CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 07/14 and CCT 09/14

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF POLICE	Second Respondent
HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

And the matter between:

HUGH GLENISTER	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF POLICE	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

Neutral citation: *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J

Heard on: 19 August 2014

Decided on: 27 November 2014

Summary: South African Police Service Amendment Act 10 of 2012 — confirmation of an order of constitutional invalidity

South African Police Service Act 68 of 1995 — Directorate for Priority Crime Investigation — adequacy of the structural and operational independence of a constitutionally mandated anti-corruption entity

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ORDER

Application for confirmation of the order of the Western Cape Division of the High Court, Cape Town:

1. Leave to appeal against the order of the Western Cape Division of the High Court, Cape Town striking out the additional evidence sought to be led by Mr Glenister is refused with costs in this Court and the High Court, including costs of three counsel.
2. Leave to appeal against the order of the Western Cape Division of the High Court, Cape Town dismissing Mr Glenister's application to have the entire legislative scheme of the South African Police Service

Amendment Act 10 of 2012 declared constitutionally invalid is refused, and each party is to pay its own costs.

3. Leave to appeal against the order of the Western Cape Division of the High Court, Cape Town dismissing the application by the Helen Suzman Foundation to declare sections 17E(8), 17G, 17H, 17I and 24 of the South African Police Service Act 68 of 1995 as amended constitutionally invalid is granted, but the appeal is dismissed with no order as to costs.

4. The order of constitutional invalidity made by the Western Cape Division of the High Court, Cape Town is confirmed to the extent set out in paragraph 5.

5. The following provisions of the South African Police Service Act 68 of 1995 as amended are inconsistent with the Constitution and are declared invalid and deleted from the date of this order:

   (a) The words "in accordance with the approved policy guidelines" as contained in section 16(2)(h) and (3).

   (b) Section 17CA(15) and (16).

   (c) The words "subject to any policy guidelines issued by the Minister and approved by Parliament" in section 17D(1)(a).

   (d) The words "selected offences not limited to" and "and" in section 17D(1)(aA).

   (e) Section 17D(1)(b).

   (f) Section 17D(1A).

(g) The "(2)" in section 17DA(1) and the whole of section 17DA(2).

(h) Section 17K(4), (7) and (8).

6. All other provisions of sections 16 to 17K of the South African Police Service Act 68 of 1995 as amended remain in force.

7. The respondents are to pay the applicants' costs in the High Court as well as costs of the confirmation application, including costs occasioned by the employment of three counsel.

8. The first respondent is also to pay wasted costs occasioned by the postponement on 15 May 2014 to the applicants, including costs of three counsel.

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Jafta J, Khampepe J, Leeuw AJ and Zondo J concurring):

Introduction

[1] All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.[1]

[1] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 57:

> "Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy. The amount of

[2] We are in one accord that South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate. And this in a way is the issue that lies at the heart of this matter. Does the South African Police Service Act[2] (SAPS Act), as amended again,[3] comply with the constitutional obligation to establish an adequately independent anti-corruption agency?[4]

Parties

[3] The applicant in CCT 07/14 is the Helen Suzman Foundation (HSF), while Mr Hugh Glenister (Mr Glenister) is the applicant in CCT 09/14. The respondents in both matters include: the President of the Republic of South Africa (President); the Minister of Police (Minister); the National Head of the Directorate for Priority Crime Investigation (National Head); the Minister of Justice and Constitutional Development (Minister of Justice); the National Director of Public Prosecutions (NDPP); and the Government of the Republic of South Africa (Government).

> drugs confiscated inside our borders testifies to this. The sophisticated international network that is responsible for transporting these drugs requires urgent attention."

An assertion that corruption "has become a scourge in our country" and that "it poses a real danger to our developing democracy" reinforces the view that corruption is rife in this country. Corruption must necessarily be rife to rise to the level of being a scourge in our country. And it is particularly when corruption is widespread that it would pose a real danger to our young democracy. It is not merely isolated and insignificant incidents of corruption that our country has to contend with, but large scale and serious levels of corruption.

[2] 68 of 1995.

[3] The SAPS Act was amended by the South African Police Service Amendment Act 10 of 2012 (SAPS Amendment Act).

[4] See *Glenister II* above n 1 at paras 189 and 191-2, where this Court held that the state has an obligation to create an adequately independent anti-corruption unit.

Background

[4] South Africa had an agency that was practically established for the primary purpose of combating corruption and specialised offences. That agency, the Directorate of Special Operations (DSO), popularly known as the "Scorpions", was eventually dissolved.[5] Out of its ashes emerged the Directorate for Priority Crime Investigation (DPCI), otherwise known as the "Hawks".[6] This was achieved by amending both the National Prosecuting Authority Act[7] (NPA Act) and the SAPS Act. The constitutional validity of Chapter 6A of the SAPS Act, in terms of which the DPCI was established, was successfully challenged by Mr Glenister in this Court in *Glenister II*.[8]

[5] In dealing with the constitutionality of the legislative scheme that created the DPCI, this Court chose not to prescribe to Parliament how the constitutional defects were to be cured.[9] And in an attempt to remedy those defects, Parliament amended the SAPS Act again. The legislative scheme of this amended version was again

[5] The DSO, which was located within the National Prosecuting Authority (NPA), was established in terms of section 7(1)(a) of the National Prosecuting Authority Act 32 of 1998 as amended by the National Prosecuting Authority Amendment Act 61 of 2000 (DSO Act). This entity was abolished by the National Prosecuting Authority Amendment Act 56 of 2008.

[6] The DPCI, which is located within the South African Police Service (SAPS), was established in terms of Chapter 6A of the South African Police Service Amendment Act 57 of 2008.

[7] 32 of 1998.

[8] See *Glenister II* above n 1, in which Mr Glenister was the applicant and the HSF appeared as amicus curiae.

[9] Id at para 191.

challenged by Mr Glenister, whereas several sections were specifically impugned by the HSF in the Western Cape Division of the High Court, Cape Town (High Court).[10]

[6] The High Court dismissed Mr Glenister's application. In line with the Minister's application, it also struck out the additional evidence on which his case was premised. The HSF achieved partial success. Some of the impugned sections were found to be constitutionally invalid, whereas several others were not. A punitive costs order was made against Mr Glenister in respect of the successful striking out application. No order for costs was made in his favour for the successful HSF application that he had aligned himself with. HSF was awarded costs.

[7] This then is the HSF's application for the confirmation of the declaration of the constitutional invalidity of several sections and its application for leave to appeal against the decision not to declare invalid other sections whose constitutionality was challenged in the High Court. There is also an application by Mr Glenister for leave to appeal against the order dismissing his challenge to the constitutionality of the very location of the DPCI within the SAPS and the entire scheme of Chapter 6A in terms of which the DPCI was established. He also applies for leave to appeal against the order striking out the additional evidence he sought to rely on, the consequential punitive costs order made against him and the failure to award him costs for the successful HSF application.

[10] In that case, reported as *Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of the Republic of South Africa and Others* [2013] ZAWCHC 189; 2014 (4) BCLR 481 (WCC) (High Court judgment), the HSF was the applicant in WCC case number 23874/12 while Mr Glenister was the applicant in WCC case number 23933/12. These two separate applications were not consolidated, but, for the sake of practical convenience, were heard concurrently by the High Court.

Issues

[8] The issues are—

(a) the correct approach to this matter;

(b) the non-joinder of the Speaker of the National Assembly and the Chairperson of the National Council of Provinces;

(c) Mr Glenister's application for leave to appeal against the High Court's order dismissing his application to have the legislative scheme of the SAPS Amendment Act declared constitutionally invalid;

(d) Mr Glenister's application for leave to appeal against the High Court's order striking out key aspects of the additional evidence he sought to rely on with punitive costs;

(e) the HSF's application for leave to appeal against the High Court's dismissal of its application to have certain sections of the SAPS Act as amended declared constitutionally invalid;

(f) the application for the confirmation of the order of constitutional invalidity;

(g) remedy; and

(h) costs.

The correct approach

[9] Our anti-corruption agency, the DPCI, is not required to be absolutely independent. It, however, has to be adequately independent. And that must be

evidenced by both its structural and operational autonomy.[11] Parties are divided on whether the DPCI legislation must be examined as a whole for constitutional compliance and if aspects of it are found wanting be declared invalid or whether attention should be given to individual sections.

[10] The correct approach to this matter is, in my view, to examine each of the impugned provisions and determine whether they militate for or against a corruption-fighting agency which, though not absolutely independent, should nevertheless be adequately independent in terms of both its structure and operations. Those provisions that do not meet the constitutional obligation to create an adequately independent corruption-busting entity, in line with *Glenister II*, must be declared constitutionally invalid individually and set aside. This approach would inform Parliament of the exact nature and areas of concern that this Court has about the affected provisions. It would also eliminate a repetition of the mistakes previously made by Parliament in its endeavour to cure the constitutional defects the legislation was suffering from, identified by *Glenister II*.

Non-joinder

[11] The President, the Government, the Minister of Police and the Minister of Justice, took the preliminary point that the applications are fatally defective because the Speaker of the National Assembly and the Chairperson of the National Council of Provinces were not joined as parties to these proceedings. These leaders should, in

[11] *Glenister II* above n 1 at para 206.

their view, have been joined because Parliament has a material interest in the proceedings in which a challenge is mounted against the legislation it has passed. I disagree.

[12] Only when the constitutionality of the procedure followed by Parliament in processing and passing legislation is challenged, does it become necessary to join Parliament as a party. This is so because Parliament bears the constitutional responsibility to ensure that the correct procedures are followed in passing legislation. And it is for this reason, as well as its resultant material interest in the matter, that it must be afforded the opportunity to be heard and to defend itself before potentially adverse conclusions are arrived at in relation to its primary area of responsibility. This would explain why Parliament had to be cited in *Matatiele Municipality*[12] when the regularity of the constitutionally required consultative process necessary to pass the impugned legislation was challenged.

[13] Parliament is, however, not to be cited when the substance of a provision is challenged, save under exceptional circumstances, like where Parliament or the Provincial Legislature itself initiated and prepared legislation as was the case in *Premier, Limpopo Province*.[13] Ordinarily, it is the Executive that initiates, prepares

[12] *Matatiele and Others v President of the RSA and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) and *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

[13] *Premier, Limpopo Province v Speaker of Limpopo Provincial Government and Others* [2011] ZACC 25; 2011 (6) SA 396 (CC); 2011 (11) BCLR 1181 (CC).

and introduces draft legislation in the National Assembly.[14] Only thereafter does Parliament get down to the business of ensuring that constitutionally prescribed procedures are followed in passing Bills into law.[15] For this reason, when the content of legislation is impugned, it is usually only the Executive that must be cited.

[14] This point thus falls to be dismissed.

Mr Glenister's application for leave to appeal

(a) Can an independent corruption-fighting entity be located within the SAPS?

[15] The thrust of Mr Glenister's application is that the entire legislative architecture in terms of which the DPCI was created and located within the SAPS must be pulled down. This is because it is incapable of establishing an adequately independent anti-corruption unit. In support of this contention, he relies on two grounds. One is the alleged incompatibility of a proper adherence to and application of sections 206(1) and 207(2) of the Constitution with the location of an adequately independent anti-corruption agency within the SAPS. And the second is that the location of the DPCI within the SAPS does not fall within the range of possible or constitutionally acceptable measures "a reasonable decision-maker in the circumstances may adopt".[16] He seeks to prove that the prevailing public perception is that the SAPS is the most corrupt institution in South Africa and that the ruling party, Cabinet and Parliament are also corrupt. The placement of the DPCI within the

[14] Sections 73(2) and 85(2)(d) of the Constitution. This is not to discount the National Assembly's powers in terms of section 55(1)(b) to initiate or prepare legislation, except money Bills.

[15] Id sections 55(1)(a), 57, 73(3)-(5) and 74-6.

[16] *Glenister II* above n 1 at para 191.

corrupt SAPS that is controlled by a corrupt government can by necessary implication only give birth to a corrupt anti-corruption unit. The public will thus not have confidence in the capability of the DPCI to fight corruption, free of manipulation by their corrupt masters. This is the nub of Mr Glenister's case. The rest is a matter of detail.

[16] Mr Glenister contends that the SAPS Amendment Act is invalid regard being had to the provisions of section 206(1) of the Constitution, which empowers the Minister to determine national policing policy and section 207(2) of the Constitution which enjoins the National Commissioner of the SAPS to "exercise control over and manage the police service in accordance with the national policing policy and the directions" of the Minister. He contends that it is not a viable option at all because there can simply be no independence within the SAPS unless sections 206(1) and 207(2) are amended. To make this and the location point he seeks to rely on additional evidence. The only qualification placed on the location of the DPCI within the SAPS, having regard to the provisions of section 206(1), is that the anti-corruption unit must be sufficiently independent. The majority in *Glenister II* said:

> "The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be 'responsible for policing'. These constitutional duties can productively co-exist, and will do so, *provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence* to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the

> state's constitutional obligations under section 7(2) of the Constitution."[17] (Footnote omitted and emphasis added.)

It ill-behoves Mr Glenister to argue, contrary to this dictum, that the DPCI can only be theoretically located within the SAPS and that the DPCI legislation must be invalidated for that reason alone.

[17] Sections 206(1) and 207(2) are fundamentally the same. They are about the determination of the national policing policy by the Minister and its application to the police service by the National Commissioner, respectively. That *Glenister II* only made reference to the application of section 206(1) but not of section 207(2), is of no moment. What was said of section 206(1) applies with equal force to section 207(2). Of concern to us should only be whether the ministerial policies accord with the notion of adequate independence. If the Minister has determined a policing policy that can co-exist productively with an adequately independent anti-corruption unit, then the application of that progressive policy by the National Commissioner in terms of section 207(2) can in no way undermine the adequacy of the independence of that unit.

[18] The oversight role of the Minister accords with political accountability which is not inimical to adequate independence. This involvement and that of the National Commissioner, in the affairs of the DPCI, do not constitute a degree of management

[17] Id at para 214.

by political actors that threatens imminently to stifle the operational independence of the DPCI.[18]

[19] About the location of the DPCI *Glenister II* also had this to say:

> "We further agree that section 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. *The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the DPCI legislation cannot be invalidated on that ground alone*. Similarly, the legislative choice to abolish the DSO and to create the DPCI did not in itself offend the Constitution."[19] (Emphasis added.)

By keeping the DPCI within the SAPS, Parliament was acting in line with the decision of *Glenister II* to the effect that the Minister's powers in terms of section 206 of the Constitution may productively co-exist with the location of an adequately independent DPCI within the SAPS.[20] The question whether the location of the DPCI within the SAPS falls within a range of possible measures "a reasonable decision-maker in the circumstances may adopt",[21] having regard to public perception, does not arise. That issue was settled in *Glenister II*.

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[18] The point made by *Glenister II*, id at para 216, in this regard is that—

> "adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible. And it would be averse to our uniquely South African constitutional structure. What is required is not insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit."

[19] Id at para 162.

[20] Id at para 214.

[21] Id at para 191.

[20] To the extent that the exercise of control over and management of the police by the National Commissioner in terms of section 207(2) may impact negatively on the adequacy of the independence of the anti-corruption entity, it is how that control and management are exercised that might be unconstitutional. On a reading of the *Glenister II* dicta that I have quoted, the constitutional imperative of adequate independence and the exercise of the section 207(2) power can co-exist comfortably.

[21] The words "provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) . . . has sufficient attributes of independence"[22] and "thus the DPCI legislation cannot be invalidated on that ground alone"[23] sum up the location issue. Whatever evidence one may seek to rely on to prove that invalidity ought to result from location alone cannot on these dicta assist the proponent of that viewpoint. The invalidation of the DPCI legislation will always require more than location and no degree of contortion can detract from this reality. As long as the challenge is premised on location as the only ground for invalidation, worse still in circumstances where reliance is sought to be placed on the public perception about levels of corruption that precede the *Glenister II* era, the application is bound to fail. It is a closed chapter that corruption is rife in South Africa and that it is a practical possibility for an adequately independent anti-corruption entity to be comfortably located within the SAPS.

[22] Id at para 214.

[23] Id at para 162.

(b) Leave to appeal against the striking out of additional evidence

[22] The evidence struck out by the High Court sought to support the two recurring and interrelated contentions dealt with above. First, the location of the DPCI within the SAPS necessarily undermines the adequacy of the DPCI's independence having regard to sections 206(1) and 207(2) of the Constitution. Second, the location of the DPCI within the SAPS does not fall within the range of possible measures "a reasonable decision-maker in the circumstances may adopt" because of the prevailing high levels of corruption.

[23] Mr Glenister's submissions in support of the application for leave to appeal against the order striking out additional evidence, owe their potency and essence to the public perception of the levels and reach of corruption sought to be shared with this Court. And that public perception is foundational to the constitutional challenge to the practicality of locating an anti-corruption unit within: (i) "a corrupt SAPS", (ii) managed and controlled, in terms of sections 206(1) and 207(2) of the Constitution, by a "corrupt Executive", (iii) deployed from the ranks of a "corrupt ruling party" in terms of its cadre deployment policies that have no regard for integrity and meritocracy. The entire super-structure of his case would, even absent other bases that are fatal to it, collapse upon the striking out of the additional evidence. This is so because virtually every aspect of his case revolves around the admissibility of the additional evidence and the relevance of its stated purpose.

[24] A useful summary of the key aspects of Mr Glenister's additional evidence was set out by the High Court.[24] Hundreds of pages are devoted to essentially establishing that the Government of South Africa, the leadership of the African National Congress (ANC) and the law enforcement agencies of this country engage in serious corruption. He seeks to prove that the SAPS is the most corrupt institution in South Africa. He also maintains that our criminal justice system is dysfunctional. To make this point, some incidents relating to the President, some Cabinet Members, members of

[24] The High Court judgment above n 10 at para 9 states that "[i]nsofar as Glenister's allegations are concerned, they may briefly be summarised as follows:

> 9.1 That at an unspecified date prior to 2009 the then Deputy Minister of Justice, Adv J de Lange, conceded that South Africa's criminal justice system was 'dysfunctional'.
>
> 9.2 That Mr Clem Sunter, a 'well known and well respected scenario planner', has recently revised his predictions for the future of South Africa and has concluded that there is a one in four chance that it will become a failed state.
>
> 9.3 That from 'public utterances' made by the President he is 'less than pleased' with the findings in *Glenister II*. This inference is drawn, inter alia, from the President's 'failure to repudiate the scurrilous opinion' of his Deputy Minister of Correctional Services, published in a newspaper article on 1 September 2011.
>
> 9.4 That corruption is rife can safely be accepted in light of comments made by winning entrants in a competition about anti-corruption strategies sponsored by Glenister himself, as well as comments made by the Institute for Accountability in Southern Africa (whose members include Glenister's legal team) and who have been 'particularly vocal' about the available strategies for the implementation of the findings in *Glenister II*.
>
> 9.5 That Mr David Lewis of Corruption Watch has 'found' that the Police Service is at present the most corrupt institution in South Africa.
>
> 9.6 That the last three National Police Commissioners are all 'loyal deployees' of the ruling party, which is 'illegal and unconstitutional'.
>
> 9.7 That the ruling party's website reflects that its goal is the 'hegemonic control of all of the levers of power in society'.
>
> 9.8 That the DPCI is corrupt and inefficient and finds itself, constitutionally, 'under the control of a Minister (who is himself compromised) who serves in a Cabinet that is not without its own challenges when it comes to issues of corruption and corruptibility'.
>
> 9.9 That the National Head of the DPCI is 'another employed cadre' of the ruling party and that his track record 'is not unblemished' if regard is had to various newspaper articles attached to support this allegation. Various other political figures are also vilified; and parliamentary exchanges and the like are included to indicate levels of corruption and inefficiency.
>
> 9.10 The respondents and the court are referred to seven separate websites which apparently support the aforementioned allegations."

Parliament, high-ranking leaders of the ANC, the top leadership of the NPA, the SAPS and the DPCI, are cited. The overwhelming majority of the people and institutions mentioned are not parties to these proceedings and are therefore unable to defend themselves.

[25] Reliance is placed on, among numerous other documents, reports generated by individuals whose objectivity on the dissolution of the DSO is arguably suspect, speculative newspaper articles and people assembled by Mr Glenister to present arguments supportive of his stance on the constitutional validity of the DPCI – the only question to be decided being which presentation undermines the DPCI best. Senior Government functionaries are loosely labelled as loyal deployees appointed in terms of the cadre deployment policies of the ANC which are effectively equated to dishonest or corrupt individuals.

[26] This Court is also sought to be informed of the uncited ANC's strategy and tactics in terms of which it seeks to take firm control of all levers of power in society and that the DPCI is one such lever of power that is sought to be taken over by the ANC through the DPCI legislation. Reference is made quite extensively and with no sign of restraint to matters which are before courts or are likely to be challenged in court like the dismissal of former National Commissioner Bheki Cele, the Arms Deal, "Nkandla" and a host of other allegations or investigations regarding the probity and integrity of high-ranking personalities in or connected to Government.

[27] Is the additional evidence scandalous, vexatious or irrelevant? Two requirements must be met before a striking out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and (ii) the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced.[25]

[28] "Scandalous" allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a "vexatious" matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and "irrelevant" allegations do not apply to the matter in hand and do not contribute one way or the other to a decision of that matter.[26] The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.[27]

[29] The allegations in the struck-out material amount to reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The object appears to be to scandalise and use the court to spread political propaganda that projects others as irredeemable crooks who will inevitably actualise Mr Clem Sunter's alleged projection that South Africa may well become a failed state. This stereotyping and political narrative is an abuse of court

[25] See rule 6(15) of the Uniform Rules of Court as well as *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 733B and *Tshabalala-Msimang and Another v Makhanya and Others* [2007] ZAGPHC 161; 2008 (6) SA 102 (W); 2008 (3) BCLR 338 (W) (*Tshabalala-Msimang*) at 110C-111C.

[26] *Tshabalala-Msimang* id at 110H-111A and *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566C-E.

[27] *Stephens v De Wet* 1920 AD 279 at 282.

process. A determination of the constitutional validity of the DPCI legislation does not require a resort to this loose talk.

[30] These assertions or conclusions are scandalous, vexatious[28] or irrelevant.[29] Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness. Mr Glenister says it himself that the additional evidence is "troubling, alarming and discomforting". The High Court correctly noted that the entirety of the Woods report constitutes hearsay and a number of paragraphs amount to opinion evidence, which is ordinarily inadmissible.[30] I am satisfied that it goes beyond mere irrelevance.

[28] Examples of scandalous and vexatious matter include para 8.8 of the affidavit deposed to by Mr Glenister on 26 November 2012, incorporated as the annexure to his founding affidavit in the High Court (High Court annexure) which refers to the last three National Commissioners as "loyal deployees of the African National Congress ('*the ANC*')" who were awarded the position due to the "cadre employment policies of the ANC"; para 8.14 which refers to the deployment of "loyal cadres" by the ANC, to all centres of power in an effort to control the agency; and para 9.11 which refers to the National Head as another "deployed cadre of the ANC".

[29] Examples of irrelevant matter include paras 10 and 13 of Mr Glenister's founding affidavit in the High Court; paras 7.1-7.6, 7.14-7.16, 8.8, 8.12, 8.14, 8.20, the last sentence of 9.1, paras 9.6-9.18, 14.8 and 15.3-15.5 of the High Court annexure; the Woods report; the Newham affidavit; and para 5.2 of Mr Glenister's replying affidavit in the High Court.

[30] The definition of hearsay is set out in section 3(4) of the Law of Evidence Amendment Act 45 of 1988 as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". There are three statutory exceptions to the general inadmissibility of hearsay evidence. The first is mutual agreement between the proponent and the opponent, the second is the confirmatory testimony by the original declarant of the narrator's initial hearsay testimony, and the third is by way of the interests of justice. None is applicable here. For example, para 9.6-9.9 of the High Court annexure, which restates conclusions allegedly reached by Adv Stephen Powell and Mr Martin Plaut, constitute hearsay.

Any opinion, whether from a lay-person or expert, which is expressed on an issue the court can decide without receiving such opinion is in principle inadmissible because of its irrelevance. Only when an opinion has probative force can it be considered admissible. This is not the case here. For example, para 8.14 of the High Court annexure refers to Mr Glenister's opinion relating to "the hegemonic tendencies of the governing alliance". This opinion has no probative force and is of no assistance to the Court in deciding the issues.

[31] The public perception of independence in *Glenister II* relates to whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features:

> "This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether *a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features* is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."[31] (Footnote omitted and emphasis added.)

Emphasis here is on "public confidence in mechanisms that are designed to secure independence". It cannot be seriously argued that location is a mechanism designed to secure independence or one of the DPCI's "autonomy-protecting features". Those are issues whose constitutional validity the HSF devoted its time to challenging. It is these features that "a reasonably informed and reasonable member of the public" must look to in reflecting on the independence of the DPCI. Certainly not location. The Court's reference to public confidence could not have been intended to mean that public opinion must from time to time be solicited to determine what the public thinks of the independence of an institution.

[31] Above n 1 at para 207.

[32] The overriding consideration is whether the DPCI legislation has inbuilt autonomy-protecting features to enable its members to carry out their duties without any inhibitions or fear of reprisals. The levels of corruption cannot assist this Court to determine whether the DPCI enjoys an adequate measure of structural and operational independence. And it does get worse for Mr Glenister because, on his own papers, the additional evidence sought to be relied on was already in existence before and when *Glenister II* was decided.[32] It does raise the question, what is the relevance of this unchanged public perception to location now? In any event the additional evidence is destructive of Mr Glenister's case. A key feature of that evidence is—

> "[t]hat corruption is a major problem in South Africa, including those senior levels of Government and the private sector, and has become endemic, is now a well entrenched perception that has been largely unchanged for over six years, though the latest reading does show a small improvement".[33]

[33] Information on widespread corruption within the SAPS has been available since the apartheid era and public perception of systemic corruption within the SAPS was already formed when *Glenister II* was decided. This is borne out by a monograph produced by the Institute for Security Studies (ISS), on which Mr Glenister relies, to the effect that—

> "[a]lmost two decades after the end of apartheid, the South African Police Service (SAPS) continues to struggle with one of the major occupational hazards of policing,

[32] See Higgs *Metro Adults View Corruption as Endemic – TNS*, Annexure "Z" to Mr Glenister's Founding Affidavit in the High Court (TNS statement).

[33] Id at 3.

> namely the abuse of power. While progress has been made since the outright brutalities of apartheid-era policing, corruption is one of the biggest challenges facing the SAPS. Perhaps the lowest point was the conviction of South Africa's former National Commissioner of Police, Jackie Selebi, on corruption charges in 2010.
>
> In 1996 the National Crime Prevention Strategy (NCPS) identified 'corruption within the criminal justice system' as one of the 'crime categories of particular concern'. This remains the case. While it is generally accepted by international experts that some corruption occurs in most, if not all law enforcement agencies, the key issue is to manage and control the extent and nature of the abuse.
>
> . . .
>
> One of the most prominent challenges facing the SAPS is the widely held perception, both within the organisation and among members of the public, that many of its members and leaders are corrupt. This monograph has explored the evidence that supports these perceptions and the measures taken by the SAPS to counter corruption in its ranks. The available evidence suggests that the problem is widespread and systemic in nature."[34] (Footnote omitted.)

[34] Mr Glenister seeks to rely on evidence of public perception of corruption sourced from the TNS statement of 22 October 2012. As at that time, the public perception of corruption existed for a period of over six years, although there had since been a marginal improvement. Reliance is also placed on the ISS Monograph which was published five months after the delivery of *Glenister II* and could not therefore have been based on public perception that only came into being after *Glenister II*. That means, when *Glenister II* was decided in 2011, the high levels of corruption Mr Glenister now seeks to inform the Court about were already an established fact. The inescapable consequence of the age of these high levels of corruption in the private and public sectors, including the SAPS, is that this Court

[34] Newham and Faull *Protector or Predator? Tackling Police Corruption in South Africa* (31 August 2011) Institute for Security Studies Monograph Number 182 (ISS Monograph) at 1 and 49.

failed to have due regard to this public perception of corruption in the SAPS as at the time we decided *Glenister II*. Its decision that the mere location of the DPCI within the SAPS cannot invalidate the DPCI legislation was in effect wrong. *Glenister II*'s decision on location is on this logic not one that "a reasonable decision-maker in the circumstances may adopt". Mr Glenister can therefore only be understood to be suggesting that the decision about the location of the DPCI in *Glenister II* is wrong.

[35] The High Court, per Desai, Le Grange and Cloete JJ, correctly found that the Minister was prejudiced because he could not reasonably have been expected to ascertain what case had to be met, given the free-flowing plethora of newspaper and journal articles, books, website references et cetera, and Mr Glenister's failure to plead his case with clarity and precision.[35] It would have been difficult for any of the

[35] Rule 18(4) of the Uniform Rules of Court provides:

> "Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

See *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78:

> "When the relief to be sought has been decided upon, and it has also been decided that motion proceedings are appropriate, the facts relevant to such relief can be selected from the raw material with due regard to the context. Those facts can then be set out simply, clearly and in chronological sequence, and without argumentative matter, in the affidavits which are to support the notice of motion."

See also *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324:

> "[I]t is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

See also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (4) BCLR 393 (SCA) (*Zuma*) at para 47:

> "It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the

parties to determine whether it was now a free-for-all insult-trading and political-point-scoring contest, sanctioned by a court of law. A court of law should never serve as a platform for that kind of engagement. This additional evidence was correctly struck out.

(c) Punitive costs order

[36] The Court should ordinarily be very loath to grant a punitive costs order in a case like this. This is constitutional litigation and parties should never be forced to be too careful to assert their constitutional rights through a court process, for fear of a costs order. And this would explain this Court's general disinclination to make costs orders against unsuccessful parties who chose to vindicate constitutional rights against the state. Punitive costs should therefore never be an easy option, regard being had to the *Biowatch* principles.[36] But that is not to say that no costs could ever be ordered against those litigating against the state. On the contrary *Biowatch* itself said:

> "It bears repeating that what matters is not the nature of the parties or the causes they advance but *the character of the litigation and their conduct in pursuit of it*. This means paying due regard to whether it has been undertaken to assert constitutional rights and *whether there has been impropriety in the manner in which the litigation has been undertaken*. . . . [P]ublic interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause.
>
> . . .
>
> *[T]he general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any*

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opponent's affidavit and to speculate on the possible relevance of facts therein contained." (Footnote omitted.)

[36] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

> *other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award*."[37] (Footnote omitted and emphasis added.)

[37] Mr Glenister has always been represented by experienced Senior Counsel. And it ought to have been known that no good purpose would be served by the admission of the "troubling, alarming and discomforting" mass of additional evidence he sought to have the Court admit. This is a manifestly inappropriate and frivolous course to pursue also because, on his own version, it seeks to project the public perception about corruption that was stale news already when *Glenister II* was decided. To seek to burden this Court with so many pages of hearsay, opinion, speculative, scandalous and vexatious evidence is conduct that must be discouraged.

[38] In pursuit of an otherwise legitimate constitutional cause of ensuring that there is an adequately independent corruption-fighting agency in this country, Mr Glenister chose to be careless and to overburden the record with an ocean of irrelevancies. The worthiness of his cause should not be allowed to immunise him against an otherwise well-deserved adverse costs order. This Court has not made an order for costs against anyone litigating against the state for a long time and for good reason. If there would ever be a fitting case for a costs order, this is it. In the exercise of this Court's discretion on costs for the application to strike out the huge volumes of unnecessary evidential material, Mr Glenister must bear ordinary costs in the High Court and in this Court.

[37] Id at paras 20 and 24.

Helen Suzman Foundation's application for leave to appeal

[39] The HSF has launched an application for leave to appeal against the High Court's decision not to declare sections 17H, 17E, 17G and 24 as well as 17I of the SAPS Act constitutionally invalid. The application raises a constitutional issue. It concerns the adequacy of the independence of an anti-corruption entity.

(a) Financial control

[40] The constitutional validity of section 17H of the SAPS Act as amended was challenged on the basis that the Executive and the National Commissioner of the SAPS have an unacceptable degree of influence over the form and content of the budget of the DPCI and over the procurement of goods and services for the DPCI. This, the HSF contends, poses a risk to the adequacy of the budget of the DPCI for the purpose of executing its mandate.

[41] South Africa's international law obligations do not set parameters on the extent to which the DPCI should have control over its budget. The OECD Report[38] on a review of models of specialised anti-corruption institutions internationally may, however, be used to "interpret and give content" to these obligations.[39] It notes the following:

[38] Organisation for Economic Co-operation and Development *Specialised Anti-Corruption Institutions: Review of Models* (2008) (OECD Report).

[39] *Glenister II* above n 1 at para 187.

> "Adequate funding of a body is of crucial importance. While full financial independence cannot be achieved (at minimum the budget will be approved by the Parliament and in many cases prepared by the Government), sustainable funding needs to be secured and legal regulations should prevent unfettered discretion of the executive over the level of funding".[40]

The international trend is that the Executive prepares the budget and Parliament approves it. But the Executive should not have an unfettered discretion over the level of funding for an anti-corruption unit. This is the position in South Africa. Good reason would have to be shown for suggesting that acting in line with this international good practice, poses a threat to the functional independence of the DPCI.

[42] The self-explanatory provisions of section 17H(1), (5) and (6) make the point:

> "(1) The expenses incurred in connection with—
>
> (a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the Directorate; and
>
> (b) the remuneration and other conditions of service of members of the Directorate,
>
> shall be defrayed from monies appropriated by Parliament for this purpose to the departmental vote in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).
>
> . . .
>
> (5) Monies appropriated by Parliament for the purpose envisaged in subsection (1)—
>
> (a) shall be regarded as specifically and exclusively appropriated for that purpose; and
>
> (b) may only be utilised for that purpose.

[40] OECD Report above n 38 at 26.

> (6) The National Head of the Directorate shall have control over the monies appropriated by Parliament envisaged in subsection (1) in respect of the expenses of the Directorate."

The DPCI's budget is "specifically and exclusively" appropriated by Parliament for the entity's expenses to be incurred in the performance of its mandate. Neither the Executive nor the National Commissioner has the final say on the level of the DPCI's funding. Parliament does. The preparation of the budget of the Directorate by its National Head, the consultation she is entitled to have with the National Commissioner on the budget and the possible mediation by the Minister in the event of disagreement between the two, demonstrate the adequacy of the DPCI's independence in relation to the budget. More importantly, the National Head has control over the monies appropriated by Parliament for the DPCI. Added to this is section 17K(2B) which provides that the National Head "shall make a presentation to Parliament on the budget of the Directorate". Although this presentation relates to the money that would have been spent already, it presents an annual platform to the National Head to raise whatever concerns she might have about the inadequacy of the previous budget and the need for a future increase.

(b) Integrity testing

[43] HSF is concerned that the Minister has enormous power over the DPCI through the integrity testing measures. It contends that the relevant provision has the potential to be used as an intimidation tactic with ominous implications. This is seen as an open-ended discretionary power which could be abused because the section does not

lay down guidelines on when and where the measures may be applied. Section 17E(8) provides:

> "(a) The Minister may prescribe measures for integrity testing of members of the Directorate, which may include random entrapment, testing for the abuse of alcohol or drugs, or the use of the polygraph or similar instrument to ascertain, confirm or examine in a scientific manner the truthfulness of a statement made by a person.
>
> (b) The necessary samples required for any test referred to in paragraph (a), may be taken, but any sample taken from the body of a member may only be taken by a registered medical practitioner or a registered nurse.
>
> (c) The Minister shall prescribe measures to ensure the confidentiality of information obtained through integrity testing, if such measures are prescribed in terms of paragraph (a)."

Subsection (9)(a) and (b) constitutes the necessary constraint on the exercise of the discretionary power[41] vested in the Minister. It provides that a member of the DPCI, and this includes the National Head, shall serve impartially and exercise powers and perform functions in good faith. It also forbids improper interference with a member of the DPCI in the exercise or performance of her powers or duties and functions. All this is to be done subject to the Constitution and the SAPS Act.

[41] In *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 34, this Court held that—

> "[w]here broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. *These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute*." (Footnote omitted and emphasis added.)

[44] As at the time of deciding *Glenister II*, the provisions of section 17E(8) were exactly the same as they are now. Yet integrity testing measures were not identified as factors that potentially undermine the sufficiency of the independence of the DPCI, although the entire Chapter 6A was impugned. I think for good reason. There is simply no basis for the assumption that the measures prescribed by the Minister will necessarily be intrusive.

[45] It is, in my view, probably more appropriate for the finer details on when and where to apply the measures to be provided for not in the legislation but in the regulations or the measures themselves. In terms of the regulations issued by the Minister for integrity testing—

> "[t]he Head of the Directorate may conduct, or authorise any member or any other person to conduct an integrity testing program to test the integrity of any relevant member of the Directorate."[42]

These regulations, particularly in the light of the delegation of powers to the Head, do not undermine the structural and operational independence of the DPCI at all, as was feared by the HSF. The mere fact that the power to prescribe measures for integrity testing is vested in the Minister should not without more raise alarm bells. It is part of accountability from which DPCI members need not be insulated. Instead of seeking to invalidate the Minister's powers to prescribe the measures, the correct approach would be to challenge the prescribed regulations on their content and application.

[42] Regulation 3(1) of the Regulations for the South African Police Service Act 68 of 1995 relating to the Directorate for Priority Crime Investigation, GN 783, *GG* 33524, 7 September 2010.

[46] Members of the DPCI must always prove to be above reproach – be men and women of integrity. And this underscores the need for integrity testing to obviate the abuse of power and victimisation of innocent citizens, by members of the DPCI. While it is quite fitting to be on high alert about the possible manipulation and abuse of the system by anybody including political executives, it is equally important that the public and even senior politicians themselves be protected from the possible abuse, blackmailing and victimisation by or through the DPCI or its individual members.

(c) Conditions of service

[47] HSF, relying on *Glenister II*, raised a concern about "the conditions of service that pertain to members, in particular its Head."[43] It went on to say that those conditions of service exposed the DPCI to "an undue measure of political influence."[44] *Glenister II* also said that—

> "before the statutory amendments now at issue, the head of the DSO, as a deputy NDPP, enjoyed a minimum rate of remuneration which was determined by reference to the salary of a judge of the High Court. By contrast, the new provisions stipulate that the conditions of service for all members (including the grading of posts, remuneration and dismissal) are governed by regulations, which the Minister for Police determines. The absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure. Not only do the members not benefit from any special

[43] Above n 1 at para 208.

[44] Id.

> provisions securing their emoluments, but the absence of secured remuneration levels is indicative of the lower status of the new entity."[45] (Footnotes omitted.)

This issue must be put in its proper context. A comparison was made between the provisions of the SAPS Act that deal with the conditions of service of all members of the DPCI and those that applied to the NDPP, the Deputy National Director of Public Prosecutions (Deputy NDPP) assigned to be the Head of the DSO and the members of the DSO. It is to the relevant provisions of the NPA Act that I now turn for a proper comparison of the conditions of service of different categories of employees under these dispensations.

[48] Section 17(1) and (3) of the NPA Act provides:

> "(1) The remuneration, allowances and other terms and conditions of service and service benefits of the National Director, a Deputy National Director and a Director shall be determined by the President: Provided that—
>
> (a) the salary of the National Director shall not be less than the salary of a judge of a High Court, as determined by the President under section 2(1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989);
>
> (b) the salary of a Deputy National Director shall not be less than 85 per cent of the salary of the National Director; and
>
> (c) the salary of a Director shall not be less than 80 per cent of the salary of the National Director.
>
> . . .

[45] Id at para 227.

> (3) The National Director is entitled to pension provisioning and pension benefits determined and calculated under all circumstances, as if he or she is employed as a Director-General in the public service."

These guarantees of salaries relate to the NDPP and the Deputy NDPP. They also applied to the Head of the DSO, who was a Deputy NDPP, as well as the Directors of Public Prosecution (DPPs) in the Provinces and other Directors at that level. Their allowances, other terms and conditions of service as well as service benefits were and continue to be determined by the President.

[49] As in the case of the NDPP, the Deputy NDPP, the Head of the defunct DSO, and the DPPs, the remuneration packages of the National Head, Deputy National Head and Provincial Heads of the DPCI are clearly determined. They are pitched at the levels no less than that of the highest paid Deputy National Commissioner, the highest paid Divisional Commissioner and the highest paid Deputy Provincial Commissioner of the SAPS, respectively.[46] Their remuneration, allowances and other conditions of service are determined by the Minister in consultation with the Minister of Finance.[47] In the case of the Deputy National Head and Provincial Heads, they are determined in a similar way but after consultation with the National Head. These remuneration scales are subject to Parliamentary approval and cannot be reduced without Parliament's concurrence.[48]

[46] Section 17CA(8)(b) of the SAPS Act.

[47] Id section 17CA(8)(a).

[48] Id section 17CA(8)(b) and (9).

[50] The conditions of service of Deputy DPPs and prosecutors, excluding remuneration, were and are still determined in terms of the Public Service Act.[49] Their salary scales have always been determined by the Minister after consultation with the NDPP and the Minister of Public Service and Administration with the concurrence of the Minister of Finance by notice in the Gazette.[50] As for the special investigators of the DSO, their remuneration, allowances and other service benefits were determined by the Minister in consultation with the National Director and with the concurrence of the Minister of Finance.[51] Otherwise, all other conditions of service that applied to them were prescribed by the NPA Act.[52]

[51] Members of the NPA and the DSO below the level of the NDPP, the Deputy NDPP, in the case of the DSO the Head and the DPPs, did not therefore have statutorily secured remuneration levels. These were determined by the Minister in consultation with several other functionaries. The members of the DPCI below the levels of the National Head, the Deputy National Head and the Provincial Heads are in a similar position. Of significance is that section 24(1)(m) of the SAPS Act provides for the regulation of "the grading of posts and remuneration structure, including allowances or benefits of members". Furthermore, section 24(2) provides for the making of different regulations for different categories of members or personnel and subsection (4) for consultation with the Minister of Finance in relation to monetary issues.

[49] 103 of 1994. See also section 19 of the NPA Act.

[50] Section 18 of the NPA Act.

[51] Section 19C of the NPA Act as amended by the DSO Act.

[52] Id sections 19A and 19B.

[52] It has always been the duty of a Cabinet member responsible for the anti-corruption unit, in consultation with other Executive functionaries, to determine the conditions of service, more importantly salaries and allowances of members below the levels of the Provincial Director of the NPA. Not surprisingly, this is also the case with these employees or members below the level of the Provincial Heads, in the DPCI. There is no fundamental difference between the determination of the conditions of service and remuneration scales of these comparable levels of personnel between the NPA, the DSO of old, and the DPCI. On the contrary, there is substantial similarity.

[53] There is thus no merit in the contention that the provisions relating to the conditions of service of members of the DPCI are, unlike their NPA and DSO counterparts, incompatible with the requirements of adequate independence necessary for an anti-corruption entity. I find these conditions of service to be constitutionally valid.

(d) Co-ordination by Cabinet

[54] Section 17I(1) empowers the President to designate a Ministerial Committee comprising at least five Ministers. That Committee is empowered to determine procedures to co-ordinate the activities of the DPCI and other relevant Government departments or institutions.[53] While political accountability is permissible, the

[53] Section 17I(2)(d) of the SAPS Act.

co-ordination of the activities of the DPCI and other departments and institutions could arguably open the door to executive interference and manipulation. It is reasonable to contend that it potentially poses a risk to the operational independence of the DPCI.

[55] Section 17F provides for co-operation between the National Head, on the one hand, and the Directors-General of Government departments and Heads of Government institutions such as any of the intelligence services or the NDPP, on the other. They are empowered to explore possibilities of taking steps necessary to help the DPCI achieve its objectives. This extends to the secondment of personnel and the gathering, correlation, evaluation, co-ordination and use of crime intelligence. All these support mechanisms are to be activated by a request of the National Head without any involvement of a Cabinet member.

[56] The determination of procedures to co-ordinate the activities of these institutions could just as well be fulfilled by the National Head and the Heads of departments and institutions themselves. That said, we need to bear in mind not only that political oversight is permissible but also that one of the comparators of the DPCI is the DSO. This point was aptly made by *Glenister II* in these terms:

> "[I]t is necessary to look at how our own constitutionally-created institutions manifest independence. To understand our native conception of institutional independence, we must look to the courts, to Chapter 9 institutions, to the NDPP, and in this context also to the now-defunct DSO. All these institutions adequately embody or embodied the degree of independence appropriate to their constitutional role and functioning. Without applying a requirement of full judicial independence, all these institutions

indicate how far the DPCI structure falls short in failing to attain adequate independence."[54]

[57] Section 31 of the NPA Act as amended by the DSO Act provided:

"(1) There is hereby established a committee, to be known as the Ministerial Coordinating Committee (hereinafter referred to as the Committee), which may determine—

(a) policy guidelines in respect of the functioning of the Directorate of Special Operations;

(b) procedures to coordinate the activities of the Directorate of Special Operations and other relevant government institutions, including procedures for—

(i) the communication and transfer of information regarding matters falling within the operational scope of the Directorate of Special Operations and such institutions; and

(ii) the transfer of investigations to or from the Directorate of Special Operations and such institutions; and

(c) where necessary—

(i) the responsibility of the Directorate of Special Operations in respect of specific matters; and

(ii) the further procedures to be followed for the referral or the assigning of any investigation to the Directorate of Special Operations."

The rest of the section deals with the composition of the Ministerial Coordinating Committee and the procedures that would govern its meetings.[55]

[54] Above n 1 at para 211.

[55] Section 31(2) and (3) of the NPA Act as amended by the DSO Act.

[58] Interestingly, the DSO's operations were also governed by policy guidelines. But of direct relevance to the matter under discussion were the vast powers vested in that Ministerial Coordinating Committee by section 31 of the NPA Act. That Committee determined "procedures to coordinate the activities" of the DSO and other government institutions. Tellingly, that extended to procedures for "the communication and transfer of information regarding matters falling within the operational scope" of the DSO and such institutions. Added to that comparatively intrusive power were the powers to determine how investigations were to be transferred from the DSO to other institutions, the referral or assigning of any investigations to the DSO as well as the DSO's responsibility in respect of specific matters. That is significant involvement. But since absolute independence is not a requirement, that would explain why, this provision notwithstanding, the operational independence of the DSO was held out as an example to look up to for guidance in determining the adequacy of the DPCI's independence.[56] Had the position been otherwise, it would, no doubt, have been among the sections identified for special attention.

[59] Section 31 was a more intrusive mirror-image of its current equivalent. *Glenister II* did not consider this particular role of the Ministerial Coordinating Committee to be a risk to the sufficiency of the DPCI's independence, so much so that it did not even mention it. Viewed objectively and with due regard to the role of that

[56] *Glenister II* above n 1 at paras 209-11.

Committee in the operations of the DPCI, it is difficult to conclude that section 17I is at odds with the institutional independence of the DPCI.

[60] Leave to appeal will be granted but the appeal itself will be dismissed.

Confirmation

[61] Provisions relating to the appointment of the National Head, the Deputy and the Provincial Heads of the DPCI, the extension of tenure, the suspension and removal of the National Head, and the jurisdiction of the DPCI were declared constitutionally invalid and set aside by the High Court. Consequently, the HSF has applied for the confirmation of that order in terms of section 167(5) of the Constitution. I deal with the issues in that order.

(a) Appointment criteria

[62] Provision is made for the appointment of the National Head in section 17CA as follows:

> "(1) The Minister, with the concurrence of Cabinet, shall appoint a person who is—
>
> (a) a South African citizen; and
>
> (b) a fit and proper person,
>
> with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate for a non-renewable fixed term of not shorter than seven years and not exceeding 10 years."

The constitutional validity of this provision was successfully challenged in the High Court on the basis that it does not provide specific criteria for the appointment of the National Head. The criteria in subsection (1) are, according to the HSF, unjustifiably broad and do not provide sufficient guidance to the Minister.

[63] The HSF would have found the criteria acceptable had the National Head, like its comparator the DSO, been required to have legal qualifications instead of undefined experience. The overarching requirement for suitability is "fit and proper" which, broadly speaking, means that the candidate must have the capacity to do the job well and the character to match the importance of the office. Experience, integrity and conscientiousness are all intended to help determine a possible appointee's suitability "to be entrusted with the responsibilities of the office concerned". Similarly, laziness, dishonesty and general disorderliness must of necessity disqualify a candidate.

[64] The kind of experience, work ethic and disposition to the truth that the potential appointee has must point to the decision that she is the right person "to be entrusted with the responsibilities of the office concerned".[57] Since inconsequential experience and character flaws could not have enhanced the prospects of her appointment to that office, if she was nevertheless appointed, then a successful legal challenge may be mounted against that appointment.

[57] Section 17CA(1) of the SAPS Act.

[65] Reliance was placed on the following dictum from *Freedom of Expression Institute*:[58]

> "There are other considerations which, in my view, indicate that the ordinary court martial in its present form is unconstitutional. In terms of rule 42 of the rules issued in terms of the Defence Act, the appointment of the prosecutor is made by the convening authority. There are no criteria laid down as to what a fit and proper person would be to be so appointed. More particularly, the appointee is not required to have any legal qualifications whatsoever. The convening authority is therefore at large to appoint anybody that it wants to. But the convening authority does not only appoint the prosecutor, his discretion is limited by their powers. For example, he may not withdraw any charge preferred against an accused without the permission and consent of the convening authority. It is therefore self-evident that not only is the convening authority able to appoint somebody who is ill-equipped to perform the function of a prosecutor, but that such prosecutor does not exercise an independent discretion and judgment. The law as it stands invites arbitrariness as it allows executive interference into judicial process."[59] (Citation omitted.)

[66] I hasten to say that a prosecutor is of necessity required to hold some legal qualifications. But not so with a police official or an investigator. Decisions that require knowledge of the law are regularly taken by a prosecutor, but it is not necessarily so with a special investigator or police official. As the name suggests, our

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[58] *Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others* 1999 (2) SA 471 (C); 1999 (3) BCLR 261 (C) (*Freedom of Expression Institute*).

[59] Id at para 19. The following discussion in *Affordable Medicines* above n 41 at para 34 was also relied on for the proposition that the appointment criteria of the National Head was too broad and therefore led to an arbitrary exercise of power:

> "The delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute." (Footnote omitted.)

corruption-busting entity is an investigative unit, not a prosecutorial authority whose members are required to analyse laws and argue cases in a court of law.

[67] The authorities cited in support of the contention that legal qualifications might, as in the case of the Head of the DSO, be necessary in this case are distinguishable and do not therefore support that proposition. It was sheer coincidence that the Head of the DSO was a lawyer. It did not have to be so. It was the fact of having to be appointed by the NDPP from among her Deputies[60] that led to this otherwise unnecessary requirement. Investigators, unlike prosecutors, do not have to appear in court except perhaps as witnesses. Members of the DPCI are more like police officials than prosecutors in terms of their line functions.

[68] Sight is not to be lost of the fact that the Head of the DSO, like the NDPP and other Deputy NDPPs and DPPs, was a prosecutor. And it was for this reason that she was required to "possess legal qualifications that would entitle him or her to practise in all courts in the Republic".[61] These highly placed prosecutors are supposed to appear in court albeit not as frequently as their juniors. Besides, they would not be able to provide the strategic leadership and guidance required by these institutions if

[60] Section 7(3) of the NPA Act as amended by the DSO Act provided:

> "The head of—
>
> (a) the Directorate of Special Operations, shall be a Deputy National Director, assigned by the National Director; and
>
> (b) any other Investigating Directorate, shall be an Investigating Director, and shall perform the powers, duties and functions of the Investigating Directorate concerned subject to the control and directions of the National Director."

[61] Section 9(1)(a) of the NPA Act. And see also section (7)(3)(a) of the NPA Act as amended by the DSO Act.

they were not suitably qualified for its core business, which is the successful prosecution of cases in our courts. Sections 15(2) and 16(3) of the NPA Act provide that the Deputy DPP must have the right to appear in the High Court and that the Minister would prescribe appropriate legal qualifications for the appointment of a prosecutor after consultation with the NDPP and the DPPs.

[69] The qualifications of the NDPP and the Deputies are identical to those of the National Head of the Directorate, the Deputy and the Provincial Heads. The only difference is that each of these officials of the NPA is required to "possess legal qualifications that would entitle him or her to practise in all courts in the Republic".[62] This difference should not come as a surprise because the NPA is a legal environment that requires people with legal qualifications to lead and to operate within it. In fact even prosecutors at entry level in the district courts are required to have legal qualifications.[63] By contrast the special investigators of the DSO were merely required to be "fit and proper"[64] because their responsibilities, just like those of the members of the DPCI, were essentially of a policing nature.

[70] Additional to the Head of the DSO, as many special investigators as were required were appointed to the DSO. Because, just like the National Head, the Deputy

[62] Section 9(1)(a) of the NPA Act.

[63] Id section 16(3) provides:

> "The Minister may from time to time, in consultation with the National Director and after consultation with the Directors, prescribe the appropriate legal qualifications for the appointment of a person as prosecutor in a lower court."

[64] Section 19A(1) of the NPA Act as amended by the DSO Act provided:

> "The National Director may, on the recommendation of the head of the Directorate of Special Operations, appoint any fit and proper person as a special investigator of that Directorate."

Head and the Provincial Heads of the DPCI, the special investigators were not prosecutors, legal qualifications were not required of them. Instead, section 19A of the NPA Act provided:

> "(1) The National Director may, on the recommendation of the head of the Directorate of Special Operations, appoint a fit and proper person as a special investigator of that Directorate.
>
> (2) The National Director must, in the prescribed form, issue an identity document under his or her signature to each person so appointed, which shall serve as proof that such person is a special investigator."

Like the police, special investigators required some kind of identity cards but not legal or any particular qualifications. They simply had to be fit and proper for the purpose of the investigations they were employed to conduct. Yet, this did not affect the adequacy of the independence of the DSO.

[71] The appointment criteria, in the impugned provisions, are objectively ascertainable. More detail is supplied in the appointment criteria of the National Head, the Deputy and the Provincial Heads than was the case with special investigators of the DSO. They are required to be "fit and proper"[65] with due regard to their experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned. It would be unreasonable to assume that a Minister and Cabinet would find it difficult to appreciate what any aspect of the criteria entails for the purpose of appointing the leaders of the DPCI. The experience

[65] See *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 20 where this Court held that the "fit and proper" criterion is an "objective jurisdictional fact".

must be such as to enable them to carry out their duties as National Head or Deputy or Provincial Head, well. It is the experience relevant to those positions of high responsibility. Integrity is essential and so is conscientiousness, as character qualifications for appointment to these high offices.

[72] The other concern raised by the HSF is that the appointment of the National Head by the Minister with the concurrence of Cabinet does not sufficiently insulate the Head from undue political influence. HSF also submitted that the imperative for the independence of an anti-corruption unit is irreconcilable with entrusting the appointment of the National Head to the Executive alone. It further contends that it is an essential safeguard of independence that the appointment of the Head be approved by, rather than merely reported to, Parliament. There is no merit in these submissions.

[73] *Glenister II* concluded that the DSO was adequately independent.[66] It also made a comparative reference to its provisions as well as those of the NPA, which were found to be adequately independent, to gauge whether the DPCI enjoyed the degree of independence appropriate for its role and functioning as an anti-corruption entity.[67] That said, it must be noted that the NDPP is appointed by the President.[68] The Deputies, from whose ranks the Head of the DSO was assigned by the NDPP who is herself a political appointee, were appointed by the President after consultation with

[66] Above n 1 at para 210.

[67] Id at paras 209-11.

[68] Section 10 of the NPA Act.

the Minister.[69] Parliament never had and still does not have any role to play in the appointment of these senior officials who are required to be independent, as is required of the NPA.

[74] The preceding observations apply with equal force to the appointment of the Deputy National Head and the Provincial Heads of the DPCI by the Minister with the concurrence of Cabinet. They are as insulated from undue executive control or influence as are the NDPP and the Deputy NDPPs. The National Commissioner of Police, who appears to be the only official in the SAPS senior to the National Head, is appointed in exactly the same way as the NDPP who used to be senior to the DSO Head. No advertisement, no prescribed interview. The location of the anti-corruption unit should thus make no difference to the appointment criteria and process of its leaders and members. To decide otherwise would constitute an indirect and indefensible shifting of the *Glenister II* goal posts in relation to location.

[75] Separation of powers requires that the Judiciary refrain from being unnecessarily prescriptive to both the Executive and Parliament on the kind of institutionally independent body required to stem the tide of corruption in this country. The constitutionally compliant policy choices they make must be respected even if there are, in the opinion of the Judiciary, better options available. Ours is to ensure that the constitutional requirements for a functional and efficient corruption-busting machinery have been met and nothing more or less.

[69] Id section 11.

[76] I conclude that the appointment criteria and process meet the constitutional requirements for adequate independence and the order of constitutional invalidity will not be confirmed on this point.

(b) Extension of tenure

[77] Section 17CA(15) and (16) of the SAPS Act provides:

> "(15) The Minister shall with the consent of the National Head or Deputy National Head of the Directorate, *retain* the National Head, or the Deputy National Head of the Directorate, as may be applicable, *in his or her office* beyond the age of 60 years for such period which shall not—
>
> (a) exceed the period determined in section 17(CA); and
>
> (b) exceed two years, except with the approval of Parliament granted by resolution.
>
> (16) The National Head or Deputy National Head of the Directorate *may only be retained* as contemplated in subsection (15) if—
>
> (a) he or she wishes *to continue to serve in such office*; and
>
> (b) *the mental and physical health of the person concerned enables him or her so to continue*." (Emphasis added.)

HSF has challenged the constitutional validity of these provisions on the basis that they amount to a renewal of the term of office which eminently threatens the sufficiency of the independence of the officials concerned and of the DPCI.

[78] Subsections (15) and (16) apply to a National Head or Deputy National Head who would have reached the age of 60 years and would thus be expected to retire.

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

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

[80] This favour, extendable to these functionaries on undisclosed bases, has great potential to compromise the independence of the affected official and by extension the

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

> "[a] renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures."[70]

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

> "[T]he lack of employment security, *including the existence of renewable terms of office* . . . are incompatible with adequate independence."[71] (Emphasis added.)

[81] The danger of renewability was also dealt with in *JASA*.[72] Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to

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[70] Above n 1 at para 223. *Glenister II* mistakenly stated that the term of office of the NDPP was not renewable, whereas it in fact was: see section 12(4) of the NPA Act.

[71] Id at para 249.

[72] *Justice Alliance of South Africa v President of the Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (*JASA*) at paras 73 and 75:

> "It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.
>
> . . .
>
> In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as

the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to "behave" herself in anticipation of renewal.

[82] The extension of the term of office of the National Head and the Deputy National Head in terms of section 17CA(15)[73] and (16)[74] has in a way been decided by *Glenister II* and is inimical to the adequacy of the independence of the DPCI. It is incompatible with the independence necessary for the National Head and Deputy National Head to be faithful to their mandate. These subsections are constitutionally invalid.

(c) Suspension and removal of the National Head

[83] Section 17DA provides for both the suspension and removal from office of the National Head. The High Court upheld a challenge to the constitutional validity of this section. Beginning with the suspension provisions, subsections (1) and (2) provide:

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possible to minimise the risk that its conferral could be seen as impairing the precious institutional attribute of impartiality and the public confidence that goes with it." (Footnotes omitted.)

[73] See [77].

[74] Id.

"(1) The National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (2), (3) and (4).

(2) (a) The Minister may provisionally suspend the National Head of the Directorate from his or her office, pending an inquiry into his or her fitness to hold such office as the Minister deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the National Head of the Directorate, the reason therefor and the representations of the National Head of the Directorate, if any, shall be communicated in writing to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) The National Head of the Directorate provisionally suspended from office shall during the period of such suspension be entitled to such salary, allowance, privilege or benefit to which he or she is otherwise entitled, unless the Minister determines otherwise.

(d) An inquiry referred to in this subsection—

(i) shall perform its functions subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), in particular to ensure procedurally fair administrative action; and

(ii) shall be led by a judge or retired judge: Provided that the Minister shall make the appointment after consultation with the Minister of Justice and Constitutional Development and the Chief Justice.

> (e) The National Head of the Directorate shall be informed of any allegations against him or her and shall be granted an opportunity to make submissions to the inquiry upon being informed of such allegations."

[84] Suspension of the National Head takes place "pending an inquiry into his or her fitness to hold . . . office". There is therefore a link between the removal process that is preceded by an inquiry and the suspension. By necessary implication, the concerns that necessitate the inquiry would also be the reasons for the suspension. It can be sustained only on the grounds listed in subsection (2). The words "as the Minister deems fit", could be understood to suggest that she need not have regard to the grounds for removal as the basis for suspension. They are unnecessary and potentially misleading.

[85] But for "as the Minister deems fit" and the possibility of a suspension without pay and benefits provided for in subsection (2)(c), I can find no reason to attack the bases on which this subsection empowers the Minister to suspend the National Head. These are specific, objectively verifiable and acceptable grounds for suspension and removal. Suspension without pay defies the exceedingly important presumption of innocence until proven guilty or the *audi alteram partem* rule and unfairly undermines the National Head's ability to challenge the validity of the suspension by withholding the salary and benefits. It irrefutably presumes wrongdoing. An inquiry may then become a dishonest process of going through the motions. Presumably, the Minister's mind would already have been made up that the National Head is guilty of what she is accused of. Personal and familial suffering that could be caused by the exercise of

that draconian power also cry out against its retention. It is the employer's duty to expedite the inquiry to avoid lengthy suspensions on pay.

[86] The only real threat to job security is the Minister's power to remove the National Head from office in terms of section 17DA(1) and (2). These provisions are not clearly set out and therefore do not provide even a modicum of clarity.[75] The removal process is initiated through the appointment of a Judge by the Minister to head an inquiry into whether the National Head should be removed from office on any of the grounds listed in section 17DA(2)(a).[76] Based on the recommendations of that Judge, the Minister may remove the Head.[77] Thereafter the fact of the removal, the reason therefor and the representations of the National Head, if any, are to be conveyed to Parliament within 14 days of the removal.[78]

[87] Unlike section 12(6) of the NPA Act that empowers Parliament to reverse the removal of the NDPP or Deputy NDPP by the President, section 17DA(2)(b) does not say what it is that Parliament is required to do upon receipt of the information relating to the Minister's removal of the National Head. There is no provision made for Parliament's interference with that decision. This begs the question, what purpose does it then serve to inform Parliament? A proper reading of subsection (2) indicates

[75] For example, the subsection should have provided first for suspension, that is (2)(a) and (c), the inquiry in terms of subsection (2)(d); then the right to be informed of the allegations in (2)(e); and finally the removal and referral to Parliament in (2)(b).

[76] The grounds listed in section 17DA(2)(a) of the SAPS Act which allow for the removal from office of the National Head are set out in [83].

[77] Id section 17DA(2)(a) and (b).

[78] Id section 17DA(2)(b).

that the Minister's removal of the National Head is, subject to whatever court processes that might ensue, final. Parliament has no meaningful role to play but merely to note the decision. One would have thought that the requirements that Parliament be informed of the removal, be furnished with reasons for the removal and the representations by the National Head within 14 days of removal, were intended to facilitate speedy intervention by Parliament before more, possibly unjustified, damage is done to the life of the National Head or the functionality of the DPCI. That intervention would ordinarily entail an assessment of the propriety of the finding of wrongdoing and the punishment meted out to the National Head, if correctly found guilty of wrongdoing.

[88] But, not only is the section silent on what Parliament is supposed to do, it is also silent on how it is to do whatever is supposed to be done, if any, and on the time frames within which any action is to be taken. It is similar to section 17CA(3) which requires the Minister to inform Parliament of the appointment of the National Head within 14 days of the appointment, but does not say what, if any, Parliament is supposed to do with that information. Evidently it is, as in this instance, merely for noting. All these are additional pointers to the lack of clarity that pervades the SAPS Act as amended. Parliament's power to intervene, as is the case in terms of section 12(6) of the NPA Act, cannot be read into this section without the Court usurping the legislative role of Parliament. There is a yawning chasm between the subsection (2) procedure and the role of Parliament set out in subsections (3) to (6).

[89] This subsection (2) removal power is inimical to job security. It enables the Minister to exercise almost untrammelled power to axe the National Head of the anti-corruption entity. The need for job security was articulated in *Glenister II* in these terms:

> "[A]t the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously."[79]

[90] Subsections (3) to (6) provide for those special measures that entrench the employment security of the National Head. They deal with the suspension of the National Head by the Minister, flowing from a possible removal process initiated by a Committee of the National Assembly. Although the Minister still has the power to suspend, no provision is made for suspension without salary, allowances, and privileges. A recommendation by a Committee of the National Assembly for the removal of the National Head would have to enjoy the support of at least two thirds of the members of the National Assembly to be implemented. The removal would then be carried out by the Minister.

[91] This suspension by the Minister and removal through a parliamentary process guarantees job security and accords with the notion of sufficient independence for the anti-corruption entity the state creates. That portion of section 17DA(1) that refers to

[79] Above n 1 at para 222.

subsection (2) and subsection (2) itself are, however, inconsistent with the constitutional obligation to establish an adequately independent corruption-busting agency. They must thus be set aside. The balance of section 17DA passes constitutional muster and would thus continue to guide the suspension and removal process of the National Head.

(d) Jurisdiction of the DPCI

[92] South Africa needs a dedicated anti-corruption agency which will also combat, prevent and investigate national priority offences. And this is what appears to be the purpose for the creation of the DPCI.[80] The state's failure to realise this objective properly is, however, apparent from the provisions that set out the functions of the DPCI.

[93] Sections that provide for the jurisdiction of the DPCI are scattered in different parts of the SAPS Act. This makes it difficult to identify the offences that the DPCI is empowered to prevent, combat and investigate. Section 17D is headed "Functions of Directorate". One might justifiably assume that all the functions are set out under that section. Regrettably, one has to look elsewhere for the definition and the list of national priority offences. Ordinarily, all the definitions are to be found in section 1 of an Act. Although section 1 of the SAPS Act does define several concepts, "national priority offences" is not one of them. It is instead located in section 17A

[80] Section 17B(a) of the SAPS Act states that the purpose for the creation of the DPCI is the—

> "need to establish a Directorate in the Service to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption."

which in turn refers to section 16 which sets out national priority offences. The complication does not end there. For other offences that constitute national priority offences, section 16(2)(iA) points to the Schedule to the Act. It should be evident from the discussion of other aspects of the Act, like the suspension and removal of the National Head, as well as the extension of tenure that the quality of drafting could use some improvement.

[94] The focus of the real challenge to the constitutional validity of the provisions that clothe the DPCI with jurisdiction however lies elsewhere. And the concerns raised are dealt with below with particular reference to the more directly impugned sections. Section 17D(1) provides:

> "(1) The functions of the Directorate are to prevent, combat and investigate—
>
> (a) national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Minister and approved by Parliament;
>
> (aA) selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); and
>
> (b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament."

To understand the nature and scope of the functions to be performed by the DPCI, it is necessary to examine the meaning of "national priority offences", the nature and effect of "policy guidelines" as well as "selected offences", the scope of "any other offence or category of offences referred to it from time to time by the National

Commissioner" and the significance of the attendant power of the National Commissioner.

"national priority offences"

[95] National priority offences are defined as "organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof, as referred to in section 16(1)".[81] Section 16 lists a series of offences, including corruption, which constitute national priority offences. A concern was raised that some of those national priority offences do not deserve the attention of an anti-corruption agency if that agency were to pay adequate attention to its core mandate. This is not correct. The DPCI has the primary duty to prevent, combat and investigate those national priority offences that are intimate to its core business like corruption, crimes against humanity, organised crime or serious commercial crime "which in the opinion of the National Head of the Directorate need to be addressed by the Directorate". It is the Directorate itself that has to ensure that its primary responsibilities are by no means compromised. Barring other considerations, this guarantees the operational independence of the DPCI.

[96] What could compromise the operational independence of the DPCI in relation to national priority offences, is the role of the all-important ministerial policy guidelines in determining the functions of the DPCI.[82] The power to issue policy guidelines for the operation of the DPCI has already been found to create "a plain risk

[81] Section 17A of the SAPS Act.

[82] Id section 17K(4), (7) and (8).

of executive and political influence on investigations and on the entity's functioning."[83] That these policy guidelines were previously issued by a Ministerial Committee and now by the Minister of Police alone, does not really subtract from the gravity of these concerns. They are all political actors whose role in influencing the functional activities of the DPCI is very likely to undermine its independence. The power to determine these guidelines is as untrammelled and objectionable under a single Minister as it was under a Committee of Ministers. It is as open now as it was before, to limit the class of national priority offences the DPCI is to confine itself to or to identify public office-bearers the DPCI is not allowed to investigate.[84] This time, a single senior politician is given the authority "to determine the limits, outlines and contents of the new entity's work. That . . . is inimical to independence."[85] The removal of the hands-on supervisory role of the Ministerial Committee has done very little, if anything, to minimise the threat to the institutional independence of the DPCI.

[97] The policy guidelines render the anti-corruption character of the DPCI dependant on whatever the Minister, in the exercise of her discretion, wants it to be. The legislation should itself spell out the parameters of the operational scope of the DPCI, not the Minister's policy guidelines. The power to make the guidelines does violence to the necessary functional autonomy of the DPCI.[86] It has been decided already that—

[83] *Glenister II* above n 1 at para 229.

[84] Id at para 230.

[85] Id at para 234.

[86] Id at para 233.

> "the untrammelled power . . . to determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences, is incompatible with the necessary independence."[87]

[98] Section 17K(4), (7) and (8), which provides for the policy guidelines, is inconsistent with the independence of the DPCI and invalid. To remedy the constitutional defect of section 17D(1)(a) the words "subject to any policy guidelines issued by the Minister and approved by Parliament" must be severed from the subsection. The balance of this subsection would still be self-standing and capable of effective application.

[99] The effect of declaring section 17K(4), (7) and (8) constitutionally invalid is that wherever the ministerial policy guidelines appear in the text, they are to be excised. The words "in accordance with the approved policy guidelines" in section 16(2)(h)[88] must also be struck out of the subsection. Similarly, "in accordance with the approved policy guidelines" in section 16(3)[89] must be excised. That would leave us with a section that is free of any encumbrances that could pervert an

[87] Id at para 250.

[88] Section 16(2)(h) of the SAPS Act provides:

> "Circumstances contemplated in subsection (1) comprise criminal conduct or endeavour thereto which a Provincial Commissioner requests the National Head of the Directorate for Priority Crime Investigation, referred to section 17C(2), to prevent or investigate by employing expertise and making resources available at national level and to which request the National Head of the Directorate for Priority Crime Investigation accedes in accordance with the approved policy guidelines."

[89] Id section 16(3) provides:

> "In the event of a dispute between the National Head of the Directorate for Priority Crime Investigation and the National Commissioner or the National Head for Priority Crime Investigation and a Provincial Commissioner regarding the question whether criminal conduct or endeavour thereto falls within the mandate of the Directorate, the determination by the National Head of the Directorate for Priority Crime Investigation in accordance with the approved policy guidelines, shall prevail."

otherwise acceptable and harmless provision for national priority offences in section 16. Section 16 must be left intact, save for the reference to the ministerial policy guidelines.

[100] The High Court declared section 17A constitutionally invalid. It bears repetition, that the National Head of the DPCI has the discretion to decide which of the national priority offences, defined by section 17A and set out in section 16, to prioritise for investigation. That constitutes an empowerment as opposed to an undermining of the institution and its functionaries. The provision puts the National Head, not political actors or their proxies, firmly in charge of the operations of the DPCI.

"selected offences"

[101] The words "selected offences" in section 17D(1)(aA) are not defined. They are not even cross-referenced to any other section of the Act to allude at least to a sense of what they mean or entail. There is thus no way for anybody to know, by a mere reading of the Act, what "selected offences" are, how they are selected and by whom. A very important institution like an anti-corruption agency should never be left to guess what its functions are, as it is now forced to do in relation to this category of offences. Whoever has the power to determine how to select, who selects and which offences are "selected offences", could easily limit the functional independence of the DPCI. The jurisdiction of the DPCI is an area where little or no room should exist for executive or political interference. One of the key features of the life of an

anti-corruption unit that must be protected against undue interference is its functions. These undefined "selected offences" are a threat to the operational independence of the DPCI.

[102] The resultant constitutional defect should be remedied through the severance of the words "selected offences not limited to". What remains would be clearly identifiable offences, in section 17D(1)(aA), to be investigated by the DPCI.

"any other offence or category of offences"

[103] The DPCI is also charged with the duty to prevent, combat and investigate "any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament." The National Commissioner is vested with the power to prescribe part of what the DPCI is to do.

[104] This is an undesirable encroachment which is exacerbated by the role that the ministerial policy guidelines play in the selection of these offences for referral. The fluidity of the situation and the vagueness in relation to the nature of the offences contemplated, the National Commissioner's license to interfere in the operational space of the DPCI and the preponderance of the policy guidelines in the determination of the DPCI's functions, are all at odds with the imperative to establish an adequately independent anti-corruption unit. Section 17D(1)(b) was thus correctly declared constitutionally invalid in its entirety.

[105] All of these conclusions are arrived at, alive to the fact that the functions of the DSO were not themselves clearly defined.[90] The DSO for instance had to investigate "offences or any criminal or unlawful activities committed in an organised fashion; or such other offences or categories of offences as determined by the President by proclamation in the Gazette."[91] All the provisions which outlined the functions of the DSO, which was found to be operationally independent in *Glenister II*, are arguably comparable to those of the DPCI as now refined. More disturbing though, is that the National Head of the DPCI does not seem to have any say in the determination of the offence or category of offences to be referred from time to time by the National Commissioner. The National Commissioner, who is far below the level of the President who had the same powers, has an unfettered discretionary power to

[90] Section 7 of the NPA Act as amended by the DSO Act provided:

> "(1) (a) There is hereby established in the *Office of the National Director* an Investigating Directorate, to be known as the Directorate of Special Operations, with the aim to—
>
> (i) investigate, and to carry out any functions incidental to investigations;
>
> (ii) gather, keep and analyse information; and
>
> (iii) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings, relating to—
>
> (aa) offences or any criminal or unlawful activities committed in an organised fashion; or
>
> (bb) such other offences or categories of offences as determined by the President by proclamation in the *Gazette*.
>
> (b) For the purpose of subparagraph (aa), 'organised fashion' includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.
>
> (1A) The President may, by proclamation in the *Gazette*, establish not more than two additional Investigating Directorates in the Office of the National Director, in respect of matters not contemplated in subsection (1)(aa) or (bb)."

[91] Id section 7(1)(a)(iii)(aa) and (bb).

prescribe to the DPCI what additional responsibilities she would like it to undertake.[92] The added fundamental difference is that the functions of the DPCI are heavily tied up to the policy guidelines which have already been declared constitutionally invalid. These offences owe their very existence to the dictates of the towering policy guidelines which evidently did not carry the same overbearing weight under the DSO dispensation.

Conclusion

[106] A lot has been done in the course of creating the new anti-corruption entity to significantly water down its primary area of focus. More concerning is the role of the policy guidelines, already invalidated by *Glenister II*, in the determination of the offences to be investigated by the DPCI. Lowering the power to determine additional offences or categories of offences from the President, as it was in the case of the DSO, to the National Commissioner and with the disconcerting frequency provided for, adds to the deepening concerns about the willingness to live up to the declared commitment to fight corruption more decisively. Our ability as a nation to eradicate corruption depends on the institutional capacities of the machinery created to that end.

[107] The frequently articulated concerns about the prevalence of corruption and the vows made to combat it, must be matched by the level of structural and operational independence enjoyed by the agency established to do the work and the resources

[92] Contrast this with section 7(1)(bb) of the NPA Act which vested essentially the same power in the President. This was not an ideal situation, but at least the President is an office-bearer sufficiently highly placed and above easy manipulation to reasonably guarantee adequate independence and protection against interference from senior politicians.

deployed to achieve that objective. That the SAPS Act amendments under consideration are a consequence of efforts meant to cure the constitutional defects identified by this Court in *Glenister II* already, is in some respects regrettable. Regrettable having regard to the apparent reluctance to strengthen the DPCI as directed by this Court, in instances like the ministerial policy guidelines and renewability. This necessitates a great measure of forthrightness by this Court with regard to what exactly needs to be done to cure the constitutional defects identified and how.

Remedy

[108] The need and urgency to put an end to the uncertainty about the particular functions that the DPCI is required to perform, require direct and immediate judicial intervention, without usurping the legislative powers of Parliament.[93] That approach will usher in the clarity that the necessity for the efficacy of the DPCI has been crying out for, for some years now. The order to be made will have to be severance of the constitutionally offensive portions, leaving intact what would still enable this country to have a functional and effective anti-corruption agency.

[109] Severability is appropriate only in circumstances where the removed portion of the legislation or section does not so amputate the affected provision as to paralyse it. What remains must still be capable of effectively advancing the legislative vision. It

[93] This was done in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

must allow for the implementation of the purpose of the provision or legislation in question. That part of the legislation or section that is to remain after severance must not owe its life to the excised provision. It must be so self-standing as to be capable of meaningful and effective application even in the absence of the excised offending part. This is feasible in this matter and that is what the effect of severance would be on the impugned provisions.[94]

[110] To give effect to that remedy, sections will be severed from legislation in their entirety only where they are constitutionally offensive as a whole. Where only a subsection or words in a subsection are unconstitutional, the sting of the declaration of constitutional invalidity will fall on that constitutionally objectionable part. The specific portions of the impugned sections are to be dealt with as follows:

(a) The words "in accordance with the approved policy guidelines" are to be excised from section 16(2)(h) and (3). This would leave the National Head to identify the national priority offences to be investigated in terms of section 17D(1)(a), without any regard to policy guidelines whose deleterious effect has already been pronounced upon.

(b) Subsections (15) and (16) are to be severed from section 17CA in their entirety. They militate against independence by potentially birthing an illegitimate hope in the belatedly-appointed National Head that a less assertive approach to certain investigations might just enhance the

[94] *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] ZACC 13; 2010 (6) SA 1 (CC); 2010 (11) BCLR 1116 (CC) at paras 45-7 and *Coetzee* id at para 16.

prospects of renewal. The certainty of retiring at 60 years of age however brightens the prospects of adequate personal and institutional independence. This severance targets only the renewability provisions.

(c) South Africa needs a dedicated and better focused anti-corruption entity. A clear identification of the functions of the DPCI is therefore crucial. To achieve that all-important objective, the segments of section 17D that are toxic to the operational independence of the DPCI must be excised. This is to be done as follows:

(i) Section 17D(1)(a) needs to and will be relieved of the words "subject to any policy guidelines by the Minister and approved by Parliament". The effect of doing so would be to clarify the mandate and function that is bestowed upon the DPCI by section 17D(1)(a) as being to prevent, combat and investigate "national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate".

(ii) Section 17D(1)(aA) is to lose the words "selected offences not limited to". What the DPCI is empowered to investigate would then clearly be "offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)".

(iii) The "and" at the end of section 17D(1)(aA) and the whole section 17D(1)(b) will be severed from section 17D(1).

(d) For the reasons set out above, section 17K(4), (7) and (8), which provide for the unbridled power to make ministerial policy guidelines that touch at the heart of the DPCI's operational independence, is to be wholly severed from section 17K. Section 17D(1A) which enjoins the National Head to enforce these policy guidelines must suffer the same fate.

(e) The power to suspend and remove the National Head of the DPCI from office vested exclusively in the Minister in terms of section 17DA(1) and (2) must be done away with. To do so, a portion of subsection (1) that refers to subsection (2) and subsection (2) itself must be severed from section 17DA. It would still be possible to address the performance-related concerns about the National Head or alleged acts of misconduct. This would be achieved through the remaining portion of subsection (1) and the whole of subsections (3) to (7) which are more in sync with the legislative vision to create an adequately independent anti-corruption unit whose National Head's job security is entrenched.

Costs

[111] Counsel for the President tendered to the applicants wasted costs, occasioned by the postponement of 15 May 2014, for three counsel. Counsel for the respondents also submitted that the complexity of the matter justified the employment of three counsel by any party. For this reason, they indicated that they would have no difficulty with an order directing their clients to pay costs for three counsel to the applicants should the applicants be successful. It is for this reason that the

respondents, who are the unsuccessful parties, will be ordered to pay costs for three counsel to the applicants. Mr Glenister is entitled to both the High Court costs and costs in this Court, for the successful HSF application that he associated himself with. An order for costs for the striking out application both in the High Court and in this Court will be made against him for three counsel.

Order

[112] In the result the following order is made:

1. Leave to appeal against the order of the Western Cape Division of the High Court, Cape Town striking out the additional evidence sought to be led by Mr Glenister is refused with costs in this Court and the High Court, including costs of three counsel.
2. Leave to appeal against the order of the Western Cape Division of the High Court, Cape Town dismissing Mr Glenister's application to have the entire legislative scheme of the South African Police Service Amendment Act 10 of 2012 declared constitutionally invalid is refused, and each party is to pay its own costs.
3. Leave to appeal against the order of the Western Cape Division of the High Court, Cape Town dismissing the application by the Helen Suzman Foundation to declare sections 17E(8), 17G, 17H, 17I and 24 of the South African Police Service Act 68 of 1995 as amended constitutionally invalid is granted, but the appeal is dismissed with no order as to costs.

4. The order of constitutional invalidity made by the Western Cape Division of the High Court, Cape Town is confirmed to the extent set out in paragraph 5.

5. The following provisions of the South African Police Service Act 68 of 1995 as amended are inconsistent with the Constitution and are declared invalid and deleted from the date of this order:

   (a) The words "in accordance with the approved policy guidelines" as contained in section 16(2)(h) and (3).

   (b) Section 17CA(15) and (16).

   (c) The words "subject to any policy guidelines issued by the Minister and approved by Parliament" in section 17D(1)(a).

   (d) The words "selected offences not limited to" and "and" in section 17D(1)(aA).

   (e) Section 17D(1)(b).

   (f) Section 17D(1A).

   (g) The "(2)" in section 17DA(1) and the whole of section 17DA(2).

   (h) Section 17K(4), (7) and (8).

6. All other provisions of sections 16 to 17K of the South African Police Service Act 68 of 1995 as amended remain in force.

7. The respondents are to pay the applicants' costs in the High Court as well as costs of the confirmation application, including costs occasioned by the employment of three counsel.

8. The first respondent is also to pay wasted costs occasioned by the postponement on 15 May 2014 to the applicants, including costs of three counsel.

FRONEMAN J (Cameron J concurring):

[113] I have had the benefit of reading the judgments of Mogoeng CJ (main judgment) and those of Cameron J, Madlanga J, Nkabinde J and Van der Westhuizen J. Except for the main judgment's finding that the process for appointing the National Head is constitutionally compliant (in respect of which I concur with Cameron J) and its dismissal of Mr Glenister's applications for leave to appeal, I agree with its reasoning and outcome.

[114] Mr Glenister sought leave to appeal against (1) the order dismissing his main application to have the entire legislative scheme of the SAPS Amendment Act declared unconstitutional and (2) the order striking out the additional evidence sought to be led in support of that application. I would grant leave in both applications and uphold the appeal (in part) on the striking out application, but dismiss the appeal in the main application.

[115] The main judgment finds that *Glenister II*[95] foreclosed both the constitutional challenge that Mr Glenister sought to bring against the SAPS Amendment Act as well as the evidence that he sought to adduce to sustain that challenge. I disagree.

[95] Above n 1.

Glenister II does neither. If that decision needs to be revisited it must be done appropriately with reasoned discussion and justification for any change. It should not be done by a re-interpretation of its meaning that narrows its original scope without explaining the necessity for the change.

Constitutional challenge

[116] Mr Glenister relied on two principles alluded to in *Glenister II*. The first related to whether the placement of the DPCI within the SAPS could fall within the range of constitutionally acceptable measures to be adopted by a reasonable decision-maker. The second related to the role or significance of public perception in determining the range of constitutionally acceptable measures.[96]

[117] The main judgment holds that because of the decision in *Glenister II*—

> "The question whether the location of the DPCI within the SAPS falls within a range of possible measures 'a reasonable decision-maker in the circumstances may adopt', having regard to public perception, does not arise. That issue was settled in *Glenister II*."[97]

It goes on to state that "[i]t is a closed chapter that corruption is rife in South Africa and that it is a practical possibility for an adequately independent anti-corruption entity to be comfortably located within the SAPS".[98]

[96] At [15].

[97] At [19].

[98] At [21].

[118] In *Glenister II* the majority judgment stated:

> "We further agree that section 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was *not in itself unconstitutional* and thus the DPCI legislation cannot be invalidated *on that ground alone*. Similarly, the legislative choice to abolish the DSO and to create the DPCI did not in itself offend the Constitution."[99] (Emphasis added.)

And:

> "The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be 'responsible for policing'. These constitutional duties can productively coexist, and will do so, provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the State's constitutional obligations under section 7(2) of the Constitution."[100] (Footnote omitted.)

[119] The judgment does not state that the creation of a separate corruption-fighting unit within the SAPS will withstand any constitutional attack. It says that something else will be needed in order to sustain that kind of constitutional challenge. Mr Glenister sought to show that the additional factor was that the current extent of corruption in our body politic was of the kind that showed that the location of the DPCI within the SAPS was not a possible option for a reasonable decision-maker. In

[99] *Glenister II* above n 1 at para 162.

[100] Id at para 214.

other words he contended that this evidence showed that locating the DPCI within the SAPS meant that it could not have "sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights".[101]

[120] His attempt to do so fell squarely within the range of approaches left open by *Glenister II*. Whether the kind of evidence he offered was sufficient to sustain the constitutional challenge is another question to which I shall return, but *Glenister II* does not prevent him from trying to do so.

[121] *Glenister II* also envisaged that evidence could be led that placed the range of options open to a reasonable decision-maker within its proper context:

> "Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the State takes, *as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt.* A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable."[102] (Emphasis added and footnote omitted.)

The italicised portion was said in reliance on the following paragraph in *Rail Commuters*:

> "The standard of reasonableness requires the conduct of Metrorail and the Commuter Corporation to fall within the range of possible conduct that a reasonable

[101] Id.

[102] Id at para 191.

> decision-maker in the circumstances would have adopted. In assessing the reasonableness of conduct, therefore, the context within which decisions are made is of fundamental importance."[103] (Footnote omitted.)

[122] In relation to public perception, *Glenister II* continued:

> "This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. *Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence.* Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective bench marks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence."[104] (Emphasis added and footnote omitted.)

[123] To sum up: *Glenister II* did not hold that there could be no challenge to the location of the DPCI within the SAPS, only that the mere fact of its location within the SAPS was not sufficient to sustain a constitutional challenge. Nor did it lay down that no evidence may be adduced to support a constitutional challenge that was based on something more than the fact of the DPCI's location within the SAPS. *Glenister II* does not preclude the presentation of evidence of the context within which the range of possible options open to a reasonable decision-maker should be assessed. Nor does it prohibit evidence about the public perception of corruption within that context.

[103] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 86.

[104] *Glenister II* above n 1 at para 207.

Mr Glenister sought to introduce additional evidence of corruption in our body politic and the public perception of the extent of that corruption in order to bolster his constitutional challenge that, currently, it is not a reasonable option to locate the DPCI within the SAPS. *Glenister II*, I repeat, allowed him to do that.

[124] The main judgment finds that the evidence of public perception that Mr Glenister sought to present showed that the perception already existed at the time of *Glenister II* and hence this evidence takes the matter no further than what that judgment already decided. I disagree. First, the evidence presented in this matter is not all the same as that which was before the Court in *Glenister II*. Second, the challenge here is predicated on what *Glenister II* decided. The legal ground for the challenge here was created by *Glenister II* and thus the challenge is not precluded by that judgment by the application of some kind of *res judicata* principle.

[125] It is one thing for this Court to find that the case Mr Glenister presented was not convincing, but quite another to say that he is prevented by our own past decision from doing so. If there are aspects of *Glenister II* which need to be revisited or clarified it must be done explicitly, not through a re-interpretation that is at odds with what the judgment actually says.

[126] Leave to appeal against the order dismissing Mr Glenister's application to have the entire legislative scheme of the SAPS Amendment Act declared unconstitutional must be granted, with costs.

The factual challenge

[127] It is necessary to emphasise some obvious considerations at this stage. In an application to strike out evidence on affidavit, neither the eventual veracity of the evidence nor the prospects of success of the main application is at issue. This is a trite proposition.[105] The only question in a striking out application is whether the evidence is admissible. The truth of the evidence plays no role at this stage; it is only determined at the end of the matter if the evidence is admitted.

[128] The main judgment proceeds from the proposition that after *Glenister II* it is an accepted fact that "corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal".[106] I agree. But it does not follow that further probing into the possible extent of the corruption is now a "closed chapter"[107] and an issue that "was settled"[108] in *Glenister II*. What if the corruption is so "rife" that the very idea of locating the DPCI within the SAPS – an otherwise perfectly acceptable option for "reasonable

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[105] Relevance does not necessarily depend on the factual merit of the impugned allegations; whether they are true is not considered but their relevance to the merits of the case is what is of consequence. See in this regard *Zuma* above n 35 at para 25 and *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W) at 177-8. In *Stephens* above n 27 at 282 the Appellate Division held that—

> "the correct test to apply is whether the matter objected to is relevant to an issue in the action. And no particular section can be irrelevant within the meaning of the Rule if it is relevant to the issue raised by the plea of which it forms a part. That plea may eventually be held to be bad, but until it is excepted to and set aside it embodies an issue by reference to which the relevancy of the matter which it contains must be judged."

The same applies to evidence on affidavit in an application. Rule 6(5)(d)(iii) of the Uniform Rules of Court allows for the equivalent of an "exception" procedure in motion proceedings.

[106] At [1]. See also [2] (where the main judgment refers to the "scourge of corruption"); [21] (where it states again that "corruption is rife"); and [75] (where it speaks of "the tide of corruption" in our country).

[107] At [21].

[108] At [19].

decision -makers" – becomes unthinkable because those controlling the SAPS may themselves be part of the corruption?

[129] The very idea that this situation might exist will be scandalous for our country, but it does not mean that our courts are entitled to prevent concerned persons from seeking to present evidence to sustain an assertion of that kind.

[130] That is exactly what Mr Glenister sought to do in his application to have the whole scheme of the SAPS Amendment Act declared unconstitutional. He tried to show that the corruption at the very centre of our political life is so pervasive that the unthinkable may be true: our elected Government is trying to undermine the independence of our constitutional institutions in order to attain its own unconstitutional aims. The location of the DPCI within the SAPS is allegedly part of this unconstitutional endeavour.

[131] That is a grave assertion against what we hold dear under the Constitution. But it is our duty to treat the challenge on its merits, not to denigrate it out of hand as scandalous and vexatious because it seeks to portray the Government, the leadership of the governing party, the ANC, and the law enforcement agencies of this country as corrupt. The same applies to the submissions that a Deputy Minister of Justice allegedly said that our criminal justice system – of which the SAPS forms an integral part – was "dysfunctional"[109] and that "a 'corrupt SAPS' [is] managed and

[109] See above n 24.

controlled . . . by a 'corrupt Executive' . . . deployed from the ranks of a 'corrupt ruling party' in terms of its cadre deployment policies that have no regard for integrity and meritocracy".[110]

[132] What we need to do is to make a dispassionate analysis of these assertions, assess whether they are relevant and then test whether the evidence presented in support of them is in accordance with our principles and rules of evidence and procedure. In doing that we need to look carefully at what "vexatious" and "scandalous" mean in the context of an assertion that corruption lies at the core of the issue at stake. Presenting evidence of corruption in that kind of situation will of necessity involve making assertions that may be regarded as abusive or defamatory or may convey an intention to harass or annoy,[111] but surely that cannot be a legitimate reason to prevent a litigant from attempting to present that kind of evidence.

Relevance

[133] I agree that Mr Glenister's application is not a model of clarity, but irritation and inconvenience at having to sort the good from the bad in a matter is insufficient reason for not going through that process. Broadly speaking, Mr Glenister seeks to make out a case for the unconstitutionality of the SAPS Amendment Act along the following lines:

[110] See at [23].

[111] These are the pre-constitutional tests for determining whether allegations are "vexatious" or "scandalous" for striking out purposes. See [28].

(a) The legislation establishing and regulating the DSO was a proper and constitutionally compliant statute to give effect to the constitutional imperative of creating a functionally and structurally independent anti-corruption entity.

(b) The 2007 ANC national conference took a decision to disband the DSO.

(c) That decision was not taken to preserve a functionally and structurally independent anti-corruption entity, but to ensure that its replacement (established under the first South African Police Service Amendment Act)[112] was under the control of the ANC, through the legislative and executive arms of Government, which did not operate independently, but were always subject to the control of the ANC.

(d) The First Amendment Act is evidence of (c).

(e) The decision of this Court in *Glenister II* effectively showed the correctness of (a) to (d) above.

(f) The SAPS Amendment Act, under consideration in this matter, is but a continuation of the purpose referred to in (a) to (d) above.

(g) The continuation of this purpose makes the decision to still locate the DPCI within the SAPS one that goes beyond the decision legitimated by *Glenister II*.

(h) Hence, the attack on the constitutionality of the legislative scheme of the SAPS Amendment Act is justified in terms of *Glenister II*.

[112] 57 of 2008 (First Amendment Act). The First Amendment Act amended the NPA Act and the SAPS Act to abolish the DSO and instead create the DPCI. It was this amendment to the SAPS Act that was under scrutiny in *Glenister II*. See [4].

(i) The evidence offered in support of the application was relevant and established the case advanced in propositions (e) to (h).

(j) The appeal should thus succeed and the whole legislative scheme of the SAPS Amendment Act should be declared constitutionally invalid.

[134] It is an unfortunate fact that the decision taken at the 2007 ANC national conference to replace the DSO was followed by a controversial decision not to proceed with corruption charges against the current President of the country, a decision that was, until very recently, still subject to litigation in the courts.[113] So too is the fact that a former National Commissioner of the SAPS has been found guilty of corruption.[114] In support of his application Mr Glenister asserted that it is the goal of the ANC to establish "hegemonic control of all the levers of power in society".[115] In support of this he relied on the ANC website and an extract from a National Executive Committee address on 8 January 2011 confirming it. The address contained in the annexure sets out the goals of the ANC and states:

> "We reiterate . . . that we place a high premium on the involvement of our cadres in all centres of power. . . . We also need their presence and involvement in key strategic positions in the State as well as the private sector, and will continue strategic deployments in this regard."

[113] *Zuma v Democratic Alliance and Others* [2014] ZASCA 101.

[114] *S v Selebi* [2011] ZASCA 249; 2012 (1) SA 487 (SCA).

[115] Para 8.12 of the affidavit deposed to by Mr Glenister on 26 November 2012 and attached as Annexure HG 1 to Mr Glenister's founding affidavit in the High Court (Annexure HG 1). Annexure HG 1 is the founding affidavit filed by Mr Glenister in his application for direct access to this Court in 2012 (case number CCT 118/12). Mr Glenister used it again in the current case, including the originally attached annexures (Annexures A-BA), in order to set out the case he sought to make. Mr Glenister's case is primarily based on the allegations in Annexure HG 1 and its annexures, and it is also portions of Annexure HG 1 and its annexures that form the majority of the subject matter of the application to strike out.

[135] This evidence was objected to as irrelevant and was struck out. It is not irrelevant to the case Mr Glenister sought to advance. If the ruling party has stated that it wishes to control all levers of power in society, it may be inferred that the location of the DPCI within the SAPS is not a reasonable option because the potential for control over the DPCI through cadre deployment in the SAPS would undermine the adequate structural and operational independence required of a dedicated anti-corruption unit.[116] The ANC's own statements, relied upon by Mr Glenister, can hardly be described as vexatious or scandalous within the meaning of the rule.

[136] There was no prejudice to the Minister that could not have been met by admitting, denying or explaining the strategy of cadre deployment on affidavit. It is an accepted rule of our law that a party who seeks to strike out evidence must nevertheless on affidavit deal with the allegations made that he seeks to strike out.[117] The Minister did not comply with this requirement at all in the striking out application. This is an instance where there was nothing that prevented him from putting up evidence on affidavit to counteract the evidence adduced by Mr Glenister.

[116] Section 206(1) of the Constitution provides 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". Section 207(2) continues that "[t]he National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing".

[117] *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C) at 295H-296B and *Dennis v Garment Workers' Union, Cape Peninsula* 1955 (3) SA 232 (C) at 239H. See also Cilliers et al *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta & Co Ltd, Cape Town 2009) vol 1 at 448; Harms *Civil Procedure in the Superior Courts* Service Issue 51 (LexisNexis, Durban 2014) vol 1 at para B6.74; Harms "Civil Procedure: Superior Courts" in *LAWSA* 3 ed (2012) vol 4 at para 144; and Van Loggerenberg and Farlam *Erasmus: Superior Court Practice* Service Issue 45 (Juta & Co Ltd, Cape Town 2014) at B1–58.

[137] Reliance was also placed by Mr Glenister on a concession made by a former Deputy Minister of Justice in the *Glenister II* matter that South Africa's criminal justice administration is "dysfunctional". This was also objected to as irrelevant and struck out. It is not irrelevant and should not have been struck out. The SAPS forms part of the criminal justice system. If it is also "dysfunctional" this fact must be of some relevance to the question of the location of the DPCI.

[138] Also struck out were media reports on statements made by the President and the former Deputy Minister of Correctional Services in relation to this Court's findings in *Glenister II*. In an address at the Access to Justice Conference[118] the President is reported to have stated that the Judiciary should not, when striking down legislation, use this as an opportunity to change policies determined by the Executive. In an interview with the President in another newspaper article he apparently expressed his preference for the minority judgment in *Glenister II* and appeared to indicate that there is uncertainty about what to do when there is more logic in the dissenting judgment than in the majority judgment. In another media article the former Deputy Minister of Correctional Services also criticises the *Glenister II* majority judgment. Mr Glenister takes issue with the President's failure to repudiate the opinions expressed in that article. Lastly, evidence is offered of the President's response to a question posed in Parliament which included the following statement by him:

[118] President Jacob Zuma "Keynote Address" (delivered at the Access to Justice Conference in Pretoria, 8 July 2011).

> "[The ANC representatives] have more rights here because we are a majority. You [i.e. the opposition] have fewer rights because you are a minority. Absolutely, that's how democracy works."

[139] These statements by the President and his apparent condonation of the views expressed by one of his Deputy Ministers are relevant to substantiate Mr Glenister's constitutional challenge that it is not a reasonable option to locate the DPCI within the SAPS, because they indicate resistance or non-acceptance of the legal position and point to a continued intention to exercise political control over anti-corruption activities. What Mr Glenister seeks to show is that there is a disregard for constitutional democracy and the Judiciary at the highest level of Government. For that reason he asserts that there is great danger if the DPCI is subject to political control by those who hold these views. In those circumstances the location of the DPCI within the SAPS cannot be a reasonable option for reasonable decision-makers.

[140] Once again there was no prejudice. The allegations could have been denied, admitted or explained on affidavit, for example, on the basis that members of the Executive are entitled to express their opinions on court decisions as part of the open democratic debate in the country and that it is wrong to try and read anything sinister in them doing that. This was not done. I fail to see anything vexatious or scandalous in requiring members of the Executive to explain statements that may be interpreted as expressing disregard for the basic tenets of our constitutional democracy.

[141] The affidavit and report of Professor Gavin Woods (Woods Report), director of the Anti-Corruption Education and Research Centre at Stellenbosch University, and the affidavit of Mr Gareth Newham (Newham affidavit), head of the Crime and Justice Programme at the Institute for Security Studies (ISS), were also struck out. They should not have been.

[142] In relation to the Woods Report, the High Court found that "in the affidavit to which the report is annexed, Woods does not even confirm that the contents of the report are true and correct".[119] This is incorrect. In his affidavit Professor Woods states that the facts deposed to in his affidavit are true and correct and that to the extent that he relies on information he received from others he believes that information to be correct. He explicitly states that "[I] further confirm the contents of the attached report". The High Court thus misdirected itself in striking out this evidence.

[143] The Woods Report deals with reports of corruption in the media and, in particular: (1) the allegations of corruption in relation to the Arms Deal; (2) "Nkandla"; (3) a former Minister of Police's "security wall and slush fund" (where there was allegedly interference in a DPCI investigation); (4) misappropriation of funds by a former Minister of Communications; (5) the involvement of a former Deputy Minister of Economic Development in a pension fund scandal; (6) irregular expenditure by, and the false qualifications of, a former Minister of Cooperative

[119] High Court judgment above n 10 at para 8.

Development and Traditional Affairs; (7) the improper appointment of Adv Menzi Simelane as NDPP (and the role played by former Minister of Justice and Constitutional Development in that appointment);[120] (8) the improper lease agreements for the SAPS buildings involving a former Minister of Public Works, a former National Commissioner and a former Director-General of Public Works; and (9) "Travelgate" (involving fraudulent travel claims by a number of members of Parliament, members of Cabinet and parliamentary office-bearers). Notably, Professor Woods states that "[i]n South Africa the Executive leadership . . . are perceived as tolerating corruption and fraud and on many occasions they have been seen as rewarding parties involved in corruption".[121]

[144] This is a report by an expert based on research he conducted. It is relevant to determine the level of corruption at the highest political level in our society and the general public's perception of corruption at that level. The proper way to counteract the views in the Woods Report was to challenge, on affidavit, Professor Woods' qualifications, methodology and conclusions. Again, this was not done.

[145] The same applies to the Newham affidavit. It includes a number of annexures illustrating the work of the ISS in the field of corruption in South Africa, including (1) a monograph on the systemic problem of corruption in South Africa (particularly in the police service), the causes of such corruption and possible strategies for combating it; (2) a report on the public's perceptions of the levels of corruption and

[120] Compare *Democratic Alliance* above n 65.

[121] Woods Report at paragraph 2.8.8.3.

other crime in the SAPS based on the findings of a study undertaken by the ISS; (3) a report on the role and effectiveness of police oversight bodies; (4) a report evincing the view of police officers at three Gauteng police stations on police corruption, which in particular shows that 66 of the 77 respondents believed corruption exists on a large scale in the SAPS; (5) an ISS article on the poor leadership within the SAPS and its impact on the effective performance by the SAPS of its mandate; (6) an ISS article addressing the lack of political will to address corruption in South Africa; (7) an opinion on the SAPS Amendment Bill prepared by a well-known law professor; and (8) the ISS' submissions to the Portfolio Committee on Police on the SAPS Amendment Act when it was still a Bill, including reasons for the opinion that an adequately independent anti-corruption entity could not be located in the SAPS. It also expresses the view that the DPCI should be located outside of the SAPS.

[146] It is not necessary to refer in detail to each of the further paragraphs objected to and struck out. Some fall within the same reasoning for admissibility set out above,[122] others do not.[123] Leave to appeal against the order upholding the Minister's striking out application must be granted, with costs. The striking out order in the High Court must be set aside and replaced with an order striking out only the paragraphs set out in footnote 123 of this judgment.

[122] Paras 10 and 13 (in part) of Mr Glenister's founding affidavit in the High Court; paras 7.1-7.5, 7.14-7.16, 8.8 (in part), 8.12, 8.20, 9.6-9.10, 9.11 (in part), 9.12-9.16, 14.8, and 15.3-15.5 of Annexure HG 1; the Woods Report; the Newham affidavit; and para 5.2 of Mr Glenister's replying affidavit.

[123] Para 13 (in part) of Mr Glenister's founding affidavit in the High Court; and paras 7.6, 8.8 (in part), 8.14, 9.1, 9.11 (in part) and 9.17-9.18 of Annexure HG 1.

[147] But even if I am wrong to read *Glenister II* to mean that it allows the constitutional challenge and this kind of evidence Mr Glenister sought to present, I believe it is at least a reasonably contestable reading for which Mr Glenister should not be castigated for adopting. If that is so, *Biowatch*[124] applies. There is insufficient reason for ascribing ill motives to him in following a reasonable reading of *Glenister II*. He should not be saddled with costs, especially not of three counsel.

Merit of the appeals

[148] That leaves only Mr Glenister's appeal against the dismissal of his application to have the entire legislative scheme of the SAPS Amendment Act declared unconstitutional. Other than in the main judgment, the appeal must be decided on the basis of the evidence referred to in [133] to [147] above, together with the evidence on the affidavits of the respondents.

[149] In *Glenister II* the majority judgment found that there is scope for the productive co-existence of the constitutional duties to create an adequately independent anti-corruption unit and to have a member of Cabinet exercise responsibility over policing.[125] The order in the main judgment adequately ensures that this purpose of productively co-existing constitutional duties between the Minister and the anti-corruption unit can be achieved. The more drastic relief Mr Glenister seeks is unnecessary. I would thus dismiss the appeal.

[124] *Biowatch* above n 36 at paras 21-3.

[125] *Glenister II* above n 1 at para 214, as quoted at [118].

CAMERON J (Froneman J and Van der Westhuizen J concurring):

[150] I have had the benefit of reading the judgment by Mogoeng CJ (main judgment) and those by Froneman J, Nkabinde J and Van der Westhuizen J. I find the reasoning and outcome of the main judgment compelling, and concur in it, subject to two qualifications. First, I agree with Froneman J, for the reasons he gives, that the application to strike out Mr Glenister's evidence should have been dismissed, and that leave to appeal should be granted to him in this Court.

[151] Second, I do not agree with the main judgment's conclusion that the process for appointing the National Head of the DPCI is constitutionally compliant.[126] In my view, consolidating the power to appoint the Head in the Minister and the Cabinet erodes the DPCI's independence to a constitutionally impermissible degree. I would confirm the High Court's order declaring section 17CA constitutionally invalid.

[152] The section provides in relevant part:

> "(1) The Minister, with the concurrence of Cabinet, shall appoint a person who is—
>
> (a) a South African citizen; and
>
> (b) a fit and proper person,
>
> with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as the

[126] At [72] to [76].

> National Head of the Directorate for a non-renewable fixed term of not shorter than seven years and not exceeding 10 years.
>
> (2) The period referred to in subsection (1) is to be determined at the time of appointment.
>
> (3) The Minister shall report to Parliament on the appointment of the National Head of the Directorate within 14 days of the appointment if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session."

So the Minister chooses the Head of the DPCI, subject to the concurrence of Cabinet. Once the appointment has been made, the Minister must "report" to Parliament. But Parliament has no veto power, nor any other say in the appointment. Is that constitutionally permissible?

[153] The High Court found that it was not.[127] Its reasons are compelling. The independence of an institution depends pivotally on the independence of those who staff it. Where political considerations influence the selection of the institution's staff, its independence is, to that extent, limited. If compliant incumbents are selected at the outset, securing their tenure and preserving the autonomy of the institution within which they work will be inadequate to secure independence.

[154] And – this is the crucial point – the more the institution's mandate threatens political office-bearers, the greater is the risk of political weight being brought to bear on its appointments. Where the institution's core mandate is to investigate crimes committed by political office-bearers, the risk may become severe.

[127] High Court judgment above n 10 at paras 47-58.

[155] That risk may be mitigated by a balanced appointment process that diffuses the power of selection and appointment among various stakeholders. It is aggravated when the power to appoint is consolidated in a single, politically prominent office-bearer, or in a close-knit group of government executives who may have a shared interest in finding a compliant appointee.

[156] This is not to pass comment on any particular group of political incumbents. Still less does it reflect on any currently in office. It reaches beyond incumbency to the stark realities of power, to which we all are prone.

[157] This Court has long recognised these salutary principles in relation to other institutions whose independence is constitutionally required. It has authoritatively noted that there should be a body that "provides a check and balance to the power of the Executive" to make appointments;[128] that if appointments are "at the discretion" of members of the Executive "there would be concern" about the appointees' independence;[129] and that it is at odds with an institution's independence if the Executive can "tell [it] . . . whom to employ".[130]

[128] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification*) at para 124 (discussing the appointment of judges).

[129] Id at para 128.

[130] *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 99 (discussing the Independent Electoral Commission).

[158] These principles are also embodied in South Africa's "native conception of institutional independence" vindicated in *Glenister II*.[131] Our Constitution's Chapter 9 institutions – which, as this Court has recognised, provide important comparators here[132] – bear witness to the pitfalls of approval powers concentrated in the Executive. Section 193 provides that every member of the institutions that support our constitutional democracy is appointed "on the recommendation" of Parliament.[133]

[159] Indeed, in the case of the Public Protector and Auditor-General the Constitution goes further, requiring that the recommendation be approved by a supermajority.[134] These are the two institutions of accountability whose gaze, like that of the DPCI, is fixed firmly on the political branches; their task "inherently entails investigation of sensitive and potentially embarrassing affairs of government".[135] As the HSF rightly contends, they may provide the "paradigm comparators" for a sufficiently independent anti-corruption unit.

[160] Recognising all this, the OECD Report,[136] whose relevance in understanding our own native constitutional obligations *Glenister II* recognised,[137] states this fundamental principle:

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[131] Above n 1 at para 211.

[132] Id.

[133] Section 193(4) of the Constitution.

[134] Section 193(5)(b)(i).

[135] *First Certification* above n 128 at para 163.

[136] Above n 38.

[137] Above n 1 at para 187.

> "The selection process for the head [of a specialised anti-corruption institution] should be transparent and should facilitate the appointment of a person of integrity on the basis of high-level consensus among different power-holders (e.g. the President and the Parliament; appointment through a designated multidisciplinary selection committee on the proposal of the Government, or the President, etc.). Appointments by a single political figure (e.g. a Minister or the President) are not considered good practice."[138]

[161] Section 17CA of the SAPS Act does not conform to these principles. It does not require "consensus among different power holders". It involves neither Parliament, except by report, nor a special selection committee. Instead, it provides for appointment "by a single political figure", namely the Minister.

[162] But the section ties the Minister's power to appoint the Head to Cabinet approval. Is this a sufficient safeguard? It is not. The members of the Cabinet, equally with the Minister, are appointed by the President and serve at his favour.[139] They are, with few exceptions, senior members of the ruling party, and politically allied to each other. So their oversight does not adequately dilute the Minister's power.

[163] Nor do they counterweigh the power of the Executive, for they are part of it. Indeed, as the High Court found, they are the very "political heads of all of the

[138] Above n 38 at 26.

[139] Section 91(2) of the Constitution.

government departments that the DPCI might have to investigate".[140] They do not bring a disinterested judgment to bear on the Head's appointment.

[164] In addition, the Head and the Minister decide who appoints the deputy national heads of the DPCI and its provincial heads.[141] So the Head's susceptibility to political influence is likely to trickle down, thus affecting the independence of those whom he or she appoints.

[165] The practical upshot is this. The Head's appointment should, as the High Court held, be subject to parliamentary approval. This has many virtues. First, it dilutes the power possessed by any single individual to appoint the Head he or she desires. Resonant with the separation of powers, it attaches a significant counterweight to the power of the Executive and its members.[142] Second, it spreads scrutiny of the appointment across the political spectrum, ensuring that a diversity of political actors has a say – including parties whose members, not being in government, will feel less exposed to possible investigation.

[166] This is no panacea, of course, especially since the votes of the ruling party's members may eventually be sufficient to carry through the appointment. But parliamentary involvement is salutary for a third reason. It is good for transparency, public accountability and democracy. It forces the appointment process out of the

[140] High Court judgment above n 10 at para 48.

[141] Section 17CA(4) and (6) of the SAPS Act.

[142] In other words, it "provides a check and balance to the power of the Executive" to make appointments, as the *First Certification* case above n 128 held was so important.

Executive's impenetrably private deliberations into the fresh light of the parliamentary chamber, whose proceedings are publicly accessible, and where they are ripe for dissection and disputation by every person in the country.

[167] Our Constitution pointedly regards as a fundamental value not only universal adult suffrage but also "accountability, responsiveness and openness" of government.[143] In *M & G Media Ltd*, the Supreme Court of Appeal rightly held that "[o]pen and transparent government and a free flow of information concerning the affairs of the State is the lifeblood of democracy".[144] The OECD Report also emphasises that the appointment process must be transparent.[145] And the Constitution recognises Parliament's essential role in providing for "participatory democracy, accountability, transparency and public involvement".[146]

[168] It is true, and the main judgment rightly points out,[147] that Parliament had no role in the appointment of the head of the DSO.[148] And, as that judgment also notes, *Glenister II* stated that "[t]he now defunct DSO was independent".[149] Setting store by

[143] Section 1(d). See also section 195(1).

[144] *President of the Republic of South Africa and Others v M & G Media Ltd* [2010] ZASCA 177; 2011 (2) SA 1 (SCA) at para 1.

[145] Above n 38 at 26.

[146] Section 57. See also, on the significance of Parliament, its institutional features, and public participation, *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at paras 46-9 and *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 90-146.

[147] See [73].

[148] See section 7(3) of the NPA Act prior to its 2008 amendment.

[149] Above n 1 at para 210.

this, the main judgment finds that the requirement of adequate independence cannot entail that Parliament must have a role in the appointment of the Head of the DPCI.[150]

[169] This reasoning is not persuasive. *Glenister II* invoked the DSO only for comparative purposes, to show "how markedly short of independence the DPCI falls".[151] In doing so, the Court made clear, "we do not suggest that the DSO constitutes a 'gold standard'".[152] Nor did the DSO "represent an inviolable standard".[153]

[170] For these reasons, it is not conclusive to point out that *Glenister II* described the DSO as independent. That is to invoke the DSO as precisely what *Glenister II* disavowed: a gold standard. *Glenister II* made no firm finding, with precedential force, that the DSO was perfectly independent in every respect. And indeed it could not have done that, for the constitutionality of the legislation constituting the DSO was not before it. It was concerned with the old DPCI, constituted by the predecessor of the legislation now before us, and invoked the DSO's relative independence only to show how far that legislation strayed from the independence constitutionally required. In assigning power to appoint the Head exclusively to the Minister and the Executive, the present legislation does the same.

[150] See [73] to [76].

[151] Above n 1 at para 210.

[152] Id at para 209.

[153] Id at para 210.

[171] In short, *Glenister II* provides no answer to the HSF's rightful concerns about the appointment of the Head of the DPCI. If anything, it compounds them. For *Glenister II* pointed to the appointment process for the Head of the DPCI under the old legislation – which said, not unlike the present legislation, that he or she shall be "appointed by the Minister in concurrence with Cabinet"[154] – as one of the factors that eroded the independence of the unit's staff.[155]

[172] There is a further point. The appointment of the head of the DSO differed materially from the process section 17CA now provides. Whereas the Head of the DPCI is appointed by the Executive alone, with only a report to Parliament, the head of the DSO was appointed by the NDPP.[156] It is true, as the main judgment observes, that the NDPP is himself appointed by the President,[157] and that he chose the head of the DSO from a further set of presidential appointees, namely the Deputy National Directors of the NPA.[158] So the appointment of the DSO was hardly immune to presidential influence.

[173] Still, in the case of the DSO that influence was indirect. The President exercised it at one remove. The NDPP – whose independence, once appointed, the Constitution directly guaranteed – made the final selection. In the case of the Head of

[154] Section 17C(2)(a) of the SAPS Act prior to its 2012 amendment.

[155] *Glenister II* above n 1 at para 219.

[156] Section 7(3)(a) of the NPA Act prior to its 2008 amendment.

[157] Section 179(1)(a) of the Constitution and section 10 of the NPA Act.

[158] Section 11 of the NPA Act.

the DPCI, by contrast, the Executive's power is unmediated. Hence the need for parliamentary involvement is here more pressing.

[174] What is more, the DSO had several positive features the current DPCI signally lacks. Those may have tipped the balance in *Glenister II*'s global assessment that the DSO was adequately independent. Put differently, the DSO was adequately independent *despite* the process for its head's appointment. But the countervailing factors that justified a conclusion of adequate independence there are absent here.

[175] Most pertinently, the DSO was outside the SAPS. By contrast, the DPCI is lodged firmly within the SAPS. The unit's location plainly matters. It is true that *Glenister II* recognised that it was constitutionally permissible to locate the DPCI within the SAPS.[159] But *Glenister II* found only that the DPCI's location did not "in itself" make the unit unconstitutional; the DPCI legislation could not be invalidated "on that ground alone".[160]

[176] The implication was that the unit's independence would be decreased by its location within the SAPS, but that it might nevertheless have other "sufficient attributes of independence to fulfil the functions required of it".[161] One important attribute to offset the DPCI's location within the SAPS would be an irreproachable process for the appointment of its members – and that is lacking here.

[159] *Glenister II* above n 1 at para 162.

[160] Id.

[161] Id at para 214. See also the judgment of Froneman J at [119].

[177] Similar considerations apply to the main judgment's invocation of the appointment process governing the NPA and its head, the NDPP.[162] In addition, the temptation to appoint an incumbent with an insufficiently robust sense of independence may be greater in the case of the DPCI – whose primary function is to investigate political office-bearers – than in the case of the NDPP, who handles all prosecutions in the country, and only incidentally those of the Executive.

[178] I would therefore confirm the High Court's order declaring section 17CA constitutionally invalid.

NKABINDE J:

[179] I have read the judgments of Mogoeng CJ (main judgment), Froneman J, Cameron J, Van der Westhuizen J and Madlanga J. I concur with the main judgment in every aspect except in relation to findings regarding section 17E(8)(a) of the SAPS Act,[163] including a finding that the provision is constitutionally compliant in respect of the integrity testing provisions in terms of that section. What raises alarm bells is the unfettered discretion vested upon the Minister. While it is correct that courts must be careful not to be prescriptive and take on a legislative role, I think that we need not shy away from the task at hand either, which is to test whether the provisions as they stand allow for sufficient independence of the DPCI from undue political interference.

[162] See [73].

[163] Section 17E(8)(a) is quoted in full at [43].

[180] Section 17E(8)(a) gives the Minister unbridled discretionary power to prescribe measures for testing the integrity of members of the DPCI. The testing "may include random entrapment, testing for the abuse of alcohol or drugs, or the use of the polygraph or similar instrument to ascertain . . . the truthfulness of a statement made by a person". The HSF contends that the power vested on the Minister is open-ended and may be abused as an intimidation tactic with ominous implications.

[181] The power to test the integrity of the members of the DPCI is important and may be conducted (if the Legislature so feels) at various intervals during members' terms of office. It is also the case that membership within the DPCI has the core requirement that the person occupying the position is seen to be a person of "integrity".[164] This is because it is important too that the "watchdogs are being watched". There is a noble aim behind ensuring that DPCI members are able to pass integrity tests. This said, it is remarkable that the testing measures to be prescribed are to be enforced against only the members of the DPCI.

[182] It is a general characteristic of the law that any power that can have pernicious effects should be better and more extensively circumscribed to the person tasked with administering that power.[165] In *Affordable Medicines*[166] this Court has recognised that

[164] See section 17CA(1) of the SAPS Act, which obligates the Minister to appoint as the National Head of the DPCI a person "with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned".

[165] For instance, where imprisonment may result there are high thresholds and procedural mechanisms to protect against the improper use of power. In the labour law context, when dismissal may result there are the prescripts of substantive and procedural fairness that should be adhered to. In administrative law, the proper exercise of

"[d]iscretion has an important role to play in decision-making". Relying on *Dawood*,[167] albeit in a different context, this Court held that discretion "permits abstract and general rules to be applied to specific and particular circumstances in a fair manner" and "[t]he scope of discretionary powers may vary".[168] In *Dawood*, this Court said:

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated *where the factors relevant to the exercise of the discretionary power are indisputably clear*. A further situation may arise where the decision-maker is possessed of expertise relevant to the decision to be made."[169] (Emphasis added and footnotes omitted.)

[183] *Affordable Medicines* further held however that—

> "delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. *Where broad*

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administrative power should be done within the limits of lawfulness, reasonableness and procedural fairness. The improper use of power is guided and guarded by the principles inherent in bodies of law which are viewed as adjuncts to the prescripts contained in empowering provisions.

[166] *Affordable Medicines* above n 41 at para 33, which was decided in the context of delegated power. One of the issues under discussion was whether it was impermissible for the Legislature to leave it to the Director-General to prescribe the conditions on which a licence may be issued. The finding made on that point was that discretion is important for decision-making; it will also vary based on the complexity of the decision to be made, the opaqueness of the factors relevant to the decision and the deference owed to a decision-maker who is possessed of the relevant expertise. However, the empowering provision, as well as the policies and objectives of the empowering statute must guide and fetter the power so exercised.

[167] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*).

[168] *Affordable Medicines* above n 41 at para 33.

[169] *Dawood* above n 167 at para 53.

> *discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute* as well as the policies and objectives of the empowering statute."[170] (Emphasis added and footnote omitted.)

[184] In my view, the exercise of the broad discretion conferred by section 17E(8)(a) is not circumscribed. The factors relevant to the exercise of the discretionary power are not expressed in the statute and it is not suggested that the Minister is possessed of expertise relevant to the exercise of that power. Those who will be affected by the decisions of the Minister when prescribing integrity testing measures will not know precisely what is relevant to the exercise of the power or in what circumstances they are entitled to seek relief if her decision adversely affects them.[171]

[185] The main judgment seems to accept that the discretionary power vested on the Minister is broad. However, it holds that section 17E(9)(a) and (b) constitutes the necessary constraints on the exercise of the discretionary power, because the subsection provides for a member of the DPCI, including the National Head, to serve impartially and exercise power and perform functions in good faith. The main judgment states that the subsection also forbids improper interference with a member of the DPCI in the exercise or performance of her or his powers, duties or functions. All this, the main judgment holds, is done subject to the Constitution and the SAPS

[170] *Affordable Medicines* above n 41 at para 34.

[171] See *Dawood* above n 167 at para 47.

Act.[172] Section 17E(9)(a) and (b) does not, in my view, fetter the Minister's wide discretionary powers.

[186] The main judgment's preferred approach is to wait for the Minister to prescribe the measures and anybody may then challenge them on their actual as opposed to anticipated content and application.[173] However, *Glenister II* is instructive in this regard:

> "In short, an ex post facto review, rather than insisting on a structure that *ab initio* prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused, which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen."[174]

[187] There is another problem with ex post facto review in this case. What kind of power is the power to create measures for integrity testing? At the point of review, where the empowering provisions are not instructive, under which principles of law would a member of the DPCI safeguard her or his rights or an investigation? It is not necessary to decide that point, but one wonders how many grounds a potential complainant would have to challenge the exercise of this discretion by the Minister where the empowering provision offers no guidance.

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[172] At [43].

[173] At [45].

[174] *Glenister II* above n 1 at para 247.

[188] In my view, the current content of section 17E(9)(a) and (b), which the main judgment suggests fetters the wide discretion, does not contain any or sufficient guide to the Minister on the proper exercise of her discretion. Remarkably, section 17E(8) does not state the factors relevant to the exercise of the discretionary power by the Minister. The empowering provision, without more, confers an unbridled discretion on the Minister. It cannot be forgotten that the DPCI must be shielded from undue political influence which is bound to come from political actors, of which the Minister forms part.

[189] The main judgment uses the current regulations to lend some authority for the proposition that this unfettered discretion will not be misapplied. It is stated that the provisions of section 17E(8) were exactly the same as they are now and yet the security and integrity measures were not identified as factors that potentially undermine the sufficiency of the independence in *Glenister II*. The main judgment holds that there is no basis for the assumption that the measures prescribed by the Minister will necessarily be intrusive.[175] I think that these remarks miss the point. The correct approach, I consider, should rather be whether the "autonomy-protecting features" are sufficient to enable the DPCI to adequately discharge its duties. This is so because there might have been other cogent reasons why *Glenister II* did not mention the impact of the impugned section 17E(8)(a).[176]

[175] At [44].

[176] On my reading of *Glenister II* that section does not appear to have been put before the Court. There was no pointed attack at this section or any other of the erstwhile Chapter's autonomy-protecting features. It may have also been a tactical move on the part of the Court to have not considered this section in particular. For instance there might have been an acknowledgement that so much of the Chapter was problematic therefore the most salient points and themes were touched upon and the entire Chapter was struck out.

[190] That the current regulations are, prima facie, appropriate is not helpful. I do not think that it is appropriate to use them as a means to certify the constitutionality of the empowering provision. Even regulations that were to strike the right balance between accountability and autonomy may be repealed or amended at the Minister's whim. Furthermore, it is likely that the regulations will submit to the dictates of the empowering provision and, if there is nothing to guide the implementation and content of the regulations, there are even fewer grounds on which to test the regulations should the time come.

[191] There is another reason why this power should be circumscribed: public perception of the Minister's unbridled power. It has already been said by this Court that the appearance or perception of independence plays a role in the evaluation of whether independence in fact exists.[177] Where the overarching test for independence is that the DPCI be sufficiently insulated from undue political interference, a component of that is for a reasonably informed, reasonable member of the public to have confidence in the autonomy-protecting features of the DPCI.[178] Such a member of the public would, in order to determine the relative import of the provision as it is, make reference to some local comparators.[179]

[177] See *Glenister II* above n 1 at para 207.

[178] Id at para 210.

[179] Id at para 211, where this Court stated:

> "[I]t is necessary to look at how our own constitutionally created institutions manifest independence. To understand our native conception of institutional independence, we must look to the courts, to Chapter 9 institutions, to the NDPP, and in this context also to the now defunct DSO."

[192] Interestingly, other state departments have employed lesser means to assure integrity without making the choice to bestow on a minister unbridled power as to how, when and where integrity testing should be done, where information garnered from these tests will be kept and who will see it. The National Defence Force also deals with matters of high confidentiality. It requires integrity testing of its members for the performance of their duties, but this is only subject to section 2A of the National Strategic Intelligence Act,[180] to which the DPCI is also subject.[181]

[193] In conclusion, I would have upheld the HSF's appeal in respect of its challenge to section 17E(8)(a) and declared that section unconstitutional.

VAN DER WESTHUIZEN J:

Introduction

[194] Young democracies often struggle with the responsibilities that come along with hard-fought freedom. South Africa is no exception. Corruption or perceptions of corruption seem to be rife. Here we are confronted with serious questions regarding our law-enforcing machinery and, more specifically, with the independence of an anti-corruption body within our system of government.

[180] 39 of 1994.

[181] Section 17E(1) of the SAPS Act provides:

> "Any person who is considered for appointment in, or secondment to, the Directorate, shall be subject to a security screening investigation in terms of and in accordance with section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994)."

[195] As to the constitutional validity of the SAPS Amendment Act, I agree by and large with the reasoning and conclusions of the main judgment by Mogoeng CJ.

[196] In her judgment, Nkabinde J raises concerns regarding section 17E(8)(a) of the SAPS Act and the integrity testing of the members of the DPCI for which it allows. I fail to see how exactly the discretion of the Minister to prescribe measures to engage in testing would undermine the DPCI's independence, or in what way the discretion could be curbed to better secure independence. That testing, under section 17E(9)(a) and (b), is to be done impartially, in good faith and without improper interference, comforts me that the judicial review of the testing practice will be possible. I am thus unable to concur with the judgment of Nkabinde J.

[197] I respectfully disagree with the conclusion the main judgment reaches on section 17CA of the SAPS Act. The location of the DPCI inside of the SAPS renders it necessary to have countervailing forces to ensure independence that were perhaps less necessary for the DSO. These countervailing factors ought to be informed to some degree by the appointment measures employed for the offices of the Public Protector and Auditor-General. The transparency afforded by airing this process in Parliament will contribute to the unit's independence. It will also serve to bolster public perception of the independence of the National Head of the DPCI. Accordingly, I agree with the judgment of Cameron J and the conclusion that the

High Court's order concerning the constitutional invalidity of section 17CA ought to be upheld.

[198] On the question of Mr Glenister's application for leave to appeal, and the admissibility of the evidence tendered by him, I diverge from the main judgment. In this regard I align myself, partly but not completely, with Froneman J's judgment.

The application for leave to appeal

[199] Mr Glenister applies to this Court for leave to appeal against the decision of the High Court dismissing his claim that the entire SAPS Amendment Act is unconstitutional. He essentially argues that even though *in theory* an anti-corruption unit could be located within the SAPS, it is *in reality* impossible to do so in today's South Africa. The officials in the leadership structure of the SAPS – according to Mr Glenister – are corrupt to such an extent that no anti-corruption unit could constitutionally be located under it.

[200] The main judgment argues that this Court's decision in *Glenister II* ruled out that argument. Like Froneman J, I prefer a different reading of that judgment. It is too strong to say that *Glenister II* conclusively dealt with all aspects pertaining to the question of the location of the DPCI.[182] Mr Glenister's challenge is not premised on the theoretical location of the DPCI as the only ground for invalidation. He questions

[182] See *Glenister II* above n 1 at para 214, which the main judgment considers to have disposed of the location issue.

whether, given our particular context, its location within the SAPS is constitutionally permissible.

[201] The main judgment considers it evident that "[i]t is a closed chapter that corruption is rife in South Africa and that it is a practical possibility for an adequately independent anti-corruption entity to be comfortably located within the SAPS".[183] Mr Glenister considers the first fact to preclude the veracity of the second. I agree with Froneman J that it is open to Mr Glenister to plead his case on this point. Leave to appeal should have been granted on this issue.

The appeal against the striking out of evidence

[202] Given the above, I think it is open to Mr Glenister to adduce evidence in support of his claim that the practical reality of conditions within the SAPS renders it incapable of housing the DPCI if the latter is to enjoy an adequate degree of independence. I agree with Froneman J that *Glenister II* did not preclude Mr Glenister from adducing evidence about the public perception of corruption within that context.[184] Indeed, Mogoeng CJ remarks: "Mr Glenister's submissions . . . owe their potency and essence to the public perception of the levels and reach of corruption sought to be shared with this Court".[185]

[183] At [21].

[184] See [123].

[185] See [23].

[203] In addition, I find the argument in the main judgment – that the evidence was before the Court in *Glenister II* and is therefore not admissible now – untenable. While corruption as a phenomenon and events evidencing corruption certainly existed prior to *Glenister II*, that does not mean that the precise evidence that Mr Glenister seeks to adduce now was before the Court then. The Court was not in a position to take judicial notice of levels of corruption in the SAPS.[186] It may only take cognisance of evidence that is properly before it.[187] It must evaluate that evidence in accordance with the principles of evidence and procedure.

[204] The main judgment[188] sets out the test for whether evidence should be struck out. It does not actually evaluate the evidence before this Court, however. It labels the evidence "odious political posturing" and finds that the Court is used to "spread political propaganda" and to advance a "political narrative".[189]

[205] This Court is inevitably and frequently asked to make decisions that have "political" implications. Constitutional adjudication is necessarily political, because it is guided by the values and principles in the Constitution, which have to be interpreted and applied within a specific socio-political reality. In a way, law – or at least

[186] While the fact that there is a high level of corruption in South Africa may be a notorious fact – which courts are, according to *S v Mosala* 1968 (3) SA 523 (T), permitted to take judicial notice of – it cannot be said that specific details of corruption in various levels of the SAPS are notorious and well-known.

[187] See Schmidt "Evidence" in *LAWSA* 2 ed (2005) vol 9 at para 821.

[188] At [27] to [28].

[189] At [29].

constitutional law – is often "political".[190] When this Court is called upon to rule on the constitutional validity of the conduct of political parties or their members, including the ruling party, constitutional law indeed impacts on day-to-day political life. That this Court and others often have to deal with "the political" does not mean that it should engage in endorsing or condemning any particular party, or faction within a party, or further a party's political agenda. The Court may not "play politics" or get involved in party political battles.[191] As far as possible, it must base its decisions regarding material placed before it on the Constitution and the law.[192] Allowing the evidence in this case would not amount to becoming involved in partisan politics. I am uncomfortable with evidence being labelled as "political" as constituting a ground for its inadmissibility.

[206] As to relevance, I align myself with the analysis of Froneman J. The question is: If it is relevant to consider the perception of a reasonable observer about the independent functioning of our national anti-corruption unit when determining its

[190] See Van der Westhuizen "A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy" (2008) 8 *African Human Rights Law Journal* 251.

[191] See, for example, Van Marle "Jurisprudence, Friendship and the University As Heterogeneous Public Space" (2010) 127 *SALJ* 628 at 639:

> "Central to this discussion is the distinction drawn between the notion of politics and the notion of the political. 'Politics' refers to examples of how actual political relations and partisan politics are acted out. 'The political' describes the theoretical reflection on the possibility of politics."

See also the sources referred to in the article, for example, Lacoue-Labarthe and Nancy *Retreating the Political* (Routledge, London 1997).

[192] Section 165(2) of the Constitution provides that this Court is "independent and subject only to the Constitution and the law, which [it] must apply impartially and without fear, favour or prejudice".

constitutional validity, can we consider the views of real, live observers to ascertain what a reasonable observer might perceive?[193] I think we can, at least to some extent.

[207] We should not organise a popularity poll about state organs' trustworthiness or levels of corruption. Head counts will get us nowhere when reasonableness is the standard. However, ascertaining what constitutes a reasonable member of the public, and what their views would be, is not done in a vacuum. It is context-specific. Judges often rely on their own experience as members of society to determine this. What Mr Glenister seems to have been trying to achieve is to present this Court with a factual basis which could inform its construction of the reasonable observer. That factual basis, at least in part, relies on what people think about this matter. Whether Mr Glenister is correct that these people are reasonable – or whether the evidence and studies are fallible, reliable or true – is a different enquiry.[194]

[208] I also agree with Froneman J that presenting evidence of corruption in this context may well entail evidence that comes across as abusive or annoying.[195] This alone is not sufficient to render the evidence inadmissible. Prejudice must be

[193] This Court held in *Glenister II* above n 1 at para 207 that public perception is constitutive of the DPCI's independence.

[194] *S v Shabalala* [1986] ZASCA 84; 1986 (4) SA 734 (A) at 743F-G noted the difference between admissibility and weight. However, the Court also held that if the weight is so inconsequential and the relevance accordingly so problematic, there can be little point in receiving the evidence.

[195] At [132].

demonstrated.[196] In addition, a court has discretion to grant a striking out order and is not compelled to do so.[197]

[209] Once it has been established that the general nature of the evidence and what it seeks to demonstrate are permissible, one must ascertain whether each particular piece of impugned evidence is actually irrelevant *and* will cause prejudice to the respondents. In order to be successful in an application to strike out, both must be demonstrated.[198]

Admissible evidence

[210] I agree with Froneman J that the evidence relating to the cadre deployment is admissible. It is relevant to the enquiry and would not cause prejudice to the respondents.[199]

[211] I am sympathetic to the main judgment's finding that the evidence regarding statements made by the President and Deputy Minister of Correctional Services (Deputy Minister) about *Glenister II* – as reported in newspapers – merely seeks to show that there is corruption at the highest level of Government and that the Executive seeks to exercise political control over anti-corruption activities.[200] If this were true, then there would logically be nowhere to place the DPCI that would be immune from

[196] Rule 6(15) of the Uniform Rules of Court. See also *Zuma* above n 35 at para 22 and *Beinash* above n 25 at 733B.

[197] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 368G.

[198] See also *Zuma* above n 35 and *Steyn v Schabort en Andere NNO* 1979 (1) SA 694 (O).

[199] At [135] to [136].

[200] At [25].

this pervasive corruption. I am therefore more sceptical about the relevance of the newspaper articles than Froneman J is.

[212] I do have serious doubts that this evidence will be of value to the outcome of the case. But I accept that Mr Glenister's main contention is that the Executive's extensive involvement in the SAPS through sections 206(1) and 207(2) of the Constitution renders it an inopportune place to house the DPCI, because of how allegedly corrupt the relevant Cabinet member and the National Commissioner (appointed by the President) are. Accordingly, evidence which could potentially support this point is relevant and admissible.[201] In addition, the statements are discrete and record utterances of the President and the Deputy Minister. They are well placed to refute Mr Glenister's interpretation of them and can do so without addressing reams of allegations. The respondents will therefore not be prejudiced.

[213] Like Froneman J, I think that the Newham affidavit is relevant and admissible.[202] The ISS report on public perceptions of the SAPS, the monograph on the systemic problem of corruption in the SAPS, the report on the role and effectiveness of police oversight bodies and the report from police officers at particular stations are directly relevant to the case Mr Glenister seeks to make. I question their ultimate probative value, as they may be speculative and the methods for research may not be convincing. But it cannot be said that they are irrelevant to

[201] In a relevance enquiry the court is asked to make a provisional or tentative assessment of the potential weight of the evidence sought to be adduced. See Schwikkard and Van der Merwe *Principles of Evidence* 3 ed (Juta & Co Ltd, Cape Town 2009) at 49.

[202] At [145].

whether the public perception of the SAPS is such that it is practically unfeasible to achieve adequate independence for the DPCI if they are located in the SAPS.

Inadmissible evidence

[214] I disagree with Froneman J that the concession made by a former Deputy Minister of Justice in *Glenister II* that the criminal justice system was "dysfunctional" is relevant. This evidence would lead us nowhere. Presumably, wherever the DPCI is situated, it must form part of the criminal justice system.

[215] I am also sceptical about the admissibility of the Woods Report. I am not convinced that the nature of the evidence will simply cause irritation and inconvenience at having to go through all of it[203] and not actually amount to prejudice, as the High Court and the main judgment found it would. There may be a danger that the respondents do not know what case to meet.[204]

[216] The Woods Report lists various allegations of corruption levelled at the Executive, but most of these are unproven. If the respondents were to attempt to address each one and met them with a bald denial – in motion proceedings – they may run the risk of having the veracity of the allegations accepted by a court.[205] This would force them to meet a multitude of ancillary issues which do not directly prove

[203] Judgment of Froneman J at [133].

[204] *Zuma* above n 35 at paras 47 and 81.

[205] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the Court held that, generally speaking, the respondent's version of events will be accepted in motion proceedings unless their response to the applicant's averment constitutes a bald denial.

anything and that would cause prejudice.[206] Those subsidiary issues include not only all the questions about the expert himself and his methodology, but also the content of the allegations. To draw the respondents into a trial about a multitude of other issues regarding evidence that is not really helpful to Mr Glenister's case is prejudicial.[207] The low probative value must be weighed against the prejudice caused.[208] The Woods Report must be struck out.

[217] As to the remainder of the evidence, I align myself with the judgment of Froneman J.[209] While the main judgment's scepticism about the value of the evidence and its weight may be well-placed, it has not been sufficiently demonstrated at this stage of the enquiry that the rest of the evidence is scandalous, vexatious or irrelevant as well as prejudicial and should therefore be struck out in its entirety.

[218] I concur with Froneman J's conclusion that leave to appeal against the order upholding the Minister's striking out application must be granted with costs. The striking out order in the High Court must be set aside and replaced with an order striking out the paragraphs set out in footnote 123 of his judgment as well as the Woods Report and evidence pertaining to the comment of the former Minister that the legal system is "dysfunctional".[210]

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[206] *Land Securities plc v Westminster City Council* [1993] 4 All ER 124 at 128H.

[207] See Schwikkard and Van der Merwe above n 2011.

[208] *S v Nel* 1990 (2) SACR 136 (C). Relevance is on a spectrum. Accordingly, if the relevance is minimal, then prejudice would become determinative.

[209] See above n 122 to n 123.

[210] Para 10 of Mr Glenister's founding affidavit in the High Court.

The appeal

[219] As to Mr Glenister's appeal against the dismissal of his main application to have the entire legislative scheme of the SAPS Amendment Act declared constitutionally invalid, I agree with the main judgment that the appeal should be dismissed.

End note

[220] Corruption threatens the very existence of our constitutional democracy. Effective laws and institutions to combat corruption are therefore absolutely essential. It is the task of the courts – and this Court in particular – to ensure that legal mechanisms against corruption are as trustworthy and tight as possible, within the demands and parameters of the Constitution.

[221] But courts can only do so much. A corruption-free society can only develop in the hearts and minds of its people – particularly the ones occupying positions of political and economic power. We need dedication to the spirit and high aspirations of the Constitution. Institutions are tools designed to help people realise their ambitions. Much dedication is required on the part of those handling the tools.

[222] Of course the structure of our institutional watchdogs must be made as immune to corruption as possible. But even the most sophisticated institutional design will require the exercise of discretion and therefore integrity on the part of – and trust in – the office-bearer. Thoroughly closing all perceived loopholes will guarantee little.

The more procedures and processes we put in place to safeguard against corruption, the more plausible deniability we give to a corrupt actor if all the technical boxes have been ticked. Generally, abstract institutional designs cannot be corrupt. As we know, people can be.

MADLANGA J:

[223] I have had the benefit of reading the judgment by Mogoeng CJ (main judgment) and those by Froneman J, Cameron J, Nkabinde J and Van der Westhuizen J. I concur in the main judgment with the exception of its dismissal of Mr Glenister's applications for leave to appeal. On these applications only,[211] I concur in the judgment of Froneman J.

[211] For the identification of these applications see the judgment of Froneman J at [114].

CCT 07/14 Helen Suzman Foundation v President of the Republic of South Africa and Others

For the Applicant:	D Unterhalter SC, M du Plessis and A Coutsoudis instructed by Webber Wentzel.
For the First Respondent:	K Kemp SC and T Masuku instructed by the State Attorney.
For the Second and Fourth Respondents:	M Donen SC, T Masuku and H Cronje instructed by the State Attorney.

CCT 09/14 Glenister v President of the Republic of South Africa and Others

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For the Second, Third and Fifth Respondents:	M Donen SC, T Masuku and H Cronje instructed by the State Attorney.