IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No CCT 09/2014

In the matter between:

HUGH GLENISTER Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

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

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Fourth Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Fifth Respondent

APPLICANT'S WRITTEN ARGUMENT

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The nature of the appeal:

1. The applicant, having launched a challenge to the provisions of the South African Police Services Amendment Act, Act 10 of 2012

('the Second Amendment Act') on the basis that the entire scheme of the Act as it relates to the Directorate for Priority Crime Investigation ('DPCI') was invalid and inconsistent with the Constitution of the Republic of South Africa, 1996 ('C') seeks to challenge on appeal the findings of the High Court that only a limited number of sections of the South African Police Service Act[1] ('the SAPS Act') fail to pass constitutional muster.

2. The applicant continues to contend that the entire scheme introduced by the Second Amendment Act is unconstitutional and falls to be struck down as invalid.

3. In the alternative and in the event of a finding that the entire scheme is not invalid the applicant, consonant with alternative relief sought in his notice of motion[2] makes common cause with the Helen Suzman Foundation in its envisaged appeal in contending that the court a quo ('the High Court') did not go far enough in the identification of sections of the SAPS Act that do not pass constitutional muster.

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1 Sections 16, 17A, 17CA, 17D, 17DA, 17K(4)-(9)
2 Bundle 1, p 008/9

4. The dispute between the parties flows from the majority judgment[3] of this Honourable Court in Glenister v President of the Republic of South Africa and Others[4] ('Glenister II') and the failure of the legislature to give effect to the findings in that judgment regarding the constitutional and legal requirements for an anti-corruption entity ("ACE").

5. Whereas this Court in Glenister II avoided being prescriptive in respect of the measures to be taken to remedy the defects it had identified in the antecedent legislation and chose instead to declare the entire Chapter 6A of the SAPS Act inconsistent with the Constitution, the High Court, despite the form of the applicant's challenge, chose to restrict its findings of invalidity to specific sections of the SAPS Act, thereby leaving intact important elements of the scheme that remain inconsistent with the Constitution.

6. It is submitted that the approach of this court in Glenister II is to be preferred to the clause by clause approach of the High Court[5] and that its judgment should be set aside and substituted with one

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3 Hereinafter referred to by use of the reference 'J'
4 2011 (3) SA 347 (CC)
5 HC(121]

invalidating and declaring unconstitutional the Second Amendment Act.

The core findings in Glenister II

7. To fulfil its 'especial duty' to respect, protect, promote and fulfil the rights entrenched in the Bill of Rights, the state must create an ACE with the necessary independence, which obligation is constitutionally enforceable[6].

8. To create an ACE that is not adequately independent would not constitute a reasonable step as it makes it unreasonable for the state, in fulfilling its obligations under C7(2), to create an ACE that lacks sufficient independence[7].

9. The 'necessary independence' is not defined. To determine the scope and ambit thereof, resort must be had to international conventions that bind the state[8].

10. The clear and unequivocal obligations in these conventions impose on the state the duty to take reasonable steps to create an ACE that has the necessary independence[9].

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6 J163, J177, J189 & J197
7 J194.
8 J178

11. The state has an obligation to create an ACE that appears from the reasonable standpoint of the public to be independent[10].

12. The constitutional requirement that the Minister of Police ('the Minister') 'must be responsible for policing'[11], does not entail that the ACE must itself function under political oversight[12].

13. Our law demands an ACE outside executive control to deal effectively with corruption[13].

14. The question is not whether the ACE 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[14].

15. What is required by 'adequate' independence is not insulation from political accountability, but only insulation from a degree of management by political actors that threatens

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9 J189
10 J207
11 C206(1)
12 J215]
13 J200
14 J206

imminently to stifle the independent functioning and operations of the ACE[15].

16. Financial and political accountability of executive and administrative functions requires ultimate oversight by the executive but such accountability must not allow intrusion into the core function of the ACE by senior politicians as such intrusion is 'inimical to an adequately independent function of the DPCI[16]'.

17. The main criteria for an effective ACE are independence, specialisation, adequate training and resources[17].

18. Independence requires that[18]:

18.1. the ACE must be able to function effectively without undue influence;

18.2. legal mechanisms are established that limit the possibility of abuse of the chain of command;

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15 J216
16 J236 J 243 & J244
17 J187
18 J206 & J207

18.3. the ACE is protected against interference in operational decisions about starting, continuing and ending criminal investigations and prosecutions involving corruption;

18.4. an adequate level of structural and operational autonomy, is secured through institutional and legal mechanisms to prevent undue political interference; and

18.5. the public perception is that the ACE is an autonomous anti-corruption entity.

The ACE established under the Second Amendment Act

19. In response to Glenister II the legislature through the Second Amendment Act, created a scheme in terms of which the DPCI remains operative within the Service, is not a dedicated ACE and remains under the control of the National Commissioner of Police ('the National Commissioner'), the Minister and Cabinet.

20. The DPCI is not clothed with the attributes of specialisation, training, resources and security of tenure of personnel embraced by this Court in Glenister II[19], and the approach adopted by the High Court of invalidating individual sections of the SAPS Act cannot address this fatal *lacuna* in the scheme.

The tensions inherent in an ACE situated within the South African Police Service ('the Service')

21. Glenister II held that the creation of a separate ACE within the Service was not *in itself* unconstitutional and thus the DPCI legislation could not be invalidated *on that ground alone*[20].

22. The applicant's core contention is that the requirements of C207(2), that a political appointee[21] who reports to a politician in the executive[22] must have 'management and control' over the Service, renders it impossible, without a constitutional amendment to that section, to create a structure in which the ACE can function within the Service with the necessary degree of independence as required by Glenister II.

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19 J187
20 162 at 397A-B
21 The National Commissioner
22 The Minister

23. The attempt in the impugned legislation to avoid unconstitutional or unlawful interference with or control over the DPCI by giving the National Head of the DPCI ('the National Head') the right to manage and direct the DPCI, is clearly unconstitutional for as long as C207(2) which vests management and control of the Service in the National Commissioner, remains part of our law.

24. Similarly, to the extent that section 17AA of the SAPS Act (which provides that the provisions of Chapter 6A in respect of the mandate of the DPCI apply to the exclusion of any section with in the SAPS Act) may have been intended to override section 11 of the SAPS Act which vests control and management of the Service in the National Commissioner, such provision cannot trump the express requirements of C207(2). Accordingly, while the establishment of an ACE within the Service may be theoretically possible, the manner in which the Second Amendment Act scheme sought to establish the DPCI within the Service is plainly unconstitutional.

25. The High Court's interpretation[23] of the sentence in J162 that the creation of a separate corruption-fighting unit within the Service was not *in itself* unconstitutional and thus the DPCI legislation

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[23] HC [32.1] pp 30/1

cannot be invalidated *on that ground alone*, does not give due weight to the words 'in itself' or 'on that ground alone'. Its finding that the applicant's complaint appears to be directed at the DPCI being located within the Service and thus under the political responsibility of the Minister[24] ignores the express reference in the applicant's founding affidavit to the constitutional requirements of C207(2)[25].

26. The High Court's finding that section 16 of the SAPS Act (and therefor by necessary consequence the attempt in section 16(3) to permit the National Head under specified circumstances to prevail over the National Commissioner) is invalid, does not address the broader constitutionality concern referred to above.

27. The High Court's further finding that the issue as to the location of the DPCI in the Service had already been decided by this court and requires no further comment[26] constitutes a failure to examine and rule on the non-compliance of the scheme with the requirements of C207(2).

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24 HC [32.1]
25 FA: paras 8.3-8.7: Bundle 1: pp23/4
26 HC [32.1]

28. It is submitted that the entire scheme is accordingly invalid and inconsistent with the Constitution.

The alternative relief:

29. To the extent that this court is not disposed to uphold the applicant's appeal and to replace the order of the High Court with one invalidating the Second Amendment Act it is submitted that this court will confirm the declaration of invalidly of those sections of the SAPS Act declared invalid by the High Court.

30. It is submitted that in addition to those sections of the SAPS Act invalidated by the High Court and those identified by the Helen Suzman Foundation, which in a variety of ways improperly and unconstitutionally deprive the DPCI of its necessary independence and facilitate executive control over it, section 17AA which seeks to elevate the provisions of Chapter 6A above all other provisions of the SAPS Act and thereby seeks unconstitutionally to limit the control and management of the Service by the National Commissioner, is also unconstitutional and should likewise be invalidated.

An ACE outside executive control:

31. 'Our law demands a body outside executive control to deal effectively with corruption[27]'.

32. Whether the matter is approached with 'oversight', or 'responsibility', or 'management', or 'control', or 'accountability' in mind as variously referred to by the High Court, it is unconstitutional to establish an ACE in which 'control' (quite apart from the other four considerations) vests in the Executive.

33. The provisions of sections 17G, 17H, 17I and 17K fail to meet the standard recorded in Glenister II of an ACE outside executive control.

<u>The requirement of reasonableness for an adequately independent ACE:</u>

34. While a court will not be prescriptive as to what measures the state should take to establish an adequately independent ACE, such measures must fall within the range of possible conduct that a reasonable decision-maker *in the circumstances* may adopt[28].

35. The High Court misconstrued or over-narrowly interpreted the above finding in Glenister II, opting instead to adopt what it called

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27 J200
28 J191

an objective approach to the validity of the legislation without regard to the relevant circumstances placed before it by the applicant[29].

36. The High Court adopted this approach having ruled that extensive evidence presented by the applicant in respect of the circumstances that Glenister II required a reasonable decision-maker should consider should be struck out.

37. It is submitted that particularly where this court has indicated that the legislation required to meet the state's constitutional obligations must fall within the range of possible conduct that a reasonable decision-maker may *in the circumstances* adopt, the High Court erred in in striking out the available evidence about the prevailing circumstances and seeking to consider the Second Amendment Act in a 'circumstance-free' vacuum.

38. It is submitted that a reasonable decision-maker in the circumstances now prevailing, as summarised succinctly in Glenister II[30] and as illustrated by the evidence struck out by the High Court, even if desirous of locating the ACE within the

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29 HC[28]
30 J166

Service, would not place it under the control of the executive and the National Commissioner, as its accounting officer, but would keep it 'separate'[31] from the hierarchy that is in place in the ordinary course in the Service under C207. This requires that executive control of the ACE be eliminated[32]. The scheme of the Second Amendment Act in issue does not do so and accordingly it is not a 'reasonable and effective'[33]step which is constitutionally required to respect, protect, promote and fulfil the constitutional rights guaranteed to all in the Bill of Rights[34].

39. As a consequence of its striking out of evidence regarding the prevailing circumstances, the decision of the High Court is not informed by the evidence relating to such circumstances which prevail in the executive branch of government, in the Service and in the DPCI. Such evidence was relevant to the conduct of a reasonable decision-maker seized with the task of implementing the orders and findings of this Court in its majority decision in Glenister II, as specifically required by clause 6 of the order in that matter.

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31 this Court's words: J162 at 397A-B
32 J200
33 J189]
34 as per C 7(2)

40. Accordingly it is submitted that the High Court deprived itself of the opportunity to assess effectively the reasonableness of the conduct of the legislature in adopting the Second Amendment Act in the circumstances.

Public perception:

41. The High Court conflated and confused the notion of public opinion regarding constitutional rights, which is irrelevant to the issues in this case, with the notion of the public perception of independence of anti-corruption machinery of state which is relevant as a circumstance that a reasonable decision-maker would take into account in taking the steps ordered by this Court[35].

42. In this regard it should be noted that the finding in S v Makwanyane and Another[36] about public opinion, has nothing to do with the principle of public perception of, and confidence in, the

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35 Order 6 of Glenister 2

36 1996 (3) SA 391 (CC) [88] & [89] (referred to in the judgment of the High Court at p15)

independence of anti-corruption machinery as adumbrated in Glenister II[37].

43. In this regard too, by striking out the evidence relating to public perception, the High Court deprived itself of the opportunity adequately to assess whether a reasonably informed and reasonable member of the public would have confidence in the DCPI's autonomy-protecting features.

Striking out:

44. Instead of having regard to evidence of prevailing circumstances and of public perception, which it ought to have done on a proper construction of the *dicta* in Glenister II cited above, the High Court struck out the uncontroverted affidavits and associated evidence placed before it by the applicant and made an ill-considered punitive costs award against him[38]. All the material struck out is reliable, cogent, unchallenged and illustrative of this Court's

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37 J207
38 HC Order 5: p 65

findings[39] as well as of the public perception of the independence of the DPCI.

45. The High Court further erred in its finding that the deponent Gavin Woods did not confirm the contents of the report attached to his affidavit[40].

46. Under the circumstances the High Court erred in holding that the second respondent's application to strike out must succeed[41], and ought to have dismissed the application with costs.

Costs:

47. As there was no factual basis for its finding that the applicant 'has been lucky to piggy-back on the HSF's well-presented case and the helpful and lucid arguments of its counsel'[42], the High Court

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39 J166
40 HC[8] p 18: para 8; Affidavit: Woods: Bundle 3: p 210: para 16
41 HC[12]
42 HC [122] at p64; Compare applicant's founding affidavit in support of his application for leave to appeal: paras 4-6: pp 68/9

erred in failing to direct the respondents to pay the costs of the main application to the applicant[43].

48. In the event that this Court should hold that the High Court was entitled to strike out the uncontested evidence (which is disputed), it is submitted that, in the light of the findings in Glenister II that the measures to be adopted by the state in the establishment of an ACE must 'fall within fall within the range of possible conduct that a reasonable decision-maker *in the circumstances* may adopt' (emphasis added) and of the significance of public perception, the decision of the applicant to adduce evidence of the then prevailing circumstances and of public perception in support of his application was entirely reasonable and ought not have been visited by a punitive costs order.

49. The High Court failed to have proper regard to the public interest nature of the proceedings and to the public-spiritedness of the applicant in making its unprecedented and inappropriate costs awards relating to him. As a consequence of this order the High Court has perpetrated the 'chilling effect' on public interest

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43 HC Order 5: p 65

litigants upon which this Court has repeatedly frowned[44]. The costs awards concerning the applicant are connected to the manifestly constitutional matters set out above and ought to be reversed on appeal in the interests of justice.

Concluding submission:

50. It is submitted that under the circumstances the applicant should be granted leave to appeal, that the appeal should be upheld, with costs, including the costs of two counsel, and that the judgment and orders of the High Court should be set aside and be substituted with a judgment:

50.1. Declaring the Second Amendment Act invalid and inconsistent with the Constitution;

50.2. Alternatively, confirming the declaration of invalidly by the High Court and further declaring sections 17AA, 17E(8), 17G, 17H, 17I, 17K(1)-(2B) invalid and inconsistent with the Constitution;

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44 Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) [138]

50.3. Reversing the ruling striking out evidentiary matter from the applicant's papers and dismissing the application to strike out with costs;

50.4. Directing the respondents jointly and severally, the one paying the other to be absolved, to pay the applicant's costs of the application, including the costs of three counsel where applicable.

IJ Smuts SC

DJ Taljaard

Counsel for the Applicant

Chambers

28 March 2014

Table of Authorities

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

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

S v Makwanyane and Another 1996 (3) SA 391 (CC)