Is an Integrity Commission is the optimal mechanism to address serious corruption in South Africa?

Abstract:

The Constitutional Court in *Glenister II* established the binding criteria that an effective and independent anti-corruption entity must be specialised, trained, properly resourced and its personnel must enjoy security of tenure of office. The legislature's task in securing compliance with the *Glenister II* requirements is to make the decision of a reasonable decision maker "in the circumstances".
In *HSF/Glenister III,* the same court, in adjudicating the legislature's impugned attempt to do so, closed its eyes to "the circumstances" then appertaining, circumstances which have deteriorated considerably since 2014 when judgment was delivered.
The benefits of hindsight suggest that the Constitutional Court erred in finding in *HSF/Glenister III* that the location of the anti-corruption entity of state within the SA Police Service is adequate compliance with the requirements it laid down in *Glenister II.*
The SA Police Service answers to the Minister of Police, currently an errant member of a semi-feral cabinet. The Hawks or Directorate of Priority Crime Investigation, are in disarray as a unit within the dysfunctional police, they are insufficiently independent to fulfil the role of independent corruption busters while located within the police and do not measure up to any of the binding criteria set in *Glenister II*.
The creation of a new Chapter Nine Institution, answerable to parliament, and styled "The Integrity Commission" or "Independent Commission Against Corruption" is the optimal way in which to ensure proper compliance with the requirements of *Glenister II,* given the architecture of the Constitution and current circumstances in SA.
Creating the political will to establish the Integrity Commission in proper compliance with the five criteria of *Glenister II* is the best way in which to secure respect for and protection of human rights in SA through efficient corruption-busting as is required in terms of the applicable international treaty obligations.

I. Introduction

> Surveying their handiwork, it is fair to say that corruption, in all its manifestations, could not have been further from the minds of the founders of the new constitutional order in South Africa when they embarked upon and completed the transition from the "whites only" parliamentary sovereignty of the apartheid regime to the supreme Constitution of the Republic of South Africa, 1996. The transition into the type of society envisaged in the Constitution is still work in progress. In the period spanning the announcement of the unbanning of liberation movements on 2 February 1990 to the coming into operation of the Constitution on 4 February 1997 a great deal of negotiation, deliberation and drafting took place.
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> This arduous process was unique in Africa in that there was no colonial power waving farewell and bestowing those liberated from the yoke of colonialism with a, frequently unsuitable, Lancaster House type constitution or worse. Instead, South Africans can proudly say that their new dispensation is completely home grown and includes the direct participation of some 2 million citizens who felt sufficiently involved in the process as it unfolded

over the years to participate directly by providing their own suggestions on its content. They did so in order to help reach the point at which the overwhelming majority of the representatives of all the people of the country were able to agree on the transfer of power to the new constitutional order and not to any victorious liberation movement harbouring hegemonic ambitions. The Constitution is a product of the National Accord and the many compromises that were hammered out in the process that took place between 1990 and 1997 when the present Constitution came into force. Cynical observers remark that a good compromise is one in which both protagonists are equally unhappy with the result.

The main protagonists in the constitution building process were Afrikaner nationalists of varying kinds and African nationalists of the liberation struggle waged by disparate formations after 1910, peacefully so until about 1960. Neither side had any pedigree or history of regard for constitutionalism. Now both give the appearance of championing it.

Apart from embracing constitutional democracy under the rule of law in a multi-party dispensation designed to ensure openness, accountability and responsiveness, the new Constitution puts human dignity, the achievement of equality and the advancement of human rights and freedoms in a non-racial and non-sexist unitary state at its foundation. This approach also involves the creation of a justiciable Bill of Rights as Chapter Two of the Constitution, one which expressly obliges the state to respect, protect, promote and fulfil the multitude of rights guaranteed to all in the Bill of Rights[1]. These obligations, as we shall see, have been construed by the Constitutional Court in 2011 in *Glenister II* as the basis for requiring the state to maintain an effective and independent anti-corruption entity so as properly to protect the nascent culture of human rights and to honour the international anti-corruption obligations assumed by the state in its post-apartheid incarnation. [2]

Combatting corruption hardly features expressly in the search for a healing of the divisions of the past and social justice for all who live in South Africa, seeking unity in their diversity.[3] It is so that the new SA police service (no longer a "force" with military overtones) is enjoined to prevent, combat and investigate crime.[4]. A hint at police corruption is foreshadowed in the creation of an independent complaints body established by national legislation which must investigate any alleged misconduct of, or offence committed by, a member of the police service in any province.[5] There is also acknowledgement that maladministration of the affairs of state or of the public administration may require investigation by the Public Protector. The wording used is instructive: conduct that is "alleged or suspected to be improper or to result in any impropriety or prejudice"[6] could cover a multitude of sins and has been interpreted to include corruption in many of the reports of the Public Protector which, constitutionally so, must be open to the public. [7] The Public

[1] C 7(2)
[2] C 231
[3] C Preamble
[4] C205 (6)
[5] C206(6)
[6] C 182(1)(a)
[7] C 182(5)

Protector has the power to take binding and enforceable "appropriate remedial action".[8] This power was conceded, eventually, by the President and parliament in the famous *Nkandla* [9] case in which a powerful judgment of a unanimous constitutional court was delivered by the Chief Justice on 31st March 2016. The public administration is required to promote and maintain a high standard of professional ethics.[10] There is a Public Service Commission which is required, among other things, to ensure that this high standard is in fact maintained.[11] Even in the iteration of the principles governing national security, corruption is not perceived as a threat, instead, the resolve of citizens "to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life" [12] is as close as the Constitution comes to the thorny topic of corruption.

All of this is quite understandable: those most intimately involved in the process were focussed on creating "a better life for all" with not a little idealism in play as can be inferred from the lyricism of the Preamble to the Constitution. Unlike the founders of the Constitution of the United States, they were not deeply suspicious of the exercise of power. On the contrary, they sought to modulate and regulate the exercise of power for the public good through the normal checks and balances that come with the application of the doctrine of the separation of powers. In Chapter Nine of the Constitution they conceived an "Integrity Branch" to go with the standard three branches traditionally called the Executive, Legislature and Judiciary. The institutions supporting constitutional democracy, especially the Public Protector and the Auditor General, have played an important role in investigating and reporting on malfeasance and misfeasance in the affairs of state and in the public administration. Due to the efforts of the Auditor General, the National Prosecuting Authority has a backlog as at October 2016 of some 3000 matters relating to corruption in public procurement. Only 151 convictions of public servants have been secured in the preceding two years The power of the Public Protector to take binding and enforceable remedial action when reporting on investigations undertaken has been put to good use during the term of office of Advocate Thuli Madonsela which ended on 14 October 2016. Hopefully the institution has developed a lasting culture of independence, integrity and impartiality and will not revert to its former executive-minded status on the watch of her successor, Advocate Busisiwe Mkhwebane, a career civil servant who has no track record of independent action and, worryingly so, has indicated that she wishes to foster a "good relationship" between her new office and government. Those who have and properly exercise the power to order appropriate remedial action do not usually enjoy a "good relationship" with those against whom the remedial action is ordered.

There are other ways of analysing the apparent lack of preparedness of the new South Africa for the ravages of corruption. Lisa Grobler, a criminologist, has drawn attention to the capture of the police by unsuitable illegally deployed cadres of the African National Congress. This phenomenon led to the conviction of police chief Jackie Selebi on charges of corruption, the

[8] C 182(1)(c)
[9] EFF and others v President of the RSA and others CC 31 March 2016 (not yet reported)
[10] C 195(1)(a)
[11] C 196(2)
[12] C 198(a)

dismissal of his successor Bheki Cele for involvement in multi-million rand irregular lease deals and the appointment of an unsuitable successor with no background in policing.[13] There is also the matter of the still uncertain fate of the current police chief, Riah Phiyega, who faces a board of inquiry into her fitness for office following adverse findings of the Marikana Commission of Inquiry.

Anthea Jeffery, a senior researcher at the SA Institute of Race Relations, looks at the historical "big picture" in her analysis of what she calls "The People's War" in her meticulously researched eponymous book. [14] She concludes that the African National Congress eliminated its black rivals in the run up to liberation. "By the time the ANC took power in May 1994, the organisation's key black rivals had been so profoundly weakened and discredited that the ANC faced little effective black opposition." [15]

In response to electoral reverses in municipal elections on 3 August 2016, the ANC announced that: "We will not rest until we have regained the confidence of our people and returned our revolution to the correct trajectory." [16] The "revolution" to which reference is made is the "national democratic revolution" and its trajectory is toward hegemonic control of all the levers of power in society. At its Mangaung conference in 2012 the ANC resolved that:

"The Democratic forces need to assert hegemony, propagate and popularise our ideas of transforming South Africa into a non-racial, non-sexist and democratic society." [17].

At the same conference the "Strategy and Tactics" document noted:

"Poor conduct on the part of sections of the ANC leadership, including new expressions of corruption and greed, which not only result in the wastage of public resources, but also undermine confidence of our people in government and in our movement"[18]

That there is a need to deal decisively with corruption and greed in the current state of South African society is beyond debate. Even the National Executive Committee of the ANC conceded as much in a media briefing on 3 October 2016. As the majority joint judgment (Moseneke DCJ and Cameron J) of the Constitutional Court noted in *Glenister II* [19] as long ago as March 2011:

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[13] Crossing the Line – when cops become criminals Jacana 2013
[14] "The People's War" Jonathan Ball 2009
[15] ibid page 509-10
[16] ANC media release dated 23 August 2016 available at www.anc.org.za
[17] Conference Resolution 7 Communications and the Battle of Ideas paragraph 6
[18] Decisive and sustained action to build a National Democratic Society paragraph 13
[19] Glenister v The President of the RSA and others (Helen Suzman Foundation as amicus curiae 2011 (3) SA 347 (CC)

'[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.'

This sobering dictum was followed up by the same court in the later cases brought by the same litigant and the Helen Suzman Foundation in the November 2014 judgment [20] of the majority penned by the Chief Justice:

[1] All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.

[2] We are in one accord that South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate. And this in a way is the issue that lies at the heart of this matter. Does the South African Police Service Act (SAPS Act), as amended again, comply with the constitutional obligation to establish an adequately independent anti-corruption agency?

The answer to the Chief Justice's thorny question, given the circumstances now current in South Africa, is a key to a future that does not include what he aptly calls "something terminal".

II. Corruption defined and discussed

The dictionary definitions, and for present purposes the Concise Oxford will do, of corrupt and corruption are, to the extent here relevant, not particularly helpful.
As an adjective "corrupt" is defined as "rotten; depraved, wicked, influenced by bribery"
As a verb: "infect, taint, deprave, bribe, destroy purity of, vitiate"
Corruption in turn is "decomposition; moral deterioration; use of corrupt practice; perversion from its original state; deformation"
The modern approach to governance with integrity suggests a pithy but more meaningful and apt definition of corruption – the abuse of public office for private gain. It is often stated that this type of corruption, usually in the state procurement system, is a form of theft from the poor. This approach is topically demonstrated by

[20] HSF/ Glenister v The President of the RSA and others 2015 (2) SA 1 (CC)

the diversion of funds intended for poverty alleviation in a township on the West Rand to the refurbishment of the Nkandla homestead of the Zuma family.
Corrupt activities attracted the attention of the South African legislature at the turn of the century. It passed the Prevention and Combatting of Corrupt Practices Act (PRECCA) no 12 of 2004 which includes the following definition of corruption in Section 3:

" General offence of corruption
Any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,
in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
is guilty of the offence of corruption."

The word "gratification" is also given an extensive definition in section 1 of the Act:

" 'gratification', includes-

(a) money, whether in cash or otherwise;

(b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;

(c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;

(d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;

(e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(f) any forbearance to demand any money or money's worth or valuable thing;

(g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;

(h) any right or privilege;

(i) any real or pretended aid, vote, consent, influence or abstention from voting; or

(j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage."

Despite the convoluted wording and scope of these definitions, PRECCA can be regarded as a noble attempt to close all legal loopholes in a context in which organised crime is increasingly sophisticated and innovative. Cybercrime, in particular, is a field in which new ways of beating the system are constantly being invented.

For all its good intentions, PRECCA has seldom been invoked in criminal prosecutions, with prosecutors preferring to fall back on the tried and tested related common law crimes of fraud and theft. When Tony Yengeni, then Chief Whip of the ANC in the National Assembly, was charged with corruption and fraud concerning his involvement in the arms deals, a plea bargain was struck which involved the withdrawal of the corruption element of the case and relieved him of the risk of a minimum sentence of 15 years. Instead he pleaded guilty to defrauding parliament in his declaration of assets and received a far lighter sentence.[21] On the other hand, in the prosecution of Jackie Selebi, National Commissioner of Police and head of Interpol, the prosecutors did persist with the corruption charge and Selebi was duly found guilty and sentenced the minimum sentence of 15 years.[22] He was investigated by the Scorpions, not the Hawks.

It is inescapable that even the best substantive laws against corruption are only as good as the manner in which they are implemented. Dysfunction in the criminal justice administration, acknowledged by then Deputy Minister of Justice, Advocate Johnny de Lange, in the August 2008 parliamentary debate on the dissolution of the Directorate of Special Operations (or Scorpions as they were popularly known), continues to dog the enforcement of the common and statutory laws against corruption.

Efficient and effective machinery of state that is able, with a high standard of ethics, to deal accountably with the scourge of corruption is required. The principles and values which inform and bind the whole of the public administration, as set out in Section 195(1) of the Constitution apply with particular relevance to the prevention and combating of serious and petty corruption.

The actual work of so preventing and combatting corruption is that of the prosecution service and the Hawks unit of the SA Police Service. An informal Anti-Corruption Task Team (ACTT) exists but does not really function as a team. When called before the standing committee on public accounts in the National Assembly, most of the ACTT members did not even bother to appear for the hearing. General B. Ntlemeza and Adv N. Jiba, respectively from the Hawks and the NPA, were given a grilling by the SCOPA members on 13 September 2016 due to the paucity of law enforcement on corruption issues. The most recent annual report (2015-2016) of the National Prosecuting Authority is rather bleak. According to the Legalbrief Today (12 September 2016) summary of a news report:

[21] S v Yengeni 2006 (1) SACR 405 (T)

[22] S v Selebi 2012 (1) SA 487 (SCA)

"The NPA plans to go after government officials accused of corruption in a bid to boost investor confidence and tackle graft, says a Business Day report. In its 2015-16 annual report tabled in Parliament last week, the NPA – which has been accused of playing a role in a political plot to unseat Finance Minister Pravin Gordhan – said special focus was placed on the prosecution of corruption. NPA head Shaun Abrahams said the Specialised Commercial Crime Unit maintained a conviction rate of 94.1% by obtaining guilty verdicts in 951 cases against a target of 93%. 'In order to improve investor perceptions and in line with government's priority focus of dealing with corrupt government officials, the unit increased the number of convictions of government officials on charges of corruption to 104,' he said. This is up from 47 in the previous year. However, Corruption Watch's David Lewis said that the conviction rate was still low, and the NPA was still poorly run and lacked independence. Corruption Watch continued to hold the view that the NPA was being led by 'inappropriate people', Lewis said."

When regard is had to the annual reports of the Auditor General, which routinely detail losses in the procurement system of around R30 billion a year (most recently increased to R46 billion), then an aggregated conviction rate of 151 corrupt government officials over the two years preceding the National Director of Public Prosecutions' report is a pathetically low success rate. According to Dennis Davis J, there is a backlog of some 3000 prosecutions arising from matters reported on by the Auditor General. The views of David Lewis are fortified by the summonsing of the Minister of Finance, Pravin Gordhan, on trumped up charges of fraud and theft which are bad in law and in fact and have been ignominiously withdrawn.

The overall arrest rate achieved by the Hawks unit during the years since its formation is also alarming; particularly for those who fear the warning of the Chief Justice that "something terminal" is afoot if corruption is not dealt with decisively. According to a written answer by the Minister of Police to a question raised in the National Assembly: the initial arrest rate per annum in the first full year (2010-2011) after the formation of the Hawks was 14793 which dropped steadily over the five applicable years to 5847 by the 2014-15 year; the conviction rate in the same period fell from a measly 7037 to a miserable 1176.[23] As the Hawks deal with "priority crimes" not all of the arrests made by them are necessarily related to corrupt activities. David Lewis, quoted above, is correct: the conviction rate is low for the reasons he suggests.

If the malaise is to be addressed then the effectiveness, efficiency, independence and adequacy of the system in place requires remedial action. It is not as though SA is without the capacity to act against the corrupt. In their last year of operation the Scorpions seized goods to the value of R 4 billion. In the next year, when the Hawks took over, the figure fell to only R35 million: a 99% decrease. The number of new investigations plummeted by 85% after the Scorpions were disbanded.[24]

The Scorpions were a mere creature of statute, parliament made them and the ANC majority in parliament was able, despite the best efforts of the opposition and elements in civil society, to dissolve them by passing ordinary legislation by a simple majority. To his everlasting credit, the late Professor Kader Asmal, a leading figure in the ANC, resigned from parliament rather than submit to party discipline by voting in favour of the demise of the Scorpions.

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[23] National Assembly Question 3522 of 11 September 2015

[24] Plaut and Holden "Who Rules South Africa" Jonathan Ball 2012 page 299 analysing the NPA annual reports covering 2007 to 2009

The Scorpions did not enjoy security of tenure of office and they were closed down for functioning too efficiently when it came to the investigation of the malfeasance of politicians and the politically well-connected.

When the intended demise of the Scorpions came up for discussion at Luthuli House on 15 April 2008 at a meeting between the then leader of the opposition, Helen Zille, and the newly elected Secretary General of the ANC, Gwede Mantashe, the following points were made by the latter according to an affidavit deposed to by the former filed, and not replied to or contradicted in any way, in *Glenister I* [25]:

Firstly, the ANC wanted the Scorpions disbanded because they were a 'political unit made up of apartheid security branch members who treated the ANC like the enemy'. Secondly, the continued investigation of then private citizen Jacob Zuma was an 'abuse of power'. Thirdly, the ANC would ensure that its Polokwane resolution to disband the Scorpions was implemented. Lastly, the ANC wanted the Scorpions disbanded because they were 'prosecuting ANC leaders'.

While these four points are commendably frank, it is impossible not to draw the inference that impunity for corrupt ANC bigwigs and their associates was the motive for disbanding the Scorpions. The courts have baulked at so inferring.

After the municipal elections of 3 August 2016, Mantashe changed his position to acknowledge that "something needs to be done about corruption and the ANC needs to be seen to be doing something about it." He is quite right to say this; the broad issue now is: what is to be done to counter the corruption abroad in the land.

Fortunately, the Constitutional Court has considered the issue both in *Glenister II* and in the *HSF/Glenister III* matters. It has determined the criteria applicable for effective anti-corruption machinery of state and after first sending parliament back to the drawing board in *Glenister II,* it has adjusted the remedial legislation passed with a view to making it comply with the criteria it has set.

The Supreme Court of Appeal is very much on the same page regarding the pernicious effects of corruption and has repeatedly made its position clear.

In *S v Shaik*,[26] the Supreme Court of Appeal had the following to say on the pervasive and destructive effects of corruption on constitutional rights:

"The 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 it is halted. Courts must send out an unequivocal message that will not be tolerated and that punishment will be appropriately severe. In our view, the trial Judge was correct not only in viewing the offence of corruption as serious, but also in describing it as follows: 'It is plainly a pervasive and insidious evil, and the interests of a democratic people and their government require at least its rigorous suppression, even if total eradication is something of a dream.' It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies." [27]

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[25] Glenister v The President of the RSA and others (Centre for Constitutional Rights and UDM intervening as amici) 2009 (1) SA 287 (CC).

[26] S v Shaik 2007 (1) SA 240 (SCA)

[27] Ibid at para 223

The Supreme Court of Appeal summed up the above succinctly in *S v Sadle*r,[28] where it held that:

"[i]t is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration."

III. The ruling in *Glenister II* regarding the criteria for effective and independent corruption busting

The litigation now known as *Glenister II* started as an application impugning the constitutionality of the legislative scheme that saw the dissolution of the Scorpions and the creation of the Hawks. It ended in an appeal to the Constitutional Court after Glenister received short shrift from the Western Cape High Court. For present purposes it is unnecessary to traverse the finer details of the amendments to legislation needed to give effect to the scheme. Glenister did not succeed in his attempt to save the Scorpions, but he was able to persuade the narrowest possible majority of justices in the Constitutional Court that the Hawks were not an adequately independent unit to be an effective corruption-busting unit in the legislative framework and operational regime contemplated by the scheme of the legislation passed to give effect to the resolution of the ANC at Polokwane. This was a resolution which called for the urgent dissolution of the Scorpions and their replacement with what became the Hawks.

The majority found that the human rights commitments of the state undertaken in the Bill of Rights necessitated the creation and maintenance of an adequately independent anti-corruption entity of state to prevent and combat corruption. The majority also found that the international law obligations undertaken by SA at UN, AU and even SADC level bound the state to have an anti-corruption entity that is effective and adequately independent to honour the international obligations so undertaken.

In reaching these important conclusions the majority in Glenister II examined the criteria according to which the effectiveness and independence of anti-corruption entities are characterised in the work of the experts within the structures of the OECD who have long studied the issues around combatting corruption. The majority, five of the nine justices seized of the matter, found that specialisation, training and independence; resources that are guaranteed and security of tenure of office are the criteria which are the hallmarks of an effective anti-corruption entity of state. These criteria have, in subsequent argument and discussion of the issues in *Glenister II* and later litigation discussed below, become known as the STIRS criteria. This handy acronym has saved a great deal of printers' ink.

Specialisation of an institution means that its staff complement has to be dedicated to one function and one function only. In this case, it means dealing with the corrupt decisively as a full time job, not part of a job that has other features and functions. A dedicated and single-minded approach is required that is quite the antithesis of a priority crimes unit that deals with diverse crimes deserving priority attention from time to time. The Hawks work on poaching, drug dealing, human trafficking and a host of other "priority crimes" that leave corruption languishing at the bottom of the pending workload. Until November 2014 the executive branch of government decided

[28] S v Sadler 2000 (1) SACR 331 (SCA) in para 13.

which crimes should be treated as priority crimes. When this was changed by the decision in *Glenister III*, Anwa Dramat, then head of the Hawks, is reported to have requisitioned the dockets relating to corruption at Nkandla, the country seat of the Zuma clan. These dockets had been kept from the Hawks by top police management under the system that obtained until the constitutional court changed it in *Glenister III*. By late 2016 no progress has been made investigating the complaints of corruption made on the basis of the "Secure in Comfort" report of the Public Protector concerning the work put in hand at Nkandla at taxpayers' expense by the Department of Public Works. These complaints were laid in December 2013 by Accountability Now, an NGO, and in March 2014 by the Economic Freedom Fighters and the Democratic Alliance, both opposition political parties. Dramat did not receive the dockets he requested; instead he was illegally suspended by the Minister of Police and eventually accepted a generous exit package after he was placed under intolerable pressure to quit. In March 2016 he was charged with the alleged kidnapping of Zimbabwean refugees who were returned, by a process that has been described as "rendition", to the Zimbabwe police in 2010. The IPID investigation of the matter exonerated Dramat, but the NPA has proceeded with the prosecution notwithstanding the IPID report on it. Dramat's exit package was negotiated with full knowledge of the allegations of kidnapping.

Training of the personnel in the intricacies of anti-corruption work is an obvious essential. The Scorpions, when they were formed, were taken to the FBI and Scotland Yard for specialised training by the Serious Frauds Office and the corruption specialists in the FBI. This has not been replicated in the case of the Hawks.

Independence, the ability to act without fear of the powerful, favour to the friendly or prejudice to the public is the defining characteristic of a truly effective anti-corruption entity. The wherewithal to withstand political interference, nefarious influences and all attempts to derail investigations is at the core of successful corruption busting. The Hawks have not been exposed to the type of training the Scorpions received as a consequence of which they do not operate at the same level of independence from the executive as the Scorpions were able to do. This change is due to the different ethos of a police unit and particularly to the reporting lines in the NPA ending at the office of the NDPP, (an independent functionary), while those in SAPS end with the Minister and the National Commissioner of Police, neither of whom is independent or even required and expected to be so.

The guaranteeing of resources for the anti-corruption entity is required in order to prevent feral or venal elites from cutting off the "oxygen supply" to the anti-corruption entity by limiting its resources, infrastructure, personnel complement and accommodation. Proper resourcing is clearly a *sine qua non* of success. The current head of the Hawks, General Berning Ntlemeza, has complained to parliament that the offices occupied by the Hawks are not fit for human habitation. *Esprit de corps* and the necessary will to take on the corrupt are difficult to generate in any under-resourced anti-corruption entity. The existence of numerous vacancies within the ranks of the Hawks exacerbates its inefficiency and ineffectiveness while also undermining *esprit de corps.*

Given the history of the dissolution of the Scorpions, the last of the STIRS criteria, security of tenure of office, is important in SA. Without security of tenure for all of its key personnel, the anti-corruption entity is vulnerable to attack or even closure. Protection of personnel who take on powerful people who are alleged to be involved in corrupt activities is essential to the survival of any anti-corruption entity worth its

salt. Quite the opposite has occurred in the case of General Johan Booysen, the former head of the Hawks in KZN.

The operative orders in the *Glenister II* appeal to the Constitutional Court were that the Hawks legislation was not constitutionally compliant in that the Hawks were not an effective and adequately independent anti-corruption entity as required by the international obligations of the country and its constitutional commitment to upholding human rights by respecting, protecting, promoting and fulfilling the rights guaranteed to all in the Bill of Rights. Parliament was given 18 months to take appropriate remedial action to address the unconstitutional aspects of the structural and operational features of the Hawks.

The court was not prescriptive about the steps required. Showing due deference to the other branches of government and to the doctrine of the separation of powers, the court asked only that parliament make the decision of a reasonable decision-maker in the circumstances. Some of the relevant circumstances are encapsulated in the STIRS criteria; others have to do with the state of play in society at any given time. A calm and quiet society in which the incidence of corruption is rare obviously requires different anti-corruption machinery of state to one in which corruption is a national pastime of crippling proportions. Sledge-hammers are not used for killing fleas, but, on the other hand, knives ought not to be taken to gunfights.

IV. The Government's Response to the *Glenister II* ruling

The government used all but four days of the 18 months given to parliament to take the remedial steps required by the judgment in *Glenister II*. A public participation process was initiated; draft legislation amending the law relating to the Hawks was prepared and was presented to the public and the police portfolio committee of the National Assembly. Interested parties were invited to make submissions on the new bill and more than twenty did so. Universities, the General Council of the Bar and several NGOs participated. Only one submission, by a Professor M Mhango from the University of the Witwatersrand, was not critical of the bill, all of the others took the draft to pieces in various ways. The main points made by Accountability Now regarding the bill were that:

- it does not ensure adequate independence for the Hawks;
- it does not include any provisions fostering specialization focused on corruption fighting;
- for as long as the executive can decide what "priority crimes" mean, it will be impossible for the Hawks to function independently, including in deciding what to investigate as suspected corruption;
- there is no guaranteed budget to ensure adequate resourcing of the Hawks;
- it lacks provision for appropriate training and education; and
- there is no security of tenure while a Minister can suspend the Head of the Hawks with or without pay.

During the oral submissions to the portfolio committee, it was invited by Accountability Now to return to the drawing board because it is impossible to make a silk purse (a STIRS compliant entity) out of a sow's ear (the bill). The chairperson of the committee, Ms Lydia Chikunga, would have none of this: she clearly regarded the function of the committee as doing the bidding of the executive branch of government

and was only prepared to consider enhancements of the bill, not the jettisoning of the bill as constitutionally unworkable.

In the end, some 50 amendments to the bill emanating from the ministry of police were effected during the parliamentary process. These did not succeed in making the bill comply with the STIRS requirements of Glenister II and in some instances rendered the final version vague, internally inconsistent and unworkable.

It was clear to all involved in the process that the ANC was unwilling to rethink its attitude toward fighting the corrupt properly with appropriate machinery of state. Instead as little as possible was done to make it constitutionally compliant in the process of "tweaking" the legislation relating to the Hawks. They remained in the SAPS, their accounting officer was still the National Commissioner of Police and the opportunities for executive influence and interference patent in the structure of the bill were left unaddressed. Objections to its constitutionality fell on deaf ears in the Presidency, the Human Rights Commission and at the Office of the Public Protector.

The bill was an attempt to do as little as possible to the existing structure and functioning of the Hawks while paying lip-service to compliance with the binding effect of the judgment of the Constitutional Court in *Glenister II.*

This sorry state of affairs was not acceptable to the Helen Suzman Foundation and to Glenister himself. Both moved to impugn the constitutionality of the amending legislation immediately it was made law. Glenister objected to the location of the Hawks within the SAPS in the circumstances in which the Hawks, the SAPS and the executive branch of government found themselves at the time of the passage of the legislation through the law making process. He adduced expert evidence which expressed the opinion that corruption is endemic in the executive, the police and the Hawks. HSF took a narrower and more technical approach by not assailing the location of the Hawks in SAPS but by comparing the provisions of the new legislative dispensation for them with the STIRS requirements laid down in Glenister II – points also made by Glenister.

Working separately, both the HSF and Glenister initially made a direct approach to the Constitutional Court. Their approaches were rebuffed without a hearing on the basis that it was not in the interests of justice to give direct access. Still working separately, they then applied to the Western Cape High Court for urgent relief aimed at challenging the constitutionality of the new legislation and at making the anti-corruption machinery of state constitutionally compliant. Their matters were heard together on the semi-urgent roll by three judges. HSF met with limited success in that court, while Glenister's case was dismissed and his efforts to introduce evidence of the relevant circumstances militating against keeping the Hawks within the SAPS were struck out with punitive costs awarded against him. None of the parties were satisfied with the judgment and all appealed to the Constitutional Court; the HSF also sought confirmation of the invalidity orders it had won. All three teams of advocates engaged by government to defend the constitutionality of the new legislation persisted in stoutly contending that it was compliant with the Constitution and with the requirements laid down in *Glenister II.*

Sadly, they were not always able to agree during argument on the proper construction and interpretation of the legislation they had been separately briefed to defend. This unfortunate feature of the matter only served to strengthen the hand of the parties impugning the constitutionality of the legislation.

V. The findings of the majority in *Glenister III*

It is necessary to look to the language employed in the majority judgment in *Glenister II* to determine whether the amending legislation, which was impugned for its lack of constitutionality in *Glenister III*, met the required STIRS standards. There are three passages in the majority judgment which require careful examination:

1. "*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***" [29] (emphasis supplied).

The phrases "in itself" and "on that ground alone" should be read to have meaning. The Constitutional Court does not drop meaningless phrases into serious judgments it hands down on topics as fraught as the highly contested adequacy of the Hawks as an appropriate anti-corruption entity.

2. "*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 within the range of possible conduct that a reasonable decision-maker **in the circumstances** may adopt. 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***"[30] (emphasis provided).

Glenister regarded the words "in the circumstances" and "so long as the measures taken are reasonable" as meaningful. He was persuaded that O'Regan J had illustrated the position definitively in her judgment in the matter of *Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others* when she wrote:

> *'What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer - the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer.*

[29] Glenister II majority judgment 2011 (3) SA 347 (CC) at paragraph [162] p 397
[30] Glenister II majority judgment at paragraph [191] p 408

> *Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities'.*[31]

These important dicta of a unanimous court were not properly taken into account in *Glenister III.*

3. "*This court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. 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 meet one of the objective bench marks for its independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence*"[32].

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[31] 2005(2) SA 359 (CC) at paragraph [88] pp 404 -405

[32] Glenister II majority judgment at paragraph [207] p 412 (footnotes excluded)

Glenister argued that the Constitutional Court in this passage had made it clear that public belief in the independence of the corruption-fighting entity was a prerequisite for a finding that the entity was in fact independent.

Measured against the STIRS requirements spelt out by the Constitutional Court for a properly independent anti-corruption authority, Glenister was concerned that the amending legislation had not solved significant problems in the establishment of the Hawks, and set out to address these issues in his founding papers filed of record in *Glenister III.* He laid particular emphasis on the question of public perception of the independence of the Hawks.

In pursuit of his argument that the entire scheme of the amending legislation failed the appropriate test of independence, Glenister set out to illustrate that the scheme did not fall within the range of possible conduct that a reasonable decision-maker could adopt *in the circumstances*, and that accordingly, parliament had not adopted *reasonable measures* to respect, protect, promote and fulfil the rights in the Bill of Rights. He did so by reference to a host of incidents and events that evidenced corruption, and by reference to expert testimony premised upon evidence of corruption, and public perception thereof. The respondents who opposed the application had chosen not to respond to this evidence, but requested the High Court to strike it out. The High Court had done so with a punitive costs award, and the striking-out order formed part of the subject matter in Glenister's application for leave to appeal.

Early in the Constitutional Court hearing of argument in *HSF/Glenister III*, there were indications in questioning from the bench that at least an element of the bench saw the judgment in *Glenister II* quite differently from the way in which Glenister had interpreted it. The difference in interpretation of what the express terms of the judgment meant, is starkly illustrated in a comparison of the judgment of the majority in *Glenister III*, penned by Mogoeng CJ, and a minority judgment written by Froneman J. Extracts from the majority judgment that portray its interpretation of *Glenister II* are enlightening:

> "*The allegations in the struck-out material amount to reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The objective appears to be to scandalize and use the court to spread political propaganda that projects others as irredeemable crooks who will inevitably actualise Mr Clem Sunter's alleged projection that South Africa may well become a failed state. This stereotyping and political narrative are an abuse of court process. A determination of the validity of the DPCI legislation does not require a resort to this loose talk.*
>
> *These assertions or conclusions are scandalous, vexatious or irrelevant. Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness."*[33]

[33] Glenister III majority judgment 2015 (2) SA 1 (CC) at paragraphs [29] and [30] pages 15 and 16

In dealing with Glenister's well-reasoned attack on the location of the Hawks within the police service as being incompatible with the independence requirement laid down in *Glenister II*, the judgment is equally strident:

> *"Mr Glenister seeks to rely on evidence of public perception of corruption sourced from the TNS statement of 22 October 2012. At that time the public perception of corruption existed for a period of over six years, although there had since been a marginal improvement. Reliance is also placed on the ISS monograph which was published five months after the delivery of* ***Glenister II*** *and could not therefore have been based on public perception that only came into being after* ***Glenister II****. That means that when* ***Glenister II*** *was decided in 2011, the high levels of corruption Mr Glenister now seeks to inform the court about were already an established fact. The inescapable consequence of the age of these high levels of corruption in the private and public sectors, including SAPS, is that this court failed to have due regard to the public perception of corruption in SAPS at the time we decided* ***Glenister II****. Its decision that the mere location of the DPCI within SAPS cannot invalidate the DPCI legislation was in effect wrong.* ***Glenister II****'s decision on location is on this logic not one that 'a reasonable decision-maker in the circumstances may adopt'. Mr Glenister can therefore only be understood to be suggesting that the decision about the location of the DPCI in* ***Glenister II*** *was wrong".*[34]

The majority upheld the striking-out of the evidence sought to be adduced by Glenister, and with it, the basis for his attack on the location of the Hawks within the police service. It accordingly dismissed his application for leave to appeal against the order dismissing his main application to have the amending legislation declared unconstitutional, and the striking out of the evidence he sought to adduce.

VI. The findings of the minority in *Glenister III*

Froneman J, on the other hand, in his minority judgment in *Glenister III* adopted a more nuanced approach to the case sought to be presented on behalf of Glenister:

> *"The main judgment finds that* ***Glenister II*** *foreclosed both the constitutional challenge that Mr Glenister sought to bring against the SAPS Amendment Act, as well as the evidence that he sought to adduce to sustain that challenge. I disagree.* ***Glenister II*** *does neither. If that decision needs to be revisited it must be done appropriately with reasoned discussion and justification for any change. It should not be done by a reinterpretation of its meaning that narrows its original scope without explaining the necessity for the change."*[35]

With reference to the manner in which *Glenister II* had dealt with the constitutional obligation to establish an anti-corruption authority, Froneman J recorded the following:

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[34] Glenister III majority judgment at paragraph 34 p 18.
[35] Glenister III Froneman minority judgment at paragraph [115] page 46.

> *"The judgment does not state that the creation of a separate corruption-fighting unit within SAPS will withstand any constitutional attack. It says that something else will be needed in order to sustain that kind of constitutional challenge. Mr Glenister sought to show that the additional factor was that the current extent of corruption in our body politic was of the kind that showed that the location of the DPCI within SAPS was not a possible option for a reasonable decision-maker. In other words, he contended that this evidence showed that locating the DPCI within SAPS meant that it could not have 'sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights'.*
>
> *His attempt to do so fell squarely within the range of approaches left open by* ***Glenister II****."*[36]

Froneman J summed up his assessment of the dicta in *Glenister II* as they applied to the case presented in *Glenister III* as follows:

> *"To sum up:* ***Glenister II*** *did not hold that there could be no challenge to the location of the DPCI within SAPS, only that the mere fact of its location within SAPS was not sufficient to sustain a constitutional challenge. Nor did it lay down that no evidence may be adduced to support a constitutional challenge that was based on something more than the fact of DPCI's location within SAPS.* ***Glenister II*** *does not preclude the presentation of evidence of the context within which the range of possible options open to a reasonable decision-maker should be assessed. Nor does it prohibit evidence about the public perception of corruption within that context. Mr Glenister sought to introduce additional evidence of corruption in our body politic and the public perception of the extent of that corruption in order to bolster his constitutional challenge that, currently, it is not a reasonable option to locate the DPCI within SAPS.* ***Glenister II****, I repeat, allowed him to do that.*
>
> *The main judgment finds that the evidence of public perception that Mr Glenister sought to present showed that the perception already existed at the time of* ***Glenister II*** *and hence this evidence takes the matter no further than what that judgment already decided. I disagree. First, the evidence presented in this matter is not all the same as that which was before the court in* ***Glenister II****. Second, the challenge here is predicated on what* ***Glenister II*** *decided. The legal ground for the challenge here was created by* ***Glenister II*** *and thus the challenge is not precluded by the application of some kind of res judicata principle.*
>
> *It is one thing for this court to find that the case Mr Glenister presented was not convincing, but quite another to say that he is prevented by our past decision from doing so. If there are aspects of* ***Glenister II*** *which need to be revisited or clarified it must be done explicitly, not through a reinterpretation that is at odds with what the judgment actually says."*[37]

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[36] Glenister III Froneman minority judgment paragraphs [119] and [120] page 47.

[37] Glenister III Froneman minority judgment paragraphs [123] – [125] pages 48 – 49.

It is perplexing that two judicial interpretations of the same judgment of the Constitutional Court made by justices of that court could be so diametrically opposed, particularly when it is considered that the majority judgment in *Glenister II* was penned by Moseneke DCJ and Cameron J, with whom Froneman J amongst others concurred, while Moseneke DCJ concurred with the majority judgment in *Glenister III, and* Cameron J concurred with Froneman J's minority judgment. Remarkably, but perfectly properly so, the Chief Justice, who wrote the majority judgment in *Glenister III*, was in the minority in *Glenister II*, a minority which had no difficulty with the constitutionality of the original legislation creating the Hawks. Regrettably for Glenister, he failed to persuade the majority with his argument that an independent corruption-fighting entity in SA had, in the prevailing circumstances, to be situated outside of the police service.

The battle was, however, not entirely lost. Although the Constitutional Court declined to confirm the High Court's order of constitutional invalidity in respect of the appointment criteria and process for the National Head of the Hawks, other aspects of the declaration of constitutional invalidity were indeed confirmed. Critically, those provisions of section 17D (1)(b) of the amending legislation, which included amongst the functions of the Hawks the prevention and combatting of "any other offences referred to it from time to time by the National Commissioner, subject to any guidelines issued by the Minister and approved by Parliament", were amongst those struck down as unconstitutional, for vesting the National Commissioner with the power to prescribe part of what the Hawks were to do, which the majority judgment described as "an undesirable encroachment which is exacerbated by the role that the ministerial policy guidelines play in the selection of these offences for referral".[38]
The majority judgment was not the triumph for which Glenister had worked so hard, but he did manage, in the part of his case which overlapped with that of the HSF, to claw back some of the independence-related criteria that Parliament had ploughed under.

VII. The basis for preferring the reasoning of the minority in *Glenister III*

The manner in which the majority in *Glenister III* has gone about interpreting the passages quoted from *Glenister II* in the preceding section does not stand up to legal or logical scrutiny. It is perhaps informed by a sense of protectiveness toward the executive, an underlying executive-mindedness or possibly judicial unwillingness, as at November 2014, to face the fact that the body politic in SA is indeed seriously corrupt. Subsequent allegations of state capture and the exposure of ever more skulduggery in high places would suggest that the majority may now regret its unwillingness to engage with the hard facts included in the "odious political posturing" it perceived back then. Had the *Nkandla* judgment, for example, preceded the hearing in *Glenister III*, the expert testimony put up by Glenister may not have fallen on such barren ground.
The approach of the minority, as encapsulated in the passages from the judgment of Froneman J quoted above, is preferable because it does not have the effect of painting the court into a corner as the majority judgment does. Dicta from the separate

[38] Glenister III majority judgment paragraphs [103] – [104] p 41.

minority judgment of Van der Westhuizen J, who was absent for the hearing of *Glenister II,* bear repeating:
"[197] I respectfully disagree with the conclusion the main judgment reaches on s 17CA of the SAPS Act. The location of the DPCI inside of SAPS renders it necessary to have countervailing forces to ensure independence that were perhaps less necessary for the DSO. These countervailing factors ought to be informed to some degree by the appointment measures employed for the offices of the Public Protector and Auditor-General. The transparency afforded by airing this process in Parliament will contribute to the unit's independence. It will also serve to bolster public perception of the independence of the national head of the DPCI."

Imagine General Berning Ntzemela, current head of the Hawks or DPCI, surviving a process of the transparent, accountable and thorough kind to which the aspirants to the office of Public Protector were submitted in the National Assembly when the term of office of Adv Thuli Madonsela expired.
Van der Westhuizen J continues in his separate minority judgment in HSF/Glenister III:

"[199] Mr Glenister applies to this court for leave to appeal against the decision of the high court dismissing his claim that the entire SAPS Amendment Act is unconstitutional. He essentially argues that even though in theory an anticorruption unit could be located within SAPS, it is in reality impossible to do so in today's South Africa. The officials in the leadership structure of SAPS — according to Mr Glenister — are corrupt to such an extent that no anticorruption unit could constitutionally be located under it.
[200] The main judgment argues that this court's decision in Glenister II ruled out that argument. Like Froneman J, I prefer a different reading of that judgment. It is too strong to say that Glenister II conclusively dealt with all aspects pertaining to the question of the location of the DPCI. Mr Glenister's challenge is not premised on the theoretical location of the DPCI as the only ground for invalidation. He questions whether, given our particular context, its location within SAPS is constitutionally permissible.
[201] The main judgment considers it evident that '(i)t is a closed chapter that corruption is rife in South Africa and that it is a practical possibility for an adequately independent anticorruption entity to be comfortably located within SAPS'. Mr Glenister considers the first fact to preclude the veracity of the second. I agree with Froneman J that it is open to Mr Glenister to plead his case on this point. Leave to appeal should have been granted on this issue.
The appeal against the striking-out of evidence
[202] Given the above, I think it is open to Mr Glenister to adduce evidence in support of his claim that the practical reality of conditions within SAPS renders it incapable of housing the DPCI if the latter is to enjoy an adequate degree of independence. I agree with Froneman J that Glenister II did not preclude Mr Glenister from adducing evidence about the public perception of corruption within that context. Indeed, Mogoeng CJ remarks that 'Mr Glenister's submissions . . . owe their potency and essence to the public perception of the levels and reach of corruption sought to be shared with this court'.
[203] In addition I find the argument in the main judgment — that the evidence was before the court in Glenister II and is therefore not admissible now — untenable. While corruption as a phenomenon and events evidencing corruption certainly existed

prior to Glenister II; that does not mean that the precise evidence that Mr Glenister seeks to adduce now was before the court then. The court was not in a position to take judicial notice of levels of corruption in SAPS. It may only take cognisance of evidence that is properly before it. It must evaluate that evidence in accordance with the principles of evidence and procedure.

[204] The main judgment sets out the test for whether evidence should be struck out. It does not actually evaluate the evidence before this court, however. It labels the evidence 'odious political posturing' and finds that the court is used to 'spread political propaganda' and to advance a 'political narrative'.

[205] This court is inevitably and frequently asked to make decisions that have 'political' implications. Constitutional adjudication is necessarily political, because it is guided by the values and principles in the Constitution, which have to be interpreted and applied within a specific socio-political reality. In a way, law — or at least constitutional law — is often 'political'. When this court is called upon to rule on the constitutional validity of the conduct of political parties or their members, including the ruling party, constitutional law indeed impacts on day-to-day political life. That this court and others often have to deal with 'the political' does not mean that they should engage in endorsing or condemning any particular party, or faction within a party, or further a party's political agenda. The court may not 'play politics' or get involved in party-political battles. As far as possible, it must base its decisions regarding material placed before it on the Constitution and the law. Allowing the evidence in this case would not amount to becoming involved in partisan politics. I am uncomfortable with evidence being labelled 'political' as a ground for its inadmissibility.

[206] As to relevance, I align myself with the analysis of Froneman J. The question is: If it is relevant to consider the perception of a reasonable observer about the independent functioning of our national anticorruption unit when determining its constitutional validity, can we consider the views of real, live observers to ascertain what a reasonable observer might perceive? I think we can, at least to some extent.

[207] We should not organise a popularity poll about state organs' trustworthiness or levels of corruption. Head counts will get us nowhere when reasonableness is the standard. However, ascertaining what constitutes a reasonable member of the public, and what its view would be, is not done in a vacuum. It is context-specific. Judges often rely on their own experience as members of society to determine this. What Mr Glenister seems to have been trying to achieve is to present this court with a factual basis which could inform its construction of the reasonable observer. That factual basis, at least in part, relies on what people think about this matter. Whether Mr Glenister is correct that these people are reasonable — or whether the evidence and studies are fallible, reliable or true — is a different enquiry.

[208] I also agree with Froneman J that presenting evidence of corruption in this context may well entail evidence that comes across as abusive or annoying. This alone is not sufficient to render the evidence inadmissible. Prejudice must be demonstrated. In addition a court has discretion to grant a striking-out order and is not compelled to do so…

End note

[220] Corruption threatens the very existence of our constitutional democracy. Effective laws and institutions to combat corruption are therefore absolutely essential. It is the task of the courts — and this court in particular — to ensure that legal mechanisms against corruption are as trustworthy and tight as possible, within the demands and parameters of the Constitution.

[221] But courts can only do so much. A corruption-free society can only develop in the hearts and minds of its people — particularly the ones occupying positions of political and economic power. We need dedication to the spirit and high aspirations of the Constitution. Institutions are tools designed to help people realise their ambitions. Much dedication is required on the part of those handling the tools.
[222] Of course the structure of our institutional watchdogs must be made as immune to corruption as possible. But even the most sophisticated institutional design will require the exercise of discretion and therefore integrity on the part of — and trust in — the office bearer. Thoroughly closing all perceived loopholes will guarantee little. The more procedures and processes we put in place to safeguard against corruption, the more plausible the deniability we give to a corrupt actor if all the technical boxes have been ticked. Generally, abstract institutional designs cannot be corrupt. As we know, people can be."

The task of ensuring that legal mechanisms are as tight and trustworthy as possible cannot be achieved if the court closes its eyes to "the circumstances" as envisaged in *Glenister II* and ignores the perceptions of the public which are regarded as critical in the same judgment. The oversight functions of the legislature and its constitutional duty to hold the executive and Chapter Nine Institutions to account should be harnessed in the interests of creating the climate in which the public can indeed trust the effectiveness of the STIRS criteria because they are rigorously in place, and not because minimal lip-service is paid to them.
The role of a multi-party parliament in limiting the excesses of an executive that may go astray is a salutary one. The design of the Constitution accommodates oversight of all Chapter Nine Institutions, which report to the National Assembly on their activities and the performance of their functions at least once a year as part of their accountability to the Assembly [39] in a manner which by-passes the executive in the interests of properly supporting and strengthening constitutional democracy.[40] It makes sense to locate the anti-corruption authority similarly to the existing Chapter Nine Institutions. It is downright counter-productive to keep the anti-corruption entity within a police service that answers to the executive, has its leadership appointed by the executive and has a track record like that of SAPS which is riddled with illegally deployed cadres of the national democratic revolution. All three of the most recently appointed national commissioners of police have not been fit for office (Selebi convicted of corruption, Cele held unfit and Phiyega facing a board of inquiry after an excoriation by the Farlam Commission that ought to have elicited her resignation)

VIII. The benefits of the 20/20 vision of hindsight since 2014 as regards "the circumstances" of the Hawks, the SAPS and the national executive

General Johan Booysen, the former head of the Hawks in KZN, has written a book called *"Blood on their hands"*[41] about the experiences he has had in the course of efforts to side-line him because of his preparedness to investigate suspected corruption on the part of the highly placed (his provincial commissioner of police, Mmamonnye Ngobeni, appointed 2009, suspended 2016, *inter alia*) and the well-connected (Thoshan Panday, a business associate of Zuma's cousin Deebo Mzobe, *inter alia*). His experience is salutary if taken together with that of the former head of

[39] C181(5)
[40] C181(1)
[41] Pan Macmillan South Africa, 2016 with Jessica Pitchford

the Hawks, General Anwa Dramat, now facing kidnapping charges. The latter's efforts to get his hands on the Nkandla dockets led to his professional demise via an illegal suspension and unconscionable pressure on him to accept a "golden handshake" resignation package, which he did. How a package of this nature can be negotiated with a suspected criminal, subsequently charged with kidnapping, is hard to explain or justify in a manner that accords with the rule of law.
In his book Booysen says:

"If the last thing I do is to expose those destroying the criminal justice system, I'll be happy. I'm not the only one who thinks Jiba [a reference to Nomgcobo Jiba, DNDPP, since struck from the roll of advocates for her mendacity] and her cabal have blood on their hands. It's now widely acknowledged that they are protecting themselves and their cohorts from prosecution.
Complacency will allow people like her and Richard Mdluli [suspended Crime Intelligence chief appointed 2009, suspended 2011, re-appointed March 2012, suspended May 2012 to the present] to capture vital state institutions to advance their own financial and other interests. That's why I won't back off. Many people turn silent when faced by injustice, but it's apathy that creates the breeding ground for the evil monsters that will in the end devour us all…
The Irish statesman Edward Burke once said: for evil to triumph, good men must do nothing." [42]

The new leader of the Hawks, General Berning Ntlemeza, is facing a review application that will lead to his removal from office on the basis that he is not a fit and proper person and that it was irrational to appoint him in the face of high court findings concerning his integrity, credibility and reliability. On his watch the Hawks have in effect been converted into the dirty tricks department of a faction of government led by the president himself.
The so-called "SARS wars" have erupted with the Minister of Finance under unwarranted attack by the Hawks. Johan van Loggerenberg, a former SARS employee has chronicled the perfidy of the executive in a book called "Rogue" [43] in which the untoward activities of the Hawks are set out in detail. In justifying his penning of the foreword to the book, Justice Johann Kriegler, a retired constitutional court justice, says the following:

"Ultimately, though, I was motivated by a personal sense of outrage at what these dirty tricks said about the rule of law in our country. For, however opaque and perverted this Kafkaesque tale, there was a discernable pattern – discernable across a number of public institutions – where key individuals, experienced, reputable and independent-minded public servants, have been cynically shunted aside, or out. Typically, the process starts with some or other alleged transgression, relatively trivial and/or outdated. That then triggers well-publicised suspension and disciplinary proceedings with concomitant humiliation, harassment and, ultimately, dismissal, constructive or actual. Then, with breath-taking speed, a hand-picked acting successor steps in and cleans out senior management; and when you look again there is a brand new crop of compliant and grateful faces.

[42] Ibid page 203
[43] Jonathan Ball 2016 with Adrian Lackay

In the process, honourable women and men have been ground down, ignominiously kicked out, their reputations ruined and their life savings exhausted. Often even the most feisty individual has been driven to exhaustion, physical, emotional and, of course, financial. Examples of broadly the same pattern of administrative abuse are to be found in a whole range of parastatals: think, for instance, of South African Airways, Denel, Eskom and the SABC. And of numerous senior public servants – Vusi Pikoli, Mxolisi Nxasana, Glynnis Breytenbach, Anwa Dramat, Shadrack Sibiya, Johan Booysen and Robert McBride, to speak only of the criminal justice sector – who've been hounded out of office."[44]

(Booysen and McBride have thus far managed, at great personal cost to resist being hounded out of office, though this is not for lack of trying on the part of their respective persecutors)

The Farlam Commission on the shootings at Marikana has reported in a manner that highlights the shortcomings of the SAPS and its leadership. Among its recommendations, all accepted by government, are calls to demilitarise the police "as a matter of priority" in accordance with the recommendations of the National Planning Commission and to consider the criminal prosecution of those responsible for the incidents at Marikana.

The national commissioner of police is suspended while facing the Claassen board on inquiry into her fitness for office. She is fighting a rear-guard action and is widely expected to receive her marching orders from the president once the board reports its findings.

The president, conflicted, compromised and corrupt continues to lead an executive some of whose members are accused of being appointed by outsiders. The president himself makes other appointments that are more designed to protect him than to promote the public interest. The judgment of the constitutional court in the *Nkandla* matter ought to have led to his resignation, but has not. He clings to office apparently avoiding or perhaps fearing his day in court on 783 counts of corruption, racketeering, fraud and money laundering flowing from his relationship with Shabir Shaik who was found guilty of corrupting him and was sentenced to 15 years imprisonment for doing so.

The review of the decision not to prosecute the president has been won by the DA and any appeals both to the SCA and to the constitutional court do not appear to enjoy any prospects of success. Indeed, the constitutional court has refused the NPA's application for leave to appeal in the matter.

The president also faces complaints of corruption relating to his role in the Nkandla debacle, dating back to December 2013, but still not investigated and his role in the "retirement" of the previous NDPP Mxolosi Ncasana, who was given a golden handshake in a ridiculously high amount after he indicated his preparedness to prosecute corruption in high places.

Perhaps revealing his leftward leaning, Professor Richard Calland of the University of Cape Town in his appropriately titled new book "Make or Break", [45] observes that:

"Under Zuma, it just became easier to plunder. Almost by definition the right-wing nationalists are unconcerned by this because they are part of the rot. There is no

[44] Ibid page xvi
[45] Penguin Random House 2016

crisis of conscience about the harm that has been done – to the ANC, to the government and to the country.
On the left, however, there is a wailing and gnashing of teeth. There is angst and fretfulness, and, yes, at least in some quarters, a crisis of conscience. Some feel guilty that they were accomplices to this project of 'state capture' and the deepening of a culture of impunity and corruption in and around the ANC's control of governmental power. Others grit their teeth and close their eyes and construct in their mind's eye a narrative that justifies not only their original support for Zuma, but their continued presence in his cabinet."[46]

Calland concludes that:

"South Africans should not turn their backs on politics. They must engage and get involved. The choice is simple: be a bystander and, thereby, an accomplice to the downward spiral or, rather, be a protagonist, a contestant, one of those who rolled up their sleeves and stood in the path of history. That is the choice for individual South Africans and for the country."[47]

Those reported by Calland to be *"wailing and gnashing their teeth"* can't say they were not warned. In the 2007 biography of Thabo Mbeki, '*The Dream Deferred"*[48], Mark Gevisser writes, well before the first occasion, on which Zuma was elected president:

"[Mbeki] was deeply distressed by the possibility of being succeeded by Zuma ... he believed his deputy's play for the presidency to be part of a strategy to avoid prosecution ... Mbeki allegedly worried that Zuma and his backers had no respect for the rule of law, and would be unaccountable to the constitutional dispensation ... There was also the worry of a resurgence of ethnic politics, and –given his support from the left – that Zuma's leftist advisors would undo all the meticulous stitching of South Africa into the global economy that Mbeki and his economic managers had undertaken over 15 years ... [T]he possibility of a Zuma presidency was a scenario far worse than a dream deferred. It would be, in effect, a dream shattered, irrevocably, as South Africa turned into yet another post-colonial kleptocracy; another 'footprint of despair' in the path of destruction away from the promises of uhuru."[49]

Notwithstanding these dire warning "the left" voted for Zuma, not once, but twice – in effect giving him ten years to prove Mbeki's misgivings were well founded. The wailing to which Calland refers is not only heard on the left, well known ANC capitalists like Matthews Phosa, Sipho Pityana and even Cyril Ramaphosa, who finds himself in a "cabinet at war with itself", to the chagrin of the president, have also wailed long and loud with senior communists like Blade Nzimande and Jeremy Cronin.

[46] Ibid page 89
[47] Ibid page 157
[48] Jonathan Ball 2007

[49] Ibid page xli

Advocate Andrew Brown, a member of the Cape Bar who is also a police reservist of nearly two decades standing, has a sobering view of the current situation which he expresses trenchantly in his latest book "*Good Cop Bad Cop" [50]:*

"As paradoxical as it may sound, crime is not a police problem. Police were created and designed to keep a small socially disobedient element in check; not to keep justified social disruption under control. As for the criticism of police brutality, what creature do you expect to spawn if you turn your police officers into bodyguards for the obese political elite? Militarise your officers, place them constantly in harm's way, leave them to live in squalor, criticise them for their inability to quell a surge of socially driven crime, and then film everything that they do.
Dogs on a tautening leash.
What then for the South African Police Service? The question is urgent, and the answer must necessarily extend beyond models of policing – for left on its current course, the middle class will all be living in Johannesburg-style compounds and the poor will be roving apocalyptically among the burning ruins.
There is a word for a system that relies on its security forces to constrain its citizens in the face of its failure to implement basic human rights.
And it's not 'democracy'.
We have the Constitution and the structures of state to prevent such an outcome. Anyone despairing of our country's ability to steer a better course need only read the recent Constitutional Court judgment on Nkandla to be filled once more with determination and belief. It is a question of resolve. It is a question of accountability.
The state needs to start performing its basic functions, and the police need to be allowed to return to theirs."[51]

As already noted, the current work rate of the Hawks is considerably below that of the Scorpions and even the Hawks themselves in the early years of their existence. The Hawks do not comply properly with a single element of the STIRS criteria laid down by the constitutional court in *Glenister II.* The attempt in *Glenister III* to render the legislation as amended constitutionally compliant has been a failure given the matters that have arisen and the developments that have occurred since the judgment was delivered in November 2014. The necessary sapiential authority or "clout" is simply absent. The Hawks are not specialised, they have not received appropriate training, their independence is highly questionable, they are not properly resourced, The experiences of Dramat, Sibiya (also controversially implicated in the Zimbabwean rendition case) and Booysen show that they do not enjoy security of tenure of office.
In short, the Hawks do not comply with any of the criteria laid down for their effective structural and operational performance requirements in *Glenister II*. Hindsight is an exact science: with the benefit of hindsight, the Constitutional Court majority in *Glenister III* and those in the minority who did not consider that the gravity of the situation was a circumstance justifying the removal of the anti-corruption authority from the SAPS, must surely be concerned that their positions need to be revisited.

IX. The justification for the creation of an Integrity Commission

[50] Zebra Press 2016
[51] Ibid pages 180 to 181

Accountability Now has made a submission to the Constitutional Review Committee of the National Assembly which suggests that an Integrity Commission in Chapter Nine of the Constitution is the appropriate response to the failure of the Hawks to carry out their constitutional mandate as defined by the Constitutional Court in *Glenister II.* This submission was originated in 2012 as a plea for an Anti-Corruption Commission but has been changed to a request for an Integrity Commission purely in the interests of positive nomenclature and without changing the substance of the request. An alternative name for the institution, one used internationally is the Independent Commission against Corruption. This, given its acronym ICAC, may not be a suitable name in a country in which Afrikaans is widely spoken.
In part, the submission, which was orally presented to the members of the committee on 15 April 2016 reads:

"What constitutional amendment is required to establish an Integrity Commission?

Accepting the need for an Integrity Commission involves relatively minor amendment to the provisions of Chapter Nine of the Constitution to create this Commission to function in a manner that complements the powers and functions of the Auditor General and the Public Protector.

The select committee of the National Assembly on Policing has been given draft legislation for this amendment and for the enabling legislation that should accompany it. [They are available on the website of Accountability Now as part of the "Glenister case" materials.]

The governing principles for Chapter Nine Institutions as set out in C 181 would apply, without amendment other than to include its name, to the Integrity Commission.

Why does South Africa not already have an Integrity Commission?

Many African countries which are party to the same international treaties and agreements as South Africa meet their obligations under these international instruments by creating independent Anti-Corruption Commissions.

It is more positive to name the Commission with this function as an Integrity Commission in that with integrity there is no corruption.

Thus far South Africa has resisted the trend elsewhere on the continent for reasons that do not stand up to sound legal or political scrutiny. There has been an absence of the political will necessary to stand up to corruption in high places and a closing of ranks behind leaders whose integrity may be open to doubt or suspicion.

The task of this Committee is to persuade the legislature that it is necessary, in the exercise of maintaining oversight over the national executive and exacting accountability from it that the formation of an Integrity Commission is the best way forward to a corruption free country in which the Bill of Rights is properly implemented, services are delivered effectively and efficiently and a better life for all is achieved due to economic growth that results from the attractiveness of the country as a destination for investment whether from local or foreign sources.

The adoption of the proposal that an Integrity Commission be formed is the best antidote to a financial ratings downgrade that is available at this delicate time in a dangerous year for the economic well-being of South Africa."

The members of the constitutional review committee of the National Assembly have resolved to give the submission their further consideration due to its weightiness and importance. It is not clear at the time of writing whether this will take place in 2016 or 2017.

X. Creating the political will to establish an Integrity Commission

Those who "move and shake" in the political, integrity, ethics, morality, philosophy, business, law enforcement, public administration, faith based, academic, media and legal spaces must first take on board the need for an Integrity Commission. Some question the need for any new institution at all. Others hanker after the re-introduction of the Scorpions, overlooking the fact that the NPA has been thoroughly captured by forces that are not in the least interested in promoting integrity. Some feel a constitutional amendment is overkill and should be avoided. This argument is raised as if the Constitution is not a living document which has already been amended 17 times in the interests of remaining relevant and appropriate in the light of changing circumstances in the country. Yet others consider a stand-alone legislated unit will suffice if it is given a mandate that complies with the STIRS criteria, never pausing to consider that a mere creature of statute is vulnerable to the same fate as that of the Scorpions.

The doubters and naysayers are all open to being persuaded, on the basis of sound and sober arguments, that the best practice solution to the problem of dealing comprehensively and effectively with the incidence of corruption is the creation of an Integrity Commission as a new Chapter Nine Institution. While it may be possible to amend the mandate of the Public Protector in order to give that office jurisdiction over the private sector, it is preferable to allow the Public Protector to concentrate on maladministration and to refer instances of corruption or suspected corruption to the Integrity Commission. This is justifiable on the basis that the Office of the Public Protector already has enough of a workload and that the specialisation criterion laid down by the constitutional court will not be met if maladministration is dealt with in the same office as corruption. Much of the maladministration investigated currently in SA is due to incompetence, negligence and neglect, among other forms of misfeasance, not deliberate malfeasance of the kind which is always present among the corrupt. The Public Protector, rightly so, has powers of investigation, but no powers of prosecution. The Integrity Commission will have both. In this way proper compliance with all of the criteria in the STIRS formula can be achieved to maximum effect in the fight against corruption.

It is so that the hearts and minds of ordinary people play a vital role in combatting corruption. Organisations like the Legal Resources Centre, Corruption Watch, FUL, The Helen Suzman Foundation, The Black Sash, Section 27, the Social Justice Coalition, CASAC, SA1St Forum, Save SA and the Open Democracy Advice Office play a crucial role in the field of creating the right climate for success in combatting the corrupt.

The science is interesting: in any given population 10% of people are always corrupt, 10% are never corrupt and the rest could go either way, depending on the circumstances. While the converse is clearly true, it is axiomatic that the hearts and

minds of the people can be won over if it is generally known and appreciated that corruption with impunity is a thing of the past in SA.
This felicitous outcome is most efficiently achieved by ushering in an Integrity Commission with the sort of fanfare that accompanied the introduction of the Scorpions. This would be the type of introduction that the Hawks did not and could not enjoy due to the public suspicion around the closure of the Scorpions. It will be far easier to lure a good number of that large 80% category into the corruption free zone if there is greater certainty in the land that the corrupt get caught, tried and punished severely if found guilty.
Indeed, the hearts and minds of the public, and those with their hands on the levers of political and administrative power would be far more easily captured with a fresh start signalled by the introduction of an Integrity Commission than with a continuation of the ACTT or any attempt to make yet another silk purse out of a sow's ear by further tweaking of the currently dysfunctional Hawks.
It ought to be accepted that the Hawks, useful as they may be in relation to other priority crimes, do not have the wherewithal to deal properly with serious corruption in SA as it manifests itself in 2016. The Hawks should be allowed to continue with their work on other priority crimes but cases of serious corruption and organised crime ought to be dealt with by the Integrity Commission.
The ANC has an internal Integrity Committee for errant members, so the notion of dealing with malfeasance in this way is not foreign in the largest political party in the country. With sufficient feet on the ground in the various sectors mentioned above, a movement for an Integrity Commission ought to enjoy the support of all sentient South Africans of goodwill who genuinely seek that elusive better life for all.
The dire warning in the poetry of Yeats, invoked by Calland[52], needs not necessarily come to pass in SA:

"Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

Perhaps more appropriately, and certainly closer to home, the words of Alan Paton in his seminal novel "Cry the Beloved Country" [53], written in 1948, still ring true today:
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'Have no doubt it is fear in the land, for what can men do when so many have grown lawless? Who can enjoy the lovely land? Who can enjoy 70 years and the sun that pours down on the earth when there is fear in the heart? Who can walk quietly in the shadow of the jacarandas, when their beauty is grown in danger? Who can lie peacefully abed while the darkness holds some secret? What lovers can lie sweetly under the stars when the menace grows with the measure of their seclusion? There are voices crying what must be done; a hundred, a thousand voices, but what do they help if one seeks counsel, for one cries this and one cries that and another cries something that is neither this nor that.'[54]

[52] Make or Break page 146
[53] Jonathan Cape 1948
[54] Ibid page 77

A great deal of advocacy work, public education, pressure from the great and the good, help, prayer and blessing from the faith based sector, as well as lobbying of politicians is needed to make the Integrity Commission a reality. The inescapable fact that without it the risk of becoming a failed state, or even suffering the less drastic ignominy of an economic ratings downgrade, will indubitably be greater might serve to concentrate sufficient minds to make the changes necessary. By establishing the Integrity Commission it will become possible to preserve and uphold the rule of law and the ethos of the Constitution. The alternative might be "something terminal". This is a risk not worth taking.

Already Archbishop Emeritus Desmond Tutu and the former Public Protector, Thuli Madonsela, have thrown the weight of their not inconsiderable influence behind the notion of establishing an Integrity Commission. This is a propitious start upon which there is a need to build.

If all else fails, Glenister will have to consider returning to the Constitutional Court for an unprecedented fourth time to make the arguments and present the evidence foreshadowed above.

When the law has run its course in respect of the allegations of crime on the part of Zuma, Mdluli, Jiba, various cabinet ministers (past and present) and those, like Panday, who enjoy the impunity that comes with proximity to Zuma; when the pending reviews in respect of the appointment of Berning Ntlemeza (as head of the Hawks) and Shaun Abrahams (as NDPP) are finally determined and when the probity and integrity of the national commissioner of police, Riah Phiyega, is ruled on in the Claassen board of inquiry, when the criminal proceedings against Pravin Gordhan are lost or withdrawn, then it may be apparent to all that the Hawks are unable to do what the Constitution, as interpreted authoritatively in *Glenister II*, requires of them, notwithstanding the rulings of the majority in *Glenister III*.

Compliance with the STIRS criteria, all of them, sets a stringent standard. The best practice way in which to comply with that standard is to create an Integrity Commission of the kind foreshadowed in the draft legislation and constitutional amendment which the police portfolio committee of the National Assembly and its constitutional review committee have already been given by Accountability Now. Generating the political will to enact the necessary changes is the right thing to do, and the time to do so in the interests of the proper administration of criminal justice is now. There is no good reason for not requiring a best practice solution to the challenges that unchecked corruption poses. There are many good reasons, only some of which are set out above, for insisting on the creation of an Integrity Commission. The people of SA need and deserve one; the idea is right, its time is now.

Paul Hoffman SC is a director of Accountability Now and author of "Confronting the Corrupt. He is indebted to those who worked on the Glenister cases before, with and after him, particularly Peter Hazell SC and Izak Smuts SC, whose suggestions have been most helpful. All errors are the author's alone.

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