



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 23874/2012

In the matters between:

THE HELEN SUZMAN FOUNDATION

Applicant

v

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

THE MINISTER OF POLICE

Second Respondent

**THE HEAD OF THE DIRECTORATE FOR
PRIORITY CRIME INVESTIGATION**

Third Respondent

**THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA**

Fourth Respondent

AND

HUGH GLENISTER

Applicant

v

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

THE MINISTER OF POLICE/SAFETY AND SECURITY

Second Respondent

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

Third Respondent

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Fourth Respondent

THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA

Fifth Respondent

Court: Justice Desai, Justice Le Grange *et* Justice Cloete

Heard: 22 and 23 August 2013, 16 and 17 September 2013 and 14 October 2013

Delivered: 13 December 2013

JUDGMENT

DESAI J, LE GRANGE J et CLOETE J:**Introduction**

- [1] In *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), hereinafter referred to as '*Glenister 2*', the Constitutional Court ('CC') declared Chapter 6A of the South African Police Service Act 68 of 1995 ('*the 2008 SAPS Act*') to be unconstitutional and invalid to the extent that it failed to secure an adequate degree of independence for the state's anti-corruption unit, the Directorate for Priority Crime Investigation ('*DPCI*').
- [2] The CC, however, suspended the declaration of invalidity for 18 months to afford Parliament an opportunity to remedy the constitutional defects in the 2008 SAPS Act.
- [3] In purported compliance with *Glenister 2* Parliament enacted the South African Police Service Amendment Act 10 of 2012 ('*the SAPS Amendment Act*') on 14 September 2012.
- [4] The applicants submit that the SAPS Amendment Act does not remedy the constitutional defects identified by the CC in *Glenister 2*. The Helen Suzman Foundation ('*HSF*') challenges the impugned legislation on a purely objective, legal basis in keeping with the approach of our courts to invalidity: see *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) at paras [22] to [24] where it was held that:

'Consistent with this objective approach to statutory invalidity, the circumstances which become apparent at the time when the validity of the provision is considered by a Court are not necessarily irrelevant to the question of its consequential invalidity. However, a statute cannot have limping validity, valid one day, invalid the next, depending upon changing circumstances...'

As pointed out in the previous paragraph, it might well happen that the right may be infringed or threatened because a governmental agency does not perform efficiently in the implementation of the statute. This will not mean that the statute is invalid. The remedy for this lies elsewhere...

Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose...If the legislation... is rational the Act of Parliament cannot be challenged on the grounds of "unreasonableness". Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of s 36 of the Constitution and it is only as part of this s 36 enquiry that reasonableness becomes relevant. It follows that it is only at that stage of enquiry that the question of reasonableness has to be considered.'

- [5] Glenister however, while aligning himself with the arguments of the HSF, has adopted a different approach. His case is largely devoted to illustrating what he contends are the current levels of corruption in South Africa, and seems to suggest that these *'factual circumstances'* mean that the threshold for the validity of the SAPS Amendment Act has been raised. In particular, he targets the President, the Minister of Police, the South African Police Service, the Head of the DPCI and the DPCI as all being corrupt. In adopting this approach he relies on *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para [88]. That case concerned whether the state had implemented reasonable measures to protect rail commuters in accordance with its positive constitutional obligation as the sole shareholder of Transnet Ltd. Clearly,

therefore, the prevailing circumstances were relevant. No attack was made on the validity of any legislation.

[6] In *Ferreira v Levin* 1996 (1) SA 984 (CC) at para [27] it was held that:

'The issue of whether a law is invalid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not.'

[7] All of the respondents oppose the relief sought, save for the Head of the DPCI and the National Director of Public Prosecutions, both of whom abide the decision of the court. Glenister's approach resulted in all of the respondents who oppose threatening striking-out applications. The Minister of Police (*the Minister*) has followed through on his threat. The Minister has also raised the issue of non-joinder of Parliament. We will deal with these two preliminary aspects before turning to the merits of the challenge to the impugned legislation.

The application to strike

[8] The Minister argues that 31 paragraphs in Glenister's papers, the annexures referred to in these paragraphs, the report of Prof Gavin Woods, and the affidavit of Gareth Newham, which are annexures to the papers, fall to be struck out on the basis that they constitute irrelevant, scandalous and vexatious matter and/or hearsay. The objection to Woods' report and Newham's affidavit is well founded. The Woods report is constituted entirely of hearsay and is irrelevant for purposes of these proceedings; indeed, in the affidavit to which the report is annexed, Woods does not even confirm that the contents of the report are true and correct.

The Newham affidavit motivates for an anti-corruption unit located outside the structure of the SAPS, an issue that has already been decided by the CC as will appear more fully below.

[9] Insofar 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 2*. 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 2*.

- 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.

[10] The crucial consideration of course is whether the Minister is prejudiced in the conduct of his case if the offending material is allowed to stand. Mr Hoffman, Glenister's lead counsel, adopted the view that there could be no possible prejudice to the Minister since he could quite easily have dealt with these allegations. He went further, and urged us to accept them as uncontested because the Minister had not done so. In our view, however, this approach overlooks what is required of a litigant in motion proceedings, namely that: (a) the facts or allegations must be set out simply, clearly, in chronological sequence and without argumentative matter; and (b) it is not open to a party to merely annex documentation and to request the court to have regard to it, given that 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, and a party would not know what case must be met: see *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324D-G. There can be little doubt that Glenister in making sweeping allegations based on unverified opinion has failed to meet these requirements; and that the Minister has been severely prejudiced in the conduct of his case as a result.

[11] Regarding the relevance of this material, Mr Hoffman sought to persuade us that the clear and unequivocal finding in *Glenister 2* about the scourge of corruption

has no bearing on the issues before us because it is the *'current factual matrix'* which dictates how we are to determine this matter. It was thus necessary to inform this court, all over again as it were, about Glenister's view of the levels of corruption in South Africa. We cannot agree. The present applications have their origin in the order in *Glenister 2*. In reaching its conclusion in that case, the CC dealt comprehensively with the issue of corruption. We are required to determine the applications before us against the framework, findings and order made by that court. It is the constitutional validity of the SAPS Amendment Act that is under scrutiny and not the reasonableness thereof. Put differently, the rationale of adequate independence of the DPCI is the protection against potential manipulation by corrupt politicians through political control. This rationale stands, irrespective of the absence or presence of actually corrupt politicians in the power structure at any given time. As stated in *Glenister 2* at para [234]:

'Again, we should not assume, and we do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence.'

[12] It follows that the Minister's application to strike must succeed.

Non-joinder of Parliament

[13] The Minister contends that the joinder of Parliament is unavoidable because of the *'unusual'* order in *Glenister 2*. The relevant portions of the order are as follows:

- ‘5. *It is declared that Ch 6A of the South African Police Service Act 68 of 1995 is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.*
6. *The declaration of constitutional invalidity is suspended for 18 months in order to give Parliament the opportunity to remedy the defect.’*

[14] The Minister contends that the joinder of Parliament is a matter of necessity rather than convenience. Para [6] of the CC order means that the question is whether Parliament has remedied the defects. However, as the papers stand, Parliament is not before the court to defend its position.

[15] In *Glenister 2* one of the challenges was directed at Parliament, it being contended that the latter had failed to comply with its constitutional obligation to facilitate public involvement in its legislative process. At para [29] the CC held that both the National Assembly and the National Council of Provinces had a direct and substantial interest in the outcome of that challenge. They should therefore have been joined in the proceedings. As it turned out the challenge was dismissed on the basis that Glenister had not made out a case for failure to facilitate public involvement.

[16] The Government is a party to these proceedings. In *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para [25] the CC held that:

'the national sphere of government comprises at least Parliament, the President and the Cabinet all of which must exercise national legislative and executive authority within the functional areas to which the national sphere of government is limited. These state organs comprise the national sphere of government and are within it.'

[17] The government thus includes Parliament, and the involvement of the former in these proceedings includes the involvement of the latter. The Minister relied on *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC) at para [13]. There it was held that, in a constitutional democracy, a court should not declare the acts of another arm of government unconstitutional without the latter having a proper opportunity to consider the constitutional challenge and to make representations. This reliance is misplaced, as *Mabaso* concerned only the failure to join a member of the executive responsible for the administration of the impugned statute, i.e., the Minister of Justice. Notably, the court in *Mabaso* did not take issue with the absence of Parliament from the proceedings, despite the fact that an Act of Parliament – its own '*work*' as the Minister terms it – was under challenge.

[18] Rule 10A of the uniform rules of court is consistent with the above position, and unambiguously provides as follows:

'If in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings.'

[Emphasis supplied.]

- [19] The Minister also placed reliance on *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC). This reliance is misconceived. As in that portion of *Glenister 2* to which we have already referred, *Doctors for Life* concerned a constitutional challenge based only on the alleged failure of Parliament to facilitate public involvement in the legislative process. Clearly, Parliament has an interest in defending its own procedural conduct, over which its principal officers – the Speaker of the National Assembly and the Chairperson of the National Council of Provinces – have authority and responsibility. It is for that reason that those officers and only those officers are required to be cited when the procedural conduct of Parliament is impugned. There is a difference, however, between procedure and substance. The officers of Parliament are not responsible for substance, which is deliberated and adopted collectively by the members of Parliament, yet is researched, initiated, introduced and – after adoption – administered by the Executive.
- [20] Neither applicant impugns the procedure followed by Parliament when adopting Chapter 6A of the SAPS Act through the SAPS Amendment Act. Rather, it is the content of the impugned provisions that is challenged, in the same way that the substance of any statute may be constitutionally challenged.
- [21] It is also of note that neither the President nor the Government has suggested that Parliament should have been joined. And, in oral argument, Ms Williams, lead counsel for the Government, contended that since the parliamentary process was not being challenged, there was no need to join Parliament.

[22] In addition, rule 5(1) of the CC rules provides that anyone who challenges the constitutional validity of an Act of Parliament must join the responsible executive authority as a party to the proceedings, not Parliament.

[23] It is for these reasons that we are satisfied that the joinder of Parliament in these proceedings is not required.

The framework against which this court must determine the constitutional validity of the SAPS Amendment Act

[24] In *Glenister 2* the CC found that the creation and location of a separate anti-corruption unit within the South African Police Service ('SAPS') is not in itself unconstitutional. The essential question is whether the anti-corruption unit enjoys sufficient structural and operational autonomy so as to shield it from undue political influence. Accordingly, at issue in this case is not the location of the DPCI within the SAPS structure, but whether the SAPS Amendment Act provides the DPCI with sufficient insulation from undue political interference.

[25] In *Glenister 2* the CC found that the DPCI structure in the 2008 SAPS Act did not enjoy sufficient structural and operational autonomy so as to shield it from undue political influence, essentially for two main reasons:

25.1 The lack of security of tenure and remuneration; and

25.2 The degree of accountability and oversight by the Ministerial Committee.

[26] As to lack of security of tenure and remuneration the CC found these to lie in the following:

26.1 The appointment of members was not sufficiently shielded from political influence;

26.2 The existence of renewable terms of office;

26.3 The existence of flexible grounds for dismissal that did not rest on objectively verifiable grounds like misconduct or ill health; and

26.4 The absence of statutorily secured remuneration levels.

[27] As to the degree of accountability and oversight by the Ministerial Committee, the CC found these to lie in the following:

27.1 The untrammelled power of the Ministerial Committee to determine policy guidelines in respect of the functioning of the DPCI as well as the selection of national priority offences;

27.2 Parliament's oversight function was undermined by the level of involvement of the Ministerial Committee;

27.3 The complaints system involving a retired judge regarding past incidents did not afford sufficient protection against future interference.

Test to be applied

[28] In assessing the attacks on the SAPS Amendment Act we must: (a) have regard to the findings already made by the CC in *Glenister 2*; and (b) apply the test of objective validity as set out in the *New National Party* case. Insofar as public perception or opinion is concerned, the question is not what the populace believes a proper unit should be. It is what the Constitution demands it should be. As pointed out in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras [88] and [89]:

'Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for Constitutional adjudication... This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.'

[29] This must be balanced against public confidence, given that in *Glenister 2* the CC had the following to say at para [207]:

'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... This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.'

[30] The present matter, entirely understandably, is a highly emotive one. It goes to the root of public perception. That is why it is necessary to remind ourselves that, just as we must fulfil our duty to declare invalid laws which fail to pass constitutional muster, we must equally guard against falling into the trap of seeking to satisfy hypersensitivity or paranoia. The very location of the DPCI within the SAPS has already been found by the CC to be constitutionally permissible. As a lower court it is not for us to take issue with that or to entertain debates about whether the DPCI should be located elsewhere. What we are required to do is to assess, objectively, whether Ch 6A of the SAPS Amendment Act provides the DPCI with *'insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit'* (*Glenister 2* at para [216]). This is the yardstick to determine whether the DPCI *'has an adequate level of structural and operational autonomy secured through institutional and legal mechanisms, to prevent undue influence'* (*Glenister 2* at para [206]). If it does, then public confidence should follow. If it does not, the converse applies.

[31] The legislature has recognised that the test is one of adequate independence. This much is evident from the preamble to the SAPS Amendment Act which provides as follows:

'AND WHEREAS there is a need to provide for a Directorate in the Service that is dedicated to the prevention, investigation and combatting of national priority

offences, in particular serious organised and transnational crime, serious commercial crime and serious corruption, and that enjoys adequate independence to enable it to perform its functions.

[Emphasis supplied.]

The attacks on the SAPS Amendment Act

[32] The HSF's main challenges (and these were the challenges focused on during argument) relate to:

32.1 Appointment;

32.2 Extension of tenure;

32.3 Suspension and removal;

32.4 Jurisdiction; and

32.5 Financial control.

[33] Glenister's challenges appear to be as follows:

33.1 That the drafters of the SAPS Amendment Act have substituted the previous overt executive control that the 2008 SAPS Act allowed over the DPCI with more subtle and less visible control, which still does not address the real difficulties identified by the CC. The complaint – although difficult to understand in the somewhat convoluted form in which it is

presented – appears to be directed at the unit being located in the SAPS structure and thus under the political responsibility of the Minister. Given that this is an issue which has already been decided by the CC, it requires no further comment; and

33.2 The amended provisions do not sufficiently insulate the DPCI from political influence in its structure and functioning in relation to: (a) operational independence; (b) resourcing; (c) conditions of service; and (d) determination of the nature of crimes to be investigated.

[34] To all intents and purposes, therefore, the constitutional challenges of the respective applicants are otherwise the same.

Appointment

The lack of adequate criteria

[35] In s 17C of the 2008 SAPS Act there were no criteria stipulated for the appointment of the Head of the DPCI, other than that the Head had to be a Deputy National Commissioner appointed by the Minister in concurrence with Cabinet.

[36] The complaint is that the new s 17CA(1) merely requires that the appointee be 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’*. This is unjustifiably

broad; it does not provide sufficient guidelines to the delegee (in this case, the Minister) in compliance with the requirement of lawful delegation under the Constitution.

[37] The importance of adequate criteria has been emphasised by our courts in a number of situations: see for instance *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at paras [54] to [57].

[38] In *Freedom of Expression Institute and Others v President, Ordinary Court Martial N.O. and Others* 1999 (2) SA 471 (C), which involved a constitutional challenge to the provisions of the Defence Act 44 of 1957, the court found at para [19] that:

'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... 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.'

[39] The CC reiterated this principle in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para [34] when it said the following:

'[T]he 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 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.'

[40] There is confusion among the respondents about whether a discretion is conferred by s 17CA(1). Mr Donen, lead counsel for the Minister, contends that the Minister has no discretion – if the criteria are satisfied, then the Minister must appoint, because of the word '*shall*'. But that is contradicted by Mr Kemp, lead counsel for the President, who accepts that there is a discretion – which he is right to have conceded, since obviously it is the Minister who decides, subjectively, whether the person is fit and proper. This is entirely separate from the fact that a court may later test the Minister's chosen appointee, and enquire whether, objectively, the person so appointed is fit and proper.

[41] The President argues that the criteria '*are objective criteria which can be implemented through court challenge*', submitting that the judgments of the Constitutional Court and the Supreme Court of Appeal in *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC); *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) – commonly referred to as the *Simelane* case – show the judicial control extant to ensure that persons of integrity are appointed. In our view, however, *Simelane* is actually authority for the proposition that the fit and

proper criterion contained in a specific statutory provision must be considered with due regard to its statutory purpose, measured against constitutional values and norms: see the SCA judgment in *Simelane* at para [120]. Accordingly, properly applied, the fit and proper criterion for the appointment of the Head of the DPCI finds itself in a different context than that of *Simelane*. In addition, Mr Kemp's submission is at odds with the view expressed by the CC in *Dawood*, to which we refer below.

[42] *Simelane* concerned s 9(1) of the National Prosecuting Authority Act 32 of 1998 (*'the NPA Act'*) which stipulates a criterion additional to those set out in s 17CA(1) of the SAPS Amendment Act, despite Mr Donen having informed us that the words in the respective sections are identical. This additional criterion is that the appointee must *'possess legal qualifications that would entitle him or her to practice in all courts in the Republic'*. This criterion thus fetters the appointment power of the President, while the appointment power of the Minister in respect of the Head of the DPCI is comparatively unguided and unrestrained. Moreover, s 179(3)(a) of the Constitution states that the National Director of Public Prosecutions must be *'appropriately qualified'*, which likewise fetters the President's discretion. *Simelane* is thus distinguishable from the present case; and demonstrates the degree to which the Minister's appointment power of the Head of the DPCI is far wider than it could (and should) be. This is also highlighted by the fact that s 6(1) of the Independent Police Investigative Directorate Act (*'the IPID Act'*) stipulates that the Executive Director of that Directorate, who is constitutionally required to be independent, must be *'suitably qualified'*.

[43] In *Dawood* the CC made it clear that the availability of *ex post facto* judicial review does not absolve the legislature from providing appropriate *ex ante* direction. That court had the following to say at para [48]:

[T]hat the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example, that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights. In a constitutional democracy such as ours the responsibility to protect constitutional rights in practice is imposed both on the legislature and on the Executive and its officials. The legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers.

[Emphasis supplied.]

[44] It is thus the primary duty of the legislature, and not the judiciary, to limit that risk. This is entirely consistent with the doctrine of separation of powers enshrined in our Constitution.

[45] Both the cardinal importance of ensuring the DPCI's adequate independence, and the relative ease with which Parliament is able to determine more detailed criteria, militate for the constitutional imperative that such criteria be included. Nor can it be said that there is any legislative purpose to be achieved by not supplying such guidance: see *Dawood* at para [56].

[46] The respondents' contention that the current criteria are adequate, given that '*fit and proper*' was held in *Simelane* to be an '*objective*' standard, is misplaced. The imperative of including, in any empowering statute, sufficient guidance to guard

against the infringement of rights in the exercise of the power conferred, is not a question of the objectivity but rather of the clarity and specificity of the criteria prescribed. This is precisely because, as the CC has recognised, the legislation, in the manner in which it is drafted, must limit the risk of the unconstitutional exercise of the discretionary power conferred. This risk is not limited by the mere ability to test the exercise of that power on an objective basis in a review.

The necessity for Parliamentary oversight

[47] The complaint is that because the Minister, with Cabinet, appoints the Head of the DPCI, this does not sufficiently insulate the Head from political interference. Having regard to the constitutional mandate of an anti-corruption unit and the imperative for its adequate independence, the appointment of its Head cannot be entrusted to the Executive alone, even more so where the legislation sets out inadequate guidelines for the delegee to exercise his or her statutory power.

[48] In *Glenister 2* it was held that the public perception of independence is an important criterion in assessing whether the anti-corruption unit is sufficiently independent. The question that arises is whether the ordinary, reasonable citizen can trust the DPCI to investigate state corruption fully and fearlessly if the Head is appointed, without any meaningful guidelines or constraints, by the Minister with Cabinet. Indeed, Cabinet comprises the political heads of all of the government departments that the DPCI might have to investigate.

- [49] In its present form, s 17CA(3) of the SAPS Amendment Act only obliges the Minister to report to Parliament on the appointment of the Head. Parliament has no veto power.
- [50] The respondents rely on *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at paras [108] – [109] where the CC endorsed the principle that appointment by the Executive (or in combination with Parliament) is constitutionally acceptable. Of course *Van Rooyen* dealt with the power of the Minister of Justice to appoint magistrates. In our view, the respondent's reliance on *Van Rooyen* is misplaced. First, magistrates apply the law. They do not investigate corruption. Second, and more importantly, magistrates, like judges, are constitutionally fully independent. Further, having regard to public perception, it is vital that the person appointed has no taint – whether perceived or otherwise – that he or she occupies office due to ministerial preference. One immediately apparent solution would be to require that Parliament approves the appointment. This would ensure that such appointment is subject to sufficient scrutiny, by a transparent and representative institution, to safeguard both the actual and perceived independence of the Head.
- [51] The importance of Parliament's involvement is illustrated by s 193 of the Constitution, which requires a special majority of Parliament to approve the appointment of the Public Protector and Auditor-General. While these institutions are squarely placed in Chapter 9 of the Constitution, in *Glenister 2* the CC had no difficulty in measuring the 2008 SAPS Act against these institutions in order to

test the constitutional requirement of independence. At para [211] the court said the following:

'As the main judgment observes, the international instruments require independence within our legal conceptions. Hence it 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 Ch 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.'

[52] The respondents also rely on the process by which judges are appointed in an attempt to illustrate that there is nothing fundamentally wrong with the absence of Parliamentary oversight. While it is true that judges are appointed without the approval of Parliament, this is a false comparison. First, the appointment criteria for judges are much stricter than those for the Head of the DPCI. S 174(1) of the Constitution makes one of the criteria for the appointment of judges to be that of appropriate qualification. Further, the appointment of judges follows a special process created in the Constitution itself. The HSF points out that the Judicial Service Commission is a multi-party body that scrutinises judicial candidates and makes recommendations to the President before he is even permitted to exercise his appointment powers. Indeed, the HSF argues that this process ensures a considerable degree of representative and transparent scrutiny and places substantial fetters on the powers of the President. Finally, there is no apparent purpose in excluding Parliamentary oversight from the appointment process of the Head of the DPCI.

The insufficiency of consultation

[53] Mr Donen informed us that the appointment process of the Head is consistent with one of the main features of independence identified by the Organisation for Economic Co-operation and Development ('OECD') in its 2008 report, *Specialised Anti-Corruption Institutions: Review of Models*. We cannot agree. The relevant extract from the OECD report reads as follows:

'Appointment and Removal of the Director

The symbolic role played by the Head of an anti-corruption institution should not be underestimated. In many ways the Director represents a pillar of the national integrity system. – The selection process for the Head 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 multi-disciplinary selection committee on the proposal of the Government, or the President, etc.) Appointment by a single political figure (e.g. a Minister or a President) is not considered good practice. The Director's tenure in office should also be protected by law against unfounded dismissals.'

[Emphasis supplied.]

[54] Ss 17CA(4) and (6) provide that the Deputy National Head and the Provincial Heads are appointed by the Minister, in consultation with the Head, and with the concurrence of Cabinet.

[55] Essentially the same complaints are levelled at the appointment process of the Deputy National Head and the Provincial Heads, and it is contended that, although consultation with the Head is required, his or her input may be ignored.

- [56] The Government argues that, in addition to the reasons already advanced in respect of the appointment of the Head, this complaint is ill-founded. The Government relies on *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at para [13] where, in summarising the appellants' argument, the court referred to various authorities in which it was found that a decision '*in consultation with*' another functionary requires the concurrence of that functionary; whereas a decision '*after consultation with*' another functionary requires no more than that the decision must be taken in good faith after consulting and giving serious consideration to the views of the other functionary: see *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at para [85]; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at para [63].
- [57] The HSF nonetheless sought to persuade us that on a proper reading of s 17CA(4) we should place a different interpretation thereon, given that the phrase '*in consultation with*' the Head on the one hand, and '*with the concurrence of*' Cabinet on the other, must have been intended by the legislature to have two different and distinct meanings. In our view, not much turns on this in light of the clear CC authority to which the respondents referred.
- [58] The more fundamental problems presented by the current appointment process of the Head contained in s 17CA(1), if properly addressed by the legislature, may well neutralise the concerns raised by the HSF in respect of the appointment of the Deputy Head and National Heads because it will follow logically that the

requirement of sufficient consultation will have to be met in respect of the latter process as well. In any event, the CC has already provided us with the meaning of *'in consultation with'* and we do not believe that it is appropriate to stretch that meaning as the HSF suggests.

Extension of tenure

[59] The 2008 SAPS Act was silent as to any specially entrenched term of office for the Head of the DPCI.

[60] S 17CA(1) now stipulates that the Head shall be appointed for a *'non-renewable fixed term of not shorter than seven years and not exceeding 10 years'*. S 17CA(2) stipulates that the term is fixed at the time of appointment.

[61] S 17CA(15) provides that the Minister shall, with the consent of the Head, retain him or her in office beyond the age of 60 years for such period that shall not: (a) exceed the period determined in s 17CA(1); and (b) exceed two years subject to the approval of Parliament. Similar provisions pertain to the Deputy Head and what is set out hereunder should thus be taken to apply to both the Head and the Deputy Head.

[62] In *Glenister 2* the CC held at paras [222] – [223] that:

'In our view, adequate independence requires special measures entrenching [the DPCI's] employment security to enable them to carry out their duties vigorously.

This is exacerbated by the fact that the appointment of the National Commissioner of the SAPS is itself renewable. By contrast, the appointment of the National Director of Public Prosecutions (NDPP) – who selected the Head of the DSO from amongst the deputy NDPPs – is not. 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.'

[Emphasis supplied.]

[63] The complaint is that the Minister may extend the tenure of the Head, subject only to the consent of the Head, for up to 2 years after retirement age of 60 years, and even beyond 2 years with the approval of Parliament. It is contended that this kind of untrammelled power strikes at the heart of a non-renewable term of tenure, which is a fundamental principle of independence.

[64] In *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) ('JASA'), the CC, in considering the extension of the term of office of the Chief Justice, held as follows 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 s 176(1) must therefore, on general principle, be construed as far as 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.'

- [65] The President argues that the power of the Minister to extend the Head's term of office is not unfettered, as it is subject, firstly, to the consent of the Head himself or herself; and secondly, to a period of a maximum of 2 years unless otherwise approved by Parliament. It is argued that the power to extend is necessary for an effective DPCI.
- [66] The Minister submits that the exercise of the power cannot be construed as a benefit capable of impairing the constitutional independence of the DPCI, as it is necessary, in light of the statutorily prescribed maximum age of retirement of 60 years, for the Minister to be permitted to consider deserving candidates for appointment for the prescribed non-renewable term who are older than 53 years at the time of appointment.
- [67] The Government argues that the subsections, in their current form, must be interpreted to mean that the duration of the term of appointment is fixed at the time of appointment in light of the clear wording to that effect in s 17CA(2); that in line with the Minister's argument, this is entirely compatible with the requirement of adequate independence; and that accordingly the complaint is without substance.

- [68] In our view the respondents' arguments cannot be sustained. Whatever the practical advantages of the power to extend the Head's tenure, the renewability of the term at the behest of the Minister is intrinsically inimical to independence. It is clear from the CC's judgments in *Glenister 2* and *JASA* that it is renewability as such, rather than the insufficiency of conditions or constraints imposed on renewability, which jeopardises independence. Renewability thus has no valid place in the scheme of a unit that is constitutionally required to be adequately independent.
- [69] S 17CA(15) specifically refers to '*retain*'. One cannot retain a person in his or her position if he or she has not already been appointed.
- [70] The same subsection injects a clear element of ministerial discretion into the extent, if not the fact, of the extension, in that it states that the further term '*shall not exceed*' certain fixed periods, thus clearly implying that it may, at the discretion of the Minister, be shorter than those fixed periods. This gives rise to the potential for favouritism or, at the very least, public perception of potential favouritism.
- [71] In addition, s 17CA(16), expressly employing the permissive word '*may*', provides that extension may only take place if: (a) the incumbent wishes to continue to serve in that office; and (b) the mental and physical health of the incumbent '*enables him or her so to continue*'. It is apparent from (a) that the willingness of the incumbent is only one condition for the extension rather than the sole source and basis for it. This is fortified by the use of the word '*consent*' in s 17CA(15)

itself, which conveys the clear impression that the Head is not intended to initiate or exercise an election to extend his or her own tenure, but rather to accept or reject the Minister's election. It is, furthermore, evident from (b) that the extension is also conditional upon an assessment of the incumbent's capabilities. This assessment cannot be conducted by the incumbent personally, since that construction would not only be absurd, but would render (b) a wholly redundant repetition of (a). The only reasonable construction of (b) therefore is that the power to assess the incumbent's suitability for extension vests in the Minister.

[72] Consequently, a contextual interpretation of the impugned provisions reveals that they purport to vest the Minister with the power to extend the tenure of the Head. The latter's term is thus renewable at the pleasure of the Minister, and to that extent the Head's independence is eroded. This erosion is not saved by the fact that the Minister's power is subject to conditions, namely a maximum time limit, the incumbent's consent and the incumbent's health (as assessed by the Minister).

[73] Further, the power of Parliament to extend the tenure of Constitutional Court judges is specifically conferred by the Constitution itself. Such conferral thus cannot be construed as reflecting any general principle that a Parliamentary power to extend tenure does not impair an institution's independence. Indeed, in *JASA*, the CC described this power (at para [67]) as '*an exception*' to the rule that a Constitutional Court judge's term is fixed. At para [75] of *JASA* the CC made it plain that extension, even by Parliament, presents the risk or at least the

perception of inadequate independence; and at para [67] alluded to fundamental differences in constitutional character between the Executive and Parliament:

'It is so that s 276(1) of the Constitution creates an exception to the requirement that a term of a Constitutional Court judge is fixed. That authority, however, vests in Parliament and nowhere else. It is notable that s 176(1) does not merely bestow a legislative power, but by doing so also marks out Parliament's significant role in the separation of powers and protection of judicial independence. The nature of this power cannot be overlooked, and the Constitution's delegation to Parliament must be restrictively construed to realise that protection.'

Suspension and removal

[74] In the 2008 SAPS Act members of the DPCI were subject simply to the SAPS disciplinary procedures set out in s 34 and s 35 thereof. Now, s 17CA(19) of the SAPS Amendment Act stipulates that any disciplinary action against a Deputy National Head, Provincial Head, member or employee in the service of the DPCI shall be considered and finalised *'within the Directorate's structures subject to the relevant prescripts'*; and s 17CA(20) stipulates that no Deputy Head, Provincial Head, member or administrative staff member of the DPCI may be transferred or dismissed except after approval by the Head. The powers of suspension and removal in respect of the Head personally are, however, in stark contrast to these provisions.

[75] During the course of argument the respondents conceded that s 17DA, in its current form, provides for two separate and distinct processes for the removal from office of the Head, notwithstanding the wording in s 17DA(1) to the effect

that the Head shall not be removed from office except in accordance with the provisions of ss (2), (3) and (4) thereof.

- [76] The first removal process vests in the Minister in terms of s 17DA(1) and (2). These provide that the Minister may provisionally suspend the Head pending such inquiry into his or her fitness to hold office '*as the Minister deems fit*'; and that the Minister may '*thereupon*' remove him or her from office on one of four grounds. These are: (a) misconduct; (b) continued ill-health; (c) incapacity to carry out his or her duties '*efficiently*'; and (d) that he or she is no longer a fit and proper person to hold office.
- [77] There is no obligation on the Minister to obtain Parliament's approval. All that he is required to do is to furnish Parliament within 14 days with the reasons for his decision, and the Head's representations. The inquiry is to be led by a judge or retired judge, appointed by the Minister after consultation with the Minister of Justice and the Chief Justice. The inquiry shall perform its functions in accordance with the Promotion of Administrative Justice Act 3 of 2000 ('*PAJA*').
- [78] The second removal process is contained in ss 17DA(3) and (4). There, Parliament is separately empowered to permanently remove the Head by a two-thirds majority, but only on the grounds of: (a) misconduct; (b) incapacity; or (c) incompetence, on a finding to that effect by a Committee of the National Assembly.

[79] The complaint is that the CC in *Glenister 2* held at para [222] that '*adequate independence requires special measures entrenching [DPCI members] employment security to enable them to carry out their duties vigorously*'. The impugned provisions do not provide sufficient security of tenure for the Head to ensure his or her independence.

[80] The Minister is empowered to suspend the Head without a hearing and without specific grounds for doing so, pending a disciplinary inquiry initiated by the Minister himself. The Minister is given the sole discretion to decide whether to suspend the Head with or without pay. The Minister is granted the sole power to remove the Head, after an inquiry conducted by a judge or a retired judge. The terms of reference of the inquiry are not specified and may be determined by the Minister. The findings of the inquiry are not binding on the Minister whose own decision is final and not subject to approval by Parliament. The Head may be removed on the basis that he or she is unable to carry out his or her duties '*efficiently*', which is not defined, and affords the Minister an unduly subjective and broad discretion.

[81] The respondents assert that the power of the Minister to remove the Head is constrained by the requirement that the inquiry into the fitness of the Head to hold that office must be conducted by a judge and, further, that such inquiry is subject to PAJA.

[82] Yet the power to remove is plainly vested in the Minister who, for some inexplicable reason, is not similarly required to conduct the process in

accordance with PAJA. It is only the inquiry process that is subject to PAJA. The Minister thus, in his sole discretion, determines the scope of the inquiry, appoints the judge to preside at the inquiry, is not bound by the findings of the inquiry, and retains the ultimate discretion to decide whether one of the grounds for dismissal exist.

- [83] Further, suspension is a threatening power. There is no hearing required; no time periods stipulated; and the Minister is given sole discretion to decide whether the Head receives pay or not during the suspension period. Not receiving a salary during the period of suspension may be a significant handbrake on the ability to fund litigation against suspension; and the mere risk that the Head may not receive a salary during the suspension period may itself be reasonably perceived to be a threat to adequate independence.
- [84] The Minister contends that PAJA is implied. But if Parliament intended this to be the case it would have said so. Indeed, it explicitly provided that the inquiry was to perform its functions subject to PAJA. It is a well-known canon of interpretation of statutes that Parliament has chosen its words carefully and deliberately – and here it has expressly chosen not to stipulate that a suspension decision is similarly subject to PAJA.
- [85] Of course, even the exercise of executive power is subject to constitutional control, yet only on the narrow ground of rationality review. This however only operates after the fact.

[86] The CC in *Glenister 2* at paras [246] – [247] explicitly held that review after the fact is no substitute for sufficient safeguards before the fact:

[A]n 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. These are signally lacking.

[Emphasis supplied.]

[87] During argument Mr Donen suggested that both avenues for removal exist for the specific reason that, if the Minister does not do his job properly, then Parliament will have the power to do so.

[88] But that cannot be. The two sections are palpably different. Ministerial removal is allowed for misconduct, ill-health, incapacity or inefficiency, or because the person is no longer fit and proper. This is a far broader power of removal (and unconstrained by comparison) to the powers afforded to Parliament, which are to remove on grounds of misconduct, incapacity or incompetence. In addition, the Minister may remove without Parliamentary oversight, yet removal by Parliament requires a two-thirds majority, which is the same majority required to amend certain sections of the Constitution, a high hurdle indeed. Simply put, it cannot be accepted that the two processes are meaningfully complementary, given that they do not actually complement each other in substance. The two processes

differ from each other in an arbitrary manner, and it is inconceivable to us that, in its present form, the *'process'* for the suspension and removal of the Head can pass constitutional muster.

Jurisdiction

[89] In the 2008 SAPS Act the functions of the DPCI were limited to preventing, combatting and investigating: (a) national priority offences; and (b) any other offence referred to it by the National Commissioner; both however subject to policy guidelines issued by the Ministerial Committee. These provisions were located in s 17D of that Act.

[90] The current legislation defines a *'national priority offence'* in s 17A as being *'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)'*. The latter subsection details the *'circumstances'* that amount to criminal conduct, or an *'endeavour thereto'*, and which *inter alia* require national prevention or specialised skills in the prevention and investigation thereof.

[91] The HSF referred us to s 16(4)(a) as read with s 16(4)(b) which provide as follows:

'(4) (a) Notwithstanding the provisions of subsections (1), (2) and (3), the Provincial Commissioner shall be responsible for the prevention and investigation of all crimes or alleged crimes committed in the province concerned.'

(b) Where an investigation of a crime or alleged crime reveals that the circumstances referred to in subsection (2) are present, the Provincial Commissioner shall report the matter to the National Head of the Directorate of Priority Crime Investigation as soon as possible.'

[92] The HSF contends that these place the discretion on the Provincial Commissioner to decide whether or not an offence is a national priority offence before it even has to be reported to the Head, in order for him or her to determine whether the DPCI should investigate. The complaint is that the duty to report is located in the incorrect place and that the DPCI must have optionality over jurisdiction.

[93] The respondents however argue that the new s 17AA makes Ch 6A (including s 17D which deals with the mandate of the DPCI) applicable to the exclusion of 'any section' within the Act. S 16 therefore cannot affect the Directorate's mandate to investigate corruption, and receive complaints for investigation.

[94] While at first blush s 17AA purports to make Ch 6A a stand-alone chapter which relates exclusively to the DPCI, when it comes to the DPCI's jurisdiction to investigate this is not in fact the case. Despite the wording of s 17AA, the impugned legislation does not ensure that the DPCI's jurisdiction is exclusive or primary or even that certain key crimes, such as corruption and organised crime, must be referred to the DPCI by the SAPS if they are perpetrated in more than one province. Indeed, there is nothing to prevent the SAPS from investigating such crimes without the involvement or even the knowledge of the DPCI. It is self-evident that the Head cannot accede to a request from a Provincial

Commissioner to investigate if no such request has been made. This undermines the finding in *Glenister 2* that the Constitution requires that corruption is investigated by a body that is sufficiently independent, both functionally and institutionally.

[95] S 17D(1) provides as follows:

'(1) The functions of the Directorate are to prevent, combat and investigate –

(a) National priority offences, which in the opinion of the National 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 of section 34 of the Prevention and Combatting of Corruption Activities Act 2004 (Act No 12 of 2004) ['PRECCA']; 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.

[96] The complaint is that, now, only one member of the Executive, as opposed to a Ministerial Committee, is empowered to impose guidelines as to how, where and when the DPCI should act. This is still, in the words of the CC at para [234], *'inimical to independence'*.

[97] The precise purpose of these *'guidelines'* is not made clear. The requirement for guidelines, coupled with the *'crept in'* provisions in s 16, have the very real potential to constrain the DPCI's work or even to direct the DPCI towards, or

away from, particular targets. This is antithetical to the very purpose of the DPCI as well as the constitutional requirement for an adequately independent corruption and organised crime fighting unit. It also militates against a unit that is reasonably perceived to be sufficiently independent.

[98] The respondents contend that the complaint is ill-founded for the following reasons. First, the policy guideline authority is not vested in the Minister, but is subject to the approval of Parliament. Second, the previous '*default*' position has been removed (i.e. that the policy guidelines issued by the Ministerial Committee would automatically be deemed to have been approved by Parliament if the latter did not approve them within a 3 month period after submission). Third, the SAPS Amendment Act has also amended s 34 of PRECCA. The effect of that amendment has been to statutorily entrench power in the DPCI to prevent, combat and investigate '*selected offences*' not limited to offences referred to in Ch 2 and s 34 of PRECCA.

[99] Part 1 of Ch 2 of PRECCA deals with the general offence of corruption; and Part 2 with offences in respect of corrupt activities relating to specific persons. These '*persons*' are public officers, foreign public officials, agents, members of the legislative authority, judicial officers and members of the prosecuting authority. Parts 3 to 6 detail an array of offences that qualify as falling under the jurisdiction of the DPCI. S 34 of PRECCA deals with the duty to report corrupt transactions and provides that any person who holds a position of authority has such a duty. The respondents accordingly argue that virtually every conceivable offence which relates to corruption automatically falls under the exclusive

jurisdiction of the DPCI; and that the policy guidelines thus in any event have very limited application.

[100] In our view the respondents' argument overlooks the finding in *Glenister 2* at para [232]:

'The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They "oversee" an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory.'

[101] That Parliament must now, by a simple majority, approve the guidelines, does not solve the problem. Parliament is also a political body and it should not be tasked with deciding on what cases the DPCI should or should not pursue where its own members may be subject to investigation. The nub of the matter is this: the DPCI's mandate, i.e. to fight corruption, is a constitutional requirement. It is not something which should ultimately be left to politicians to determine. The statutes governing the work of the NDPP, the Auditor-General and the Public Protector – all of which were found in *Glenister 2* to be instructive in considering the requirement of adequate independence – do not permit similar external interference by political actors. While it is so that the Minister must determine policing policy in terms of s 206(1) of the Constitution, it is nonetheless incumbent upon the legislature to find a way to meaningfully address the

constitutional requirement of adequate independence for the jurisdiction of the DPCI.

[102] The respondents' argument also overlooks s 17D(1)(aA), which stipulates that the DPCI is to investigate '*selected offences not limited to offences referred to in Chapter 2 and section 34*' of PRECCA. It is not clear by whom, when and on what basis the selection is to be made. Indeed, the respondents themselves are at odds about who makes that determination.

[103] In his affidavit the President avers that it is the Minister who will determine the '*selected offences*':

'The Applicant contends that this provision is unconstitutional because it is unclear from the provision "by whom, when and on what basis the selection is made". The Minister who is responsible for determining the National Policing Policy will determine the selected crimes. This is in terms of section 206(1) read with section 207(2) of the Constitution. The scope of authority of the DPCI cannot extend to determining on its own scope of authority over the criminal matters that it can investigate.'

[Emphasis supplied.]

[104] The Minister, on the other hand, avers in his affidavit that:

*'As the National Head is entrusted with the "responsibilities of the office concerned" (see s 17CA(1)) it is he or she who will make the selection [of the selected offences] *with due regard to his or her experience.*'*

[Emphasis supplied.]

[105] During argument the Minister however adopted a different approach. Mr Donen suggested that the Minister (his own client) is wrong, and that in fact the selection is done by legislation, i.e. PRECCA. This does not make sense given that s 17D(1)(aA) stipulates, in terms, that '*selected offences*' are not limited to the offences referred to in PRECCA.

[106] A further difficulty with the interpretation proffered by Mr Donen is that s 34 of PRECCA refers (in addition to offences in Ch 2) to the following offences, namely '*theft, fraud, extortion, forgery or uttering a forged document*'. Therefore, this would, on Mr Donen's interpretation, mean that the DPCI is now mandated to investigate crimes such as theft and forgery – hardly the work of a supposedly dedicated corruption fighting unit. But the confusion goes further, given that, in argument, Ms Williams, lead counsel for the Government, disagreed with Mr Donen, and submitted that the correct interpretation of the section is that it is indeed the Head who will make the selection.

[107] The position therefore is that in relation to this crucial aspect of the legislation – the very mandate of the DPCI to investigate corruption – not even the respondents are at one with each other.

Financial control

[108] S 17H of the 2008 SAPS Act placed all financial control over the DPCI with the National Commissioner as the accounting officer. The respondents concede that

a considerable degree of financial power was thus wrongly placed, but point out that the CC in *Glenister 2* made no adverse comment.

[109] The CC in *Glenister 2* did however highlight the lack of security of remuneration for the Head of the DPCI and its members; and found that this was one of the reasons why the unit did not enjoy sufficient structural and operational autonomy so as to shield it from undue political influence.

[110] The HSF does not take issue with the remuneration provisions now incorporated in the SAPS Amendment Act. Glenister complains that although the CC's concerns relating to the security of tenure and service conditions have '*by and large*' been remedied by the amended provisions, only the Head, and to a lesser degree the Deputy and Provincial Heads, have especially entrenched employment security. He contends that to secure sufficient independence the '*conditions of service*' of all of the members of the DPCI should be statutorily entrenched, but does not explain where, in his view, the deficiencies lie.

[111] However, as pointed out by the respondents:

111.1 The remuneration, allowances, other terms and conditions of service and service benefits of the Head are now determined by the Minister with the concurrence of the Minister of Finance; and of the Deputy National Head and Provincial Heads by the Minister after consultation with the National Head and with the concurrence of the Minister of Finance (s 17CA(8)). Under the 2008 SAPS Act (the old s 17G) the remuneration, allowances

and other conditions of service of members of the DPCI were regulated in terms of s 24 of the SAPS Act, which in turn provided that these would be determined in accordance with regulations made by the Minister;

111.2 In addition, the salary of the Head shall not be less than the salary of the highest paid Deputy National Commissioner; that of the Deputy Head shall not be less than the salary level of the highest paid Divisional Commissioner; and that of the Provincial Head shall not be less than the salary level of the highest paid Deputy Provincial Commissioner (s 17CA(8));

111.3 The Minister must submit the remuneration scale payable to the National Head, the Deputy and Provincial Heads to Parliament for approval, and such remuneration scale may not be reduced except with the concurrence of Parliament (s 17 CA(9));

111.4 In terms of s 17DB the Head determines the fixed establishment of the DPCI and the number and grading of posts, in consultation with the Minister and the Minister for Public Service, and appoints the staff of the DPCI;

111.5 In terms of s 17G the remuneration, allowances and other conditions of service of members of the DPCI must be regulated by the Minister in terms of s 24; but in terms of s 17CA(18) these regulations must now be submitted to Parliament for approval.

- [112] In our view, the upshot is that statutorily secured remuneration levels now exist; members benefit from special provisions securing their emoluments; and the secured remuneration levels are indicative of the special status of the new entity.
- [113] The HSF's complaint is that s 17H of the SAPS Amendment Act requires the Head to *'prepare and provide the National Commissioner with the necessary estimate of revenue and expenditure of the Directorate for incorporation on the estimate and expenditure of the [SAPS]'*. If the Commissioner and the Head are unable to agree on the estimate of revenue and expenditure for the DPCI, the Minister shall mediate between the two. It is unclear how the matter will be resolved if mediation is unsuccessful.
- [114] The HSF argues that it is essential for the DPCI's independence that its funds are sufficient for it to fulfil all of its constitutional functions, and that it should not be *'dependent'* for its funding on favour from the SAPS or the Executive. Adequate independence requires that Parliament appropriate the necessary funds specifically for the DPCI based on the DPCI's own estimate and submissions.
- [115] The Minister argues that s 17H adequately insulates the DPCI from financial control and interference by virtue of the fact that the Head is responsible for preparing and providing the Commissioner with the DPCI's estimate of revenue and expenditure; and further that funds appropriated by Parliament for purposes of the DPCI's expenditure must be regarded as specifically and exclusively for that purpose and may only be utilised for that purpose (s 17H(5)).

[116] Both the HSF and the respondents relied on the *New National Party* case in support of their respective contentions, although obviously for different reasons. In that case it was held at paras [98] – [99] that:

'In dealing with the independence of the [Independent Electoral] Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.'

[Emphasis supplied.]

[117] In our view the answer to this is the following. The Head provides the National Commissioner with its estimate for incorporation in the SAPS estimate. The Commissioner does not have the final say. The Head must agree with him. If they cannot agree, the Minister mediates. If the mediation is successful, then that is the end of the dispute. If the mediation is unsuccessful, the Minister does not have the final say. The dispute has to go before Parliament. S 17K(2B) explicitly provides that the Head shall make a presentation to Parliament on the budget of the DPCI.

[118] Accordingly the DPCI is now afforded an adequate opportunity to defend its budgetary requirements before Parliament in accordance with the requirement for adequate independence referred to in the *New National Party* case.

Summary

[119] In summary, therefore, s 16 as well as ss 17A, 17CA, 17D, 17DA and 17K(4) to (9) contained in Ch 6A of the SAPS Amendment Act do not pass constitutional muster for the following reasons:

119.1 The appointment process of the Head lacks adequate criteria for such appointment and vests an unacceptable degree of political control in the Minister and Cabinet, which is also in conflict with the standard of international best practice;

119.2 The power vested in the Minister to extend the tenure of the Head and Deputy Head is intrinsically inimical to the requirement of adequate independence;

119.3 The suspension and removal *'process'* not only vests an inappropriate degree of control in the Minister, but also allows for two separate and distinct processes, determined on the basis of arbitrary criteria, each able to find application without any reference to the other; and

119.4 There is an unacceptable degree of political oversight in the jurisdiction of the DPCI, and the relevant provisions are themselves so vague that not even those responsible for their implementation are able to agree on how they should be applied.

Nature of relief to be granted

[120] In its notice of motion the HSF sought an order declaring s 16 and Ch 6A of the SAPS Amendment Act inconsistent with the Constitution and invalid to the extent that they fail to secure an adequate degree of independence for the DPCI; together with an order suspending the declaration of constitutional invalidity for 12 months in order for Parliament to remedy the defects.

[121] During argument the HSF adopted a more narrow approach, and sought an order that the specific sections impugned be declared inconsistent with the Constitution and thus invalid. Having regard to the history of this litigation, it seems to us that the latter route is the more appropriate one to follow, given that Parliament is always at liberty to redraft any legislation, and does not require a court order to do so. Put differently, if Parliament finds, when correcting the impugned sections, that consequential amendments are required to other sections, it is of course entitled to amend those sections as it deems fit. Indeed, even though the CC in *Glenister 2* struck down Ch 6A of the 2008 SAPS Act, Parliament in turn made amendments also to s 16 (which did not fall within Ch 6A). It is also a pragmatic way to move the legislative process forward to finality.

Costs

[122] The HSF has been substantially successful and accordingly it is entitled to its costs. As regards Glenister, however, the position is somewhat different. For the reasons already advanced, it is appropriate that he be ordered to bear the costs of the Minister's striking-out application on the punitive scale of attorney and client. There can also be little doubt that Glenister has been lucky to piggy-back on the HSF's well-presented case and the lucid and helpful arguments of its counsel, Mr Unterhalter and Mr Du Plessis. Unfortunately, the arguments advanced on behalf of Glenister did little to assist his case and accordingly, even though the outcome is the one sought by him, it cannot be said that his contribution was in any way meaningful. In these circumstances, and save for the order that we intend to make in respect of the striking-out application, it is our view that Glenister should pay his own costs.

Conclusion

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

- 1. It is declared that s 16 as well as ss 17A, 17CA, 17D, 17DA and 17K(4) to (9) contained in Ch 6A of the South African Police Service Amendment Act No 10 of 2012 are 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.**

2. The declaration of constitutional invalidity in paragraph 1 above is suspended for 12 (twelve) months in order for Parliament to remedy the defects.
3. The orders in paragraphs 1 and 2 above are referred, in terms of s 8(1)(a) of the Constitutional Court Complementary Act No 13 of 1995, to the Constitutional Court for confirmation.
4. The respondents in case no 23874/2012 are ordered to pay the costs of the applicant in that matter, namely the Helen Suzman Foundation, jointly and severally, on the scale as between party and party, and including the costs of three counsel where employed.
5. The applicant in case no 23933/2012, namely Hugh Glenister, is ordered to pay the costs of the application to strike out of the second respondent, namely the Minister of Police (also referred to by the applicant therein as the Minister of Safety and Security), on the scale as between attorney and client.
6. Save as aforesaid, there shall be no order as to costs.

DESAI J

LE GRANGE J

CLOETE J