



CONSTITUTIONAL COURT OF SOUTH AFRICA

**Helen Suzman Foundation v President of the Republic of South Africa and Others;
Glenister v President of the Republic of South Africa and Others**

CCT 07/14 and CCT 09/14

**Date of hearing: 19 August 2014
Date of judgment: 27 November 2014**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting these cases and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court delivered judgment in two applications for leave to appeal against decisions of the Western Cape Division of the High Court, Cape Town and in an application for the confirmation of the High Court's order. The matter concerns the independence of the anti-corruption unit in the South African Police Service (SAPS).

The State's anti-corruption unit, the Directorate for Priority Crime Investigations (DPCI), informally known as the "Hawks", was originally established in 2008. This Court identified various constitutional defects with the legislation introducing the DPCI in *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6 (*Glenister II*). The South African Police Service Amendment Act 10 of 2012 (SAPS Amendment Act) was enacted to cure these constitutional defects. The High Court found that some of the provisions of the SAPS Amendment Act were still inconsistent with the constitutional obligation to create a structurally and operationally independent anti-corruption unit. The High Court also dismissed part of the Helen Suzman Foundation's (HSF) application to have several further provisions declared unconstitutional. In addition, the High Court struck out the additional evidence sought to be led by Mr Glenister and dismissed his application to declare the entire legislative scheme of the DPCI constitutionally invalid.

In the Constitutional Court, HSF contended that various provisions which were not declared unconstitutional undermined the sufficiency of the institutional and functional independence of the DPCI. Specific areas of concern included: the renewability of the

term of office; suspension and dismissal procedures; and appointment criteria of the National Head of the DPCI as well as the possibility of the Minister of Police's undue political interference through the implementation of policy guidelines governing the DPCI's jurisdiction.

Mr Glenister, on the other hand, sought to have the whole legislative scheme of the SAPS Amendment Act declared unconstitutional. Alternatively, he aligned himself with HSF's submissions. He also sought leave to appeal against the order of the High Court striking out large portions of his evidence.

The State parties opposed the confirmation of the order of invalidity and all other applications made by HSF and Mr Glenister. They contended that the SAPS Amendment Act insulates the DPCI from undue political interference and that the doctrine of separation of powers prevents the courts from being overly prescriptive about the legislative measures designed to fight corruption.

In the majority judgment, by Mogoeng CJ (Moseneke DCJ, Jafta J, Khampepe J, Leeuw AJ and Zondo J concurring), the Constitutional Court dismissed Mr Glenister's application for leave to appeal with costs; granted the HSF's application for leave to appeal but dismissed the appeal against the High Court's refusal to declare certain sections unconstitutional; and confirmed the substantial part of the High Court's order. The Constitutional Court held that certain defects highlighted in *Glenister II* have not been cured. These include: the unconstitutionality of the provisions relating to the extension of tenure of the National Head of the DPCI; the undue political interference in the operations of the DPCI through ministerial policy guidelines; and the untrammelled power of the Minister of Police to remove the Head of the DPCI. The remedy employed by the Court was to sever those parts of specific sections that were found to be inconsistent with the constitutional obligation to create an anti-corruption unit that enjoys adequate structural and operational independence.

A separate judgment by Froneman J (Cameron J concurring) concurs in the judgment of Mogoeng CJ, except for (i) the finding that the process of appointing the National Head is constitutionally compliant (in which respect he concurs with Cameron J); and (ii) its dismissal of Mr Glenister's application for leave to appeal with costs. He finds that *Glenister II* did not foreclose either the constitutional challenge to the SAPS Amendment Act that Mr Glenister sought to bring or the leading of additional evidence to sustain that challenge. In respect of Mr Glenister's constitutional challenge to the SAPS Amendment Act, he finds that leave to appeal should be granted, but that the order in the main judgment ensures that the productive co-existence of the constitutional duties of the Minister and the anti-corruption unit can be achieved without resorting to the more drastic relief Mr Glenister seeks. He would thus dismiss the appeal. Madlanga J concurs in the judgment by Froneman J except to the extent that Froneman J concurs in the judgment by Cameron J.

A separate judgment by Cameron J (Froneman J and Van der Westhuizen J concurring) holds that the process for the National Head's appointment is not constitutionally

compliant. He finds that concentrating the power of appointment in a single member of the Cabinet, without an express process of Parliamentary approval, will jeopardise the DPCI's independence. He disagrees with Mogoeng CJ that *Glenister II* prevents this Court from making this finding. Cameron J would therefore confirm the High Court's order declaring section 17CA invalid.

In a separate judgment, Nkabinde J concurs with the main judgment but would have found that section 17E(8)(a), which empowers the Minister of Police to prescribe measures for the integrity testing of DPCI members, is unconstitutional. In her view, the empowering provision fails to list the factors necessary to guide the exercise of the discretionary power and to inform those adversely affected by the exercise of that power under what circumstances they may seek relief.

Finally, Van der Westhuizen J agrees with Mogoeng CJ except for the following points: Firstly, he agrees with Cameron J that Parliament ought to be involved in the appointment of the National Head of the DPCI. Secondly, he aligns himself in part with Froneman J's judgment, by concluding that Mr Glenister's application for leave to appeal should have been granted and certain of his evidence should not have been struck out. Van der Westhuizen J is uncomfortable with the majority's labelling of this evidence as political posturing and finds that this is not a ground upon which to strike out evidence. He emphasises that no legal scheme can successfully rule out all corruption. This can only be achieved if those in decision-making positions have integrity and are committed to the values of our Constitution.