, only 18 special investigators had indicated that they did not want to be transferred to the SAPS;

20.2 In terms of s 43 A (3) (a) as from the fixed date all those who held the office of special investigator and who consented to the transfer, are transferred to the SAPS and become members of that force;

20.3 Also from the fixed date, such administrative and support personnel of the DSO as may be agreed upon between the NDPP and the National Commissioner may be transferred to the SAPS. This case does not concern the administrative and support personnel but only the investigative personnel and no more reference need be made to the administrative and support personnel;

20.4 S 43 A (4) (a) provides that an employee contemplated in subs (3) may be transferred to the SAPS only with his or her consent. This emphasises that no special investigator can be compelled to take up a position within the SAPS;

20.5 Those who do not consent to be transferred to the SAPS must notify the NDPP thereof in writing before the applicable date (subs (5((a). In respect of them the NDPP has two options:

20.5.1 he may, after consultation with the Minister and the Cabinet members responsible for the public service and finance, offer to transfer the employee to a reasonable alternative post or position in any Government Department or State Institution; or

20.5.2 he may, after consultation with the Minister of Justice and Constitutional Development offer to transfer the employee to a reasonable alternative post or position in the prosecuting authority other than a post of special investigator.

20.6 All transfers are subject to s 14 of the Public Service Act, 103 of 1994, which provides for the preservation of salary scales, and is reinforced by s 43 A (4) (b), which provides that the remuneration and other terms and conditions of employment of employees transferred in terms of subs (3) may not be less favourable than those that applied immediately before the transfer.

21. Whilst the amendments to the NPA Act therefore provide for the transfer of investigative personnel <u>from</u> the DSO, they do <u>not</u> provide for their transfer <u>to</u> the DPCI. Personnel for that directorate are to be selected as provided for in s 7 of the SAPS Amendment Act. In terms of s 7 (1) persons

may be selected for appointment in the DPCI from the following five categories:

21.1 Former special investigators of the DSO who transferred to the SAPS;

21.2 Members who served in the organised crime component of the SAPS;

21.3 Members who served in the commercial crime component of the SAPS;

21.4 Any other member of the SAPS; and

21.5 Any administrative and support personnel employed at the fixed date by the DSO and the SAPS.

22. In terms of s 7 (2) the selection criteria must be advised by the National Commissioner to the Head of the DPCI and those criteria shall be determined with reference, amongst others, to experience, training, skills, competence or knowledge (s 7 (3)).

23. S 17E of the SAPS Amendment Act provides for security, screening and integrity measures in respect of those considered for appointment in the DPCI.

24. The overall scheme of the two Acts, read together, is to consolidate crime investigation powers within the SAPS. The investigative powers under s 7 and chapter 3A are simultaneously removed from the NPA Act. None of the provisions of the NPA Act dealing with prosecutors and prosecutions, nor the investigative powers in s 24 of that Act is affected.

25. The proposition that the scheme of the Acts is to render the NPA unable to function independently without fear, favour or prejudice, is plainly wrong.

25.1 S 20 of the NPA Act provides that the power contemplated in s 179 (2) and all other relevant sections of the Constitution, to institute and conduct criminal proceedings on behalf of the State, to carry out any necessary functions incidental to instituting and conducting such criminal proceedings and discontinuing criminal proceedings, vests in the prosecuting authority;

25.2 Whatever the scope of the functions encompassed by the expression “incidental to” instituting such criminal proceedings, they are vested in the NPA;

25.3 S 20 of the NPA Act is not amended by the NPA Amendment Act;

25.4 S 20 is supported by s 32 of the NPA Act.

25.4.1 S 32 (1) (a) provides that a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith without fear, favour or prejudice and subject only to the Constitution and the law;

25.4.2 S 32 (1) (b) provides that subject to the Constitution and the NPA Act itself, *"no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in their exercise, carrying out or performance of its, his or her powers, duties and functions"*;

25.4.3 In terms of s 32 (2) all members of the prosecuting authority are required to take an oath of office in which they swear or solemnly affirm that they will uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the law of the Republic without fear, favour or prejudice and as the circumstances of any particular case may require, in accordance with the Constitution and the law.

26. These are the provisions that give effect to s 179 (4) of the Constitution, which provides that "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice".

27. Sections 20 and 32 of the NPA Act are entirely unaffected by the NPA Amendment Act. The national legislation contemplated are required by s 179 (4) thus remains perfectly intact.

28. It is submitted that the consolidation of primary investigative functions within the SAPS and their removal from the NPA is consistent with the Constitution. S 179 provides for a single National Prosecuting Authority in the Republic (subs (1)), which has the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings (subs (2)). Whilst it may not be unconstitutional to also confer limited investigative powers on the National Prosecuting Authority, s 179 refers only to the power to institute criminal proceedings on behalf of the State. As far as the constitutional mandate or function of the NPA is concerned, it is limited to the institution of criminal proceedings and does not include the investigation of crime.

29. Regardless of whether it is competent to confer investigative powers on the NPA, it is plainly not inconsistent with the Constitution to limit its powers to those concerned with the institution of criminal proceedings on behalf of the State, and matters incidental thereto.

30. Similarly, the location of investigative powers within the SAPS is plainly perfectly consistent with the Constitution. S 205 (3) provides that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

31. There is thus no merit in a case that the location of an investigating directorate within the SAPS is inconsistent with the Constitution in any way.

32. From the inception of the DSO its mandate overlapped with that of the SAPS. This is explained in the terms of the reference of the Khampepe Commission of enquiry (p 319). The overlap arises from s 16 of the SAPS Act read with s 7 of the (unamended) NPA Act, both of which deal with the investigation of organised crime at a national level.

33. It is accordingly submitted that the establishment of the DPCI as set out in the SAPS Amendment Act is not in any way inconsistent with the Constitution or the statutory framework applicable to the South African Police Service.

34. Thus neither the removal of the investigative powers of the NPA under s 7 and chapter 3A from the NPA Act, nor the establishment of the DPCI within the SAPS is inconsistent with any of the provisions of the Constitution in any respect.

35. It is submitted that there is nothing in the scheme of either of the Amendment Acts read separately, or the two Amendment Acts read together with is inconsistent with the Constitution. Indeed, there is a powerful argument based on the provisions of sections 179 and 205 of the Constitution that the relocation of the primary investigative functions previously associated with the DSO, to the SAPS was necessary to give effect to the constitutional design. It is, however, unnecessary to make a finding in that regard. It is sufficient for present purposes that the scheme and effect of the Amendment Acts is not inconsistent with the Constitution.

A POLICY CHOICE

36. Both sections 179 and 205 require the enactment of national legislation to give effect to their provisions. The Constitution does not prescribe that the relevant provisions must necessarily be contained in separate Acts, nor in which Acts they must be placed. The design of the necessary statutory measures is left up to the executive (which initiates legislation; s 85 (2) (d)) and, ultimately, Parliament. The conceptualisation, design and formulation of such enactments and the organisational, financial and political ramifications thereof involve a range of policy choices and decisions over a broad front.

37. This was recognised in the report of the Khampepe Commission where the following was said in relation to a finding that there was nothing unconstitutional in the DSO sharing a mandate with the SAPS:

> *"Should Government consider it appropriate to discharge its agenda within the legal framework as now pertains, it can certainly do so provided that such action is not inconsistent with the Constitution".*
>
> (Par 12.4, p 351).

38. Until the time that the DSO was established the NPA exercised the prosecutorial function envisaged in s 179 of the Constitution and the SAPS the investigative and other functions contemplated in s 205. Save for the

limited investigative functions of the NPA under s 24 and s28 of the NPA Act, there was no overlap. The introduction of the DSO in 2001 and placing it within the NPA broadened the investigative powers of the DSO. Doing so involved a policy choice, as much as the one which has now been made.

39. The Applicant himself refers to what he terms "an abrupt about – turn in respect of previous Government policy" (par 3, p 7). The parties are *ad idem* that the debate is fundamentally about a policy choice.

40. The law in this regard has been crystallised in a series of decisions. Policy decisions are generally the preserve of the Executive and the Legislature, not the Courts. This was recognised by Chaskalson P in *S v Lawrence (and other related cases)* 1997 (4) SA 1176 (CC) para [42] where he said the following in relation to legislative policy choices:

> *"To apply that test to economic regulation would require Courts to sit in judgments on legislative policies on economic issues. Courts are ill-equipped to do this and in a democratic society it is not their role to do so. In discussing legislative purpose Prof Hogg says:*
>
> > *'While a Court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, the Court need not be so definite in respect of legislative facts in constitutional cases. The most that the*

Court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist'.

The rational-basis test involves restraint on the part of the Court in finding legislative facts. Restraint is often compelled by the nature of the issue; for example an issue of economics which is disputed by professional economists can hardly be definitively resolved by a Court staffed by lawyers. The most that can realistically be expected of a Court is a finding that there is, or is not, a rational basis for a particular position on the disputed issues".

41. In Bel Porto School Governing Body v Premier Western Cape 2002 (3) SA 265 (CC) Chaskalson CJ (as he then was) again addressed this topic, but in relation to policy choices by the Executive. He said the following in paragraph [45] (p 282), dealing with an argument that the Eastern Cape Education Department had adopted a particular approach which it was argued should also have been followed in the Western Cape:

"That is irrelevant to the rationality enquiry. The fact that there may be more than one rational way of dealing with the particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the

domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable".

42. Regarding the rationality standard, Chaskalson said the following in Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA 2000 (2) SA 674 (CC), after stating that it was a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary, and that decisions must be rationally related to the purpose for which the power was given, (par [90]):

"Rationality is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with a decision

simply because it disagrees with it or considers that the power was exercised inappropriately".

43. The aforegoing quote ends with a reference to *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at paragraph [36] where it was held that as long as there is a rational relationship between the method and object, it is irrelevant that the object could have been achieved in a different way.

44. In relation to a decision that amounted to administrative action and was subject to review, O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) said the following in par [48]:

"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so, a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of Government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to

be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances, a Court should pay due respect to the route elected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or where it is not reasonably supported on the facts or reasonable in the light of the reasons given for it, a Court may not review that decision".

45. The terminology of reasonableness in this *dictum* applies to administrative action in the context of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). The standard in relation to constitutional review, however, remains rationality, not reasonableness, being a less onerous standard (see *Pharmaceuticals*, *supra*; *Bel Porto*, *supra*, *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), para [67]; *New National Party v Government of the RSA* 1999 (3) SA 191 (CC)).

46. In the present case it is submitted that the choice made by the Executive and Parliament is entirely consistent with sections 179 and 205 of the Constitution. The establishment of the DPCI within the framework of the SAPS Amendment Act is manifestly designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority and other crimes.

That is a legitimate and valid governmental purpose and the means by which it is sought to be achieved are logical, rational and consistent with the Constitution.

47. The contention that the true purpose of the Acts is to shield high-ranking ANC members from prosecution is an inference the Applicant seeks to draw from certain evidence (whether admissible or not). Such an inference can only be drawn in a civil case (such as this) if it is consistent with all the proved facts (*Govan v Skidmore* 1952 (1) SA 732 (N) at 734; *Ocean Accident and Guarantee Corp v Koch* 1963 (4) SA 147 (A) at 159).

48. Such an inference is, however, inconsistent with a number of vital facts.

48.1 The first is that the Acts carefully provide for the continuation of any investigations and prosecutions that were under way when they were enacted;

48.2 The second is that the vast majority of those investigations and prosecutions have been finalised, as recorded in the judgment of Yekiso J in the application brought by the same Applicant in this Division in October 2008;

48.3 The third is that the re-alignment of the DSO's investigative functions and the resolution of the problems inherent in the fact that its

mandate overlapped with that of the SAPS, was a concern from very early on. The concern was based on the applicable provisions of the Constitution and high level governance legislation such as the Public Finance Management Act, as is evident from the Khampepe Commission report and the references to the Hefer Commission.

KHAMPEPE COMMISSION REPORT

49. The Applicant deals with the report of the Khampepe Commission (paragraph 46 to 51 of the founding affidavit (p 32 to 35)). He relies on a recommendation that the DSO should be retained within the NPA. That recommendation is contained in paragraph 47.4 of the report (p 416).

50. It is, however, necessary also to refer to paragraph 47.5 of the report, which reads as follows:

> *"I have considered the totality of the evidence and argument and am satisfied that the DSO should remain within the NPA but certainly with such adjustments as are recommended in the body of the report including the recommendation relating to the power of the President under s 97 (b) of the Constitution to transfer political oversight and responsibility over the law enforcement component of the DSO to the Minister of Safety and Security in order to clear the anomaly already alluded to herein".*

51. Earlier in the report the commissioner says the following in her recommendations in relation to the evaluation of the implementation of the legislative mandate of the DSO:

> *"I am a mindful of the myriad of problems comprehensively dealt with by other submitters, with regard to the shared mandate (DSO – SAPS) and the conflicts and further potential conflicts that the shared mandate presents. Notwithstanding, I hold the view that tinkering with the legal mandate of the DSO is not likely to fundamentally eliminate these problems".* (Emphasis added).
>
> (Par 16.3, p 359).

52. Some of the findings of the Commission show that a lack of adequate control over the DSO's activities gave cause for serious concern.

52.1 In par 18.3 (p 336) reference is made to *"a disturbing complaint that some of the members of the DSO have not been vetted by the NIA (the National Intelligence Agency) as is required by law".* It goes on to state that *"there can be little debate that the practice is unacceptable and may ultimately prove to undermine the security of the state".*

52.2 In par 20.5 (p 371 to 372) further concerns are raised which reflect on a failure of governance and control. The Commissioner there stated as follows:

> *"Furthermore, I find that there is merit in the concern raised in evidence relating to the alleged abuse by the DSO with regard to the manner in which it publicises its work in the media. This alleged conduct has attracted public criticism against the DSO of being 'FBI style', meaning that the DSO conducts its operations as though it were a law unto itself. There is indeed merit to this complaint".*

52.3 The Commission was sharp in its criticism of this conduct in paragraph 21.6 (p 372):

> *"I venture to opine that I find such conduct to be out of kilter with our constitution, reprehensible, unprofessional and corroding (sic: erroding?) the public's confidence in the law enforcement agencies".*

53. The report as a whole makes it plain that the DSO was not able to perform its statutory mandate, as interpreted by itself, without engaging in intelligence gathering (seen as part of its function under s 7 (1) (a) (ii) of the

NPA Act before amendment). The Commission referred to this (para 24.1 p 378) and then made the following finding in paragraph 24.2 (p 378 to 379):

> *"The welter of evidence before the Commission as well as the on site visit to the DSO revealed that the DSO has established intelligence gathering capabilities. This goes beyond the ambit of its information gathering mandate set out in s 7 of the NPA Act".*

54. In the next paragraph the anomalous position of the DSO is portrayed in disturbing terms. In para 24.3 (p 379) the finding of the Commission is formulated as follows:

> *"The Minister who exercises final responsibility over the work of the NPA is the Minister for Justice and Constitutional Development. She performs this function as a responsible political head under which the administration of the NPA Act falls. She does not, however, have practical, effective political oversight responsibility in respect of the law enforcement elements of the work of the DSO".*

55. The report continues as follows:

> *"24.4 The Minister who exercises final responsibility for law enforcement is the Minister of Safety and Security. He*

does not have political responsibility in respect of the investigative element of the work of the DSO.

24.5 The disjunction in political accountability for the entire work of the DSO, in part explains the discord regarding the effective political oversight over and accountability for the DSO".

56. Financial governance of the DSO is equally anomalous. In paras 24.6 to 24.7 (p 379) the Khampepe Commission reported as follows:

"24.6 The CEO of the DSO is, in terms of the Act, responsible for the financial accountability of the DSO. At the same time, the Director-General: Justice is the accounting officer for the Department of Justice to which the NPA (read DSO) fall (sic). <u>As a result, there are technically two financial heads responsible for the financial accountability of the DSO</u>.

24.7 Under the PFMA (the Public Finance Management Act) the accounting responsibility who will lie with the Director-General: Justice in respect of matters failing under the NPA and at the same time, the CEO in the DSO would equally have the accounting responsibilities under the PFMA".

57. In paragraph 24.8 it is noted that some of the most important threats relating to organised crime operationally fell beyond the command and control of the Minister of Safety and Security because of the DSO's role in that regard. In paragraph 24.9 reference is made to an SAPS argument that the arrangement did not reflect sound principles of governance and that the DSO was, also in this respect, a law unto itself and capable of unilateral action. "The DSO was even able to determine crime threats and priorities outside the ambit of the Safety and Security Ministry, and without any input by the latter".

58. In paragraph 24.10 the Khampepe Commission said that:

> *"This argument is, in my view, compelling. It is both untenable and anomalous that the Minister of Safety and Security who has the responsibility to address the overall policing / investigative needs and priorities of the Republic should not exercise any control over the investigative component of the DSO considering the wide and permissive mandate of the DSO relating to organised crime"*.

59. In paragraph 24.11 it went on to say the following:

> *"The anomaly arises because the Minister for Justice and Constitutional Development does not account to Parliament in respect of the law enforcement aspects of the work of the DSO.*

Whereas the Minister of Safety and Security accounts to Parliament in respect of law enforcement aspect activities of the SAPS, he does not do so in respect of the law enforcement of the DSO. There is thus a dichotomy regarding which Minister should ultimately take responsibility for the profoundly significant law enforcement component of the work of the DSO".

60. These passages of the report show that there were real and very serious concerns about many important aspects of the DSO. Confusion about political responsibility for its activities, uncertainty about financial governance, its operation outside the overall policing structures, and the fact that it acted "as a law unto itself" could not be overlooked and allowed to continue.

61. The intelligence gathering activities of the DSO give rise to important constitutional concerns. In terms of the Constitution, intelligence services resort under chapter 11, which deals with security services. This is reflected in s 199 (1).

62. In terms of s 209 an intelligence service, other than an intelligence division of the defence force or police service, may be established only by the President as head of the national executive and only in terms of national legislation.

63. This makes it impossible for legislation or a proclamation or other "tinkering" with s 7 of the NPA Act to validly establish the NPA as an

intelligence service. This is an intractable obstacle to the location of the DSO within the NPA.

64. The Khampepe Commission recognised this difficulty (paragraph 24.12, 24.13 (pp 381)). It drew a distinction between “intelligence gathering” and “information gathering” in paragraph 24.14 (p 381), but without defining the difference. It proceeded to make the following finding, which again is important in the context of dealing with appropriate control and governance of the DSO, in paragraph 24.15 (p 381):

> *“Having considered the information placed before the Commission and the evidence tendered before me, I have been left with an impression that it is more than probable that the DSO has gone to establish, for itself, intelligence gathering capabilities and in fact gathers intelligence in a pursuit of its mandate. This, if correct, would be unlawful”.* (Emphasis added).

65. Reference is then made to the need for the DSO’s information gathering activities (presumably as distinct from its intelligence gathering activities) to “ultimately filter through to NICOC” (the National Intelligence Co-ordinating Committee). In paragraph 24.17 Justice Khampepe reported that she was however not persuaded that the argument that the DSO should be included in the intelligence structure of the NICOC cures the difficulty of it being an (unlawful) intelligence gathering agency. She remarked that

s 199 (1) of the Constitution does not permit of the interpretation that the DSO is an intelligence agency contemplated in that provision.

66. In the recommendations under this section, the Khampepe Commission reported as follows in paragraph 25.1 (p 383):

> *"There is a compelling reason to harmonise the political oversight over the activities of the DSO".*

67. The paragraph goes on to repeat much of what has been referred to above in relation to the findings, and concludes in the last sentence as follows:

> *"This has to be addressed through the invocation of s 97 (b) of the Constitution".*

68. This is then the context in which the recommendations in paragraphs 47.4 and 47.5 of the report must be understood. The Khampepe Commission's support for retention of the DSO within the NPA was heavily qualified by the recommendation in paragraph 47.5. That qualification is consistently ignored by the Applicant.

69. In accordance with the Khampepe Commission recommendations to retain the DSO within the NPA the anomaly set out above had to be addressed. That requires reference to s 97 (b) of the Constitution as the

provision proposed by the Commission under which that could be achieved. That section provides as follows:

> *"The President by proclamation may transfer to a member of the Cabinet –*
>
> *(a) …*
>
> *(b) any power or function entrusted by legislation to another member".*

70. At first blush this may seem to be an appropriate provision to address this problem. Once the provisions of the NPA Act, in particularly s 7, are scrutinised however, and the constitutional constraints in s 209 (1) are considered, it is evident that no proclamation under s 97 (b) can resolve the problems identified in the Commission's report.

71. In her affidavit Ms Nchwe makes the point in para 19 (p 2011) that the recommendation for resolving the dysfunction in the political responsibility of the investigative unit of the DSO could not legally be implemented. She says that furthermore, the transfer of political oversight over the investigative unit of the DSO could not confer any intelligence mandate on its members purely by way of proclamation. It is submitted that those statements are entirely borne out by the provisions referred to above.

(See also Nchwe para 22, (p 2012); para 25 to 26, (p 2013 to 2015)).

72. It is submitted that the recommendations of the Khampepe Commission were also contradictory and inconsistent. On the one hand, the Commission stressed the importance of harmonising the political oversight over the activities of the DSO (para 25.1, p 383), but on the other hand, made a recommendation in paragraph 47.5 that would have deepened the dysfunction between the law enforcement and prosecutorial functions of the DSO.

73. These aspects demonstrate the need for careful assessment of the weight and status of the Khampepe Commission report. It contained recommendations that were intended to serve as guidelines. It is not legislation, nor does it supplant or modify the Constitution. Its recommendations were not entirely harmonious, and, at least in the respect referred to above, could not legally or practically be put into effect.

74. It is therefore not surprising that although Cabinet approved the report in principle, it was ultimately not able to give effect to all of its recommendations. It could not retain the DSO within the NPA, and at the same time harmonise the political oversight over the activities of the DSO; nor could it legitimise the intelligence gathering capability of a body performing the functions of the DSO; nor could it resolve the confused issues of financial accountability for the DSO.

75. It is submitted that in this regard the Executive and Parliament were faced with a choice as to which of the recommendations of the Khampepe

Commission to implement or modify. Retaining the DSO within the NPA with full knowledge of the operational and functional issues addressed in the Khampepe Commission report would have been dangerous. Once it was known that the DSO was acting unlawfully in its intelligence gathering function, it would have been unlawful and irresponsible for the Executive and Parliament to permit it to continue in that fashion. Awareness of the "myriad of problems" arising from the shared mandate, without taking positive steps to resolve them, would have been equally irresponsible.

76. The chosen solution was to place the functionality of the DSO within the SAPS, which had a constitutionally sanctioned intelligence service (see s 209), where the directorate could function within the priorities identified by the National Commissioner of Police and within sound and conventional financial and operational governance structures.

77. When the findings and recommendations of the Khampepe Commission were known and analysed, the DSO simply could not be permitted to continue with its operations as before and within the structure and framework that had existed hitherto.

78. Once this is realised, it becomes clear that the foundation of the Applicant's case is fallacious. His case rests on the proposition that the DSO can and should continue as had before, whereas it is plain from the Khampepe Commission report that it would be inconsistent with the Constitution – and utterly irresponsible – to permit it to do so.

INDEPENDENCE OF THE NPA AND DPCI

79. In paragraphs 110 and 111 of the Applicant's heads of argument far-reaching – and frankly speculative – submissions are made about the manner in which the DPCI will conduct itself in future. It is submitted that under the dispensation contemplated by the Acts, the Minister and the governing party or alliance or coalition will henceforth "legally" have the final decision on who will and who will not be investigated by the DPCI unit of the SAPS. This submission seems to suggest that the Minister and the governing party *de facto* and *de jure* have the final say on who is investigated by the SAPS as a whole. It is also apparently a plea for a criminal investigation service that is free from any political control in the sense that there is no Minister who is a member of the governing party who may have political responsibility for it.

80. The concept that a member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives, is ordained by s 206 of the Constitution.

81. That does not mean that the police service is under the control of the governing party. But even if it does, that is what the Constitution requires.

82. The Applicant argues in paragraph 112 that the DSO operatives are effectively "demoted" to the ranks of DPCI because they cannot act

independently as they have done hitherto in the NPA, and that such "demotion" undermines the right of all citizens to equality before the law, to dignity and to freedom from violence and other infringements of the human rights.

83. It is submitted that this argument is startling in its disregard for the Constitution and the laws involved. Both Acts, make it patently clear that there will be no demotion. Moreover, no "DSO operatives" were lawfully entitled "to act independently". They had no right to independence; they had an obligation in discharging their prosecutorial functions to act without fear or favour. That obligation remains encumbent upon them.

84. The Khampepe Commission report demonstrated graphically the dangers of a DSO acting "as a law unto itself" i.e. independently and without recognition of the statutory and constitutional constraints on its functions.

85. The Applicant's repeated claim that infringement of his human rights will flow from the disbandment of "the most successful organised crime fighting unit in the history of the country" (see heads of argument, para 112 and 113) overlooks the fact that regardless of how the DSO's successes to be evaluated and assessed (in respect of which there is not unanimity), that must apparently in large measure be ascribed to the fact that it exceeded its information gathering function in terms of s 7 of the NPA Act, failed to have appropriate security vetting for its operatives, that there was a lack of

appropriate financial governance and that it acted “as a law unto itself in determining policing objectives.

86. The Applicant’s case amounts to a plea for efficiency regardless of the rule of law, constitutional values and legislative norms.

87. As far as the NPA is concerned, it has been pointed out above that its independence derives from s 179 (4) of the Constitution read with sections 20 and 32 of the NPA Act.

88. The submission on behalf of the Applicant in paragraph 111 of the heads of argument that the NPA will be incapable of acting without fear, favour or prejudice for lack of investigative capacity, is without any foundation. S 28 of the NPA Act is not repealed. In terms of s 28 (1) (a) if the investigative director has reason to suspect that a specified offence has been or is being committed or that an attempt has been made to commit such an offence, he or she may conduct an investigation on the matter in question whether or not it has been reported to him or her in terms of s 27. Moreover, in terms of s 28 (1) (b), if the NDDP refers a matter in relation to the alleged commission or attempted commission of a specified offence to the investigating director, the latter is obliged to conduct an investigation or a preparatory investigation as referred to in subs 28 (13).

89. S 8 of the NPA Amendment Act substitutes s 28 (2) (a) of the NPA Act and provides for the designation of any person in the amended s 7 (4) to conduct the investigation required.

90. These provisions preserve an investigative competency for the NPA. It is simply wrong to submit that the NPA will no longer have any investigative capacity.

91. It should also be noted that in terms of s 17 D (3) of the SAPS Act the head of the DPCI may, if he has reason to suspect that a national priority offence has been or is being committed, request the NDPP to designate a director of public prosecutions to exercise the powers of s 28 of the NPA Act.

92. In this context it is relevant to refer to the perpetuation and development of the prosecution guided investigation programme of the SAPS. In paragraph 110 of the founding affidavit (which is followed by paragraphs 106 and 107) the Applicant makes the point that “the distinguishing feature of the DSO is that the process is prosecution driven”. That is admitted by Simelane (para 61.1, p 2100).

93. Simelane however points out that there is co-operation at various levels between the NPA and the SAPS. The asset forfeiture unit works very closely with the SAPS and the organised crime units of the SAPS work closely with prosecutors (para 61.2 and 61.3, p 2100 to 2101).

94. The co-operation between the NPA and SAPS is also evident from the affidavit of Mr S G Lebeya. He refers to the prosecution guided investigations project, and describes its operation in paragraphs 9 to 11 (p 2135 to 2137). He draws attention to s 17F (4) of the SAPS Amendment Act which provides that the NDPP must ensure that a dedicated component of prosecutors is available to assist and co-operate with members of the DPCI in conducting its investigations.

95. Mr Lebeya denies that the prosecution guided method of investigation will be lost due to the Amendment Acts and states that it has been used in the SAPS for some time and will continue to be used in appropriate cases in the future.

96. He also points out (para 17, p 2138 to 2139) that the DSO had offices only in five regions and that outside those regions the SAPS investigated all crime, including organised and other priority crimes, and that where appropriate the prosecution guided approach was used throughout the Country.

97. In his affidavit Mr J W Meiring explains that he is the head of the commercial branch of the SAPS and that the commercial branch head office and that the serious economic offences unit are directly responsible to him. In paragraph 4.6 (p 2143) he refers to partnerships between the SAPS and NPA, and Department of Justice and Constitutional Development and Business Against Crime, in the establishment of the first specialised

commercial crime Court in Pretoria in November 1999. He says that since then such Courts have been established in Johannesburg, Port Elizabeth, Durban, Cape Town and Bloemfontein. Prosecutors from the specialised commercial crime unit prosecute in those Courts. Investigators and prosecutors are co-located in the same offices and work together on such matters. They start interacting from the commencement of the investigation (para 4.8, p 2143).

98. The prosecutors referred to in his affidavit all fall within the NPA and are all bound by s 20 and 32 of the NPA Act. The power of the NPA to investigate matters is not abolished by the Amendment Act. In particular, s 28 of the NPA Act remains intact. The powers under that section can be activated either through the NDPP hierarchy or by a request from the DPCI.

99. It is accordingly submitted that the notions underlying the Applicant's assertions that the NPA will loose its independence and will now be devoid of investigative powers are not correct.

100. The Applicant's assertions that there is direct "political manipulation" of the SAPS (heads of argument para 14, p110) are also not correct. The submissions overlook s 11 of the SAPS Act, which deals with the powers, duties and functions of the National Commissioner. In terms of s 11 (2) (a) he is obliged to develop a plan before the end of each financial year setting out the priorities and objectives of policing for the following financial year. This

plan in tabled in both houses of Parliament and is linked to the budget of the SAPS.

101. In paragraph 33 of the Applicant's heads of argument it is said to be the Applicant's case that the functionality previously associated with the DSO cannot properly and constitutionally be relocated within the SAPS in the DPCI unit contemplated by the two Acts. It argues that as part of the SAPS the DPCI unit will operate under the constitutionally sanctioned political control and direction of the Minister of Police and will receive policy guidelines from a ministerial committee consisting of at least five cabinet ministers if s 17 I of the SAPS Amendment Act "passes constitutional must".

102. Apart from the oblique challenge intimated here to the provisions of s 17 I for the first time, the argument seems to overlook the fact that in terms of s 31 of the NPA Act there was a ministerial co-ordinating committee (referred to in the Khampepe Commission report as the MCC) which had similar functions in respect of the DSO to those which are now provided for in s 17 I of the SAPS Act. Indeed, the Applicant complains that the MCC should have met more often than it did.

103. It is submitted that this glaring inconsistency exposes yet another fallacy underlying the Applicant's case.

104. The submissions in paragraph 34 (e) of the Applicant's heads of argument are also not sound. The submission is made that the DSO has

historically been involved with the investigation of organised crime, corruption and similar offences at the highest level in South Africa. It is further submitted that it has been able to do so because it is not under the control and direction of any politician and because the last NDPP took his constitutional mandate to heart and in fact led the DSO personnel in a manner which enabled them to act independently without fear, favour or prejudice.

105. These submissions overlook the facts spelled out in the affidavits of Nchwe, Simelane, Lebeya and Meiring that the SAPS has also historically been involved with investigation of organised crime, corruption and similar offences at all levels in South Africa. One need go no further that refer to s 16 of the SAPS Act, the Prevention of Organised Crime Act and the Prevention of Corruption Act to realise that this is so.

106. The Applicant's case is further based on the fallacious notion that only the DSO investigated organised crime and that only the DSO investigated corruption at the highest level in South Africa. The evidence shows that that is simply not true.

107. The Applicant's disregard for Constitutional and statutory structures is evident from paragraph 34 (f) of the heads of argument. In that paragraph independence and effectiveness are equated. The reality is however that the entire civil service is organised under Directors-General who are responsible to Ministers. If independence in the sense implied by the Applicant is required

for effectiveness, then structurally and constitutionally no government department can be effective.

108. The proposition reveals a dangerous flaw in the Applicant's case. The clear implication is that the DSO was effective because it was not properly located and accommodated within any of the constitutionally and legislatively sanctioned reporting and governance structures. It is this perceived "independence" which led to the situation where the Khampepe Commission found good grounds for regarding it as a "law unto itself".

109. The constitutional standard, however, is not effectiveness. It is lawfulness.

110. The Applicant's contention that the NPA is deprived of all its investigative powers by the Amendment Act also overlooks the provisions of s 24 of the NPA Act, which reads as follows:

> *"(1) Subject to the provisions of s 179 and any other relevant section of the Constitution, this Act or any other law, a director referred to in s 13 (1) (a) has, in respect of the area for which he or she has been appointed, the power to –*

(a) institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in s 20 (3);

(b) …

(c) supervise, direct and co-ordinate specific investigations; and … ".

111. These provisions existed before the 2001 amendment introducing the DSO, and are unaffected by the NPA Amendment Act.

112. In paragraph 39 of the heads of argument, it is submitted that the NPA's power to institute criminal proceedings on behalf of the State is rendered "somewhat nugatory" in sensitive corruption matters in which it is necessary to employ the services of an independent investigative unit, clothed with the powers given to the DSO, to carry out any necessary function incidental to instituting criminal proceedings.

113. This submission seems to suggest that –

113.1 Investigative powers are incidental to the power to institute criminal proceedings;

113.2 That the power to institute criminal proceedings is somehow undermined where the prosecutor himself cannot undertake an investigation and must get someone else to do it.

114. It is submitted that these underlying premises of the argument are not valid. Reference has already been made to the retention of the NPA's

investigative powers insofar as they are relevant to prosecutions. More fundamentally, however, the heart of the DSO issue, even before the appointment of the Khampepe Commission lay in the difference between general investigative functions and those relating to the institution and prosecution of criminal proceedings. The notion that wide and general powers of investigation are "incidental" to the power to institute criminal proceeding is fallacious. Certainly within the constitutional scheme, powers of investigation are not merely regarded as incidental to powers of prosecution. Otherwise there would be no need for the distinction between the prosecuting authority in s 179 and the provisions dealing with investigations in s 205.

THE ANC's POLOKWANE RESOLUTION

115. Much is made in the Applicant's papers of the decision taken at the African National Congress' national conference in 2007 to disband the DSO. In paragraph 106 of the Applicant's heads of argument the proposition is put in these words:

> *"The Cabinet and Parliament were not constitutionally entitled merely to dance to the tune of the ANC. They ought to have weighed and considered the Polokwane resolution against the requirements of the Constitution, recognised that both the express and implicit rationale for the resolution were fatally flawed and found the resolution incapable of being acted upon in a manner consistent with the requirements".*

116. There are a number of fallacies inherent in this submission.

116.1 Firstly, the Constitutional Court held in *Glenister v President of the RSA* 2009 (1) SA 287 (CC) in para [54] that there was nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party;

116.2 It is apparent that the Executive did carefully weigh the Polokwane decision and considered it against the requirements of the Constitution. This is evident from the affidavits of Nchwe and Simelane. The Cabinet came to a different conclusion to that proposed by the Applicant, but that does not make its conduct unlawful;

116.3 It is also evident from the affidavit of Carrim that Parliament considered the matter through its various structures, in a wide-ranging and intensive process;

116.4 Lastly, the difficulties arising from the recommendations of the Khampepe Commission have already been referred to. Removal of the DSO from the NPA was certainly one way of harmonising the governance of the DSO. The fact that that is also what the ANC resolved is immaterial.

117. It is instructive to compare the terms of the ANC resolution (para 8, p 514), which merely provided that “the directorate of special operations (scorpions) be dissolved”, with the Draft Bills (at p 539 and p 549) and with

the Amendment Acts (at 2048 and 2059 of the record). Such a comparison disproves the notion that either the Cabinet or Parliament merely acted as a rubber stamp for the ANC's decision or "merely danced to the tune of the ANC".

118. In paragraph 108 of the Applicant's heads of argument it is submitted that no other credible rationale for the scheme of the two Acts has been proffered. That is not correct. The issues identified by the Khampepe Commission have been addressed above. The fact that the ANC resolution proposed a means of resolving the difficulties that have been discussed before, albeit in blunt and unattenuated terms, certainly does not make it unlawful for Cabinet and Parliament to give effect thereto in the form of the Amendment Acts.

INTERNATIONAL OBLIGATIONS

119. The Applicant has sought to suggest that by passing the Amendment Acts, South Africa has violated its international obligations. The Applicant's allegations are at p 86 to 89 of the papers.

120. In response, Ms Nchwe pointed out that in terms of s 34 of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004, there is an obligation to report corruption to the SAPS, not the DSO. To the extent that the Republic has international "obligations" to have bodies or persons

dealing with corruption through law enforcement, that body is the SAPS. It never was the DSO.

121. In the Applicant's heads of argument (para 139) this answer is characterised as "nonsensical". Unless, however, the Applicant can show that the investigation of corruption fell within the constitutional and statutory mandate of the DSO, the answer is perfectly valid. As a matter of fact and law the DSO simply was never the body by means of which South Africa sought to comply with any obligations it might have had pursuant to the UN Convention or the African Union Convention.

122. For this reason it is submitted that the alleged violation of international obligations is, again, based on a fallacy.

PUBLIC PARTICIPATION PROCESS

123. The public participation process is described in the affidavit of Mr Yunus Carrim, p 2146 and following.

124. The Applicant's case, according to paragraph 150 of its heads of argument, is set out in paragraphs 82 to 84 of the founding papers, at pages 47 to 49. The Applicant's also deals with this aspect in paragraph 130 (p 83 to 84).

125. The submission in paragraph 150 of the heads of argument is remarkable for the manner in which it overstates the Applicant's case and

goes beyond any evidence (let alone any admissible evidence) on the papers. The measured response to this submission is that paragraph 130.2 of the Applicant's affidavit is palpably inadmissible hearsay. It refers to "several" complaints by unidentified persons making unsubstantiated complaints. The Applicant places reliance on media reports of the events as corroboration, but these also plainly do not render the allegations admissible.

INTERDICT

126. This Court's power to grant a temporary interdict is derived solely from s 172 (2) (b), which provides as follows:

> *"(b) A Court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct".*

127. It is submitted that s 172 (2) (b) contemplates a temporary interdict or temporary relief following upon an order of constitutional invalidity, and not one preceding or anticipating such an order. A Court cannot invoke the power conferred by s 172 (2) (b) without declaring that the legislation in question is unconstitutional, and it would be incompetent for a Court to exercise the power without having made such an order.

128. The approach to interim relief being granted by a High Court in relation to matters falling within its jurisdiction was considered in *National Gambling Board v Premier, Kwa-Zulu Natal* 2002 (2) SA 715 (CC). In that case the Constitutional Court declined to express a view on the question whether the High Court has jurisdiction to grant interim relief in relation to matters that fall under s 167 (4). In *President of the Republic of South Africa v UDM* 2003 (1) SA 472 (CC) the Constitutional Court writing *en banc* expressly declined to decide whether the High Court has jurisdiction to suspend the operation of an Act of Parliament (paragraph [27] at 484 F – G) but assumed that there might be exceptional cases in which the High Court might grant such an order (*ibid*).

129. In paragraph [28] of the *UDM* case the Constitutional Court found that in certain circumscribed circumstances a High Court may grant an interim order *"designed to prevent serious and irreparable prejudice"*, but emphasised that *"such an order would not have the effect of suspending the coming into force of the impugned legislation"* (485 B – C).

130. The position was summarised thus in paragraph [32] of the *UDM* case:

> *"[32] From the foregoing, we would hold that:*
>
> *(a) It is not necessary in this case to decide whether a High Court has jurisdiction to grant interim relief the effect of*

which is to suspend the operation of national or provincial legislation.

(b) A High Court has jurisdiction to grant interim relief designed to maintain the status quo or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or through action it is reasonably feared might cause irreparable harm of a serious nature.

(c) Such interim relief should only be granted where it is strictly necessary in the interests of justice. That is the constitutional standard provided in ss 80(3) and 122(3) of the Constitution and should also apply in cases such as those presently under consideration.

(d) In determining the interests of justice, the Court must balance the interests of the person seeking interim relief against the interests of others who might be affected by the grant of such relief.

(e) The interim relief should be strictly tailored to interfere as little as possible with the operation of the legislation and all the more so where the legislation relates to an amendment to the Constitution".

131. In the present case the Applicant seeks nothing less than an interdict suspending operation of the Acts. There is no attempt at *"strictly tailoring the relief sought"* to interfere as little as possible with the operation of the legislation. The application is not aimed at interdicting specified conduct pursuant to the Acts, but at the Acts themselves as a whole.

132. It is necessary to decide whether this Court has jurisdiction to grant such interim relief in this case. This requires the question left open in paragraph [32] (a) of the *UDM* case to be answered.

133. At the outset it is important to bear in mind that the Court has no common law power to declare an Act of parliament invalid. That power is derived solely from s 172 of the Constitution, which has no common law antecedent. Making such a declaration in a particular case involves considerations of constitutional comity between the judiciary, the executive and the legislature at the highest level (*President of the Republic of South Africa v SARFU* 1999 (2) SA 14 (CC), paragraph [29]).

134. At common law no Court would have the power to grant an interdict against the implementation of an Act of Parliament generally. Whilst a Court could have prohibited specified conduct undertaken pursuant to an Act of Parliament, it had no power to suspend an Act as a whole. (See *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC), paragraph [20].)

135. This is consistent with the reference to temporary as opposed to interim relief in s 172 (2) (b). The difference is that temporary relief may nevertheless be final in effect (*Metlika Trading*) and therefore not interim in the sense that it is reversible or that the decision to grant it can be revisited by the Court that made the order. When considering the constitutional validity of an Act, the court interprets the Act in question and the relevant provision(s) of the Constitution, and tests the former against the latter. In these circumstances there is no room for a finding to be made on an interim basis, i e subject to revision by the court of first instance.

136. In paragraph [54] of the *National Gambling Board* case the question whether a High Court would have the power to grant an interim interdict in circumstances where it is alleged that Parliament or the President has failed to fulfil a constitutional obligation was left open. It was mentioned that this issue raises complex constitutional questions.

137. It is submitted that this Court cannot grant the interim interdict sought by the Applicant since the complaints raised by the Applicant in this case concern matters that fall within the exclusive jurisdiction of the Constitutional Court under s 167 (4) (e). This Court has no jurisdiction to make any decision of any kind in respect of those issues.

138. To the extent that it may be found that this Court does have the power to grant an interim interdict in this case, it is submitted that it can only do so if the requirements summarised in paragraph [32] of the *UDM* case are

satisfied. The Applicant must prove that he will suffer prejudice which will otherwise be irreparable, which can be prevented by the granting of some carefully tailored interim interdict that stops short of suspending the Acts.

139. It is submitted that the Applicant has not adduced any evidence nor advanced any grounds that bring it within the scope of the *UDM* requirements.

140. This case is not based on any specific or definable prejudice to the Applicant himself or anyone else, that can be addressed by means of a limited interdict. He claims to be championing the rights of "the general public" and to be seeking to prevent prejudice to and to anonymous "members of the DSO" (paragraph 154) generally.

141. The harm which the Applicant says he wants to avoid – namely problems with "unscrambling the egg" – is not irreparable. The Applicant contends that it will be more problematic to do so if an interim interdict is not granted and he ultimately obtains the declaratory order he seeks, but does not contend – nor prove – that any prejudice would be irreparable.

142. These assertions do not satisfy the requirement of "irreparable harm of a serious nature" (UDM case, paragraph [39 (b)] nor is there anything to show that interim relief is "strictly necessary in the interests of justice" (paragraph [39 (c)].

143. In the premises the Applicant has not made out a case for interim relief, according to the required standard.

CONCLUSION

144. It is submitted that none of the grounds of constitutional validity advanced by the Applicant have been established.

145. The Court is invited to decide that neither the President nor Parliament has failed to fulfill any of their constitutional obligations.

146. In the premises the application should be dismissed with costs, including those of two counsel. Such costs should also include those incurred in respect of the day when the matter was first set down.

W R E DUMINY, SC

S POSWA-LEROTHOLI

Chambers, 29 May 2009