CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/10
[2011] ZACC 6

In the matter between:

HUGH GLENISTER	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR SAFETY AND SECURITY	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
together with	
HELEN SUZMAN FOUNDATION	Amicus Curiae

Heard on : 2 September 2010

Decided on : 17 March 2011

JUDGMENT

NGCOBO CJ:

Introduction

[1] This is an application for leave to appeal against a decision of the Western Cape High Court, Cape Town (High Court) and an application for direct access. These applications concern the constitutional validity of the National Prosecuting Authority Amendment Act[1] (NPAA Act) and the South African Police Service Amendment Act[2] (SAPSA Act). These two statutes, together, will be referred to as the impugned laws. The gravamen of the complaint relates to the disbanding of the Directorate of Special Operations (DSO), a specialised crime fighting unit that was located within the National Prosecuting Authority (NPA), and its replacement with the Directorate of Priority Crime Investigation (DPCI), which is located within the South African Police Service (SAPS). The impugned laws brought this about.

[2] The DSO was established in 2001 under section 7(1) of the National Prosecuting Authority Act[3] (NPA Act). Its purpose was to supplement the efforts of existing law enforcement agencies in addressing organised crime. The DSO was vested with powers to investigate and institute criminal proceedings relating to organised crimes or other specified offences. On 27 January 2009, the President signed into law the impugned laws. The combined effect of the impugned laws was to disband the DSO and establish the DPCI. It is this effect of the impugned laws which is at the centre of the present

[1] 56 of 2008.

[2] 57 of 2008.

[3] 32 of 1998.

constitutional challenge. The applicant, Mr Glenister, a businessman, challenged the impugned laws in the High Court on various grounds.

The background

[3] These applications are a sequel to *Glenister v President of the Republic of South Africa and Others* (*Glenister I*).[4] In *Glenister I*, Mr Glenister and others unsuccessfully challenged the decision of the Cabinet to initiate the impugned laws. After they were signed into law, the applicant challenged their validity on various grounds in the High Court. This challenge, too, suffered the same fate but on different grounds. The applicant now seeks leave to appeal against the decision of the High Court, alternatively, an order granting him direct access.

[4] The President of the Republic of South Africa, the Minister for Safety and Security, now the Minister for Police, and the Minister for Justice and Constitutional Development, the first, second and third respondents respectively (respondents), are resisting both applications. Although the notice to oppose also cited the National Director of Public Prosecutions (NDPP), he did not play an active role in the proceedings.[5] In this Court, the Helen Suzman Foundation (amicus), a non-governmental organisation, applied for and was admitted as amicus curiae. Its objectives are "to defend the values that underpin . . . liberal constitutional democracy and to promote respect for

[4] [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC).

[5] The Government of the Republic of South Africa was cited separately in the notice to oppose as fifth respondent, but was represented in the proceedings by the first, second and third respondents.

human rights." It joins the applicant in challenging the validity of the impugned laws, but did so on their alleged inconsistency with this country's international obligation to establish an independent anti-corruption unit.

[5] The full factual background giving rise to these proceedings is set out in *Glenister I*.[6] It is therefore not necessary to repeat it, save so far as it is relevant to these proceedings.

[6] The DSO was established in 2001 to supplement the efforts of existing law enforcement agencies in tackling organised crime. In due course, concerns were raised within the criminal justice system and the intelligence community relating to the role and functioning of the DSO. To respond to these concerns, on 1 April 2005 the President appointed Judge Khampepe to chair a commission of inquiry (Khampepe Commission) to investigate and report on aspects of the DSO, including the rationale for its establishment, its mandate, its location within the NPA as opposed to the SAPS, and the relationship between the SAPS and the DSO. The resulting Khampepe Commission Report (Khampepe Report), signed on 3 February 2006, recommended that the DSO should continue to be located within the NPA, albeit with certain adjustments. Other recommendations related to the President's power to transfer oversight and responsibility over the law enforcement component of the DSO to the Minister for Safety and Security and the need to tackle the unhealthy relationship between the DSO and the SAPS.

[6] *Glenister I* above n 4 at paras 1-2 and 10-6.

[7] Cabinet appeared to approve the Khampepe Report. A Cabinet statement of 29 June 2006 reveals that it endorsed the National Security Council's decision to accept, in principle, the recommendations of the Khampepe Commission, including the retention of the DSO within the NPA. A further statement of 7 December 2006 stated, among other things, that Cabinet had reviewed progress in implementing the recommendations of the Khampepe Commission.

[8] Meanwhile, the African National Congress (ANC), the ruling party, at its 52nd national conference, held in Polokwane in December 2007, adopted a resolution calling for a single police service and the dissolution of the DSO (Polokwane Resolution).

[9] On 12 February 2008, following the Polokwane Resolution, the Minister for Safety and Security, speaking in the National Assembly, proposed the dissolution of the DSO and the creation of a new unit under the SAPS to deal with organised crime. In the same month, the Director-General of the Department for Justice and Constitutional Development stated during a radio interview that the DSO would be amalgamated with the SAPS. The legislative programme of the Department for Safety and Security for 2008 indicated that laws dealing with the DSO would be placed before Parliament during that year.

[10] Following a Cabinet meeting in April 2008, the Presidency issued a statement to the effect that Cabinet had approved the NPAA Bill and the General Law Amendment Bill, later renamed the SAPSA Bill (the Bills). Among other things, these Bills proposed to dissolve the DSO and replace it with the DPCI. The stated purpose of the Bills was to strengthen the country's capacity to fight organised crime and to give effect to the decision to relocate the DSO from the NPA to the SAPS.

[11] As I have indicated above, the applicant and others challenged the decision to initiate the Bills. The North Gauteng High Court held that it had no jurisdiction to hear the application. By the time the matter reached this Court by way of an application for leave to appeal and an application for direct access, the Bills had not only been approved by Cabinet but were then before Parliament. This Court, in *Glenister I*, dismissed the challenge, holding that it had not been established that it would be appropriate for this Court to intervene in the affairs of Parliament nor that material and irreversible harm would result if the Court did not intervene at that stage.[7]

[12] On or about 23 October 2008, the impugned laws were passed by Parliament, and on 27 January 2009 they were assented to and signed by the President. On 17 April 2009, the applicant challenged the constitutional validity of the impugned laws in the High Court.

[7] Id at para 57.

Proceedings in the High Court

[13] In the High Court, the applicant based his constitutional challenge on several grounds. The one challenge was based on the absence of a rational basis for the enactment of the impugned laws. The others alleged failure to comply with various constitutional obligations relating to accountability; cultivating the principles of good human resource management practices and good labour relations; upholding international obligations; facilitation of public involvement; protecting values enshrined in the Bill of Rights; and allowing the NPA to properly exercise its functions.

[14] The High Court dismissed all the grounds of attack based on constitutional obligations. It held that, under section 167(4)(e) of the Constitution, only this Court may "decide that Parliament or the President has failed to fulfil a constitutional obligation."[8] It accordingly concluded that it lacked jurisdiction to consider the constitutional challenges based on the alleged failure to fulfil constitutional obligations.

[15] The High Court dismissed the challenge based on rationality. It held that the establishment of the DPCI within the framework of the SAPS "is manifestly designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority

[8] *Glenister v The President of the Republic of South Africa and Others*, Case No 7798/09, 26 February 2010, Western Cape, Cape Town, unreported at para 5 (High Court Judgment). Section 167(4) of the Constitution provides:

> "Only the Constitutional Court may—
>
> . . . .
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation".

crimes and other crimes";[9] this is a legitimate governmental purpose to pursue; and the means by which this purpose is sought to be achieved "appear to be rational."[10] It accordingly concluded that the decision to disband the DSO and establish the DPCI "is rational and can certainly not be described as arbitrary."[11]

Proceedings in this Court

[16] The application for leave to appeal is directed against these findings and conclusions of the High Court. Direct access is sought in the event we uphold the finding and conclusion of the High Court that it lacked jurisdiction in respect of the challenges based on constitutional obligations.

[17] The gravamen of the applicant's constitutional complaint is the disbandment of the DSO, which, as indicated above, was located within the NPA, and its replacement by the DPCI, which is located within the SAPS. The applicant contended that the scheme of the impugned laws which brought about these changes is unconstitutional. He submitted that it is irrational, unreasonable, unfair and undermines the structural independence of the NPA. He argued that, in enacting the impugned laws, the legislature violated a number of its constitutional obligations. The obligations contended for were to act reasonably and accountably; to cultivate good human resource management; to respect international

[9] High Court Judgment above n 8 at para 13.

[10] Id.

[11] Id.

treaty obligations; to maintain an independent anti-corruption unit; to allow public participation in the legislative process; to allow the NPA properly to exercise its functions; and to respect values enshrined in the Bill of Rights.

[18] The amicus presented a discrete argument based on an international obligation to establish an independent anti-corruption agency. It contended that the impugned laws violate this constitutional obligation. This obligation, the amicus argued, flows from the international treaties that South Africa has ratified which require states parties to establish an independent anti-corruption unit to fight the scourge of corruption. Having regard to the location of the DPCI within the SAPS and the statutory provisions governing it, the amicus maintained that the DPCI is not independent.

[19] For their part, the respondents maintained that the scheme of the impugned laws finds support in the provisions of sections 179 and 205 of the Constitution. Section 179(2) provides for the NPA with "the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings." Section 205 provides for the national police service whose objects "are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law." There is nothing constitutionally wrong therefore in locating an anti-corruption unit within the SAPS, the respondents argued. They further argued that the South African Police Service

Act[12] (SAPS Act), as amended by the SAPSA Act, and understood in the context of the NPA Act, contains sufficient safeguards to ensure the independence of the DPCI.

[20] The respondents contended that the scheme of the impugned laws is rational. They submitted that the scheme was put in place to enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes, including corruption. They argued that this is a legitimate governmental purpose to pursue and that the means by which this purpose is sought to be achieved are logical, rational and consistent with the Constitution. In addition, the respondents submitted that the High Court was correct in dismissing the constitutional challenges based on failure to fulfil constitutional obligations for lack of jurisdiction.

[21] In this Court, however, save for the obligation to facilitate public involvement in the legislative process, I did not understand the applicant to suggest that each of the other obligations constitutes a self-standing cause of action. Indeed, in response to a question by the Court, counsel for the applicant disavowed any claim that the obligation to cultivate good human resource management, based on section 195 of the Constitution, for example, provides an independent cause of action. In addition, he conceded, very properly, that the challenge based on failure to facilitate public involvement is a matter that falls within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.

[12] 68 of 1995.

[22] Save for the constitutional challenge based on failure to facilitate public involvement, the High Court erred in concluding that it lacked jurisdiction in relation to other challenges based on constitutional obligations. The obligations contended for in these challenges were not of the kind contemplated in section 167(4)(e) of the Constitution.[13] However, the High Court was correct in dismissing the constitutional challenge based on failure to facilitate public involvement for lack of jurisdiction.[14] It is this challenge which now forms the basis of the direct access application by the applicant. It will be convenient to consider this challenge first, for, if the applicant succeeds on this challenge, it may not be necessary to consider the application for leave to appeal.[15]

The application for direct access

[23] The application for direct access relates to the challenge based on the alleged failure by Parliament to facilitate public involvement in the legislative process leading to the enactment of the impugned laws. It is by now settled that sections 59(1)[16] and 72(1)[17]

[13] See *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at paras 13-30; 2006 (12) BCLR 1399 (CC) at 1411C-1416A (*Doctors for Life*); see also *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC) at paras 11-25 and *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) at para 21 (*Poverty Alleviation*).

[14] *Doctors for Life* above n 13 SA at paras 27-8; BCLR at 1415D-F.

[15] Compare *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) at para 114.

[16] Section 59(1) of the Constitution provides:

> "The National Assembly must—
>
> (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

of the Constitution impose a constitutional obligation on Parliament to facilitate public involvement in its legislative and other processes.[18] It is equally settled that this obligation is of the kind envisaged in section 167(4)(e).[19] Only this Court has the jurisdiction to decide whether Parliament has failed to facilitate public involvement in its legislative process.

[24] Before leaving this topic, it is necessary to comment on the procedure followed by the applicant in raising this challenge. Direct access must be sought with the leave of this Court in those matters where, in addition to this Court, other courts also have jurisdiction. To bypass the other courts and bring those matters directly to this Court, litigants require

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(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person."

[17] Section 72(1) of the Constitution provides:

"The National Council of Provinces must—

(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person."

[18] *Doctors for Life* above n 13 SA at para 14; BCLR at 1411E-G; see also *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 12; SA 2007 (1) BCLR 47 (CC) at para 34 (*Matatiele II*); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 26 (*Merafong*) and *Poverty Alleviation* above n 13 at para 9.

[19] *Doctors for Life* above n 13 SA at para 28; BCLR at 1415F and *Poverty Alleviation* above n 13 at para 21.

an indulgence from this Court in the form of leave of this Court.[20] In matters where this Court has exclusive jurisdiction, that is, in those matters set out in section 167(4) of the Constitution,[21] no indulgence is required as the litigants are obliged to come to this Court.

[25] An application for leave to obtain direct access is therefore not the appropriate vehicle for bringing to this Court matters in which it has original jurisdiction. Unless another rule specifically applies, those applications must be brought to this Court on notice of motion pursuant to CC rule 11.[22] It was therefore not necessary for the applicant to bring an application for direct access in order to raise the challenge based on failure to facilitate public involvement. To the extent that our decision in *Poverty*

[20] Section 167(6) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court".

Rule 18 of the Constitutional Court Rules, 2003 sets forth the procedure for direct access.

[21] Section 167(4) of the Constitution provides:

> "Only the Constitutional Court may—
>
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
>
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
>
> (c) decide applications envisaged in section 80 or 122;
>
> (d) decide on the constitutionality of any amendment to the Constitution;
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
>
> (f) certify a provincial constitution in terms of section 144."

[22] CC rules 14 to 17 apply to certain matters within the exclusive jurisdiction of this Court. These rules do not, however, apply to an application brought under section 167(4)(e) of the Constitution. Accordingly, CC rule 11, which provides for the default procedure, applies here.

Alleviation may have suggested otherwise,[23] it does not represent the correct procedure. The applicant's application for direct access must therefore be treated as an ordinary application to this Court in terms of rule 11.

[26] That said, the challenge based on failure to facilitate public involvement must fail for three reasons. First, it was not brought timeously. In *Doctors for Life*[24] and *Matatiele II*[25] we emphasised the need to raise a challenge of this nature immediately and without delay. In *Doctors for Life*, we held that "applicants who have not pursued their cause timeously in this Court may well be denied relief."[26] The President signed the impugned laws into law on 27 January 2009. The applicant launched his application for leave to appeal only on 19 May 2010, slightly more than a year and three months later. This delay has not been explained. The explanation tendered by counsel from the bar was that the applicant faced a dilemma whether to conduct litigation in this Court in relation to this challenge and other litigation in the High Court in relation to those matters that do not fall within the exclusive jurisdiction of this Court.

[27] This explanation is not acceptable. The applicant may well have come directly to this Court with this challenge and sought to urge us that, in relation to the other challenges which do not lie within the exclusive jurisdiction of this Court, it was in the

[23] *Poverty Alleviation* above n 13 at para 21.

[24] *Doctors for Life* above n 13 SA at para 218; BCLR at 1467E.

[25] *Matatiele II* above n 18 at para 100.

[26] *Doctors for Life* above n 13 SA at para 218; BCLR at1467E.

interests of justice that we hear those challenges together with the challenge based on failure to facilitate public involvement.[27]

[28] This delay and the lack of a satisfactory explanation for it would have been sufficient to deny the applicant relief.[28]

[29] Second, this challenge is directed at Parliament, which, it is alleged, failed to comply with its constitutional obligation to facilitate public involvement in its legislative process. Both the National Assembly and the National Council of Provinces have a direct and substantial interest in the outcome of this challenge. They should therefore have been joined in the proceedings. Failure to join the Speaker of the National Assembly and the Chairperson of the National Council of Provinces would also have been fatal to the application.

[30] Ordinarily, these two reasons should be dispositive of this challenge. However, on the merits, the application raises an important question concerning the obligation of Parliament to facilitate public involvement in its legislative process. In addition, we have the affidavit of Mr Yunus Carrim, the Deputy Minister for Cooperative Governance and Traditional Affairs. Mr Carrim dealt with the facilitation of public hearings in the legislative process that led to the enactment of the impugned laws. He was, at the time, a

[27] Compare *Matatiele II* above n 18 at para 105.

[28] *Doctors for Life* above n 13 SA at para 218; BCLR at 1467E.

Member of Parliament, the Chairperson of the Justice and Constitutional Development Portfolio Committee and the Co-chair of the joint committee that dealt with the impugned laws in Parliament. The joint committee was comprised of the Justice and Constitutional Development Portfolio Committee and the Safety and Security Portfolio Committee (Joint Committee). We therefore have sufficient information on record to deal with the merits of this challenge.

[31] This leads to the third reason why this challenge should fail. The applicant has not made out a case for failure to facilitate public involvement. In *Doctors for Life*, we considered the nature and scope of the obligation to facilitate public involvement in the legislative process and said:

> "Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.
>
> In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what

> Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."[29]

[32] And in *Matatiele II*, we explained that this obligation does not simply entail holding hearings. It must provide the opportunity to influence the decision of the law-maker:

> "While it is true that the people of the province have no right to veto a constitutional amendment that alters provincial boundaries, they are entitled to participate in its consideration in a manner which may influence the decisions of the Legislature. The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."[30] (Footnote omitted.)

[33] The question is whether, in passing the impugned laws, Parliament took reasonable steps to facilitate public involvement.

[29] Id SA at paras 145-6; BCLR at 1451A-F.

[30] *Matatiele II* above n 18 at para 97.

[34] The applicant acknowledges that public hearings were held in Parliament during August and September 2008 and that public hearings were also held in the provinces during September and October 2008. He contends, however, that the process was flawed. He complains that there was no justifiable basis for treating the Bills as urgent and that it was unreasonable to have allocated five days for public hearings on the Bills.

[35] Mr Carrim's affidavit resists this challenge. He states that the Bills presented to Parliament were substantially re-written as a result of an exhaustive consultation process. He further alleges that more than 190 hours were spent in full committee and sub-committee meetings discussing the Bills, more than 100 hours on informal exchanges with a variety of stakeholders and over 7 200 people participated in public hearings in the provinces.

[36] In addition, Mr Carrim states that a comprehensive report was prepared on every submission received, and that the Joint Committee which considered the impugned laws went through this report. The Joint Committee met with the DSO and the SAPS organised crime fighting units to advise them on the Bills and to get their input. He states that numerous submissions were received, including that of the applicant, and that the Joint Committee took the submissions into account in finalising the impugned laws. He states that one of the issues raised in the submissions was the operational independence of the DPCI.

[37] There is nothing to gainsay this evidence. Significantly, Mr Carrim states that, at the end of his submission to the Joint Committee, the applicant remarked that he was surprised to have been given "a fair hearing and complimented the Committee for the fair manner in which [he was received]."

[38] In the light of this evidence, I am unable to conclude that Parliament did not fulfil its obligation to facilitate public involvement. On the contrary, the conclusion that Parliament fulfilled its constitutional obligation to facilitate public involvement in relation to the impugned laws is unavoidable.

[39] In the event, the application falls to be dismissed. As this application was heard together with the application for leave to appeal, costs relating to it will be considered later in this judgment.

[40] Before considering the application for leave to appeal, there are preliminary issues that must first be disposed of. These are applications for condonation by: (a) the applicant for the late filing of the application for leave to appeal; (b) the amicus for the late filing of written submissions; and (c) the respondents for the late filing of their response to the written submissions of the amicus.[31]

[31] In addition, there was an application to strike out. The papers relating to this application were never brought to our attention. It is therefore not necessary to make any order on it.

Condonation applications

[41] The test for determining whether condonation should be granted is the interests of justice.[32] Factors that are relevant to this determination include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay or defect, the nature and cause of any other defect in respect of which condonation is sought, the importance of the issue to be decided in the intended appeal and the prospects of success.[33]

[42] These applications must be determined in the light of these principles.

Late filing of the application for leave to appeal by the applicant

[43] The order sought to be appealed against was given on 18 June 2009. No reasons were given at the time, but were furnished only on 26 February 2010. This delay was unfortunate. The practice of giving an order immediately and furnishing reasons later is one to be resorted to when a court has made up its mind on the conclusions but requires time to formulate reasons. While there are pressures of other judicial work in the High Court, reasons for an order must receive priority and must be given shortly after the order. Any delay in furnishing the reasons may prejudice a litigant who wishes to appeal

[32] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[33] See *Van Wyk* and *Brummer* above n 32.

against the order. That said, the application for leave to appeal was launched on 19 May 2010. This was more than 10 months after the order was made and almost three months after the reasons for the order were furnished. In short, the application was filed more than 15 days after the filing deadline prescribed by CC rule 19.

[44] CC rule 19(2) provides as follows:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."[34]

[45] This rule is clear and admits of no ambiguity. It requires a prospective appellant to lodge an application for leave to appeal "within 15 days of the order against which the appeal is sought." The rule does not contemplate a situation where reasons for the order are given on a later date than that of the order. It provides only for a situation where the order forms part of the judgment. Where reasons for the order are given later, a prospective appellant is therefore confronted with a dilemma: either (a) to lodge an application for leave to appeal against the order without furnishing grounds upon which the intended appeal will be based and provide grounds later; or (b) to wait until the

[34] CC rule 19(2).

reasons are furnished and then lodge the application for leave to appeal and ask for condonation citing the delay in furnishing the reasons as the explanation for the delay.

[46] Rule 49(1)(b) of the Uniform Rules of Court that apply to the High Courts was inserted to address this dilemma.[35] It postpones the commencement of the period within which leave must be sought until reasons have been delivered. There is a need for the rules of this Court to be amended so as to address the dilemma confronting a prospective appellant where the reasons for the order are furnished later than the date of the order. But what is to be done in the meantime?

[47] The question is whether this is an appropriate case in which we should invoke the inherent power of this Court to protect and regulate its process under section 173.[36] This is an extraordinary power which must be exercised sparingly and in exceptional situations.[37] In my view, the present situation, in which there is a vacuum because

[35] URC 49(1)(b) provides:

> "When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days."

[36] Section 173 of the Constitution provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[37] *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 22; *Parbhoo and Others v Getz and Others* [1997] ZACC 9; 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 4 and *S v Thunzi and Others* [2010] ZACC 12; Case No CCT 81/09, 5 August 2010, as yet unreported at paras 19-22.

neither legislation nor the rules address it, is an extraordinary one in which it would be appropriate to exercise the inherent power under section 173.[38]

[48] Pending the promulgation of the relevant rule, this Court should adopt a procedure which requires that, where reasons for the order are given later than the date of the order, the application for leave to appeal is to be lodged within 15 days of the date when the reasons for the order were delivered. Applying this procedure to the present case, the application for leave to appeal should have been lodged on 19 March 2010. The application was therefore late by 62 days. The application for condonation must be assessed in light of this delay.

[49] The explanation furnished for the delay is utterly unsatisfactory.[39] Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in

[38] *Pennington* above n 37 at para 22; *Parbhoo* above n 37 at para 4.

[39] The applicant says that: he had to undertake business trips and could not communicate with his lawyers effectively whilst he was away; there was a lengthy record to read; and his attorneys and counsel were geographically separated. A diligent litigant, desirous of appealing against the order, and respecting the rules of this Court, would not have conducted himself in the manner in which the applicant did. It is difficult to believe that, having regard to the technological advances in communication, effective communication between the applicant and his attorneys was not possible.

A perusal of the 17-page affidavit in support of the application for leave to appeal belies any explanation given for the delay. It deals with the relief sought, the history of the litigation submissions, interests of justice and condonation. Save for a paragraph dealing with the dismissal of challenges based on alleged constitutional obligations, the submission is a repetition of the submission made in the High Court, and, as if this was not enough, both sets of argument are attached. There are no page references to any part of the record in the affidavit. It is therefore difficult to understand why there was this two-month delay.

particular the nature and the scope of its constitutional obligation, if any, to establish an independent anti-corruption unit. These are constitutional issues of considerable importance. Apart from this, the decision to disband the DSO and its replacement by the DPCI has evoked public interest in the light of the fight against corruption. And the issues urged upon us by the applicant and the amicus are arguable.

[50] It is, therefore in the interests of justice to grant condonation.

The amicus's late filing of written submissions

[51] The amicus seeks condonation for the late filing of its written argument, the cause of which was its failure to comply with the page limit for written argument required by the rules and directions of this Court. While the amicus is the author of its own misfortune, the explanation is understandable and condonation should be granted.

The respondents' late filing of the response to the written submissions of the amicus

[52] The respondents seek condonation for the late filing of their response to the written submissions of the amicus. They received the condensed version of the written submissions of the amicus on 26 August 2010. They contend that they therefore could not respond timeously. I think they may well have worked on the basis of the long version and could have filed their response timeously. I am nevertheless satisfied that condonation should be granted in their case too.

The application for leave to appeal

[53] The question whether the application for leave to appeal should be granted depends upon whether: (a) it raises a constitutional issue; and (b) it is in the interests of justice to grant leave. Both these questions must be answered in the affirmative in the light of the conclusion reached in relation to condonation, namely, that the application raises constitutional issues of considerable importance; it is in the public interest to consider the issues in the intended appeal; and the intended appeal is arguable. These considerations warrant the granting of leave to appeal. Leave to appeal should therefore be granted.

The appeal

[54] The following main issues arise on appeal:

(a) Are the impugned laws irrational?

(b) Do the impugned laws run afoul of constitutional provisions dealing with the powers and the functioning of the NPA?

(c) Does the Constitution require Parliament to establish an independent anti-corruption unit, and, if so, did Parliament comply?

(d) Do the impugned laws otherwise infringe any of the rights in the Bill of Rights?

(e) In the event of the applicant succeeding on any of these grounds, what is the appropriate relief?

Rationality

[55] Under our Constitution, national legislative authority vests in Parliament.[40] However, in the exercise of its legislative authority, "Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."[41] But like all exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that "there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose."[42] Nor can Parliament act capriciously or arbitrarily.[43] The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or appropriate.[44]

[56] The declared purpose of the SAPSA Act is to enhance the investigative capacity of the South African Police Service in relation to national priority and other crimes by establishing a Directorate for Priority Crime Investigation to combat those crimes.[45]

[40] Section 44(1) of the Constitution.

[41] Section 44(4) of the Constitution.

[42] *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 19 (*New National Party*).

[43] Id.

[44] *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 86 and 89-90 and *New National Party* above n 42 at para 24.

[45] Preamble of SAPSA Act.

[57] It cannot be gainsaid that this is a legitimate governmental purpose to pursue. Criminals are becoming more sophisticated and nowadays tend to specialise in particular crimes. Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy. The amount of drugs confiscated inside our borders testifies to this. The sophisticated international network that is responsible for transporting these drugs requires urgent attention.

[58] For our country to win the war against these serious crimes, we need to enhance the capacity of the police to prevent, combat and investigate these crimes and other national priority crimes. Strengthening the ability and the capacity of the SAPS to address the scourge of corruption and other national priority crimes is unquestionably a legitimate governmental purpose. Establishing a separate division in the SAPS, the DPCI, for that purpose is rationally related to the achievement of that purpose. The finding of the High Court in this regard must therefore be upheld.

[59] I did not understand the applicant to suggest otherwise. He contends that the scheme of the impugned laws is irrational. That scheme is the dissolution of the DSO, which was located in the NPA, and replacing it with the DPCI, which is located within the SAPS. What makes this scheme irrational, the applicant maintains, is that: it gives

effect to the Polokwane Resolution; Parliament blindly followed this resolution; and the DSO was dissolved in order to shield high-ranking ANC politicians and their associates from prosecution. The main plank of his argument was that it was irrational for the DSO to be dissolved because it was the most successful crime fighting unit. As he put it, the "dilution of the excellence of the DSO into the unknown and untested DPCI, which will be required to function in a dysfunctional SAPS under political control instead of independently, makes no rational sense at all." It is worth noting here that there is a dispute about the efficacy of the DSO. The Minister for Police refutes the applicant's assertion that the DSO was effective by pointing to comments made by the former head of the DSO to Parliament. These were to the effect that the perception that the DSO was better than the police was misleading, and that the DSO success rate was inflated in part because it was able to select its cases.

[60] The respondents contended that the scheme of the impugned laws is rational. They submitted that the establishment of the DPCI was designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes and other crimes. They argued that this is a legitimate governmental purpose and that the means by which it is sought to be achieved are logical, rational and consistent with the Constitution. They submitted that the creation and the subsequent dissolution of the DSO were policy decisions that were within the power of the executive and Parliament to make.

[61] The respondents submitted that the inference sought to be drawn by the applicant, namely, that the true motive of the impugned laws is to shield high-ranking members of the ANC from prosecution, is untenable. They draw attention to the fact that: (a) the impugned laws make provision for the continuation of investigations and prosecutions that were underway when they were enacted; (b) the majority of those investigations and prosecutions have been finalised; and (c) concerns relating to the operations of the DSO pre-date the Polokwane Resolution as evidenced by the Khampepe Report.

[62] Assume, for the moment, that the impugned laws were in fact motivated by the Polokwane Resolution. This does not render the scheme unconstitutional. As this Court recognised in *Glenister I*, "there is nothing wrong, in our multiparty democracy, with Cabinet seeking to give effect to the policy of the ruling party."[46] Indeed, it may well be the central role of a political party to formulate policy recommendations with the intention that they be implemented, and there is nothing untoward in the Cabinet taking up such recommendations. Under our parliamentary system, these recommendations become law only if the executive embodies them into legislation which it initiates, Parliament passes the legislation, and the President signs the legislation. The origin of the legislation does not negate the fact that at each of these steps, the relevant political actor applied his or her mind to the legislation. And on the record there is no basis to conclude that this was not done.

[46] *Glenister I* above n 4 at para 54.

[63] I now deal with the applicant's main complaint, namely the disbanding of the DSO and its replacement with the DPCI.

[64] The decision to disband the DSO and establish the DPCI and locate it within the SAPS must be understood in the context of the Constitution. Section 179 of the Constitution makes provision for a single national prosecuting authority with "the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."[47] On the other hand, section 205 makes provision for the national police service, whose objects "are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."[48]

[65] It is therefore within the power of Parliament to establish an anti-corruption unit and to locate it within the SAPS. The Constitution does not prescribe to Parliament where to locate the anti-corruption unit. It leaves it up to the executive, which initiates legislation under section 85(2)(d), and ultimately to Parliament to make a policy choice. I agree with the submission of the respondents that the conceptualisation, design and formulation of legislation required by the provisions of sections 179 and 205 of the Constitution, as well as the organisational, financial and political ramifications thereof, involve a range of policy choices and decisions over a broad front. In as much as the

[47] Section 179(2) of the Constitution.

[48] Section 205(3) of the Constitution.

decision of the legislature to establish the DSO was a policy decision, so too is the decision to disband the DSO and establish the DPCI and locate it within the SAPS. As this Court pointed out in *Bel Porto*, "[t]he fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision."[49]

[66] That the decision was one of policy finds support in the record. The memorandum on the objectives for amending the impugned laws sets out a number of reasons for the displacement of the DSO and establishment of the DPCI.[50] In this regard the Khampepe Commission was appointed in order to look into issues such as the lack of coordination between the DSO and the SAPS, the lack of oversight over the DSO, and operations conducted by the DSO outside of its mandate. The memorandum also highlighted the need to address organised crime in a more comprehensive fashion.[51] It is apparent from the record before us that the establishment of the DPCI and the displacement of the DSO stemmed from, among other concerns, the controversy that surrounded the DSO since its inception, in particular, concerns about the level of involvement by the prosecutors into investigations, and the loss of objectivity of prosecutors leading investigations. As a result of this, a policy decision was therefore taken by the government to transfer this investigative component of the NPA to the SAPS.

[49] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 45 (*Bel Porto*).

[50] Memorandum on the Objects of the General Law Amendment Bill, GN 523 GG 31016, 9 May 2008 at paras 1.2-1.4.

[51] Id at para 1.4.

[67] Under our constitutional scheme it is the responsibility of the executive to develop and implement policy.[52] It is also the responsibility of the executive to initiate legislation in order to implement policy.[53] And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts.[54] As has been said, "[i]t is not for the court to disturb political judgments, much less to substitute the opinions of experts."[55]

[68] Here we are not concerned with the question as to which of the two units between the DSO and the DPCI is more efficient than the other. We are concerned with whether the establishment of the DPCI is rationally related to a legitimate governmental purpose. As long as there is a rational relationship between the decision to disband the DSO and establish the DPCI and the governmental purpose to enhance the investigative capacity of the SAPS in relation to national priority crimes, it is irrelevant that the governmental purpose could have been achieved by retaining the DSO.[56] The decision by Parliament to disband the DSO and establish the DPCI within the SAPS is entirely consistent with objects of the police service set out in section 205(3) of the Constitution. The decision to

[52] Section 85(2)(b) of the Constitution.

[53] Section 85(2)(d) of the Constitution.

[54] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 42, quoting with approval Professor Hogg.

[55] Id.

[56] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 36.

locate the DPCI within the SAPS is manifestly designed to prevent, combat and investigate national priority crimes and other crimes. This is a legitimate governmental purpose and the means by which the impugned laws seek to achieve this purpose are rationally related to the governmental purpose.

[69] In all these circumstances the evidence cannot be said to establish that the purpose of Parliament as reflected in the impugned laws was to protect leaders of the ANC. The respondents' contention that the legislation authorises the continuance of existing investigations and that most of the investigations under the old regime have already been completed has not been refuted.

[70] The challenge based on rationality must therefore be dismissed.

Do the impugned laws violate the provisions of section 179?

[71] The applicant also contended that the impugned laws violate the provisions of section 179 of the Constitution. Three arguments were advanced in this regard. Two of them, made in the written argument, were: first, that the disbanding of the DSO undermines the independence of the NPA which is required by section 179(4); and second, that the DSO could not be disbanded without the concurrence of the NDPP as required by section 179(5). At the hearing, the applicant advanced a third argument based on the provisions of section 179(2) read with section 179(4). As I understand the

argument, it was said that these two provisions, read together, required the DSO to be located within the NPA. Section 179 provides, in relevant part:

> "(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
>
> . . . .
>
> (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
>
> (5) The National Director of Public Prosecutions—
>
> (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process".

[72] I deal with these arguments in turn.

[73] The first argument is untenable. It is that without the power to investigate crimes that it prosecutes, the NPA cannot function without fear, favour or prejudice. But this cannot be so. Section 205(3) of the Constitution assigns the power to "prevent, combat and investigate crime" to the SAPS. In the course of oral argument, counsel for the applicant was constrained to concede that, but for the prior-existing DSO within the NPA, he could not contend that the impugned laws were unconstitutional. In effect, then, the applicant's claim is one of retrogression. But the issue is not relative; the issue is whether the NPA is able to operate without fear, favour or prejudice without the DSO. If

it is able to do so, it does not matter that a prior scheme existed.[57] There is no suggestion that it cannot. Sections 20 and 32 of the NPA Act, both of which remain unaltered by the impugned laws, ensure the independence of the NPA.[58]

[74] The second argument, based on section 179(5), proceeded along these lines. Section 179(5) requires the NDPP to determine prosecution policy with the concurrence of the Minister for Justice and Constitutional Development. The dissolution of the DSO is the exercise of prosecution policy. The applicant argued that the DSO could not therefore be dissolved without the concurrence of the NDPP. The dissolution of the DSO without the concurrence of the NDPP was therefore fatal to the impugned laws.

[75] The argument fails to distinguish between the power of Parliament to make laws and the authority of the NDPP to determine prosecution policy. The decision whether to

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[57] It bears mention that there was some concern that the DSO under the NPA was perhaps too independent, operating as "a law unto itself." Khampepe Commission of Inquiry, *Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations ("The DSO"), Final Report* (February 2006) at para 21.5.

[58] Section 20 of the NPA Act provides:

> "(1) The power, as contemplated in section 179(2) and all other relevant sections of the *Constitution*, to—
>
> (a) institute and conduct criminal proceedings on behalf of the State;
>
> (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
>
> (c) discontinue criminal proceedings,
>
> vests in the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*."

Section 32(1)(a) of the NPA Act provides:

> "A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law."

establish the DSO and where to locate it is manifestly not a decision about a policy to be observed in the prosecution process and is thus not a prosecution policy decision. It is a decision about how best to fight national priority crimes and other crimes. The constitutional authority to make this decision flows from the legislative powers vested in Parliament, in general, and, in particular, by sections 179(1)[59] and 179(7).[60] By contrast, section 179(5) is concerned with the determination of prosecution policy "which must be observed in the prosecution process." The power conferred by this provision is narrowly confined to the conduct of the prosecution process. It is not concerned with the powers of the NPA to investigate national priority crimes. The decision whether to disband the DSO does not therefore require the concurrence of the NDPP.

[76] The third argument was advanced during oral argument. It was based on reading section 179(2) and section 179(4) together. Section 179(4), which requires national legislation to "ensure that the prosecuting authority exercises its functions without fear, favour or prejudice", guarantees the independence of the NPA. This independence is supported by granting the NPA the power to investigate the crimes in respect of which it

[59] Section 179(1) of the Constitution provides:

> "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
>
> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
>
> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

[60] Section 179(7) of the Constitution provides:

> "All other matters concerning the prosecuting authority must be determined by national legislation."

initiates criminal proceedings, because crime investigation is a necessary function "incidental to instituting criminal proceedings."[61] Locating the DSO in the NPA was intended to guarantee that it would conduct its own investigations. Without the DSO, the NPA loses its independence, and therefore the impugned laws, which brought about this result, are unconstitutional.

[77] The fallacy in this argument is its premise. It rests on the assumption that the Constitution requires the NPA to be given the power to investigate crimes as a "necessary function" that is "incidental to instituting criminal proceedings." But that is not so. The Constitution expressly gives this power to the national police service, whose objects include "to prevent, combat and investigate crime".[62] Whatever the scope of the phrase "the power . . . to carry out any necessary functions incidental to instituting criminal proceedings" in section 179(2), a phrase we need not, in this case, define, it cannot mean that the powers vested in the police service by the Constitution must be assigned to the NPA. Nor does it mean that a specialised crime fighting unit must be established within the NPA.

[78] Given the provisions of sections 179 and 205 of the Constitution, in particular, the assignment of the powers to investigate crime to the police and the power to prosecute crime to the NPA, it is indeed doubtful whether the power to investigate crime can be

[61] Section 179(2) of the Constitution.

[62] Section 205(3) of the Constitution.

said to be incidental to the power to prosecute crime. Happily, in this case we do not have to consider the question of whether Parliament had the power to confer full blown investigating functions and powers on the NPA in the light of the provisions of sections 179 and 205.

[79] What must be stressed here is that the Constitution does not require the creation of a specialised crime unit within the NPA. This is implicit, if not explicit, from the provisions of section 205(3) which assigns to police the power to investigate crime. It leaves the decision to the exercise of political judgment by Parliament, the exercise of which is subject to the Constitution. The Constitution also does not require that once the specialised crime unit is located within the NPA, its location may never be changed without undermining the independence of the NPA. Its location may be changed but this is subject to the Constitution. Nor does the location of the specialised unit within the SAPS in itself violate the Constitution in the light of the provisions of section 205(3).

[80] International law does not support the proposition advanced by the applicant either. For example, the Legislative Guide for the Implementation of the United Nations Convention against Corruption provides:

> "States parties may either establish an entirely new independent body or designate an existing body or department within an existing organization. In some cases, an anti-corruption body may be necessary to start combating corruption with fresh and concentrated energy. In other cases, it is often useful to enlarge the competence of an existing body to specifically include anti-corruption. Corruption is often combined with

> economic offences or organized criminal activities. It is thus a sub-specialization of police, prosecution, judicial and other (for example, administrative) bodies. Implementers are reminded that the creation of new bodies with hyper-specialization may be counterproductive, if it leads to overlapping of competences, a need for additional coordination, etc., that would be hard to resolve."[63]

[81] It is difficult to fathom how the location of the specialised crime fighting unit within the SAPS will render the NPA unable to operate without fear, favour or prejudice merely because it no longer houses the DSO. There is simply no evidence to support the argument that without the DSO the NPA will lose its structural independence. It follows that this argument cannot be upheld.

[82] The arguments based on section 179 cannot stand and must be dismissed. The remaining question is whether to replace the DSO with the DPCI is unconstitutional because it violates the constitutional obligations to: (a) establish an independent crime fighting unit; and (b) respect, protect, promote and fulfil the rights in the Bill of Rights. It is to these issues that I now turn.

The obligation to establish an independent body

[83] Corruption is a scourge that must be rooted out of our society. It has the potential to undermine the ability of the state to deliver on many of its obligations in the Bill of Rights, notably those relating to social and economic rights.

[63] United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006) at para 463 (Legislative Guide).

[84] As will be discussed later, this judgment recognises an obligation arising out of the Constitution for the government to establish effective mechanisms for battling corruption. The establishment of an anti-corruption unit is one way of meeting the obligation to protect the rights in the Bill of Rights. The Constitution is not prescriptive, however, as to the specific mechanisms through which corruption must be rooted out, and does not explicitly require the establishment of an independent anti-corruption unit. The amicus and the applicant conceded this in the course of the hearing. Nevertheless, they contended that the obligation to establish an independent anti-corruption unit is implicit in the Constitution when viewed in the light of South Africa's international treaty obligations. Lest I be misunderstood, while I am prepared to hold that there is a constitutional obligation for the state to take effective measures to fight corruption, I am not prepared to narrowly construe the options available to the state in discharging that obligation.

[85] The amicus advanced two interrelated submissions in support of the constitutional obligation contended for. First, this obligation arises from the ratification of the United Nations Convention against Corruption[64] (Convention) and the enactment of the

[64] 2004 43 *ILM* 37. The Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004. We have not been able to establish whether the Convention was in fact approved by a resolution of Parliament as required by section 231(2) of the Constitution. Having regard to legislative practice, it appears that once an international agreement has been approved by resolutions of both the National Assembly and the National Council of Provinces, the executive publishes a notice in the Government Gazette for the general information of the public. See, for example, GN 1534 GG 32722, 20 November 2009 (confirming approval, by resolution in both the National Assembly and the National

Prevention and Combating of Corrupt Activities Act[65] (PRECCA); and second, this obligation arises from the positive obligation of the state to protect the rights in the Bill of Rights which is imposed by section 7(2) of the Constitution as informed by South Africa's obligations under the Convention. The applicant advanced an argument similar to the first submission of the amicus. He contended that the obligation derives from the ratification of the Convention which gave it a "constitutionally binding effect" as affirmed by the preamble to PRECCA.

[86] These contentions raise three interrelated issues: (a) whether the ratification of the Convention gives rise to a constitutional obligation to establish an independent anti-corruption unit; (b) whether the domestic incorporation of the Convention gives rise to a constitutional obligation; and (c) whether the obligation to protect and fulfil the rights in the Bill of Rights contemplated in section 7(2) of the Constitution, when viewed in the light of the Convention, establishes a constitutional duty to establish an independent anti-corruption unit.

[87] These contentions must be evaluated in the light of the place of international law in our domestic legal framework, in particular the scheme of section 231 of the

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Council of Provinces, of the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971).

[65] 12 of 2004.

Constitution, which governs international agreements.[66]

Status of international agreements in our law

[88] Section 231 of the Constitution governs international agreements and provides:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that

[66] After oral argument, this Court issued further directions (dated 29 November 2010) calling for additional written submissions. These directions directed the parties to lodge additional submissions on the following issues:

> "1) Precisely what legislative action is required before an international agreement becomes law in South Africa under section 231(4) of the Constitution?
>
> 2) What legislative action, if any, was taken to incorporate the provisions of the United Nations Convention against Corruption (the Convention) into law under section 231(4) of the Constitution?
>
> 3) If the Convention is part of our law by virtue of the provisions of section 231(4) of the Constitution read with the domestic legislation, and if there is a conflict between the Convention and the domestic legislation on the one hand and the Constitution on the other, is the validity of the impugned legislation to be tested against a provision of the Constitution, or against the provisions of the domestic legislation and the Convention?
>
> 4) If the Convention is not law in the sense contemplated in section 231(4)—
>
> i. what obligations, if any, does it create, and in particular, does it oblige the Republic of South Africa to establish an independent anti-corruption unit? If so;
>
> ii. does the Court have the power to enforce this obligation? And if so; and
>
> iii. what is the source of that power?"

> has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[89] The constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements.[67] But an international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature.[68] To produce that result, it requires, second, the approval by resolution of Parliament.[69]

[90] The approval of an agreement by Parliament does not, however, make it law in the Republic unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval unless it is inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an "international agreement becomes law in the Republic when it is enacted into law by national legislation."[70]

[67] Section 231(1) of the Constitution.

[68] Section 231(3) of the Constitution. We are not concerned with such agreements, here.

[69] Section 231(2) of the Constitution.

[70] Section 231(4) of the Constitution.

[91] The approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an "international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty."[71] The approval of an international agreement under section 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other states, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law[72] or taking other steps to bring our laws in line with the agreement to the extent they do not already comply.

[92] An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not

[71] Vienna Convention on the Law of Treaties, 1969 8 *ILM* 679 at article II para 1(b).

[72] See below [99].

been incorporated in our law cannot be a source of rights and obligations.[73] As this Court held in *AZAPO*:

> "International conventions do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment."[74]

[93] There is support for this approach to the relationship between international agreements and domestic law in other common law jurisdictions.[75] Dealing with the status of the United Nations Convention on the Rights of the Child under Australian law, the High Court of Australia said:

> "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law."[76] (Footnotes omitted.)

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[73] *Pan American World Airways Incorporated v S.A. Fire and Accident Insurance Co. Ltd.* 1965 (3) SA 150 (A.D.) at 161C-D. Compare *R v Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696 (HL) at 762A-B (legislative incorporation in the United Kingdom) and *Capital Cities Communication Inc. v Canadian Radio-Television & Telecommunications Commission* [1978] 2 S.C.R. 141 at para 54 (legislative incorporation in Canada).

[74] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 26.

[75] See *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at paras 69 (per L'Heureux-Dubé J) and 79 (per Iacobucci J); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 at 224 and *Kavanagh v Governor of Mountjoy Prison* [2002] 3 I.R. 97 at 129.

[76] *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273 at 286-7.

[94] In jurisdictions that require legislative incorporation of an international agreement in order for the agreement to create rights and obligations under domestic law, the legislative act which incorporates the international agreement into domestic law has the effect of transforming an international obligation that binds the sovereign at the international level into domestic legislation that binds the state and citizens as a matter of domestic law.

[95] To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.

[96] This is not to suggest that the ratification of an international agreement by a resolution of Parliament is to be dismissed "as a merely platitudinous or ineffectual act."[77] The ratification of an international agreement by Parliament is a positive statement by Parliament to the signatories of that agreement that Parliament, subject to

[77] Id at 291.

the provisions of the Constitution, will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.[78]

[97] Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be "consistent with the Republic's obligations under international law applicable to states of emergency." These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

[98] But treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to "incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door."[79]

[78] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 35.

[79] *Teoh* above n 76 at 291 and *Ex parte Brind* above n 73 at 718E-F.

[99] For an international agreement to be incorporated into our domestic law under section 231(4), our Constitution requires, in addition to the resolution of Parliament approving the agreement, further national legislation incorporating it into domestic law. There are three main methods that the legislature appears to follow in incorporating international agreements into domestic law:[80] (a) the provisions of the agreement may be embodied in the text of an Act;[81] (b) the agreement may be included as a schedule to a statute;[82] and (c) the enabling legislation may authorise the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the Government Gazette.[83]

[100] The consequence of incorporation of an international agreement into our domestic law under section 231(4) is that the agreement "becomes law in the Republic". It is implicit, if not explicit, from the scheme of section 231, that an international agreement that becomes law in our country enjoys the same status as any other legislation.[84] This is

[80] Dugard *International Law: A South African Perspective* 3 ed (Juta, Cape Town 2005) at 61.

[81] Examples of this approach include the Civil Aviation Offences Act 10 of 1972 (giving effect to the provisions of the Convention on Offences and certain other Acts committed on board Aircraft of 1963; the Convention for the Suppression of unlawful Seizure of Aircraft of 1970; and the Convention for the Suppression of unlawful Acts against the Safety of Civil Aviation of 1971) and the Children's Act 38 of 2005 (giving effect to the provisions of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993, also known as the Hague Convention on Inter-country Adoption).

[82] Examples of this approach include the Civil Aviation Act 13 of 2009 (incorporating the Convention on International Civil Aviation of 1944 and its governing protocols, as well as the International Air Services Transit Agreement of 1944, as schedules) and the Diplomatic Immunities and Privileges Act 37 of 2001 (incorporating, among other things, the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 as schedules).

[83] An example of this approach includes section 2(3)(a) of the Extradition Act 67 of 1962.

[84] See [88] above.

so because it is enacted into law by national legislation, and can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates its intent that the enacting legislation should have such status. On certain occasions, Parliament has done this by providing that, in the event of a conflict between the international convention that has been incorporated and ordinary domestic law, the international agreement would prevail.[85]

[101] The amicus therefore properly accepted that, upon incorporation under section 231(4), an international agreement assumes the status of ordinary legislation in our law. In addition, the amicus also accepted, quite properly, that if there is a conflict between an international agreement that has been incorporated into our law and another piece of legislation, that conflict must be resolved by the application of the principles relating to statutory interpretation and superseding of legislation.

[85] See for example the Children's Act 38 of 2005, giving effect to the Hague Convention on Inter-country Adoption and noting, in section 256(2), that "where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails." In some countries, international agreements are given a status superior to other legislation. In the Netherlands, article 94 of the Constitution provides that in a conflict between international and domestic law, international law prevails:

> "Within the Kingdom, legal regulations in force shall not be applicable if such application is incompatible with provisions of treaties that are binding on all persons or of resolutions by international organizations."

Translation in Flanz (ed) *Constitutions of the Countries of the World* (Oceana Publications, Inc, New York 2003) at 18. Similarly, in France, article 55 of the Constitution provides that "[t]reaties or agreements duly ratified or approved, upon publication, prevail over Acts of Parliament", translation in Flanz (ed) *Constitutions of the Countries of the World* (Oceana Publications, Inc, New York 2000) at 17, and in Argentina, article 75(22) of the Constitution provides that "[t]reaties and concordats have a higher standing than laws." Translation in Flanz (ed) *Constitutions of the Countries of the World* (Oceana Publications, Inc, New York 1999) at 14.

[102] Once it is accepted, as it must be, that incorporation of an international agreement under section 231(4) gives the international agreement the status of ordinary legislation, two consequences flow from this. Firstly, insofar as provisions in the international agreement give rise to rights and obligations under domestic law, these rights and obligations flow from, and are limited by, the extent to which the domestic legislation incorporating the agreement includes those provisions.[86] Secondly, it can hardly be contended that the incorporation of an international agreement gives rise to constitutional rights and obligations. The incorporation of an international agreement does not transform the rights and obligations embodied in the international agreement into constitutional rights and obligations.[87] It only transforms them into statutory rights and obligations that are enforceable in our law under the national legislation incorporating the agreement.

[103] Neither the approval of the Convention under section 231(2) nor its incorporation under 231(4) would have the effect of transforming the rights and obligations embodied

[86] In the United Kingdom, for example, which follows a similar legislative incorporation process to South Africa, the European Convention on Human Rights (ECHR) was given domestic effect via the passage of the Human Rights Act 1998 (Human Rights Act). The Human Rights Act did not give effect to every article of the ECHR, however, so the effect of legislative incorporation of the ECHR into domestic UK law was that certain rights embodied in the convention were given substantive domestic effect, and the interpretation of such rights under English law is guided by ECHR jurisprudence, but only those rights enumerated in the Human Rights Act give rise to domestic claims rooted in English law. See Ewing "The Human Rights Act and Parliamentary Democracy" (1999) 62 *MLR* 79 at 84-8.

[87] The provisions of section 37(4)(b)(i) of the Constitution, which provides that legislation that derogates from the Bill of Rights must be "consistent with the Republic's obligations under international law applicable to states of emergency", arguably transforms the rights and obligations embodied in international agreements into constitutional rights and obligations, but only in the limited context of states of emergency. We are not concerned with legislation that has been enacted in consequence of a declaration of a state of emergency. It is therefore not necessary to express any firm views on this issue.

in the Convention into constitutional rights and obligations. In the light of this conclusion, it is not necessary to consider whether PRECCA in fact incorporated the Convention into domestic law under section 231(4). Even if the provision in the Convention that creates the international obligation to establish an independent anti-corruption unit is a self-executing provision, as the applicant argued somewhat faintly, its status would be no different from any other provision in a statute and it would not create constitutional obligations.[88]

[104] I now turn to the argument based on section 7(2).

The argument based on section 7(2) of the Constitution

[105] As I understand it, the argument of the amicus that there is a constitutional obligation to establish an independent anti-corruption unit rooted in section 7(2) of the Constitution proceeded along the following lines. Section 7(2) of the Constitution creates an obligation on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." This obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights. As corruption and organised crime have a deleterious impact on any

[88] It is at least arguable that, to the extent Parliament passes legislation later in time that conflicts with the provisions of PRECCA and the Convention, PRECCA is superseded by the subsequent passage of the impugned legislation absent a provision in PRECCA providing that the provisions of the Convention prevail in a conflict between PRECCA and other legislation passed by Parliament. It is not necessary, however, to express a firm view on this issue as it is not before us.

number of these rights, the amicus contended that among the state's positive duties under section 7(2) is an obligation to prevent and combat these specific social ills. The obligations contained in the Convention, the amicus argued, give content to the state's duty to protect and fulfil its obligations in terms of section 7(2).

[106] I accept that corruption has a deleterious impact on a number of rights in the Bill of Rights and that the state has a positive duty under section 7(2) to prevent and combat corruption and organised crime. I also accept that, in giving content to the obligations of the state in section 7(2), a court must consider international law as an interpretive tool as required by section 39(1)(b).

[107] Under section 7(2), there are a number of ways in which the state can fulfil its obligations to protect the rights in the Bill of Rights. The Constitution leaves the choice of the means to the state. How this obligation is fulfilled and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect. Thus, in relation to social and economic rights, in particular those in sections 26 and 27, the obligation of the state is to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights."[89]

[89] Section 26(2) (right of access to adequate housing) and section 27(2) (right of access to health care, food, water and social security) of the Constitution.

[108] The amicus has sought support for its argument in section 39(1)(b) of the Constitution. That provision requires courts, when interpreting the Bill of Rights, to "consider international law". A distinction must be drawn between using international law as an interpretive aid, on the one hand, and relying on international law as a source of rights and obligations, on the other. The purpose of section 39(1)(b), as its heading, "Interpretation of Bill of Rights", makes clear, is to provide courts with an interpretive tool when interpreting the Bill of Rights. It does not purport to incorporate international agreements into our Constitution. Nor can it be used to create constitutional obligations that do not exist in our Constitution.

[109] The argument based on section 7(2) raises the question whether it is permissible, through a process of interpretation, to read into our Constitution a constitutional obligation that the Constitution does not expressly create. This question must be determined in the light of section 39(1)(b) of the Constitution, which, as I have already indicated, requires courts, when interpreting the Bill of Rights, to consider international law.

[110] None of the international agreements cited by the applicant and amicus provides interpretive guidance as to the rights with which they are concerned. A court such as this Court is not provided with meaningful assistance in interpreting the right to equality under section 9 of the Constitution, or dignity under section 10, by reading the text of the

Convention. It does not follow from the fact that corruption can have a deleterious impact on the enjoyment of certain rights that the conventions addressing corruption and organised crime create a constitutional obligation on the state, through the operation of section 7(2), to establish an independent anti-corruption unit in the mirror image of those envisioned in the conventions.

[111] The obligation of the state, under section 7(2) to prevent and combat corruption must be informed by the provisions of section 205. Section 205 of the Constitution requires the state to establish a national police service whose objects include preventing, combating and investigating crime, which would include corruption, and protecting and securing the person and property of the inhabitants of the Republic.[90] There is no requirement that the state must use the best method possible or the most effective methods to combat crime including corruption. While this is an ideal to strive for, it is not a constitutional requirement. The state must "enable the police service to discharge its responsibilities effectively".[91] That is all that the obligation entails.

[90] Section 205 of the Constitution states:

> "(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
>
> (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.
>
> (3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[91] Section 205(2) of the Constitution.

[112] To read the obligation to consider international law as creating, in conjunction with the obligation to protect the rights in the Bill of Rights, a constitutional obligation to establish an independent anti-corruption unit, as the amicus invites us to do, inevitably would result in incorporating the provisions of the Convention into our Constitution by the back door. This would, in effect, amount to giving the Convention a status equal to the provisions of the Constitution, contrary to the express provisions of section 231 of the Constitution, which determine the legal status of an international agreement. In addition, this would go against the express provisions of section 205 of the Constitution, which do not require an independent anti-corruption unit. In my view, the invitation by the amicus cannot be accepted. Sections 39(1)(b) and 7(2) cannot be used to achieve the result contended for.

[113] In the result, I conclude that there is no constitutional obligation to establish an independent anti-corruption unit as contended by the applicant and the amicus. It follows, therefore, that the argument based on a constitutional obligation to establish an independent anti-corruption unit must fail.

[114] The point to be stressed, however, is that which is made later in this judgment. It is this: international law, in particular the Convention, does not dictate to states parties the particular form of independence that must be granted to an anti-corruption unit. This is a recognition of the complexity and context-specific nature of the issues involved in the fight against corruption. Significantly, international law also recognises that states

parties have constitutions that are the supreme law in their respective countries and to which the establishment of an anti-corruption unit is subject. Thus, article 6(1) of the Convention requires each state party to establish an anti-corruption unit "in accordance with the fundamental principles of its legal system". Article 6(2) underscores the need to have regard to a country's constitution, by requiring each state party to grant its anti-corruption unit "the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence."

[115] It is in this context that the role of international law, in particular the Convention, must be understood. The Convention may be used as an interpretive aide in understanding the nature and scope of the constitutional obligation to effectively combat corruption and organised crime, but such obligation is not a matter that is governed directly by the Convention.[92] As the Convention explicitly states, an anti-corruption unit must be established "in accordance with the fundamental principles of [our] legal system". As an interpretive tool, therefore, the Convention is at all times subject to the requirements of the Constitution, in particular those provisions of the Constitution that specifically deal with the powers of the legislature to establish a police service in order to prevent, combat and investigate crime.

[92] *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 26.

[116] Section 205(3) of the Constitution requires the establishment of a national police service in order to "prevent, combat and investigate crime".[93] Section 205(2) requires that the legislature "establish the powers and functions of the police service" in order to "enable the police service to discharge its responsibilities effectively".[94] I accept that for the police service to effectively discharge its responsibilities under the Constitution, it must not be subject to undue influence. That is the extent of the obligation imposed by the Constitution, and it is in this context that the obligation imposed by section 7(2) must be understood. The question for determination, therefore, is whether the impugned laws establish an anti-corruption unit that has the capacity to "discharge its responsibilities effectively", as required by the Constitution. As I will demonstrate in the next section, a careful analysis of the provisions of the impugned laws makes plain that the legislature has established an anti-corruption unit which has the capacity to "discharge its responsibilities effectively".

Meaning of independence

[117] The amicus submitted that for an anti-corruption agency or body to be independent, it must: have the power to initiate its own investigations; allow investigators and prosecutors autonomous decision-making powers in handling cases; not be subject to undue influence from any of the branches of government or any third party; and have structural and operational autonomy. Save to point out that the second criterion must not

[93] Section 205(3) of the Constitution.

[94] Section 205(2) of the Constitution.

be understood to suggest that an anti-corruption unit must be located within the NPA, there is support for these broad criteria for independence.[95] I did not understand counsel for the amicus to suggest otherwise. On the contrary, he very properly conceded that the legislature has a choice either to establish the anti-corruption agency as an independent agency or locate it either within the SAPS or the NPA. That choice, however, must be governed, and indeed is limited, by the Constitution.

[118] What is apparent from international instruments is that the requirement of independence is intended to protect members of the agency from undue influence. This is necessary to ensure that the anti-corruption unit can "discharge its responsibilities effectively". The independence of anti-corruption agencies is "a fundamental requirement for a proper and effective exercise of [their] functions."[96] This is so because corruption largely involves the abuse of power. In corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office.[97] Hence the need to shield anti-corruption units from undue influence. This is a theme that recurs in the international and regional instruments cited by the amicus. Independence in this context therefore means the ability to function effectively without any undue influence. It is this autonomy that is an important factor which will affect the performance of the anti-corruption agency.

[95] See [119] below.

[96] Organisation for Economic Co-operation and Development (OECD), *Specialised Anti-Corruption Institutions: Review of Models* (2008) at 17 (OECD report).

[97] Id.

[119] Based on its review of models of specialised anti-corruption agencies, the OECD has offered the following broad criteria for determining independence:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, *genuine political will* to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive *anti-corruption strategy*. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the *structural and operational autonomy* that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for *appointment and removal of the director* together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of *accountability*; specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work."[98]

[120] It is therefore permissible to locate anti-corruption agencies within existing structures such as the NPA and the SAPS.[99] However, the independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. The centralised and the hierarchical nature of their structures and the fact that they report at the final level to a Cabinet minister, as in the case of the police and the NPA, presents a risk of interference. The risk of undue interference is even higher when members of the unit lack autonomous

[98] Id at 6.

[99] See [79]-[81] above.

decision-making powers and where their superiors have discretion to interfere in a particular case. What is required are legal mechanisms that will limit the possibility of abuse of the chain of command and hierarchical structure or interference in the operational decisions involving commencement, continuation and termination of criminal investigations and prosecutions. All of this, however, is subject to the state party's "fundamental principles of its legal system"[100] as embodied in its constitution.

[121] Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence. I do not understand these instruments to require absolute or complete independence. Indeed, the OECD has defined independence to primarily mean that "the anti-corruption bodies should be shielded from undue political interference."[101] It concludes that—

[100] Article 6 of the Convention provides:

> "1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
>
> (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
>
> (b) Increasing and disseminating knowledge about the prevention of corruption.
>
> 2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided."

[101] OECD report above n 96 at 6.

> "in light of international standards, one of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of *structural and operational autonomy* secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting 'pre-emptive obedience'. In short, 'independence' first of all entails de-politicisation of anti-corruption institutions."[102] (Underlining added.) (Footnote omitted.)

[122] The qualification that "full independence" is not a mandatory feature of an anti-corruption agency is a significant one. It recognises that there are different fundamental principles within each legal system. There are those legal systems, like ours, where the executive is assigned final responsibility over the functioning of police or the prosecution, as the case may be. Even with the administration of justice, the Minister for Justice and Constitutional Development bears political responsibility for the administration of justice. This is a special feature of our constitutional democracy. The Cabinet Minister responsible for the police is required by our Constitution to take final responsibility for the functioning of the police, including all crime fighting units located within the police. The same is true of the Minister for Justice with regard to the NPA.

[123] This qualification is therefore intended to accommodate these constitutional requirements. But it also recognises the functional realities of these bodies and the need for accountability. These bodies should not be a law unto themselves. They should, as the passage cited earlier makes plain, "submit regular performance reports to executive

[102] Id at 17.

and legislative bodies, and enable public access to information on their work."[103] All of this presupposes that the legislature, the executive and the judiciary have a role to play in the exercise by these bodies of their powers, consistently with the country's constitution. Indeed, the international agreements themselves explicitly require a state to establish an anti-corruption agency "in accordance with the fundamental principles of its legal system."[104]

[124] Thus understood, the independence of an anti-corruption unit in the context of international agreements must not be confused with the independence of the judiciary, for example. Nor does independence in the context of anti-corruption international agreements require that the executive should play no part in the functioning of anti-corruption agencies. Were this to be the case, this would run afoul of the fundamental principles of our legal system as contained in our Constitution, in particular, sections 206(1) and 179(6). Indeed, it is doubtful whether, if that had been the requirement, states like ours would have ratified the conventions. What is crucial, therefore, is whether the anti-corruption agency enjoys an adequate level of structural and operational autonomy, secured through institutional and other legal mechanisms aimed at preventing undue influence.

[103] See [119] above.

[104] Article 6(2) of the Convention.

[125] The question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it "discharges its responsibilities effectively", as required by the Constitution. The provisions of the SAPSA Act, one of the impugned laws, have since been incorporated into the SAPS Act and are contained in chapter 6A, which deals with the DPCI. It will therefore be convenient to consider the relevant provisions of the impugned laws as they appear in the SAPS Act. This is the approach that was adopted by the parties. The question presented here must therefore be answered by examining the provisions of the SAPS Act, in particular, those dealing with the application of chapter 6A, the appointment of the head of the DPCI, its functioning, financial support, parliamentary oversight and legal mechanisms for dealing with undue political interference.[105]

[126] Before turning to the specific provisions of the SAPS Act, however, it is important to emphasise the particular context within which these provisions must be assessed. The Convention dictates that states parties must establish an independent anti-corruption unit, but it remains sensitive to the need that the establishment of this unit accord with the fundamental principles of a particular state's legal system.[106] This is a crucial consideration. What it means is that the starting point of the analysis, and the ultimate test of the appropriateness and adequacy of the structure and location of a South African

[105] Section 3 of the SAPSA Act inserted the provisions of chapter 6A into the SAPS Act.

[106] Article 6(2) of the Convention.

anti-corruption unit, is the Constitution. If the structure and location of the unit accord with the fundamental principles embodied in our Constitution, it cannot be found wanting.

[127] In challenging the independence of the DPCI, much weight was placed by the amicus and the applicant on the assertion that the unit would be exposed to political influence. This is indeed a valid concern, as undue influence could well undermine the effectiveness of an anti-corruption unit. However, the argument that an anti-corruption unit in South Africa must be insulated from political actors is simply inconsistent with the fundamental principles of our Constitution.

[128] Our Constitution assigns to the police the role of preventing, combating and investigating crime.[107] The placement of an anti-corruption unit that is dedicated to preventing, combating and investigating particular forms of criminal conduct within the SAPS is therefore entirely consistent with the Constitution. Once this is recognised, it follows that the constitutional provisions related to the functioning of the police, in particular those related to political oversight over the police, are instructive in assessing the degree of political exposure appropriate for an anti-corruption unit in South Africa given our particular legal system.

[107] Section 205(3) of the Constitution.

[129] It is apparent from the provisions of the Constitution that, far from requiring insulation from the political sphere, it is a fundamental principle of our legal system that there is political oversight over the police. To this end, section 206(1) requires that a member of the Cabinet be responsible for policing and determining national policing policy. Section 206(8) requires the establishment of a committee composed of the Cabinet member and members of the Executive Councils responsible for policing in the provinces to "ensure effective co-ordination of the police service and effective co-operation among the spheres of government." To the extent then that oversight over a South African anti-corruption unit located within the police is subject to Cabinet-level oversight, such oversight is not only consistent with the Constitution, but expressly contemplated.

[130] A similar conclusion must be drawn with regard to the political appointment of, and control over, the head of the anti-corruption unit. Section 207(1) of the Constitution bestows upon the President the responsibility to appoint the National Commissioner of the police service, and section 207(2) requires the National Commissioner to exercise control over the police in accordance with the national policing policy and directions of the Cabinet member responsible for policing. Political involvement in the leadership selection and direction of the police is therefore a constitutional imperative. It follows that a similar level of involvement in a specialised unit within the police would therefore not be inconsistent with the Constitution.

[131] Yet more insight is gained by comparing the relative level of political insularity called for by the Constitution with respect to different governmental institutions. The courts, for example, are required to be "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."[108] The prosecuting authority, on the other hand, must exercise its functions "without fear, favour or prejudice."[109] By contrast, the constitutional provisions related to the police service are silent as to the need for the service to operate either independently or without fear, favour or prejudice.[110] This distinction is drawn not to support a conclusion that the police, or a specialised unit within the police, may lawfully operate with fear, favour and prejudice. Far from it. The distinction is significant merely because it reflects the Constitution's determination as to the appropriate level of independence from the political system of particular governmental institutions. These determinations must be kept in mind in assessing the specific provisions of the SAPS Act. And it is to that task that I now turn.

[132] The starting point in determining the sufficiency of the independence of the DPCI is the commitment to address the scourge of corruption and other national priority offences, and to establish an independent anti-corruption unit that is apparent from the

[108] Section 165(2) of the Constitution.

[109] Section 179(4) of the Constitution. This does not mean that the national prosecuting authority must be cut-off from the political sphere. Indeed, section 179(6) provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

[110] See sections 205-7 of the Constitution.

provisions of chapter 6A of the SAPS Act.[111] The core provision in this regard is section 17B. It provides that among the factors that must be taken into account in the application of the provisions of this chapter, is the "need to ensure that the Directorate . . . has the necessary independence to perform its functions . . . [and] is equipped with the appropriate human and financial resources to perform its functions". Thus, chapter 6A is premised on the independence of the DPCI. To this extent, it provides an interpretive injunction for the application and implementation of its provisions. Those who are charged with the application and implementation of the provisions of this chapter are bound by this injunction. It is an injunction that is deeply rooted in the need for an anti-corruption unit, free from any undue political influence or otherwise. The submissions of the applicant and the amicus do not take sufficient account of this important provision.

[133] Section 17B provides the framework within which the provisions of the impugned laws must be understood and applied. But more importantly, it sets the standard against which the proper implementation and application of the provisions of chapter 6A must be assessed. It requires the provisions of chapter 6A to be applied in a manner that promotes, rather than undermines, the independence of the DPCI. Thus, for example, the policy guidelines that must be determined by a Ministerial Committee for the functioning of the DPCI must be designed to ensure that the DPCI is not subject to any undue influence in performing its functions. Similarly, the appointment of the head of the DPCI

[111] Indeed, the OECD emphasises that "[i]t is genuine political commitment, coupled with adequate resources, powers and staff, which are as crucial as formal independence, if not more so, to the success of an anti-corruption institution." OECD report above n 96 at 17.

as well as his or her removal, the structure and operation of the DPCI and the oversight functions must be designed to promote the independence of the DPCI.

[134] If the implementation or the application of chapter 6A falls short of the standard prescribed by section 17B, namely, the "need to ensure that the [DPCI] . . . has the necessary independence to perform its functions", it is open to challenge as a breach of this provision. Section 17B provides a significant guarantee for the independence of the DPCI. Therefore the remaining provisions of chapter 6A must be understood in the light of this guarantee that sets the standard for their application and implementation. Apart from the provisions of section 17B, the other provisions of chapter 6A provide important safeguards against undue interference with the functioning of the DPCI.

[135] First, the commitment to the independence of the DPCI is evidenced by ensuring the financial autonomy of the DPCI. Thus, under section 17H, the administration and functioning of the DPCI must be paid from monies appropriated by Parliament for this purpose to the department in terms of the Public Finance Management Act.[112]

[136] Second, there are important safeguards in the manner in which the head of the DPCI is appointed and its structural and operational autonomy are designed to prevent undue influence. The head of the DPCI holds the rank of a Deputy National Commissioner and is appointed by the Minister for Police with the concurrence of the

[112] 1 of 1999.

Cabinet. The appointment of the head of the DPCI therefore is not left in the hands of the Minister, alone, but must be a combined effort of the executive. Thus instead of leaving the appointment of the head of the DPCI to the Minister for Police as would have been competent under the Constitution, the impugned laws place this responsibility in the hands of the entire Cabinet. And to ensure that Parliament effectively performs its oversight functions, the Minister is required to report to Parliament on the appointment of the head of the DPCI. Other members of the Directorate are appointed by the National Commissioner who does so on the recommendation of the head of the DPCI.

[137] Operationally, there are important safeguards to ensure the independence of the DPCI. The primary function of the DPCI is to prevent, combat and investigate national priority offences. The head of the DPCI decides which priority offences must be investigated.[113] In doing so he or she acts in accordance with policy guidelines for the selection of national priority offences that are determined by a Ministerial Committee. These policy guidelines must be approved by Parliament in terms of section 17K(4). While the National Commissioner of Police also has the power to refer to the head of the Directorate offences that may be investigated, he or she too is guided by the policy guidelines determined by the Ministerial Committee.[114] Thus, far from leaving it to the Minister for Police to determine the policy guidelines, this is the responsibility of the Ministerial Committee which must do so in a manner that ensures that the DPCI has the

[113] Section 17D(1)(a) of the SAPS Act.

[114] Section 17D(1)(b) of the SAPS Act.

necessary independence to perform its functions, coupled with Parliamentary oversight as a counterbalance.

[138] These policy guidelines, which include guidelines on the functioning of the DPCI, must ensure that they limit the possibility of abuse of the chain of command and hierarchical structure or any interference in the operational decisions involving the conduct of investigations and prosecutions. This must be so because the provisions of chapter 6A must be applied in a manner that will "ensure that the [DPCI] . . . has the necessary independence to perform its functions", as required by section 17B of the SAPS Act and as required by the Constitution to "discharge its responsibilities effectively". There is no reason to believe that the policy guidelines will not comply with this requirement, but if they do not, Parliament, in the exercise of its power to approve the policy guidelines, will no doubt not approve them under section 17K. And if they should pass through Parliament unchallenged, they may well be challenged in court as being inconsistent with the provisions of the impugned laws, in particular, section 17B.

[139] Third, the involvement of the NPA and the NDPP in the investigations conducted by the DPCI strengthens the structural and operational autonomy of the DPCI and provides yet another important safeguard to prevent undue influence with the investigation and the prosecution of corruption. Under section 17D(3), the head of the Directorate may request the NDPP to designate a Director of Public Prosecutions to investigate a national priority offence. The Director of Public Prosecutions is then

required to invoke the extensive powers of investigation accorded to the NPA by section 28 of the NPA Act. The involvement of the Director of Public Prosecutions in the investigation is significant because the investigators under the NPA Act do not report to the National Commissioner of Police or the head of the Directorate. In addition, section 17F(4) requires the NDPP to "ensure that a dedicated component of prosecutors is available to assist and co-operate with members of the [DPCI] in conducting its investigations."

[140] The involvement of the Director of Public Prosecutions and a dedicated component of prosecutors to assist in the investigations is especially significant. While the OECD warns that the independence of law enforcement agencies that are institutionally placed within existing structures, such as the police, requires special attention, it suggests as one of the ways to address the risk of abusing the chain of command and hierarchical structures that the "police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor."[115] And this is precisely what sections 17F(4) and 17D(3) do. Bringing together the police and the prosecutors to work on investigations, in my view, strengthens the independence of the DPCI. This is an important structural and operational mechanism to ensure the effectiveness of the DPCI in the performance of its duties.

[115] OECD report above n 96 at 17.

[141] Fourth, the autonomy of the DPCI is further strengthened by parliamentary oversight. Section 17K of the SAPS Act makes provision for parliamentary oversight. Subsection (1) provides that "Parliament shall effectively oversee the functioning of the Directorate and the committees established [under the Act]." Parliament, for example, has the power to request a report from the head of the Directorate on the activities of the DPCI.[116] In addition, Parliament must approve all policy guidelines in connection with the functioning of the DPCI.[117] It was suggested, in the course of oral argument, albeit in a faint tone, that if the rules for the functioning of the Directorate, the selection of national priority offences and the referral of offences to the Directorate by the National Commissioner are not approved within three months, they are deemed to have been approved. This does not detract from the fact that Parliament has a final responsibility to approve these rules. And this is an important measure to ensure that the policy guidelines that are determined by the Ministerial Committee do not interfere with the functioning of the Directorate.

[142] It is appropriate to respond to the suggestion that the Ministerial Committee is a political body likely to undermine the effectiveness of the DPCI. This suggestion is highly speculative and has no factual basis. The scheme of the impugned laws finds support in our Constitution. The Ministerial Committee comprises of the Ministers for Police, Finance, Home Affairs, Intelligence and Justice. The composition of the

[116] Section 17K(3) of the SAPS Act.

[117] Section 17K(4) of the SAPS Act.

Ministerial Committee is understandable. Under the Constitution, the Minister for Justice and Constitutional Development "must exercise final responsibility over the prosecuting authority."[118] The Minister for Police is responsible for policing.[119] The Ministers for Finance, Home Affairs and Intelligence have a role to play in the administration and functioning of the police and the fight against corruption and organised crime. Each of these Ministers has a role to play in the functioning and administration of the DPCI. This is the way our constitutional democracy is structured.

[143] What must be emphasised here is that in creating these agencies, member states are not required to ignore their constitutions. As pointed out earlier, the Convention requires states to establish anti-corruption agencies "in accordance with the fundamental principles of [their] legal system."[120] Indeed, the Legislative Guide for the implementation of the Convention emphasises this. Thus, in terms of implementation of article 6 of the Convention, the Legislative Guide provides:

> "Article 6 is not intended to refer to the establishment of a specific agency at a specific level. What is needed is the capacity to perform the functions enumerated by the article.
>
> . . . .
>
> Article 6, paragraph 2, requires that States endow the body in charge of preventive policies and measures with:

[118] Section 179(6) of the Constitution.

[119] Section 206(1) of the Constitution.

[120] See [114] above.

(a) The 'independence' to ensure it can do its job unimpeded by 'undue influence', in accordance with *the fundamental principles of their legal system*;

(b) Adequate material resources and specialized staff and the training necessary for them to discharge their responsibilities.

The Convention does not mandate the creation or maintenance of more than one body or organization for the above tasks. It recognizes that, given the range of responsibilities and functions, it may be that these are already assigned to different existing agencies."[121] (Emphasis added.)

And the guidance for implementation of article 36 is to similar effect:

"Article 36 requires that States parties, in accordance with *the fundamental principles of their legal system*, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement.

. . . .

Such a body or bodies or persons must be granted the necessary independence, in accordance with *the fundamental principles of the legal system* of the State party, to be able to carry out their functions effectively and without any undue influence and should have the appropriate training and resources to carry out their tasks. An interpretive note states that the body or bodies may be the same as those referred to in article 6".[122] (Emphasis added.)

[144] The question therefore is whether the creation of the Ministerial Committee and giving it the responsibility to oversee the functioning of the DPCI is consistent with "the fundamental principles of [our] legal system." In my view, it is. This is in accordance with the fundamental principles of our Constitution, as evidenced by section 179(6)

[121] Legislative Guide above n 63 at paras 43 and 53-4.

[122] Id at paras 462 and 464.

which requires the Minister for Justice and Constitutional Development to "exercise final responsibility over the prosecuting authority", and section 206(1) which provides that the Minister for Police "must be responsible for policing and must determine national policing policy". The inclusion of these Ministers in the Ministerial Committee is therefore required by the Constitution. The other Ministers are included because of the role they play in the administration and the functioning of the DPCI. What must be stressed here is that while the Ministerial Committee has the responsibility for the functioning of the DPCI, this is subject to parliamentary oversight, which provides a counter-balance.

[145] The Ministerial Committee addresses the concern that may arise from the fact that the Minister for Police is constitutionally responsible for the functioning of the police, and thus the DPCI. The impugned laws address this concern by: first, requiring policy guidelines that deal with the functioning of the Directorate, the selection of national priority offences, the referral of cases to the Directorate by the National Commissioner, and procedures to coordinate the activities of the DPCI and other government departments and institutions; second, requiring that these policy guidelines must be determined not just by the Minister for Police but a Ministerial Committee; third, requiring that these policy guidelines must be approved by another arm of government, namely, the legislature; and finally, ensuring that the guidelines are designed to ensure that the DPCI has the necessary independence to effectively perform its functions. Thus although the DPCI is within the police, it is subject to separate policy guidelines

determined by a Ministerial Committee which oversees the functioning of the DPCI and ultimately, at the final level, by Parliament.

[146] It may well be that another structure could have been established. That, however, is not the issue. The question is whether these safeguards, together with the others already referred to, provide adequate structural and operational autonomy secured through institutional and legal mechanisms to prevent undue political interference. What must be stressed here is that it is not the judicial role to dictate to other branches what is the most appropriate way to secure the independence of an anti-corruption agency. The judicial role is limited to determining whether the agency under consideration complies with the Constitution. Indeed the legislature here had to exercise a political judgment. That there is more than one permissible way of securing the structural and operational autonomy of the DPCI does not make the choice of one rather than the other unconstitutional.[123]

[147] Finally, there is judicial oversight to prevent undue interference, which may result in criminal sanctions. In order to address any undue political influence with the functioning of the DPCI, section 17L(1) makes provision for the appointment of a retired judge to investigate complaints. These complaints include complaints "of any improper influence or interference, whether of a political or any other nature, exerted upon [a

[123] *Bel Porto* above n 49 at para 45.

member of the Directorate] regarding the conducting of an investigation."[124] In addition, the head of the Directorate may, of his or her own accord, request the retired judge to investigate complaints or allegations relating to investigations by the Directorate or alleged interference with such investigations.[125] This is an important legal mechanism to address undue political interference in the investigation.

[148] Apart from this, section 67 of the SAPS Act makes it a criminal offence to resist or willfully hinder or obstruct a member of the police force in the exercise of his or her functions.[126] Similarly it is a criminal offence to induce or attempt to induce any member not to perform his or her duties or to act in conflict with his or her duties.[127] Members of the DPCI are members of the police force and are therefore protected by the provisions of section 67 from interference with their work.

[149] In structuring the DPCI as it did, Parliament in effect assured that all three branches of government play an active role in the functioning of the anti-corruption unit. The executive, in the form of the Ministerial Committee, sets the policy guidelines; the legislature, in the form of Parliament, approves or rejects these policy guidelines and otherwise exercises oversight over the unit; and the judiciary, in the form of a retired judge, assures that complaints of interference with the unit are investigated. The

[124] Section 17L(4)(b) of the SAPS Act.

[125] Section 17L(10) of the SAPS Act.

[126] Section 67(1)(a) of the SAPS Act.

[127] Section 67(2)(a) of the SAPS Act.

judiciary also plays a crucial role in ensuring that the application and the implementation of the provisions of chapter 6A, in particular, policy guidelines for the functioning of the DPCI, ensures that the DPCI has the necessary independence to perform its functions effectively and consistently with section 17B.

[150] The inclusion of each branch of government and the designation to each of a specified role follows from the importance of the fight against corruption to all aspects of government. It also serves as an important safeguard against encroachment by any single branch into the independent operation of the DPCI. These are adequate checks and balances to ensure the independence of the DPCI. Ultimately, therefore, the provisions of chapter 6A contain sufficient safeguards to prevent undue interference in the functioning of the DPCI, backed by the injunction to apply and implement the provisions of this chapter, in a manner that ensures that the DPCI has the necessary independence to perform its functions effectively.

[151] It is true that the investigative capacity once held by the DSO within the NPA now lies with the DPCI within the SAPS and that no prosecutors are placed within the DPCI. Both the applicant and the amicus make much of this. They argued that this detracts from the independence of the anti-corruption agency, the DPCI. As I understand the argument, this is so because the prosecutors are independent and are required by law to be such. But the same is true of the DPCI, which, in terms of section 17B(b)(ii), must have "the necessary independence to perform its functions."

[152] But significantly, this argument overlooks section 17F(4) which provides that the NDPP must ensure that a dedicated component of prosecutors is available to assist and co-operate with the DPCI in conducting its investigations. This must be understood in the light of the provisions of section 17D(3), which empower the head of the DPCI to request the NDPP to designate a Director of Public Prosecutions to exercise the investigative powers in section 28 of the NPA Act. It is therefore apparent that the NDPP is still very much involved in the DPCI.

[153] In sum, the impugned laws provide the DPCI with adequate independence to deter the exertion of inappropriate influence by:

(a) guaranteeing the DPCI the necessary independence to perform its functions;

(b) ensuring that the DPCI has an adequate level of structural and operational autonomy secured through legal mechanisms to prevent undue influence;

(c) involving the NPA and the NDPP in the investigations conducted by the DPCI;

(d) providing parliamentary oversight over the functioning of the DPCI and the Ministerial Committee that makes policy guidelines relating to the functioning of the DPCI;

(e) providing judicial oversight to deal with complaints of undue influence;

(f) providing criminal sanctions to deal with undue influence; and finally,

(g) ensuring that the provisions of the impugned laws are applied and implemented in a manner that ensures that the DPCI has the necessary independence to perform its functions effectively and consistently with section 17B.

[154] Above all, a significant safeguard which appears to elude both the applicant and the amicus is section 17B which contains an explicit injunction on the application of the impugned laws. It expressly requires that the need to ensure that the DPCI has the necessary independence must be taken into consideration in applying the provisions of the impugned laws. What this means, in effect, is that in determining and approving the policy guidelines relating to the functioning of the DPCI, overseeing the functioning of the DPCI, exercising the powers of oversight over the Ministerial Committee, and in dealing with complaints relating to undue influence, all branches of government, including the officials who administer the provisions of the impugned laws, must apply the provisions of the impugned laws in a manner that will promote the independence of the DPCI. And if this is not done, it violates not only the provisions of the impugned laws, but the Constitution itself.

[155] This, in my view, is an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms that are designed to prevent undue interference in the effective functioning of the DPCI. There is no suggestion in the

papers that the injunction in section 17B has not been complied with. Instead, the applicant was content with launching a facial challenge to the impugned laws. To the extent that this challenge is a facial challenge to the impugned laws, it must therefore fail.

[156] For all these reasons, I hold that the DPCI enjoys an adequate level of structural and operational autonomy which is secured through institutional and legal mechanisms aimed at preventing undue political interference. I am therefore satisfied that the impugned legislation complies with the obligation in section 205(2) of the Constitution that requires national legislation to "enable the police service to discharge its responsibilities effectively".

Violation of the rights in the Bill of Rights

[157] As I understand the argument, it proceeds from section 7(2) of the Constitution, which requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." It was submitted that taking measures that are retrogressive, as in locating the anti-corruption unit within the SAPS, which is not independent, as opposed to the NPA, which is, detracts from the duty to protect the rights in the Bill of Rights. This proposition must stand or fall by the further submission that the present anti-corruption unit is not independent. Once it is found, as I have above, that there are adequate safeguards to prevent undue political interference, I do not think it can be suggested that the measures are retrogressive. I would, therefore, reject the challenge based on the violation of constitutional rights.

Costs

[158] The litigation initiated by the applicant in these proceedings cannot be described as vexatious. The issues that the applicant has urged on us are constitutional matters of considerable importance. In the event, I am not persuaded that we should depart from the general rule that where a private litigant is unsuccessful in vindicating his or her constitutional rights he or she should not be mulcted with costs. The argument by the respondents that the applicant is bringing the same challenge that he brought under *Glenister I* misconstrues our decision in *Glenister I*. In *Glenister I* we did not consider the merits of the challenge. We were concerned only with the timing of the challenge. The applicant therefore was entitled to raise his constitutional challenges in the manner in which he did. There should, accordingly, be no order for costs.

Order

[159] In the event, I would have granted the applications for condonation and leave to appeal. I would have dismissed the appeal and the constitutional challenge to the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008 for failure to facilitate public involvement in the legislative process.

Brand AJ, Mogoeng J and Yacoob J concur in the judgment of Ngcobo CJ.

MOSENEKE DCJ AND CAMERON J:

Introduction

[160] The sharp issue in this case is the constitutional validity of national legislation that brought into being the Directorate for Priority Crime Investigation (popularly known as the Hawks) (DPCI)[1] and disbanded the Directorate of Special Operations (popularly known as the Scorpions) (DSO).[2]

[161] We have had the distinct benefit of reading the meticulously crafted judgment of Ngcobo CJ (main judgment). We are indebted to it for its comprehensive exposition of the background, the contentions of the parties and the issues. We agree with the manner in which it disposes of the applications for direct access, condonation and for leave to appeal.

[162] We gratefully adopt the manner in which the main judgment disposes of certain grounds advanced by the applicant to invalidate the impugned legislation. Like it, we conclude that the impugned legislation, which created the DPCI, cannot be invalidated on the grounds that it is irrational or that Parliament had failed to facilitate public

[1] South African Police Service Act 68 of 1995 (SAPS Act) as amended by the South African Police Service Amendment Act 57 of 2008 (SAPS Amendment Act).

[2] National Prosecuting Authority Act 32 of 1998 (NPA Act) as amended by the National Prosecuting Authority Amendment Act 56 of 2008 (NPA Amendment Act).

involvement in the legislative process that led to its enactment. We further agree that section 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the DPCI legislation cannot be invalidated on that ground alone. Similarly, the legislative choice to abolish the DSO and to create the DPCI did not in itself offend the Constitution.

[163] However, two crucial questions remain for determination. The first is whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. And if it does, the second is whether the specialised unit which the impugned legislation has established, the DPCI, meets the requirement of independence. In answer to the first question, unlike the main judgment, we conclude unequivocally that the Constitution itself imposes that obligation on the state. To the second question, we hold, unlike the main judgment, that the requirement of independence has not been met and consequently that the impugned legislation does not pass constitutional muster.

[164] The sequel to these conclusions is that they lead us to an outcome that diverges from the main judgment. We uphold the appeal, find the offending legislative provisions establishing the DPCI constitutionally invalid and suspend the declaration of

constitutional invalidity in order to give Parliament the opportunity to remedy the constitutional defect within 18 months.

[165] What follow are the reasons that underpin the conclusion we reach. First, we describe the need for combating corruption and organised crime related to it; thereafter we identify the source of the obligation to establish an independent anti-corruption unit; and third, we examine the content of the obligation. In the end, we assess whether the structural and operational attributes of the DPCI satisfy the requirement of independence.

The need and rationale for combating corruption

[166] There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.

[167] This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own

legislation,[3] in regional[4] and international[5] conventions and in academic research.[6] In a statement preceding the text of the United Nations Convention against Corruption[7] (UN Convention), Kofi Annan[8] observed:

> "This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development."

[168] These sentiments were echoed on behalf of South Africa when it signed the UN Convention. Minister Fraser-Moleketi said:

> "Corruption is a common feature in all political systems, despite the differences that may exist in their governing philosophies or their geography. Nation-states are increasingly

[3] Prevention and Combating of Corrupt Activities Act 12 of 2004 and Prevention of Organised Crime Act 121 of 1998.

[4] Southern African Development Community Protocol against Corruption (SADC Corruption Protocol) adopted on 14 August 2001 and Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol) adopted on 24 August 1996, http://www.sadc.int, accessed on 16 March 2011.

[5] United Nations Convention against Corruption (2004) 43 *ILM* 37 (UN Convention); United Nations Convention against Transnational Organized Crime (2001) 40 *ILM* 353; and African Union Convention on Preventing and Combating Corruption (2004) 43 *ILM* 5 (AU Convention).

[6] Goudie & Stasavage "Corruption: The Issues" (1997) OECD Development Centre Working Paper No 122; Hussman et al "Institutional Arrangements for Corruption Prevention: Considerations for the Implementation of the United Nations Convention against Corruption Article 6" (2009) U4 Anti-Corruption Resource Centre; Pilapitiya "The Impact of Corruption on the Human Rights Based Approach to Development" (2004) United Nations Development Programme, Oslo Governance Centre; Lash "Corruption and Economic Development" (2003) U4 Anti-Corruption Resource Centre; and Van Vuuren "National Integrity Systems – Transparency International Country Study Report (Final Draft): South Africa 2005" (2005) Transparency International.

[7] http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, accessed on 16 March 2011. UN Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004.

[8] Then Secretary-General of the United Nations.

> aware that corruption presents a serious threat to their core principles and values, and hinders social and economic development. As a result, there has been a growing acceptance of the need to address the problem in a coordinated, comprehensive and sustainable way."[9]

[169] The preamble to the African Union Convention[10] (AU Convention) readily acknowledges that "corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent". In a similar vein, the preamble to the Southern African Development Community Protocol against Corruption[11] (SADC Corruption Protocol) refers to "the adverse and destabilising effects of corruption throughout the world on the culture, economic, social and political foundations of society", and recognises that "corruption undermines good governance which includes the principles of accountability and transparency".

[170] Perhaps the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it is to be found in our own domestic legislation. The preamble to the Prevention and Combating of Corrupt Activities Act[12] (PRECCA)

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[9] Opening statement by Ms Geraldine J Fraser-Moleketi, the then Minister for the Public Service and Administration, South Africa, on the occasion of the signing ceremony of the UN Convention (9 December 2003), http://www.info.gov.za/speeches/2003/03122912461005.htm, accessed on 16 March 2011.

[10] The AU Convention was adopted on 11 July 2003. South Africa signed the Convention on 16 March 2004, ratified the Convention on 11 November 2005 and it entered into force on 5 August 2006.

[11] The SADC Corruption Protocol was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

[12] 12 of 2004. The preamble states:

> "WHEREAS the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;

records that corruption and related corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardises the rule of law. It endangers the stability and security of societies; jeopardises sustainable development; and provides a breeding ground for organised

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> AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;
>
> AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;
>
> AND WHEREAS the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;
>
> AND WHEREAS there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering;
>
> AND WHEREAS corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities;
>
> AND WHEREAS a comprehensive, integrated and multidisciplinary approach is required to prevent and combat corruption and related corrupt activities efficiently and effectively;
>
> AND WHEREAS the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption and related corrupt activities efficiently and effectively;
>
> AND WHEREAS the prevention and combating of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation, with the support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community-based organizations, if their efforts in this area are to be efficient and effective;
>
> AND WHEREAS the United Nations has adopted various resolutions condemning all corrupt practices, and urged member states to take effective and concrete action to combat all forms of corruption and related corrupt practices;
>
> AND WHEREAS the *Southern African Development Community Protocol against Corruption*, adopted on 14 August 2001 in Malawi, reaffirmed the need to eliminate the scourges of corruption through the adoption of effective preventive and deterrent measures and by strictly enforcing legislation against all types of corruption;
>
> AND WHEREAS the Republic of South Africa desires to be in compliance with and to become Party to the *United Nations Convention against Corruption* adopted by the General Assembly of the United Nations on 31 October 2003;
>
> AND WHEREAS it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized,
>
> BE IT THEREFORE ENACTED . . . ."

crime. The preamble notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that regional and international co-operation is essential to prevent and control corruption and related crimes.

[171] The preamble goes on to recognise that various United Nations resolutions and the SADC Corruption Protocol condemn corruption and related corrupt practices and underscores "the need to eliminate the scourges of corruption through the adoption of effective preventative and deterrent measures and by strictly enforcing legislation against all types of corruption". It makes plain that the Republic enacts the legislation in order "to be in compliance with and to become Party to" the UN Convention.[13]

[172] Expectedly, our courts too have warned of the pernicious threat corruption poses to our collective enterprise to entrench a just and democratic society. In *S v Shaik and Others*,[14] this Court warned that corruption is "antithetical to the founding values of our constitutional order."[15] Similarly, in *South African Association of Personal Injury Lawyers v Heath and Others*,[16] this Court held that—

> "[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment

[13] Id.

[14] [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC).

[15] Id at para 72.

[16] [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).

> to *human dignity, the achievement of equality and the advancement of human rights and freedoms*. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."[17] (Emphasis added.)

[173] In *S v Shaik and Others*,[18] the Supreme Court of Appeal pointed out that—

> "[t]he seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and *negatively affects development and the promotion of human rights*. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe."[19] (Emphasis added.)

[174] We have noted the resolve of Parliament to battle corruption. That provokes the question: which "effective preventative and deterrent measures" are needed for "strictly enforcing legislation against all types of corruption"?[20] For the narrow purpose of this case, it must be asked what is the source of the obligation to establish and maintain a corruption-fighting unit, and which structural and operational attributes must it have? To this question we now turn.

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[17] Id at para 4.

[18] 2007 (1) SA 240 (SCA).

[19] Id at para 223. See also *S v Kwatsha* 2004 (2) SACR 564 (ECD) at 569-70; *S v Salcedo* 2003 (1) SACR 324 (SCA) at para 3; and *S v Sadler* 2000 (1) SACR 331 (SCA) at para 13.

[20] See above n 12.

The obligation to establish and maintain a corruption-fighting unit

[175] The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution.

[176] Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public.[21] In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy.[22] Similar requirements apply to public procurement, when organs of state contract for goods and services.[23] It is equally

[21] See section 195 of the Constitution.

[22] Section 215.

[23] Section 217.

clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.[24] In turn the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices.[25]

[177] The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the state. It requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state's obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms. Parliament itself has recognised this in the preamble to PRECCA.[26] All this constitutes uncontested public and legislative policy in South Africa. For it has been expressly articulated and enacted by Parliament. That, however, is not the end of the matter.

[24] Section 205(3).

[25] Section 179(2).

[26] See above n 12.

[178] The core ground advanced in order to invalidate the legislation that established the DPCI is that it lacks the necessary structural and operational independence to be an effective corruption-fighting mechanism. And that, for that reason, the impugned legislation is inconsistent with international obligations of the Republic and therefore the Constitution. It must be said that the Minister did not, nor could he, contend that independence is not a necessary attribute of a corruption-fighting mechanism. The impugned legislation provides in circuitous words that when applying its terms, the need to ensure that the Directorate has the necessary independence to perform its function should be recognised and taken into account.[27] The "necessary independence" is not defined. In order to understand the content of the constitutionally-imposed requirement of independence we have to resort to international agreements that bind the Republic.[28] As we now show, our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state's conduct in fulfilling its obligations in relation to the Bill of Rights.

Independence, international obligations and our Constitution

[179] The Constitution contains four provisions that regulate the impact of international law on the Republic. One concerns the impact of international law on the interpretation

[27] Section 17B(b)(ii) of the SAPS Act provides that "[i]n the application of this Chapter the following should be recognised and taken into account . . . [t]he need to ensure that the Directorate . . . has the necessary independence to perform its functions".

[28] In *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 34-5, this Court made it plain that it is entitled to consider both binding and non-binding instruments of international law.

of the Bill of Rights.[29] A second concerns the status of international agreements.[30] A third concerns customary international law. The Constitution provides that it "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."[31] A fourth concerns the application of international law. It provides that when interpreting any legislation, "every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[32] In this judgment we are concerned primarily with section 39(1)(b) and with section 231, and it is to the latter provision that we turn first.

[29] Section 39(1)(b) provides that, when interpreting the Bill of Rights, a court, tribunal or forum "must consider international law".

[30] Section 231 provides:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[31] Section 232.

[32] Section 233.

[180] The negotiating and signing of all international agreements "is the responsibility of the national executive."[33] An agreement that the executive has concluded does not without more bind the Republic. For that to happen, the agreement must be approved by resolution in both the National Assembly and the National Council of Provinces (NCOP).[34] However, agreements "of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession" need not be so approved. They bind the Republic once the national executive has properly entered into them, but must be tabled in the National Assembly and the NCOP within a reasonable time.[35]

[181] In our view, the main force of section 231(2) is directed at the Republic's legal obligations under international law,[36] rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement "binds the Republic" and Parliament exercises the Republic's legislative power, which it must do in accordance with and within the limits of the Constitution,[37] the provision must be read in conjunction with the other provisions within section 231. Here, section 231(4) is of particular significance. It provides that an international agreement "becomes law in the

[33] Section 231(1).

[34] Section 231(2).

[35] Section 231(3).

[36] See Dugard *International Law: A South African Perspective* (3 ed) (Juta, Cape Town 2005) 59-62.

[37] Section 44(4) of the Constitution provides: "When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution."

Republic when it is enacted into law by national legislation". The fact that section 231(4) expressly creates a path for the domestication of international agreements may be an indication that section 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them.[38] It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.

[182] As noted earlier, the main force of section 231(2) is in the international sphere. An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That important fact, as we shortly show, has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.

[183] A number of international agreements on combating corruption currently bind the Republic. The UN Convention imposes an obligation on each state party to ensure the

[38] For an academic discussion on the legal positions under the interim Constitution and the final Constitution see Dugard "Kaleidoscope: International Law and the South African Constitution" (1997) 8 *European Journal of International Law* 77 at 81-3; Keightley "Public International Law and the Final Constitution" (1996) 12 *South African Journal on Human Rights* 405 at 408-14; and Devine "The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993" (1995) 44 *International and Comparative Law Quarterly* 1 at 6-11.

existence of a body or bodies tasked with the prevention of corruption.[39] Moreover, Article 6(2) provides that—

> "[e]ach State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided."

[184] Under Article 8(1) of the Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol) member states are required to institute appropriate and effective measures to curb corruption. Under Article 8(2) these measures include the following—

> "(a) Establishment of adequately resourced anti-corruption agencies or units that are:
>
> (i) independent from undue intervention, through appointment and recruiting mechanisms that guarantee the designation of persons of high professional quality and integrity;
>
> (ii) free to initiate and conduct investigations".

[185] Under the SADC Corruption Protocol, states parties must "adopt measures, which will create, maintain and strengthen . . . institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption".[40]

[39] Article 6(1) above n 5.

[40] Article 4(1)(g).

[186] The AU Convention provides in Article 5(3) that states parties undertake to "[e]stablish, maintain and strengthen independent national anti-corruption authorities or agencies". Article 20(4) reinforces the importance of independence in more direct terms: "The national authorities or agencies shall be allowed the necessary independence and autonomy, to be able to carry out their duties effectively."

[187] The amicus helpfully referred us to a report prepared in 2007 by the Organisation for Economic Co-operation and Development (OECD): *Specialised Anti-corruption Institutions: Review of Models* (OECD Report).[41] It reports on a review of models of specialised anti-corruption institutions internationally. The OECD Report identified the main criteria for effective anti-corruption agencies to be independence, specialisation, adequate training and resources.[42] The OECD Report is not in itself binding in international law, but can be used to interpret and give content to the obligations in the Conventions we have described.[43]

[41] http://www.oecd.org/dataoecd/7/4/39971975.pdf, accessed on 16 March 2011.

[42] The OECD drew these criteria from the provisions of UN Convention as well as the Council of Europe Criminal Law Convention on Corruption. Id at 6.

[43] In terms of Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 (1969) 8 *ILM* 679, the subsequent practice of states in applying a treaty can be used to indicate how the states have interpreted the treaty and thus give content to treaty obligations. Article 31 of the Convention reads:

> "*General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

[188] The OECD Report defined independence as follows:

> "Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference."[44] (Emphasis removed.)

The OECD Report also found that—

> "one of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting 'pre-emptive obedience'. In short, 'independence' first

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(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Although South Africa has neither signed nor ratified this Convention, commentators observe that South Africa employs the Convention in formulating its practice regarding treaties: see Schlemmer "Die Grondwetlike Hof en die Ooreenkoms ter Vestiging van die Wêreldhandelsorganisasie" (2010) 4 *TSAR* 749 at 753.

[44] Above n 41 at 6.

> of all entails de-politicisation of anti-corruption institutions. The adequate level of independence or autonomy depends on the type and mandate of an anti-corruption institution. Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge with preventive functions. . . .
> . . . .
> The question of independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. Police and other investigative bodies are in most countries highly centralised, hierarchical structures reporting at the final level to the Minister of Interior or Justice. Similarly, but to a lesser extent, this is true for prosecutors in systems where the prosecution service is part of the government and not the judiciary. In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case. Accordingly, the independence of such bodies requires careful consideration in order to limit the possibility of individuals' abusing the chain of command and hierarchical structure, either to discredit the confidentiality of investigations or to interfere in the crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions. There are many ways to address this risk. For instance, special anti-corruption departments or units within the police or the prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor."[45] (Footnotes omitted.)

[189] The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and

[45] Id at 17.

draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs "to provide appropriate protection to everyone through laws and structures designed to afford such protection."[46] Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.

[190] And since in terms of section 8(1), the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state", it follows that the executive, when exercising the powers granted to it under the Constitution, including the power to prepare and initiate legislation,[47] and in some circumstances Parliament, when enacting legislation, must give effect to the obligations section 7(2) imposes on the state.[48]

[191] Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes, as long as they fall

[46] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44.

[47] Section 85(2)(d) provides that the President exercises the executive authority, together with the other members of the Cabinet, by "preparing and initiating legislation".

[48] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 69.

within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt.[49] A range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.

[192] And it is here where the courts' obligation to consider international law when interpreting the Bill of Rights is of pivotal importance. Section 39(1)(b) states that when interpreting the Bill of Rights a court "must consider international law". The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.

[193] That is a duty this country itself undertook when it acceded to these international agreements. And it is an obligation that became binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them, more especially the UN Convention.

[49] Id at para 86.

[194] That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies "binds the Republic" is of prime significance. It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.

[195] This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.

[196] More specifically, we emphasise that the form and structure of the entity in question lie within the reasonable power of the state, provided only that whatever form and structure are chosen do indeed endow the entity in its operation with sufficient independence. Differently put, the requirement of independence does not answer the

question, what form and structure must the entity take? It merely asks, does the form and structure given to the entity, ensure that it is sufficiently independent?

[197] We therefore find that to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable. It is not an extraneous obligation, derived from international law and imported as an alien element into our Constitution: it is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.

[198] More specifically, the amicus contended, and we agree, that failure on the part of the state to create a sufficiently independent anti-corruption entity infringes a number of rights. These include the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.

[199] Having reached this conclusion, we pause to step back for a moment. We do so to reflect more broadly on the suggestion in the main judgment that our constitutional law does not require the state to create an independent anti-corruption entity. We consider this erroneous, not only for the reasons we have set out so far, but for a deeper reason arising from the architecture of our Constitution.

[200] As we have already pointed out, corruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights. That corrosion necessarily triggers the duties section 7(2) imposes on the state. We have also noted that it is open to the state in fulfilling those duties to choose how best to combat corruption. That choice must withstand constitutional scrutiny. And, even leaving to one side for a moment the Republic's international law obligations, we consider that the scheme of our Constitution points to the cardinal need for an independent entity to combat corruption.[50] Even without international law, these legal institutions and provisions point to a manifest conclusion. It is that, on a common sense approach, our law demands a body outside executive control to deal effectively with corruption.

[201] The point we make is this. It is possible to determine the content of the obligation section 7(2) imposes on the state without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision, as the main judgment suggests, to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact.

[50] See Chapter 9 "State Institutions Supporting Constitutional Democracy".

[202] A further provision of the Constitution that integrates international law into our law reinforces this conclusion. It is section 233, which, as we have already noted, demands any reasonable interpretation that is consistent with international law when legislation is interpreted. There is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.

Limitation

[203] Any right in the Bill of Rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including the nature of the right, the importance of the limitation, and its nature and extent.[51] The respondents offered no attempt to justify any limitation of the duty to create an independent anti-corruption unit; their argument was that the unit was indeed sufficiently independent. The absence of any attempt to justify limitation is not surprising since it would, in our view, be hard to advance. The need for a sufficiently independent anti-corruption unit is so patent, and the beneficent potential of its operation so incontestable, and the disadvantages of its creation so hard to conceive, that justification would be hard to muster.

[51] Section 36(1) of the Constitution.

[204] The provisions of the South African Police Service Amendment Act[52] (SAPS Amendment Act) must therefore be measured for compliance with the state's obligation to invest the agency with the necessary independence.

[205] We add that any obligation binding upon the Republic under international law must not conflict with express provisions of the Constitution, including those in the Bill of Rights. Here, there is no conflict. Far from containing any provision at odds with the obligation to create an independent corruption-fighting entity, the very structure of our Constitution – in which the rule of law is a founding value,[53] which distributes power by separating it between the legislature,[54] the executive[55] and the judiciary,[56] and which creates various institutions supporting constitutional democracy, which it expressly decrees must be independent and impartial[57] – affords the obligation a homely and emphatic welcome.

[206] The main judgment notes that independence requires that the anti-corruption agency must be able to function effectively without undue influence. It finds that legal

[52] 57 of 2008.

[53] Section 1(c) of the Constitution provides: "The Republic of South Africa is one, sovereign, democratic state founded on the following values . . . [s]upremacy of the constitution and the rule of law."

[54] Chapters 4 "Parliament" and 6 "Provinces".

[55] Chapter 5 "The President and National Executive".

[56] Chapter 8 "Courts and Administration of Justice".

[57] Chapter 9 "State Institutions Supporting Constitutional Democracy". The institutions are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. Section 181(2) provides that these institutions are "independent" and must be "impartial".

mechanisms must be established that limit the possibility of abuse of the chain of command and that will protect the agency against interference in operational decisions about starting, continuing and ending criminal investigations and prosecutions involving corruption. It then asks whether the DPCI has sufficient structural and operational autonomy to protect it from political influence. Here the question is not whether the DPCI has full independence, but whether it has an adequate level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political interference.

[207] To these formulations we add a further consideration. This Court has indicated that "the appearance or perception of independence plays an important role" in evaluating whether independence in fact exists.[58] This was said in connection with the appointment procedures and security of tenure of magistrates. 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. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to

[58] *S v Van Rooyen* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 32, endorsing the finding in *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC) at 172 that the test for independence should include public perception.

meet one of the objective benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.

Does the DPCI have the operational and structural attributes of independence?

[208] We consider that the provisions creating the DPCI, while succeeding in creating some hedge around it, fail to afford it an adequate measure of autonomy. Hence it lacks the degree of independence arising from the constitutional duty on the state to protect and fulfil the rights in the Bill of Rights. Our main reason for this conclusion is that the DPCI is insufficiently insulated from political influence in its structure and functioning. But we rest our conclusion also on the conditions of service that pertain to its members and in particular its head. These make it vulnerable to an undue measure of political influence.

[209] In considering the statutory provisions that create the DPCI, we make comparative reference to the provisions that regulated the structure and functioning of the DSO that preceded it. By doing so we do not suggest that the DSO constitutes a "gold standard" from which Parliament cannot deviate. We nevertheless consider that the fact that Parliament has created an entity that in signal ways is less independent than the DSO is relevant to the inquiry, in two ways.

[210] First, it impacts on the public perception of independence. A reasonable and informed member of the public may have misgivings about the DPCI's independence,

given that the features protecting it are so markedly more tenuous than those of the DSO. Second, we find it hard to conclude that the creation of an entity that is markedly less independent than the DSO can fulfil the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights. This is because, as we now show, independence is assessed on the basis of factors such as security of tenure and remuneration, and mechanisms for accountability and oversight. These factors must be analysed to determine whether, on the whole, the body satisfies the threshold of adequate independence. The now-defunct DSO was independent. While it does not represent an inviolable standard, comparison with it shows how markedly short of independence the DPCI falls.

[211] There is a further point. 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 Chapter 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.

[212] We therefore find reference to the now-repealed provisions that invested the DSO with its powers and created protections for their exercise illuminating.

[213] The lack of independence is reflected in our view most signally in the absence of secure tenure protecting the employment of the members of the entity and in the provisions for direct political oversight of the entity's functioning. We deal first with security of tenure, and then with political oversight.

[214] The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be "responsible for policing".[59] These constitutional duties can productively co-exist, and will do so, provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the state's constitutional obligations under section 7(2) of the Constitution.

[215] Differently stated, we do not consider that the Constitution's requirement that a politician "must be responsible for policing" requires either that the anti-corruption unit must itself function under political oversight, or that the particular oversight arrangements in the legislation now impugned are constitutionally acceptable. On the

[59] Section 206(1).

contrary, as we now show, we consider the political oversight the legislation requires incompatible with adequate independence.

[216] The second general point we make is that adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible. And it would be averse to our uniquely South African constitutional structure. What is required is not insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit.

Security of tenure and remuneration

[217] As we turn to the conditions of employment of the DPCI, we make the initial observation that under the provisions that applied to the now-defunct DSO, the head of the DSO, the directors, deputy directors and prosecutors all had to swear an oath of office or make an affirmation before commencing duty.[60] That oath was to—

> "uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law."[61]

There appears to be no comparable requirement in the provisions constituting the DPCI.

[60] Section 32(2)(a) read with section 4 of the NPA Act before amendment by the NPA Amendment Act.

[61] Section 32(2)(a) of the NPA Act before amendment by the NPA Amendment Act.

[218] We do not say that an oath or affirmation of this kind ensures independence. Nor do we say that it is essential to it. We make a different point. We note that the absence of any solemn undertaking, before commencing service and exercising powers, indicates the sharply diminished standing the legislation accords the DPCI and its members. No longer are they regarded as independently bound by oath to uphold the Constitution and to perform their duties without fear, favour or prejudice. They are ordinary police officials, required to perform their duty,[62] no doubt, but not enjoined or bound to do so by oath or affirmation.

[219] What is more, the head of the DPCI and the persons appointed to it enjoy little if any special job security. The provisions at issue provide that the head of the DPCI shall be a Deputy National Commissioner of the SAPS, and shall be "appointed by the Minister in concurrence with the Cabinet".[63] In addition to the head, the Directorate comprises persons appointed by the National Commissioner of the SAPS "on the recommendation" of the head,[64] plus "an adequate number of legal officers"[65] and

[62] Under the South African Police Service's Code of Conduct, promulgated by regulation in terms of section 24(1)(h) of the SAPS Act, members of the SAPS commit themselves to, amongst other things, upholding the Constitution and the law. See Regulations for the South African Police Service relating to the Code of Conduct for Members of the Service, GN R529 GG 27642, 10 June 2005.

[63] Section 17C(2)(a) of the SAPS Act.

[64] Section 17C(2)(b) of the SAPS Act.

[65] Section 17C(2)(c) of the SAPS Act.

seconded officials.[66] The Minister is required to report to Parliament on the appointment of the head of the DPCI.[67]

[220] The members of the DPCI are, like other members of the SAPS, subject to inquiries into their "fitness . . . to remain in the Service on account of indisposition, ill-health, disease or injury"[68] and on various other grounds.[69] Under prescribed conditions, an inquiry may be converted into a disciplinary inquiry.[70] Under the South African Police Service Act (SAPS Act), the National Commissioner may "discharge" any member of the DPCI from the SAPS on account of redundancy or the interests of the SAPS.[71] The Commissioner is empowered to discharge a member of the service if, for reasons other than unfitness or incapacity, the discharge "will promote efficiency or economy" in the SAPS, or will "otherwise be in the interest of" the SAPS.[72] The reach of this provision appears to include the head of the Directorate.

[221] The grounds for dismissal under the SAPS Act are broad. The DPCI's members enjoy the same security of tenure as other members of the police force – no more and no less. Their dismissal is subject to no special inhibitions, and can occur at a threshold

[66] Section 17C(2)(d) of the SAPS Act.

[67] Section 17C(3) of the SAPS Act.

[68] Section 34(1)(a) of the SAPS Act.

[69] Section 34(1)(b)-(h) of the SAPS Act.

[70] Section 34(3) read with section 40 of the SAPS Act.

[71] Section 35(a)-(b) of the SAPS Act.

[72] Section 35 of the SAPS Act.

lower than dismissal on an objectively verifiable ground like misconduct or continued ill-health.

[222] In short, the members of the new Directorate enjoy no specially entrenched employment security. They, like other members of the SAPS, have employment rights under the SAPS Act and under other labour and employment law statutes, but no special provisions secure their employment. While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.

[223] This is exacerbated by the fact that the appointment of the National Commissioner of the SAPS is itself renewable.[73] By contrast, the appointment of the National Director Public Prosecutions (NDPP) – who selected the head of the DSO from amongst the Deputy NDPPs – is not.[74] 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.

[73] Section 7(2) of the SAPS Act.

[74] Section 12(1) of the NPA Act.

[224] The lack of specially entrenched employment security bears on the protection afforded the members of DPCI by the complaints mechanism headed by a retired judge.[75] In our view, the absence of specially secured employment may well disincline members of the Directorate from reporting undue interference in investigations for fear of retribution. In the result, the mechanism the new provisions create to protect any member of the Directorate "who can provide evidence of any improper influence or interference" exerted upon him or her regarding an investigation[76] necessarily diminishes in efficacy.

[225] The contrast with the position under the now-defunct DSO is signal. Previously, under the NPA Act, the DSO was established in the office of the NDPP, and fell within the NPA.[77] In terms of section 179(1) of the Constitution, the NDPP is appointed by the President as head of the national executive. The head of the DSO was a deputy NDPP, assigned from the ranks of deputy NDPPs by the NDPP,[78] and reporting to the NDPP. The NPA Act provides that a deputy NDPP may be removed from office only by the President, on grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office.[79] And Parliament holds a veto over the removal of a deputy NDPP. The reason for the removal, and the representations of

[75] The main judgment at [147] relies in part on the complaints mechanism for the conclusion that the independence requirement is satisfied.

[76] Section 17L(4)(b) of the SAPS Act.

[77] Section 7(1)(a) of the NPA Act before amendment by the NPA Amendment Act.

[78] Section 7(3)(a) of the NPA Act before amendment by the NPA Amendment Act.

[79] Section 12 of the NPA Act.

the deputy NDPP, must be communicated to Parliament, which may resolve to restore the deputy NDPP to office.[80]

[226] These protections applied also to investigating directors within the DSO.[81] The special protection afforded the members of the DSO served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution.

[227] In addition, before the statutory amendments now at issue, the head of the DSO, as a deputy NDPP, enjoyed a minimum rate of remuneration which was determined by reference to the salary of a judge of the High Court.[82] By contrast, the new provisions stipulate that the conditions of service for all members (including the grading of posts, remuneration and dismissal) are governed by regulations,[83] which the Minister for Police determines.[84] The absence of statutorily secured remuneration levels gives rise to problems similar to those occasioned by a lack of secure employment tenure. Not only do the members not benefit from any special provisions securing their emoluments, but the absence of secured remuneration levels is indicative of the lower status of the new entity.

[80] Section 12(6)(c)-(d) of the NPA Act.

[81] Section 17 of the NPA Act applies to the NDPP, deputy NDPPs and directors.

[82] Section 17(1) of the NPA Act before amendment by the NPA Amendment Act.

[83] Sections 17G and 24 of the SAPS Act.

[84] Section 24 of the SAPS Act.

Accountability and oversight by the Ministerial Committee

[228] Our gravest disquiet with the impugned provisions arises from the fact that the new entity's activities must be coordinated by Cabinet.[85] The statute provides that a Ministerial Committee, which must include at least the Ministers for Police, Finance, Home Affairs, Intelligence and Justice,[86] and may include any other Minister designated from time to time by the President,[87] may determine policy guidelines in respect of the functioning of the DPCI,[88] as well as for the selection of national priority offences.[89] Indeed, the power the statute grants the head of the DPCI to combat and investigate national priority offences which in the opinion of the head need to be addressed, is expressly subordinated to policy guidelines issued by the Ministerial Committee, as is the power of the National Commissioner to refer offences or categories of offences to the DPCI.[90]

[85] Section 17I of the SAPS Act is headed "Coordination by Cabinet".

[86] Section 17I(1)(a) of the SAPS Act.

[87] Section 17I(1)(b) of the SAPS Act.

[88] Section 17I(2)(a) of the SAPS Act.

[89] Section 17I(2)(b) of the SAPS Act.

[90] Section 17D(1) of the SAPS Act provides:

> "The functions of the [DPCI] are to prevent, combat and investigate—
>
> (a) national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the [DPCI], subject to any policy guidelines issued by the Ministerial Committee; 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 Ministerial Committee."

[229] The head of the DPCI, as a Deputy National Commissioner and a member of the SAPS,[91] is accountable to the National Commissioner, whose post, as we have pointed out, lacks sufficient security of tenure,[92] thus inevitably creating vulnerability to political pressure. In addition to this, the power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI creates in our view a plain risk of executive and political influence on investigations and on the entity's functioning.

[230] It is true that the policy guidelines the Ministerial Committee may issue could be broad and thus harmless. But they might not be broad and harmless. Nothing in the statute requires that they be. Indeed, the power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate – or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating.

[231] This may be far-fetched.[93] Perhaps. The Minister for Police must submit any policy guidelines the committee determines to Parliament for approval.[94] This is a

[91] Section 17C(2)(a) of the SAPS Act.

[92] See above [222] and [223].

[93] We have not been able to establish that the Ministerial Committee has in fact issued any guidelines. By GN R783 GG 33524, 7 September 2010, the Minister for Police issued regulations in terms of section 24(1)(eeA) of the SAPS Act dealing with disclosure of financial and other interests; measures for integrity testing of members of the DPCI and for protection of confidentiality of information, and the form and manner in which complaints may be made to the retired judge provided for in section 17L.

[94] Section 17K(4) of the SAPS Act.

safeguard against far-fetched conduct. But if Parliament does nothing, the guidelines are deemed to be approved.[95] The point is that the legislation does not rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open. This is in our view plainly at odds with a structure designed to secure effective independence. It underscores our conclusion that the legislation does too little – indeed, far too little – to secure the DPCI from interference.

[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.

[233] We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of "priority offences". What those crimes might be depends on the opinion of the head of the Directorate as to national priority offences – and this is in turn subject to the Ministerial Committee's policy guidelines.[96] The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a

[95] Section 17K(5) of the SAPS Act.

[96] Section 17D(1)(a) of the SAPS Act.

discretion, outside the confines of the legislation itself. This cannot be conducive to independence, or to efficacy.[97]

[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. What is more, the new provisions go further than mere competence to determine guidelines. They also make provision for hands-on supervision. They provide:

> "(a) The Ministerial Committee shall oversee the functioning of the Directorate and shall meet as regularly as necessary, but not less than four times annually.
>
> (b) The National Commissioner and the Head of the Directorate shall, upon request of the Ministerial Committee, provide performance and implementation reports to the Ministerial Committee."[98]

[235] These provisions afford the political executive the power directly to manage the decision-making and policy-making of the DPCI. As with the power to formulate policy guidelines, the statute places no limit on the power of the Ministerial Committee in overseeing the functioning of the DPCI. On the contrary – the requirement that the Ministerial Committee must meet regularly, and that on request performance and

[97] As indicated in n 93, two years after the legislation was passed, we have been unable to find any guidelines published in terms of section 17I(2) of the SAPS Act.

[98] Section 17I(3) of the SAPS Act.

implementation reports must be provided to it, in our view creates the possibility of hands-on management, hands-on supervision, and hands-on interference.

[236] We find this impossible to square with the requirement of independence. We accept that financial and political accountability of executive and administrative functions requires ultimate oversight by the executive. But the power given to senior political executives to determine policy guidelines, and to oversee the functioning of the DPCI, goes far further than ultimate oversight. It lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.

[237] The new provisions contain an interpretive injunction: in their application "the need to ensure" that the DPCI "has the necessary independence to perform its functions"[99] must be recognised and taken into account. But this injunction operates essentially as an exhortation. It is an admonition in general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether. This is because the interpretive rule enjoins political executives to take the need to ensure independence into account. At the same time other provisions place power in their hands without any express qualification – power to determine policy guidelines and to oversee the functioning of the DPCI.

[99] Section 17B(b)(ii) of the SAPS Act.

[238] It is the structure of the DPCI that brings its capacity to be adequately independent into question, and it is its structure that renders the interpretive injunction potentially feeble. What independence requires is freedom from the risk of political oversight and trammelling, and it is this very risk that the statutory provisions at issue create.

[239] The new provisions require parliamentary oversight of the DPCI.[100] In addition, the National Commissioner must submit an annual report to Parliament.[101] And the head of the DPCI must at any time when requested by Parliament submit a report on the DPCI's activities.[102] These are beneficial provisions. Under our constitutional scheme, Parliament operates as a counter-weight to the executive, and its committee system,[103] in which diverse voices and views are represented across the spectrum of political views, assists in ensuring that questions are asked, that conduct is scrutinised and that motives are questioned.

[240] We note, in considering how far parliamentary oversight counter-weighs these limitations of structure, that the phrase "oversee the functioning of the Directorate"

[100] Section 17K(1) of the SAPS Act provides: "Parliament shall effectively oversee the functioning of the Directorate and the committees established in terms of this Chapter."

[101] Section 17K(2) of the SAPS Act.

[102] Section 17K(3) of the SAPS Act.

[103] See National Assembly Rules (as of June 1999) Chapter 12 Rule 125(1) ("Parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly".); Rules of the National Council of Provinces (issued March 1999) Chapter 9 Rule 89(1) ("Provinces are entitled to be equally represented in committees"), http://www.pmg.org.za/parlinfo/narules and http://www.pmg.org.za/parlinfo/ncoprules, accessed on 16 March 2011.

occurs in relation to the duties of both the Ministerial Committee[104] and Parliament,[105] except that in the latter case it is preceded by the word "effectively". While the Ministerial Committee must "oversee the functioning" of the DPCI, Parliament must "effectively oversee" its functioning. Despite this verbal emphasis on Parliament's oversight, no timelines or minimum standards are set for what it does in this regard. By contrast, the statute requires that the Ministerial Committee meet "as regularly as necessary, but not less than four times annually."[106] It is plain, as we indicated earlier, that it is the Ministerial Committee's oversight that is intended to be hands-on.

[241] We thus make two points. First, the parliamentary oversight the new provision requires is more benign and less intrusive than that of the Ministerial Committee. Second, Parliament's powers are insufficient to allow it to rectify the deficiencies of independence that flow from the extensive powers of the Ministerial Committee. This diluted level of oversight, in contrast to the high degree of involvement permitted to the Ministerial Committee in the functioning of the Directorate, cannot restore the level of independence taken at source.

[242] We appreciate that Parliament is unlikely to ignore its oversight role. But the provisions are nowhere designed to afford it as active an involvement in the functioning

[104] Section 17I(3)(a) of the SAPS Act.

[105] Section 17K(1) of the SAPS Act.

[106] Section 17I(3)(a) of the SAPS Act.

of the DPCI as that of the Ministerial Committee. In addition, the Ministerial Committee and the head of the DPCI have power to determine what the reports to Parliament contain. This is a significant power, which may weaken the capacity of Parliament to ensure a vigorously independent functioning DPCI.

[243] We consider that it is not unrealistic to conclude that the Ministerial Committee will be actively involved in overseeing the functioning of the DPCI. By contrast, parliamentary committees comprise members of a diversity of political parties and views. No consolidated or hegemonic view, or interest, is likely to preponderate to the exclusion of other views. As importantly, parliamentary committees function in public.[107] The questions they ask of those reporting to them aim at achieving public accountability. The Ministerial Committee by contrast comprises political executives who function out of the public gaze. The accountability they seek to exact is political accountability. It is inimical to an adequately independent functioning of the DPCI.

[244] We appreciate that the international agreements at issue require the Republic to establish an anti-corruption agency "in accordance with the fundamental principles of its legal system".[108] We also accept that our legal system requires some level of executive involvement in any area of executive functioning. We do not cavil with some measure of executive involvement. It is its extent, and the largeness with which its shadow looms in

[107] Section 59 of the Constitution.

[108] Article 6(1) of the UN Convention.

the absence of other safeguards, that is inimical to the independent functioning of the DPCI.

[245] A beneficial feature of the new provisions is that that the National Commissioner may request that prosecutors from the NPA assist the DPCI in conducting investigations.[109] But the arrangement does little to remedy the concern of politically intrusive oversight. A weakness inherent in it is that it is the National Commissioner who must exercise the power to request that prosecutors join an investigation. Whether the Commissioner will exercise this power in politically fraught investigations must be open to question. It will depend on the Commissioner, and on the terms of his or her appointment. We accept that, where such requests are made, the prosecutors will not be subject to the same chain of command as the investigators in the Directorate, but will continue to report to the NPA. This will help secure some measure of independence and serve as a warrant against undue political influence in investigations. But it is a limping and partial mechanism, which underscores the inadequacy of the arrangements to secure the overall independence of the DPCI.

[246] The other safeguards the provisions create are in our respectful view inadequate to save the new entity from a significant risk of political influence and interference. The complaints mechanism, headed by a retired judge,[110] and backed up by power to refer a

[109] Section 17F(2) and (4) of the SAPS Act.

[110] Section 17L of the SAPS Act.

complaint for prosecution,[111] operates after the fact. It permits complaints to be made, but does not constitute a hedge in advance against their causes. It also permits a member of the public to complain about infringement of rights caused by an investigation, and permits "any member of the Directorate who can provide evidence of any improper influence or interference, whether of a political or any other nature, exerted upon him or her regarding the conducting of an investigation" to complain.[112]

[247] This in our respectful view deals with history. It does not constitute an effective hedge against interference. What is more, section 17L(7) is clear that in the course of this investigation the retired judge may request information from the NDPP in so far as it may be necessary, but the NDPP may on "reasonable grounds" refuse to accede to such request. That may place a considerable hurdle in the way of the retired judge's investigation. In short, an *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

[111] Section 17L(5) of the SAPS Act provides:

> "The retired judge may upon receipt of a complaint investigate such complaint or refer it to be dealt with by, amongst others, the Secretariat, the Independent Complaints Directorate, the National Commissioner, the Head of the Directorate, the relevant Provincial Commissioner, the National Director of Public Prosecutions, the Inspector-General of Intelligence, or any institution mentioned in chapter 9 of the Constitution of the Republic of South Africa, 1996."

[112] Section 17L(4)(b) of the SAPS Act.

mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking.

[248] For these reasons we conclude that the statutory structure creating the DPCI offends the constitutional obligation resting on Parliament to create an independent anti-corruption entity, which is both intrinsic to the Constitution itself and which Parliament assumed when it approved the relevant international instruments, including the UN Convention. We do not prescribe to Parliament what that obligation requires. In summary, however, we have concluded that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the DPCI's power to investigate at the hands of members of the executive, who control the DPCI's policy guidelines, are inimical to the degree of independence that is required. We have also found that the interpretive admonition in section 17B(b)(ii) of the SAPS Act is not sufficient to secure independence.

[249] Regarding the entity's conditions of service, we have found that the lack of employment security, including the existence of renewable terms of office and of flexible grounds for dismissal that do not rest on objectively verifiable grounds like misconduct or ill-health, are incompatible with adequate independence. So too is the absence of statutorily secured remuneration levels. We have further found that the appointment of its members is not sufficiently shielded from political influence.

[250] Regarding oversight, we have concluded that the untrammelled power of the Ministerial Committee to determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences, is incompatible with the necessary independence. We have found that the power to request prosecutors to join an investigation has limited impact, given that the National Commissioner is the functionary who has the power to request it. We have also found that the mechanisms to protect against interference are inadequate, in that Parliament's oversight function is undermined by the level of involvement of the Ministerial Committee, and in that the complaints system involving a retired judge regarding past incidents does not afford sufficient protection against future interference.

Order

[251] In the event, the following order is made:

1. The applications for condonation by the applicant, the first, second and third respondents and the amicus are granted.
2. The application for leave to appeal is granted.
3. The constitutional challenge to the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008, for failure to facilitate public involvement in the legislative process, is dismissed.
4. The appeal succeeds to the extent indicated in paragraph 5.
5. It is declared that Chapter 6A of the South African Police Service Act 68 of

1995 is inconsistent with 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.

7. The respondents are ordered to pay the costs of the applicant, including the costs of two counsel, in the High Court and in this Court.

Froneman J, Nkabinde J and Skweyiya J concur in the judgment of Moseneke DCJ and Cameron J.

For the Applicant:	RP Hoffman SC and PStC Hazell SC instructed by Louis and Associates.
For the First, Second and Third Respondents:	WRE Duminy SC and S Poswa-Lerotholi instructed by the State Attorney, Cape Town.
For the Amicus Curiae:	DN Unterhalter SC and M du Plessis instructed by Webber Wentzel.