

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 225/15

In the application of:

HELEN SUZMAN FOUNDATION

Applicant for admission as *amicus curiae*

and

MINISTER OF POLICE

First Respondent

**MINISTER FOR PUBLIC SERVICE AND
ADMINISTRATION**

Second Respondent

In re:

ROBERT McBRIDE

Applicant

and

MINISTER OF POLICE

First Respondent

**MINISTER FOR PUBLIC SERVICE AND
ADMINISTRATION**

Second Respondent

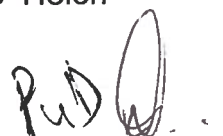
SUPPORTING AFFIDAVIT

I, the undersigned,

POOJA UPASANA DELA

do hereby make oath and state that:

1. I am an attorney of the High Court of South Africa, practising as a senior associate in the firm Webber Wentzel, situated at 90 Rivonia Road, Sandton Johannesburg. Webber Wentzel are the attorneys of record in this application for the Helen



Suzman Foundation ("**HSF**"), a non-governmental organisation whose objectives are to defend the values that underpin our liberal democracy and to promote respect for human rights.

2. I am duly authorised to depose to this affidavit and bring this application on behalf of the HSF.
3. The facts contained in this affidavit are, unless otherwise stated or indicated by the context, within my personal knowledge, and are, to the best of my knowledge and belief, true and correct.

INTRODUCTION

4. This is an affidavit in support of an application in terms of Rule 10 of the Constitutional Court Rules for the admission of the HSF as *amicus curiae* in the proceedings between Mr Robert McBride ("**Mr McBride**" or "**the Applicant**"); and the Minister of Police ("**the Minister**" or "**the First Respondent**") and the Minister for Public Service and Administration ("**the Second Respondent**") ("**the Proceedings**").
5. This affidavit is structured as follows:
 - 5.1 factual background;
 - 5.2 the interest of the HSF in the Proceedings;
 - 5.3 the position to be adopted by the *amicus curiae* in the Proceedings;
 - 5.4 the submissions which the HSF seeks to make in the Proceedings should it be admitted as *amicus curiae*; the relevance of these submissions and how they will assist the above Honourable Court in determining the issues before

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it; and how these submissions differ from those of the Applicant and Respondents;


- 5.5 the appropriate timetable, should the HSF be admitted as *amicus curiae*, for the filing of argument and the future conduct of this matter.

FACTUAL BACKGROUND

6. The HSF was admitted as *amicus curiae* in the High Court proceedings under case number GP 06588/2015 ("**the High Court proceedings**"). Judgment in those proceedings was handed down on 4 December 2015. In its judgment, the High Court acknowledged the useful contribution made by the HSF to the consideration and adjudication of the matter.
7. The Applicant lodged an application for confirmation in terms of Rule 16(4) of the Constitutional Court Rules ("**the CC Rules**") on 15 December 2015 ("**the confirmation application**"). The Minister filed a notice of opposition to the confirmation application and a notice of appeal in terms of Rule 16(2) of the CC Rules, dated 11 January 2016. The HSF has further had sight of the Constitutional Court Directions dated 25 January 2016; the record of proceedings in the court a quo, filed on 29 March 2016; the Applicant's written submissions and practice note, dated 5 April 2016; and the Minister's written submissions dated 12 April 2016 ("**the Minister's written submissions**").

(collectively referred to as "**the Confirmation Papers**")

8. The Confirmation Papers raise important constitutional issues. The HSF has a substantial interest in the Proceedings.
9. The HSF took the steps prescribed by the Rules to obtain the parties' consent to its admission as *amicus curiae*. The HSF wrote a letter to the parties on

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11 April 2016, requesting the parties to consent to its admission as *amicus curiae* by no later than 15 April 2016 ("**the 11 April 2016 letter**"). The 11 April 2016 letter is attached to this affidavit marked "**SA1**". On 11 April 2016, the Applicant granted consent for the HSF to be admitted as *amicus curiae*. A copy of this letter is annexed hereto marked "**SA2**".

10. On 12 April 2016, the HSF received a copy of the Minister's written submissions. After perusing the Minister's written submissions, it became apparent to the HSF that the Minister now accepts that the "*impugned provisions do not provide for the adequate protection of the independence of [Independent Police Investigative Directorate ("IPID")]*" (paragraph 5 of the Minister's written submissions). The Minister thus opposes only this Honourable Court's confirmation of paragraphs 3 to 6 of the order in the High Court proceedings ("**the Order**") (paragraph 6 of the Minister's written submissions): namely, the remedial relief.
11. On 12 April 2016, the HSF directed a letter to the parties ("**the 12 April 2016 letter**") stating that "*The Minister's volte face on the merits does not dispose of the matter, as the Constitutional Court still needs to exercise its constitutional power to confirm all aspects of the High Court's order, including the finding of the unconstitutionality of the statutory provisions*" and indicating that the HSF's submissions bear directly on both the merits and remedy. The 12 April 2016 letter further recorded the HSF's view that its interest in the matter remains relevant and clear; its submissions will be of material benefit to the Court; and in substance differ from the submissions of the applicant and respondents. A copy of the 12 April 2016 letter is annexed hereto marked "**SA3**".

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12. On 15 April 2016, the Minister granted consent for the HSF to participate as an *amicus curiae* in the Proceedings ("**the 15 April 2016 letter**"). A copy of the 15 April 2016 letter is attached to this application marked "**SA4**".
13. The HSF was admitted as *amicus curiae* in the court *a quo* on the basis that it had an interest in the matter, advanced submissions relevant to the proceedings and raised new contentions which were of assistance to the court *a quo* (see paragraph 6 of the judgment in the court *a quo*, annexed to the founding affidavit in the confirmation application as "**Annexure A**"). The HSF submits that it continues to have the same substantial interest.
14. The HSF further submits that the submissions which it intends to make, should it be admitted as *amicus curiae*, will be of material benefit to this Honourable Court in the determination of the complex legal issues before it and are distinct from those of the parties. Moreover, the HSF undertakes, should it be admitted as *amicus curiae*, to file its written submissions by 4 May 2016, *alternatively*, any other date determined by this Honourable Court, in terms of Rule 10(9) of the Constitutional Court Rules, so as not to delay hearing of this matter. The HSF has applied to be admitted as *amicus curiae* within the time periods allowed by this Court's Rules.
15. The Confirmation Papers raise important substantive constitutional issues, including dealing with far-reaching substantive relief in respect of the legislative regime which should apply pending amendment of the impugned legislative provisions, and, on the Minister's version, requiring Mr McBride, who was purportedly suspended under an unlawful regime (which he has successfully challenged) to remain suspended. The Confirmation Papers also centrally involve a consideration of the proper remit of the independence of IPID in ensuring the



proper operation of key constitutional organs, including the South African Police Service itself.

16. It is respectfully submitted that it is in the interests of justice for matters of paramount public importance, such as the present, to be ventilated fully, with the benefit of HSF's submissions.

THE HSF'S INTEREST IN THE PROCEEDINGS

17. The HSF is a non-governmental organisation whose objectives are to "*defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".
18. The HSF is an organisation primarily concerned with the principles of democracy and constitutionalism, the rule of law, as well as South Africa's constitutional and international law obligations, all of which are implicated in this matter.
19. Mr McBride seeks an order in the Proceedings confirming the orders of constitutional invalidity to sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act, 2011 ("**IPID Act**"); sections 17(1) and 17(2) of the Public Service Act, 1994; and regulation 13 of the Regulations for the Operation of IPID (GNR98 of GG35018, 10 February 2012), and the ancillary orders granted by the court *a quo* on 4 December 2015.
20. Whilst the suspension of Mr McBride raises important questions, the issues at stake in the Proceedings go far beyond the suspension of Mr McBride and this Court's decision may, and probably will, have significant repercussions for South Africa in relation to its constitutional and international law framework, and for ensuring the protection of the structural, operational and institutional independence of the IPID.

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21. Further, this Court's decision may have an important impact on how other courts interpret and apply domestic and international law in relation to IPID and the exercise of public power which has the potential to erode the structural, operational and institutional independence of IPID.
22. The central issue in the Proceedings is whether the legislative machinery regulating the functions of IPID and its highest officers sufficiently insulates the unit and its members from undue political interference and other such threats which have the potential to undermine the structural, operational and institutional independence of IPID and, more broadly speaking, the rule of law. The HSF will contend that such legislative machinery (and ultimately the exercise of public power by the Minister in suspending IPID's Executive Director) falls short of the level of adequate independence demanded by the Constitution and international law. Having regard to the key rôle played by IPID in the law enforcement framework and the fight against corruption, there is simply no scope to argue that the Head of IPID, who has been unlawfully and unceremoniously suspended by the Minister, must remain suspended even though the power to suspend in those circumstances is contrary to the Constitution and the very essence of independence of IPID.
23. The scourge of corruption and organised crime undermines the rights enshrined in our Bill of Rights, endangers the stability and security of our society, and jeopardises sustainable development, the institutions and values of democracy and ethical values, morality, the rule of law and the credibility of our government. These human rights and social and ethical values are entrenched in our constitutional law, are those which the HSF actively seeks to promote, and must be ventilated fully before this Honourable Court.



24. The HSF has a longstanding history of promoting South Africa's domestic and international law commitments in the realm of upholding democracy, the rule of law, constitutionalism and human rights. The HSF has specialised expertise and interest in national, regional and international law standards in relation to the issues before this Honourable Court.
25. The HSF thus seeks to intervene as *amicus curiae* in the proceedings in order to advance the submission that the structural, operational and institutional independence of IPID is critical to the ability of that body to fulfil its constitutional and legislative mandate, as well as the Republic's obligations under international law. IPID is insufficiently insulated from executive interference which, in turn, diminishes (a) the unit's ability to fulfil its constitutional mandate and (b) public confidence in the institution of IPID. The legislative framework governing the structural, operational and institutional independence of the IPID falls short of South Africa's international treaty obligations and either is unlawful and unconstitutional, or must be read down substantially to comport with constitutional standards. The question which then arises, and which is central to the determination of the issues before this Honourable Court, is the level of the required independence.
26. When considered against the core function of IPID, which exists to curb rampant organised crime and corruption threatening the political and economic integrity of the country, it is apparent that the issues raised in the confirmation application are of paramount public interest to a young and fledgling democracy.
27. Should the HSF be admitted as *amicus curiae*, it will advance the submissions set out below.

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THE HSF'S POSITION AND SUBMISSIONS

28. The possibility that IPD may be subjected to undue political influence by the executive, which in turn may compromise its ability to hold the police accountable, resonates with the recognition in international law that police oversight bodies must be independent of undue executive interference.
29. If admitted as *amicus curiae* in the Proceedings, the HSF intends to make the following submissions:
- 29.1 Independent policing and prosecutorial bodies, ie bodies which are sufficiently protected from executive, political and other interference, are indispensable in the fight against, *inter alia*, corruption and organised crime. One such body is the IPID. Where this independence is undermined, legislatively or otherwise, it will in turn impact on the capacity of these bodies effectively and efficiently to combat these vices and to fulfil their constitutional, legislative and international law mandates. An obvious consequence of this decreased capacity on the part of these bodies may well mean an increase in corruption and organised crime.
- 29.2 Accompanying this increase in corruption and organised crime will be a diminution of the State's ability to fulfil, and of the capacity of individuals to realise, a number of the fundamental rights contained in the Bill of Rights.
- 29.3 It is trite that corruption and organised crime have a pervasive and destructive effect on the ability of the State to fulfil, and of individuals to realise, a number of fundamental rights contained in the Bill of Rights, including the rights to equality, dignity, freedom and security of the person, as

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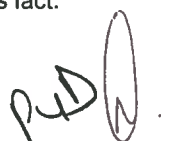
well as the rights of access to housing, healthcare, food and water, and social security.¹

29.4 The State is obliged, under section 7(2) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". Implicit in this obligation is the requirement that whatever measures are taken by the State in this regard, such measures cannot, unless it is reasonable and justifiable to do so, have the effect of diminishing these rights. The duty of accountability and the values inherent in the rule of law make it clear that the State is prohibited from taking measures or conducting itself in a manner which diminishes the rights in the Bill of Rights. Where the State conducts itself in this manner, it breaches its obligations under section 7(2).

29.5 State conduct which does not ensure adequate independence or resources on the part of the body (or bodies) tasked with combatting corruption and organised crime within the SAPS, such as IPID, facilitates and promotes corruption and organised crime. The facilitation and promotion of corruption and organised crime, in turn, infringe on the rights in the Bill of Rights and the State's duty to respect, protect, promote and fulfil these rights.

29.6 Where the State has implemented legislative measures, and assumed international law obligations to fight the scourge of corruption and organised crime (measures and obligations which are intended to, and do, promote the access of individuals to their constitutional rights) it is prohibited from abandoning these measures or adhering to a lesser standard of

¹ The Preamble to the Prevention and Combating of Corrupt Activities Act, 2004 ("**PRECCA**") recognises this fact.



independence which allows for undue executive and political interference with the work of IPID, thereby allowing the scourge of corruption to infiltrate a unit mandated to combat these vices.

30. In light of the above, the HSF intends to make written submissions on the constitutional and international law requirements of adequate independence of a body such as IPID and why adequate protection to the structural, operational and institutional independence of IPID against political, executive and other interference (especially, but not limited to, the security of tenure of its highest officers) is indispensable to the proper functioning of the IPID and public confidence in the institution itself.
31. Given the obligation of the courts, in terms of section 39(1)(b) of the Constitution, to "consider international law" when interpreting the Bill of Rights and the fundamental rights contained therein, it is clear that when interpreting and giving content to the various rights that are implicated by the cancer of corruption and organised crime, the HSF will argue that the courts are obliged to consider various provisions of, *inter alia*, the following international law instruments:
- 31.1 The United Nations Convention Against Corruption;
 - 31.2 The Southern African Development Community Protocol Against Corruption;
 - 31.3 The African Union Convention on Preventing and Combating Corruption; and
 - 31.4 The UN Convention Against Transnational Organised Crime.
32. Any steps taken or conduct by the State which have the effect of weakening or undermining the independence or effectiveness of such bodies would be



inconsistent with South Africa's international obligations and a failure of the rule of law.

33. On this basis, the HSF submits that the submissions which it intends to make in the Constitutional Court proceedings are equally relevant to paragraphs 3 to 6 of the Order. The effect of the Minister's new stance is that, while it acknowledges that the legislation is fatally defective and that the Minister should never have had the power which he purported to exercise, Mr McBride should remain suspended and nevertheless face disciplinary proceedings in terms of the unconstitutional provisions.
34. The HSF submits that the default position in constitutional law is that unconstitutional conduct which is the subject of challenge must be declared to be inconsistent with the Constitution and must be set aside in its entirety, from inception. The consequences of unlawful conduct must thus be reversed. It is only in exceptional circumstances, where the unlawful conduct cannot be reversed or corrected, that the Court may, in the interests of justice, decide to limit the effect of the declaration of invalidity.
35. Those considerations of practicality and pragmatism find no application in the current matter. The Court can clearly reverse and correct the unlawfulness. At the very least, this may be done prospectively, from the date of judgment. There is no reason why Mr McBride should not resume his lawful occupation of office forthwith. Indeed, it is important to recall that it was Mr McBride himself who challenged the lawfulness of the Minister's conduct. To suggest that he is disentitled to the substantive remedy he seeks would not do proper justice in this matter. In any event, to allow his suspension to endure would amount to this Court perpetuating an illegality which it, itself recognised.

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36. The HSF's submissions go to the core of this question in that they relate to the nature and importance of the independence of IPID, as informed by, *inter alia*, the Constitution and the relevant principles international law. This assessment regarding independence forms the basis for any decision as to the appropriate remedy, and must thus be considered by the Constitutional Court in its proceedings, irrespective of the positions adopted by the parties in this regard.
37. There are no separation of powers concerns pertaining to the relief granted by the High Court. Section 172(1)(b) expressly mandates the Court to order "*just and equitable*" relief. Having regard to the centrality of independence for the functioning of IPID (as submitted by HSF), it is essential that IPID and its Executive Director are not left in a vulnerable legal position for a moment longer. Our basic constitutional values are threatened by perpetuating the unlawful régime. The need to correct or reverse the illegality is thus pressing and immediate. The scheme set forth in the Order is also only interim and affords Parliament the opportunity, in the fullness of time, to deal with the legislative and disciplinary issues at the heart of this matter.

CONCLUSIONS

38. The HSF submits that the submissions it wishes to advance are relevant and will be of assistance to the Court, not least because such submissions have not been advanced by the other parties to the Proceedings.
39. Accordingly, the HSF seeks leave of this Honourable Court to intervene as *amicus curiae* in the Proceedings. The HSF requests that the Chief Justice to issue directives to regulate the participation of the HSF in these proceedings. The HSF also seeks an order directing it to make written and oral submissions.

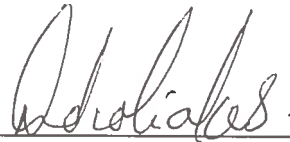


WHEREFORE, the HSF seeks the relief in the notice of application to which this affidavit is attached.



POOJA UPASANA DELA

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at *Sandton* on this the *19* day of APRIL 2016, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Full Names:

Business Address:

Designation:

Capacity:

NATALIA ANDROLIAKOS
 Commissioner of Oaths Ex Officio
 Registered Attorney R.S.A.
 DM Kisch Inc
 Inahda Greens Business Park
 54 WIERDA RD WEST, WIERDA VALLEY, SANDTON
 P.O. BOX 781218, SANDTON, 2146