IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No CCT 09/2014

In the matter between:

HUGH GLENISTER Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER OF POLICE Second Respondent
(FORMERLY THE MINISTER OF SAFETY AND SECURITY)

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Fourth Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Fifth Respondent

APPLICANT'S NOTE IN TERMS OF CLAUSE 5 OF THE PRACTICE DIRECTION OF 17 MAY 2010

(a) Names of the parties

The names of the parties are set out in the case heading above.

(b) Nature of the proceedings

The Applicant seeks leave to appeal against a judgment declaring sections of the South African Police Service Act 1995 ("the SAPS Act") inconsistent with the Constitution and invalid to the extent that they fail to secure an adequate degree of independence for the Directorate for Priority Crime Investigation ("the DPCI"), on the basis that the judgment does not go far enough. The application for leave to appeal is set down to be heard on the same day as a similar application brought by the Helen Suzman Foundation, and

the confirmation hearing following upon the order in the Court *a quo*.

(c) <u>The issues that will be argued</u>

(i) That the Court *a quo* erred in not finding that the entire scheme providing for the DPCI introduced by the South African Police Service Amendment Act 10 of 2012 ("the Second Amendment Act") is invalid and inconsistent with the Constitution of the Republic of South Africa, 1996 for want of securing the necessary independence and freedom from executive control.

(ii) Alternatively, that the Court *a quo* failed to identify and declare invalid all the provisions in the Second Amendment Act which fail to pass constitutional muster for want of securing the necessary independence and freedom from

executive control required for an effective anti-corruption entity ("ACE"), and that the scheme contemplated fails to remedy defects in Chapter 6A of the SAPS Act identified in the majority judgment in Glenister v President of the RSA and Others; Helen Suzman Foundation as Amicus Curiae 2011 (3) SA 342 (CC) ("Glenister II").

(d) Portions of the record necessary for the determination of the matter

Regrettably, it is not possible to identify portions of the record that may properly be omitted from consideration for the determination of the matter.

(e) An estimate of the duration of oral argument

It is not known whether the various respondents will be separately represented, as they were in the Court *a quo*, and it is accordingly difficult to estimate with any degree of accuracy how long argument will endure. The matter ought to be capable of completion in one day.

(f) Summary of argument

(i) The entire scheme provided for the DPCI by the provisions of the Second Amendment Act, situated as it is in the South African Police Service ("the SAPS"), is unconstitutional and invalid.

(ii) Notwithstanding the fact that this Court in Glenister II held that the creation of a separate corruption-fighting entity within the SAPS is not in itself unconstitutional and that the legislation relating thereto could not be invalidated on that

ground alone, there is an inherent tension in positioning such a unity in the SAPS, by virtue of the constitutional requirement in section 207(2) that the National Commissioner of the SAPS, who is a political appointee and accountable to the Minister of Police, is required by that section to exercise control over and manage the SAPS in accordance with the national policing policy and the directions of the Minister.

(iii) While it may theoretically be possible to establish the requisite unit within the SAPS, the manner in which the Second Amendment Act has sought to do so does not clothe it with the requisite independence and freedom from executive control identified as necessary in the majority judgment in Glenister II.

(iv) The attempt in the Second Amendment Act to provide for the National Head of the DPCI to override the National Commissioner, or for the DPCI to fall outside her

management and control, are in conflict with the above-cited constitutional prescripts, and invalid.

(v) To the extent that the entire scheme may be held not to be invalid for want of independence and freedom from executive control, it will be argued that, while the Court *a quo* correctly identified and declared invalid certain provisions of the SAPS Act, it failed to identify all the provisions of the Second Amendment Act that continue to limit the independence and the freedom from executive control of the DPCI, and that the provisions of s 17AA, 17E(8), 17G, 17H, 17I, and 17K(1) – (2B) should also be declared invalid and inconsistent with the constitution.

(vi) It will be argued that the Court *a quo* erred in striking out evidentiary material in the Applicant's papers that were illustrative of issue of public perception and the prevailing circumstances at the time of adoption of the legislation, both

issues being relevant to the validity of the legislation as determined in the majority judgment in Glenister II.

(vii) It will be argued that the Court *a quo* improperly granted a punitive costs order against the Applicant in respect of the Second Respondent's application to strike out material, and that it further erred in not awarding costs to the Applicant in the light of the partial success of his application as reflected in the declaration of invalidity issued by it.

(viii) It will be argued that the appeal should succeed, with costs.

(g) List of authorities on which particular reliance will be placed

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC);

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC).

I J SMUTS SC

D J TALJAARD

Counsel for the Applicant

Chambers

28 March 2014