

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT _____ / 2015

HIGH COURT CASE NO: 6588/10

In the matter between:

ROBERT MCBRIDE

Applicant

and

MINISTER OF POLICE

First Respondent

MINISTER FOR PUBLIC SERVICE AND ADMINISTRATION Second Respondent

and

**COUNCIL FOR THE ADVANCEMENT OF THE SOUTH
AFRICAN CONSTITUTION**

First Amicus Curiae

HELEN SUZMAN FOUNDATION

Second Amicus Curiae

FOUNDING AFFIDAVIT

I, the undersigned,

ROBERT MCBRIDE

do hereby make oath and say:

- 1 I am an adult male, currently suspended from my position as the Executive Director of the Independent Police Investigative Directorate (“**IPID**”), situated at 114 Madiba Street, Pretoria.
- 2 The facts set out in this affidavit are true and correct, and are within my personal knowledge unless the context indicates otherwise. Where I make legal submissions, I do so on the advice of my legal representatives.

THE PARTIES

3 I am the applicant in this matter, and the suspended Executive Director of IPID.

3.1 I was appointed as the Executive Director of IPID on 3 March 2014, in terms of s 6 of the Independent Police Investigative Directorate 1 of 2011 (“**IPID Act**”). I held this position until 24 March 2015, when the Minister of Police (“**the Minister**”) placed me on precautionary suspension. On 6 May 2015, the Minister instituted disciplinary proceedings against me for alleged misconduct. In taking these measures, the Minister relied on his statutory power to remove the Executive Director of IPID under s 6(6)(a) of the IPID Act, read with the IPID Regulations,¹ the Public Service Act, 1994 and the Senior Management Services Handbook.²

3.2 The allegations against me primarily concern my role as the Executive Director of IPID in the issuing of an IPID investigation report on the involvement of the South African National Police Services (“**SAPS**”) in the illegal rendition of four Zimbabwean nationals in November 2010 and January 2011. The merits of the allegations against me are not relevant to this application, but can be determined in appropriate disciplinary proceedings in due course after this Court has pronounced on the constitutional validity of the relevant provisions.

¹ Regulations for the Operation of the Independent Police Investigative Directorate (GNR98 of GG35018 of 10 February 2012).

² The Public Service Disciplinary Code was amended in September 2003 to incorporate chapter 7 of the Senior Management Service Handbook and to render it applicable to heads of department. Under Schedule 1 of the Public Service Act, the Executive Director of IPID is designated as the head of a national department.

- 4 The First Respondent is the **MINISTER OF POLICE (“the Minister”)**, cited in his official capacity and care of the State Attorney at SALU Building, 316 Thabo Sehume Street, Pretoria. The First Respondent is the official whose actions and powers in respect of the Executive Director of IPID are the subject of this application.
- 5 The Second Respondent is the **MINISTER FOR PUBLIC SERVICE AND ADMINISTRATION**, cited in his official capacity and care of the State Attorney at SALU Building, 316 Thabo Sehume Street, Pretoria. No relief is sought against the Second Respondent; he is cited only for such interest as he may have as the member of the National Executive responsible for the administration of the Public Service Act, 1994. In the High Court, the Second Respondent abided the decision of the Court.

THE DECLARATION OF INVALIDITY

- 6 This is an application in terms of s 172(2)(d) of the Constitution and rule 16(4) of the Rules of this Court for confirmation of the orders of constitutional invalidity and ancillary orders made by the High Court, Gauteng Division, Pretoria, per the Honourable Justice Kathree-Setiloane, on 4 December 2015. A copy of the judgment of the High Court is annexed marked “**A**”.

7 IPID is the body established to investigate alleged misconduct and offences, including corruption, committed by members of the SAPS. IPID is established under s 3 of the IPID Act, which came into operation on 1 April 2012.³

8 The Constitution requires that IPID be established and it expressly provides that it has to be independent. Section 206(6) of the Constitution provides:

“On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.” (Emphasis added.)

9 The responsibilities of the Executive Director of IPID are set out *inter alia* in s 7 of the IPID Act. These entail the strategic and financial management of the Directorate, appointments and oversight of staff, and the control and direction of investigations conducted by the Directorate’s investigators.

10 The High Court declared the following statutory and regulatory provisions unconstitutional to the extent that they purport to authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director of IPID:

10.1 Section 6(3)(a) of the IPID Act, which renders the appointment of the Executive Director of IPID subject to the laws governing the public service, including the impugned provisions of the Public Service Act that are detailed below;

³ GN 3 in GG 35081 of 10 February 2012.

10.2 Section 6(6) of the IPID Act, which empowers the Minister unilaterally to remove the Executive Director of IPID from office. It provides that:

“The Minister may remove the Executive Director from office on account of –

(a) misconduct;

(b) ill-health; or

(c) inability to perform the duties of that office effectively.”

10.3 Sections 16A(1), 16B, 17(1) and (2) of the Public Service Act, which empower the Minister (as the relevant executive authority) unilaterally to take disciplinary action against and to dismiss the Executive Director (designated as the head of department in Schedule 1 of the Public Service Act); and

10.4 Regulation 13 of the Regulations for the Operation of the Independent Police Investigative Directorate (GNR98 of GG35018 of 10 February 2012), which renders all members of IPID, including the Executive Director, subject to the Public Service Disciplinary Code.⁴ Under that Code, the Executive Director enjoys no special protection from suspension, discipline and removal from office, but is subject to the same procedures as any national head of department in the public service.

11 The effect of the above provisions is that:

⁴ That is, the Disciplinary Code and Procedures for the Public Service adopted by the Public Service Coordinating Bargaining Council under Resolution 2 of 1999, and as amended under Resolution 1 of 2003.

- 11.1 The Minister is afforded unilateral powers to suspend, discipline and remove from office the Executive Director of IPID;
 - 11.2 There is no provision for any parliamentary oversight over the suspension, discipline and removal from office of the Executive Director;
 - 11.3 The Minister is afforded a carte blanche in filling any vacancy he has created by removing the incumbent Executive Director from office (under s 6(4) of the IPID Act), and the period of suspension of the Executive Director is potentially open-ended; and
 - 11.4 The Executive Director is subject to the same disciplinary and removal provisions under the Public Service Act that apply to any national head of department in the public service, even though the same considerations and requirements of independence do not apply to such national heads of department.
- 12 I contended before the High Court, and that Court accepted, that these provisions are inconsistent with the independence of IPID that is expressly guaranteed under s 206(6) of the Constitution, as they do not afford the Executive Director the security of tenure that is required for the national head of IPID.
- 13 In summary, I contend that:
- 13.1 The impugned statutory provisions fail to meet the requirements of independence for an anti-corruption investigative body, as set out by this

Court in *Glenister II*⁵ and *Helen Suzman Foundation*.⁶ Although those matters concerned the provisions allowing for the suspension, discipline and removal of the head of the Directorate for Priority Crimes Investigation (“DPCI”) they are directly on point given the similarity in the mandates of IPID and the DPCI.

13.2 The express constitutional provision requiring IPID’s independence means that it must be entitled to at least the same independence as the DPCI – which is a similar institution, but with no express constitutional protection. Yet the statutory provisions at issue in this application are even less protective of independence than the DPCI provisions which were struck down by a unanimous Constitutional Court in *Helen Suzman Foundation*.

13.3 The independence of IPID is required both under the Constitution and under international law. Under international law, independence is required because IPID’s mandate entails fighting corruption and systemic corruption in the police, but also to ensure effective police accountability more generally.

13.4 The impugned provisions are also not consistent with the level of independence afforded to police complaint directorates in comparative foreign jurisdictions, where the power to remove the head of these bodies is subject to parliamentary oversight – unlike under the IPID Act.

⁵ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (“*Glenister II*”).

⁶ *Helen Suzman Foundation v President of the RSA; Glenister v President of the RSA* 2015 (2) SA 1 (CC).

Parliamentary oversight of police complaints investigative bodies is recognised internationally as a key element of an effective police accountability system.

- 14 The High Court correctly accepted these contentions and declared the relevant provisions invalid. I now apply to this Court to have it confirm the orders concerned.

THE ANCILLARY ORDERS

- 15 In seeking the declaration of constitutionally invalidity, I accepted before the High Court and continue to accept that it is appropriate to suspend these orders for a certain period to allow Parliament to correct the defects in the impugned statutes and regulations. The High Court order makes provision for this in paragraph 2 of the order, which suspends the declaration of invalidity for a period of 12 months.

- 16 However, I submitted to the High Court and continue to submit that an interim reading-in remedy is needed to secure the independence and proper functioning of IPID while Parliament deliberates on the appropriate amendments. The interim remedy adopted by the High Court (in paragraph 3 of its order) is that section 6(6) of the IPID Act be read as though it provides:

“Sub-sections 17DA(3) - (7) of the SAPS Act apply to the suspension and removal of the Executive Director of IPID, with such changes as may be required by the context”.

17 Sub-sections 17DA(3) - (5) provide for the removal of the National Head of the DPCI, and read as follows:

(3) (a) *The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.*

(b) *The adoption by the National Assembly of a resolution calling for that person's removal from office.*

(4) *A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with a supporting vote of at least two thirds of the members of the National Assembly.*

(5) *The Minister-*

(a) *may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and*

(b) *shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.*

18 I submit that properly interpreted and in accordance with the dicta in ***Helen Suzman Foundation*** at paragraph 90, these provisions contemplate a single removal process having two-stages, namely:

18.1 the institution of proceedings by a Committee of the National Assembly to enquire into whether there is valid ground for removal (at which point the National Head may be suspended); and

18.2 if the Committee finds that there is a valid ground for removal, the adoption by the National Assembly of a resolution calling for the removal of the National Head, with a supporting vote of two-thirds of the National Assembly.

19 I emphasise that that the provisions of s 17DA(3)-(5) constitute an appropriate interim regime because:

19.1 The Executive Director of IPID fulfils a similar function to the National Head of the DPCI and a similar degree of independence is required for both officials to carry out their corruption-fighting mandate without fear of undue political interference;

19.2 The reading-in order would not be a significant encroachment on Parliament's authority. It makes use of Parliament's chosen method of removal and suspension for the head of an independent corruption-fighting body of a similar status to IPID; and

19.3 The interim remedy leaves it open to Parliament to adopt a different method, provided that it guarantees a similar level of structural and operational independence.

20 Lastly, in the High Court I also sought orders declaring invalid and setting aside the decisions of the Minister to suspend me and to institute disciplinary proceedings against me, which decisions were taken in the exercise of the Minister's unconstitutional statutory powers. This relief was granted in paragraphs 4 and 5 of the High Court's order.

20.1 In seeking to have the Minister's decisions set aside, I recognised that, to the extent that the National Assembly may consider that there is any merit in having the disciplinary charges considered by a committee of the National Assembly, it would be unduly disruptive and detrimental to the

effective functioning of IPID should my suspension be set aside only to be re-instituted shortly thereafter under s 17DA(3)-(5) of the SAPS Act.

20.2 I accordingly accepted that paragraph 6 of the High Court's order was appropriate. It suspends the order setting aside my suspension by the Minister for a period of 30 days to allow the National Assembly and the Minister, if they so choose, to exercise their powers in terms of the provisions of s17DA(3)-(5) of the SAPS Act.

21 I support the order of suspension, the interim reading-in order and the remaining orders granted by the High Court. I now apply to this Court to have it confirm the orders concerned.

THE EFFECT OF THE RELIEF SOUGHT AND GRANTED IN THE HIGH COURT

22 I wish to emphasise the following as regards the extent and import of the relief that I sought and was granted in the High Court:

22.1 It does not insulate me, as the Executive Director of IPID, from suspension or disciplinary action, and does not render me immune from removal from office.

22.2 It has never been my case that the Executive Director of IPID is not accountable and may never be subjected to disciplinary action. I contend only that disciplinary action against the Executive Director, including suspension, the institution of a disciplinary inquiry and removal, cannot be taken by the Minister acting unilaterally (as the IPID Act currently

purports to permit), but must be subject to guarantees necessary to protect the independence of IPID, including the effective oversight of Parliament.

22.3 I also do not contest the institution of a disciplinary inquiry into the allegations against me *per se*. I readily accept that I may be called upon to explain and account for my conduct at an inquiry that adequately safeguards the independence of IPID and its Executive Director. Indeed, the interim reading-in order that I proposed allows for such an inquiry to be held by a committee of the National Assembly.

22.4 The inquiry that the Minister has instituted against me does not adequately safeguard the independence of IPID, however. It has been instituted exclusively by the Minister; is to be chaired by an appointee of the Minister alone; and its findings may be implemented by the Minister without any Parliamentary oversight and intervention.

23 In other words, I in no way shy away from being subjected to disciplinary proceedings. All I am seeking to do is ensure that such disciplinary proceedings must occur in a manner that protects my independence and that of IPID in the manner that the Constitution requires. A confirmation of the orders granted by the High Court would achieve that.

24 I accordingly seek an order in terms of the Notice of Motion to which this affidavit is attached.

INFORMATION REQUIRED BY RULE 21

- 25 The record before the High Court ran to 1585 pages. There is no portion of evidence that requires transcription.
- 26 In relation to the duration of the matter, I point out that the matter in the High Court involved two amici curiae and that it took two days to be argued. However, I am advised that one day should suffice for the confirmation proceedings in this Court, particularly since the legal issues are well defined and there is precedent from this Court that pertains directly to the issues.
- 27 There are no other circumstances which are relevant to the directions to be given by the Chief Justice.

ROBERT MCBRIDE

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the ____ day of _____ 2015, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity: