DX : 33

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 48/10

In the matter between –

HUGH GLENISTER	**APPLICANT**
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST RESPONDENT**
THE MINISTER OF SAFETY AND SECURITY	**SECOND RESPONDENT**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FOURTH RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**FIFTH RESPONDENT**

APPLICANT'S SUBMISSIONS

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APPLICANT'S SHORT NOTE PURSUANT PARAGRAPH 5 OF THE CHIEF JUSTICE'S PRACTICE DIRECTIONS IN TERMS OF RULE 32(2)

(a) The names of parties and the case number:

These details are set out above.

(b) The nature of the proceedings:

Together with ancillary relief, Applicant seeks leave to appeal, alternatively direct access, in an application in which an order is sought declaring unconstitutional and invalid two statutes whereby the Directorate of Special Operations under the National Prosecution Authority was disbanded and the Directorate of Priority Crime Investigation under the South African Police Service was established in its place.

(c) The issues that will be argued:

The issues that will be argued are the following:

(i) The irrationality of the scheme comprising the enactment of the two Acts;

(ii) The unreasonableness of the said scheme;

(iii) The unfairness of the said scheme;

(iv) The violation by the said scheme of South Africa's international treaty obligations;

(v) The flawed public participation process that preceded the passing of the two Acts;

(vi) The infringement of the bill of rights by the impugned legislation;

(vii) The structural unconstitutionality that has arisen as a result of the undermining of the NPA and the functions of the NDPP by reason of the said scheme.

(d) Portions of the record necessary for the determination of the matter:

In the opinion of Applicant's counsel, the whole of the record will need to be read, save for Respondents' striking out application in the event of same being abandoned.

(e) Estimated duration of argument:

It is estimated that argument from both sides will take one day.

(f) Summary of the argument:

A brief summary of Applicant's argument is set out in annexure A hereto.

(g) List of authorities:

A list of the authorities on which particular reliance will be placed during oral argument is set out in annexure B hereto.

R P HOFFMAN SC

8 July 2010 **P ST C HAZELL SC**

ANNEXURE A

BRIEF SUMMARY OF APPLICANT'S ARGUMENT

1. Effective constitutionalism requires checks and balances upon the exercise of executive and legislative powers. Our Constitution seeks to limit these powers in relation to the prosecution of crime by making it the function of the NDPP under C 179(5) to determine prosecution policy for an NPA which operates independently of the executive and legislative branches of government, acting *"without fear, favour or prejudice".* This was a salutary step on a continent wracked by the "It's our turn to eat" type of corruption found in government.

2. The DSO was introduced with the active participation of the then NDPP as a matter of prosecution policy and to give legislative substance to the requirements of C179(2) read with C179(4).

3. The DSO can not be constitutionally disbanded without the *imprimatur* of the NDPP because its disbandment amounts to a change in prosecution policy. No such imprimatur has been given. It is beyond the constitutionally prescribed powers of the executive

and legislature to make laws which change prosecution policy unless there is co-operation and consent from the NDPP, neither of which, on the facts, has been forthcoming.

4. The deferral of the ANDPP to what he calls the *"prerogative"* of government is ineffective and ill conceived. No such prerogative to makes laws affecting prosecution policy exists under the Constitution, all laws have to be consistent with the Constitution; any law affecting prosecution policy which is not determined by the NDPP is accordingly invalid, be it good, bad or indifferent.

5. In any event, the political decision taken at the Polokwane conference of the ANC urgently to disband the DSO is so arbitrary and irrational as to fail the test of legality. The court *a quo* did not even attempt to deal with the irrationality of disbanding the DSO in its judgment. Parliament no longer enjoys the unbridled sovereignty of old. It has to act legitimately and constitutionally, and has not done so in this instance. The rationale for its disbandment is admittedly to get the DSO off the backs of crooked politicians and their cronies. This is not a legitimate government purpose.

6. The effect of the decision to disband is wide ranging, as can be seen from the seven discrete topics dealt with in the main heads of

argument. Apart from the clear violation of the labour rights of individuals directly affected and effectively demoted by the disbandment, the effect of the two Acts on the country's international obligations is the worst violation of the rule of law caused by the scheme.

7. South Africa is in breach of its undertakings to maintain an independent corruption fighting unit of the kind envisaged in its treaty obligations outlined in the founding affidavit because DPCI is simply not independent and never can be whilst under the policy control of a mere politician, the Minister of Police, rather than a professional NDPP.

8. Accordingly, the two Acts should be declared invalid.

ANNEXURE B

APPLICANT'S LIST OF AUTHORITIES UPON WHICH PARTICULAR RELIANCE WILL BE PLACED

1. **Transnet Limited t/a Metrorail and Others,** 2005 (2) SA 359 (CC) at paragraph 35

2. **Wightman v Headfour (Pty) Ltd** 2008 (3) SA 371 (SCA) at paragraph 13

3. **New National Party of South Africa v Government of the RSA**, 1999 (3) SA 191 (CC), paragraph [19]

4. **Pharmaceutical Manufacturers Association of South Africa and Another: In Re ex parte President of the Republic of South Africa and Others**, 2000 (2) SA 674 (CC), paragraphs [85] and [86]

5. **Prinsloo v Van der Linde and Another**, 1997 (3) SA 1012 (CC) at paragraph [25]

6. **President of the RSA and Others v SA Rugby Football Union and Others**, 2000 (1) SA 1 (CC) at paragraph [149]

7. **Bato Star Fishing v Minister of Environmental Affairs**, 2004 (4) SA 490 (CC) at paragraph [48]

8. **Mlokoti v Amathole District Municipality and Another**, 2009 (6) SA 354 (E) at 362 and 363

9. **Crous v the Blue Crane Route Municipality and Another** (2009) 30 ILJ 840 (Tk), at paragraphs [57] and [58]

10. **Nxele v Chief Deputy Commissioner, Corporate Service, Department of Correctional Services and Others**, [2008] 12 BLLR 1179 (LAC)

11. **Doctors for Life International v Speaker of the National Assembly and Others**, 2006 (6) SA 416 (CC)

12. **Moise v Greater Germiston Transitional Local Council**, 2001 4 SA 491 (CC) paragraph [19]

13. ***Ex parte* Attorney-General, Namibia: *In re*: The Constitutional Relationship between the Attorney-General and the Prosecutor-General** 1995 (8) BCLR 1070 (NmS), at pages 1085 and 1086

14. **Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the RSA**, 1996 (4) SA 744 (CC) at paragraph [146]

APPLICANT'S HEADS OF ARGUEMENT

INTRODUCTION

1. In this matter Applicant unsuccessfully applied as a matter of urgency in the Cape High Court for an order invalidating the National Prosecuting Authority Amendment Act, 56 of 2008, and the South African Police Service Amendment Act, 57 of 2008 ("the two Acts").

2. The judgment *a quo* was delivered on 26 February 2010, argument having been heard on 2 and 3 June 2009. The application was dismissed with no order as to costs. Applicant seeks leave to appeal, *alternatively* an order granting direct access.

3. The essential issue is whether the two Acts are constitutionally valid. The only paragraph in the judgment *a quo* which deals cursorily with this is paragraph 13, which does not even mention the legal and constitutional implications of the disbandment of the Directorate of Special Operations ("DSO").

CONDONATION AND LEAVE TO APPEAL

4. The said application was launched out of time. For the reasons dealt with in paragraphs 39 to 44 of Applicant's founding affidavit in

these proceedings **(record pages 3115-3116)** it is respectfully submitted that granting condonation would be appropriate.

5. In so far as leave to appeal is concerned, the Chief Justice has directed that argument on the merits be included in this written argument. Applicant submits that his below submissions render it appropriate to grant leave to appeal, alternatively direct access.

PERTINENT PROVISIONS OF THE CONSTITUION

6. Sections 1, 2, 167(5), 179, 195(1) and (2) read with 197(3), 205(2) and (3), 206(1), 207(2), 231 read with 198 of the Constitution are relevant.

7. The following provisions of the Bill of Rights also feature: 7(1) and (2), 9, 10, 11, 12, 21, 22, 23 and 25.

ROADMAP TO READING THE RECORD

8. In order to come readily to grips with the papers, it is suggested that the reading of the record be done in the order set out in the annexed “roadmap to reading the record”, marked “C”.

OVERVIEW OF THE BACKGROUND TO APPLICANT’S CASE

9. Applicant’s present application *a quo* was preceded by an unsuccessful attempt by him to prevent the dissolution of the DSO in which the Court, in upholding the doctrine of the separation of powers, came to the conclusion that it was

premature to attack the then proposed legislation before the legislative and executive authorities had finalised their functions in respect of the two Bills. This process was completed when First Respondent signed the two Acts into law on 16 and 17 February 2009 with effect from 20 February 2009. The principles of deference to the other spheres of government no longer apply in the manner in which they were previously invoked by the Court.

Proclamations 9 and R12, HG2 and HG3, record pages 102 to 105

10. Applicant has insisted that the legislation does not pass constitutional muster. After the dismissal of his first attack on the scheme of the legislation:

    (a) He made representations to Parliament;

    (b) He requested First Respondent not to assent to the bills and to refer them back to Parliament as being unconstitutional;

    (c) When First Respondent assented to the legislation, he requested that it not be implemented pending this application.

    All to no avail.

11. In the matter before the court *a quo* Applicant sought final relief declaring the two Acts to be unconstitutional and invalid. At the micro level the case is about the constitutionality of the scheme of

the two Acts encompassing the dissolution of the Directorate of Special Operations (DSO) and the transfer of its investigative personnel to the new Directorate of Priority Crime Investigation (DPCI) in the South African Police Service (SAPS). At the macro level it is about the preservation of the rule of law and the independent ability of the National Prosecuting Authority (NPA) to function constitutionally: *"without fear, favour or prejudice".*

JURISDICTION

12. Applicant contends that the court *a quo* was competent to hear the matter in its entirety in view of the fact that C 167(5) and C 169 allow it to declare an Act of Parliament invalid. If Applicant is wrong in this, then in any event the Court has jurisdiction of hear the matter by way of direct access.

FACTUAL DISPUTES IN MOTION PROCEEDINGS

13. Any factual disputes must be resolved in terms of the rule in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) which is of significance in this application. There are 2 exceptions to the general rule that final relief may only be granted if the facts stated by the respondents, together with the admitted facts in the applicant's affidavits, justify such relief.

14. The first exception is where the denial by a respondent of a fact alleged by the applicant is not such as to raise a real, genuine or *bona fide* dispute of fact.

> **Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others,** 2005 (2) SA 359 (CC) at paragraph 35; **Wightman v Headfour (Pty) Ltd** 2008 (3) SA 371 (SCA) at paragraph 13.

15. The **Wightman** case covers precisely the situation in the present case. Applicant has no personal knowledge of the relevant facts, for the obvious reason that he is an ordinary citizen and thus an outsider to the political process. The relevant facts lie exclusively within the knowledge of the respondents. However the respondents have in numerous respects elected not to provide countervailing evidence but rather to furnish bare denials. We ask the Court to apply the said first exception.

16. The second exception is where the allegations or denials of the respondent are so clearly untenable that the court is justified in rejecting them on the papers. We ask the Court to apply the said second exception.

17. Neither First Respondent nor either of his predecessors has filed an answering affidavit or even a confirmatory affidavit. The answering affidavits of Nchwe and Simelane do not purport to be made on behalf of First Respondent. It follows that, where

allegations are made in the founding affidavit regarding First Respondent, those allegations are unanswered and must be accepted to be correct, in accordance with the general rule in **Plascon-Evans**.

18. In this application Applicant contends that there are no genuine disputes of fact and that the receivable matter referred to above affords sound grounds for granting Applicant relief.

FACTS PROVED BY APPLICANT

19. The DSO was established in terms of section 7(1) of the NPA Act, 32 of 1998, and came into existence on 12 January 2001 with the aim of instituting criminal proceedings relating to organized crime or such other offenders or categories of offenders as the President may determine, and of carrying out necessary functions incidental to instituting such proceedings.

Record, page 20, paragraph 30

20. The DSO had an enviable track record with conviction rates of between 85 and 90% during the course of its existence.

Record, pages 25 and 26, paragraph 37

21. When he suspended Vusi Pikoli on 23 September 2007, former President Mbeki stated that *"the machinery to fight crime was*

further strengthened in 2000 when Parliament adopted legislation creating the DSO in the office of the NDPP."

Record, pages 246 to 248

22. The DSO has investigated many prominent members of the ANC, including parliamentarians involved in the Travelgate scandal, Shabir Shaik, Jacob Zuma, Tony Yengeni and Jacky Selebi.

Record, page 27, paragraph 41

23. Although it is now belatedly disputed by Second and Third Respondents, it was common cause in the previous proceedings that the DSO investigated irregularities in the arms deals.

24. The Khampepe Commission recommended that the DSO should be retained within the NPA.

Record, pages 313 to 456

25. In particular, Judge Khampepe recommended *"that it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO" w*here it is *"prosecution led".*

26. The Government accepted Khampepe's recommendations both in a 29 June 2006 Government Communications statement and in a similar 7 December 2006 statement re a cabinet meeting.

Record, pages 457 to 463

27. At its Polokwane conference in December 2007, the ANC resolved to disestablish the DSO as a matter of urgently and cause its investigative personnel to *"fall under"* SAPS. It further instructed that the necessary changes to the law should be effected without delay.

28. The rationale given for this new departure was that *"the Constitutional imperative that there should be a single police service should be implemented".*

Record, pages 513 to 516

29. As early as 14 February 2008 Simelane told 702 Talk Radio that the DSO *"will definitely get amalgamated and that basically means that there is dissolution. So the Scorpions will go into the organised crime unit of the police … Work has started and we are going to be on track to get it done as soon as possible."*

Record, page 535

30. The government's decision to disestablish the DSO was clearly taken in order to give effect to the Polokwane resolutions as appears from Safety and Security Minister Nqakula's speech in Parliament on 12 February 2008.

Record, page 602

31. This is what was expected of government by the ANC as appears from the article in the Financial Mail of 11 January 2008 in which Matthews Phosa said, *"The President of the country takes guidelines, mandates and instructions from the ANC … There is only one centre of power and that is the highest decision-making structure of the ANC. … The President and his or her cabinet accounts (sic) to the NEC of the ANC, as any other structure of Government does."*

Record, page 586 to 589

32. Press reports at the time confirm that the Cabinet's plan to disband the DSO sought to give effect to the Polokwane resolutions.

Record, pages 603 to 625

33. At a meeting held between ANC Secretary General Gwede Mantashe and DA leader Helen Zille on 15 April 2008, Mantashe

made it clear that the ANC wanted the DSO disbanded because the DSO was prosecuting ANC leaders.

Record, page 627

34. On 24 April 2008, Nyati Mthethwa, then ANC Chief Whip, wrote an open letter to the Cape Times making plain that the decision to disband the DSO had its roots in the Polokwane resolutions.

Record, pages 629 to 631

35. At a media briefing on 30 July 2008 regarding the DSO, Maggie Sotyu (Chairperson of the Portfolio Committee for Safety & Security, one of the Parliamentary Portfolio Committees charged with facilitating the public participation process) stated, *inter alia*, that submissions from the public opposing the dissolution of the DSO were useless as the decision to disestablish the DSO had already been taken at Polokwane, that the role of Parliament was to carry out the decisions taken by the ruling party, and that what was required by the two Portfolio Committees charged with facilitating the public participation process was submissions from members of the public as to how to make the legislation workable.

Applicant, record page 83, paragraph 130.1
Dani Cohen, record page 957 to 960

36. The minutes of the Workplace Forum Meeting of 30 January 2008 record how the news of their impending demise first landed on the DSO: *"The management informed us that a decision had been taken by the ANC, as the ruling party – to disband the DSO and that a communication was received from the Minister of Justice and Constitutional Development on the 7th or 8th of January 2008 that indeed the DSO is disbanding."*

Record, pages 524 to 527

37. As appears from the analysis by Dr Johan Burger in his TIME TO TAKE ACTION article, disestablishing the DSO would harm the fight against crime, since SAPS is not well placed to perform functions of the kind carried out by the DSO.

Record, pages 678 to 684

38. This is reinforced by the facts contained in the documents annexed to the affidavit of former policeman Ivan Meyers.

Record, pages 1224 to 1228

39. The opinion of Groeneveldt has material in it which is to the same effect. Applicant contends that the two Acts have been passed without regard to the rule of law. This requires that all

governmental conduct must not be arbitrary and must be connected to a legitimate governmental purpose, failing which it is unconstitutional in any constitutional democracy, such as ours, which functions under the rule of law.

Record, pages 1026 to 1057

40. The above factual matrix, when reviewed against the background of clear and binding constitutional law, forms a sufficient basis for granting the relief claimed by Applicant.

SEVEN LEGAL CONCEPTS RELIED UPON BY APPLICANT:

FIRST: IRRATIONALITY

41. There must be a rational relationship between any scheme which Parliament adopts and the achievement of a legitimate governmental purpose. It cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.

> **New National Party of South Africa v Government of the RSA**, 1999 (3) SA 191 (CC) at paragraph [19]; **Pharmaceutical Manufacturers Association of South Africa and Another: In Re ex parte President of the Republic of South Africa and Others**, 2000 (2) SA 674 (CC) at paragraphs [85] and [86]

42. A constitutional State may not regulate in an arbitrary manner or manifest *'naked preferences'* that serve no legitimate governmental

purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State.

> **Prinsloo v Van der Linde and** Another, 1997 (3) SA 1012 (CC) at paragraph [25]

It is apparent on any fair conspectus of the record, including the ANC's spokespersons' statements and Maggie Sotyu's press conference of 30 July 2008, that the impugned legislation has been enacted essentially to give effect to, and under dictation of, the ANC resolution taken at its Polokwane conference to dissolve the DSO as a matter of urgency. Matters of prosecution policy (such as the disbandment of the DSO) are not within the constitutional powers of the Cabinet or of Parliament because the NDPP is constitutionally the *fons et origo* of all prosecution policy. The executive and legislature can only change prosecution policy to the extent that this has the *imprimatur* of the NDPP – a feature conspicuous by its absence in this matter.

43. The Executive and the Legislature have failed to exercise their law-making powers in a manner consistent with the Constitution, in accord with the rule of law, and in a way approved by the Court. The legislative and executive branches of government, in blindly following the *diktat* of the party's Polokwane decision, failed to act *"in good faith and without misconstruing the nature of (their)*

powers". The power to initiate the disbandment of the DSO is that of the NDPP alone.

> **President of the RSA and Others v SA Rugby Football Union and Others**, 2000 (1) SA 1 (CC) at paragraph [149]

44. This was in clear breach of the principle of legality and accordingly contrary to the rule of law. The Cabinet and Parliament were not constitutionally entitled merely to dance to the tune of the ANC. They ought to have weighed and considered the Polokwane resolution against the requirements of the Constitution, recognised that both the express and implicit rationale for the resolution were fatally flawed, and found the resolution incapable of being acted upon in a manner consistent with the requirements of the Constitution.

45. On a fair assessment of the material placed before the Court, and with due regard for the requirements of the law concerning disputes of fact in motion proceedings, it is plain that the reason for the dissolution of the DSO and the transfer of its investigative staff to SAPS is that the DSO was working too well at investigating allegations of corruption or criminality against highly placed ANC politicians and their associates.

46. No other credible rationale for the scheme of the two Acts has been proffered: The single police service argument rejected by the Khampepe Commission has, quite correctly, been abandoned by those Respondents who have filed answering affidavits. The rationalizations made by Simelane in his answering affidavit in relation to the recommendations of that commission and the make-weight arguments put up on behalf of the Second Respondent fly in the face of the open and frank admissions of the leadership of the ANC to the effect that the DSO had to be dissolved because it has made life difficult for about a third of the membership of the NEC of the ANC.

Simelane, paragraph 51, record page 2093;
Zille, paragraphs 8 to 10, record pages 626 to 628; press reports, record pages 620 to 623

47. Any decision based on the need to protect individuals on the receiving end of the unwanted attention of a legitimate and independent law enforcement agency such as the DSO cannot possibly accord with the principles of legality. Nor can it in any way be connected to a legitimate governmental purpose. The withdrawals of current investigations and the absence of any new investigations are strongly suggestive of an ulterior motive behind the dissolution of the DSO; one which is not countenanced by the rule of law and is therefore unconstitutional.

48. Under the dispensation contemplated by the two Acts, the Minister and the governing party or alliance or coalition will henceforth "legally" have the final decision on who will and who will not be investigated by the DPCI unit of the SAPS which has illegally replaced the DSO unit of the NPA. It will be upon the investigations of the SAPS, via its new DPCI unit, that the NPA will be dependent for successful prosecutions. In effect, and with no requirement that the SAPS act without fear, favour or prejudice, this will create the unconstitutional situation that certain individuals may effectively be placed beyond the reach of the law or, worse yet, above it.

49. This flies in the face of the requirements of the equality provision of the Bill of Rights which envisages equal protection and benefit of the law. An NPA incapable of acting without fear, favour or prejudice, for lack of investigative capacity, is an NPA unable to fulfil its constitutionally prescribed power to institute criminal proceedings in the manner required by the Constitution.

50. Effectively demoting DSO operatives to the ranks of DPCI so that they cannot act independently, as they have hitherto done in the NPA, undermines the right of all to equality before the law, to dignity and to freedom from violence and other infringements of their human rights which will flow from the disbandment of the most

successful organized crime fighting unit in the history of the country.

51. It is irrational to disband the most successful crime fighting unit the country has. The inherent arbitrariness of the scheme of the two Acts, brought into being for an ulterior motive to protect the powerful from the investigation of an independent body, is obvious. The two Acts affect the dissolution of the DSO in a manner which is irrational and accordingly unlawful in the sense that all conduct of the executive (in proposing the legislation) and the legislature (in passing it) has to be consistent with the law and the Constitution.

52. The effect of preventing and precluding the investigation of any class of "royal game" is to undermine the equality before the law which is enshrined in C 9.

53. It is furthermore patently irrational to absorb a well functioning organization like the DSO into a dysfunctional one like SAPS. The supporting affidavit of Myers and the annexed information make it extremely obvious that there are serious functional problems within SAPS. The dilution of the excellence of the DSO into the unknown and untested DPCI, which will be required to function in a dysfunctional SAPS under political control instead of

independently, makes no rational sense at all. Protecting political big-wigs does not qualify as a legitimate governmental purpose.

54. On the basis of irrationality, the two Acts accordingly fail to pass constitutional muster.

SECOND: UNREASONABLENESS

55. In the context of reviewing decisions of administrative agencies, O'Regan J held in **Bato Star Fishing v Minister of Environmental Affairs**, 2004 (4) SA 490 (CC) at paragraph [48] that a Court should be careful not to attribute to itself superior wisdom in matters entrusted to other branches of government. A decision requiring balance between competing considerations taken by an institution with expertise in that area should be respected by the Courts. A power may identify a goal but not dictate which route should be followed. The route selected by the decision-maker should thus be respected, but this does not mean that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

56. This *dictum* is of equal application to a consideration of the reasonableness and accountability of the scheme of the two Acts in the context of its inconsistency with the Constitution.

57. The information presented to Parliament and to the Court shows that the DSO was the most successful and effective crime fighting unit in the land. Its dissolution will put the fight against organized crime back by 20 years according to those who should know, being the members of the Concerned Members Group of the DSO, who presented this evidence to parliament, to no good effect.

58. Organized crime and corruption are rampant in South Africa. Even First Respondent has conceded that this is so. The criminal justice system is in disarray, so much so that the former Deputy Minister of Justice conceded in parliament that it is dysfunctional.

Glenister, paragraph 109, record page 68

59. In these circumstances it was neither reasonable nor accountable, in the sense set out by the Court in the **Metrorail** case, to dissolve the DSO. In that matter the court summarised the various considerations which fall to be weighed in determining *"reasonable measures"*. These are:

(a) The nature of the duty in question;

(b) The social and economic context of the duty;

(c) The range of factors relevant to performing the duty;

(d) How closely the duty relates to the core activities of the duty holder;

(e) The extent of any threat to the fundamental rights enshrined in the Bill of Rights;

(f) The intensity of any harm should the duty not be met.

60. At the core of constitutional democracy and of the social contract in place in all countries in which the rule of law holds sway is the obligation to protect all people against crime. This is the duty of the government of the day and it is fundamental to the success of any social order that crime, and corruption in particular, be effectively combated and prevented. This duty is carried out in South African society through the structures and functions put in place under Chapters 8 and 11 of the Constitution. Any new legislation which involves the disbanding of the most successful, well-trained, properly equipped, effective and well-endowed crime fighting unit in existence (as the record indicates), whatever its shortcomings may be, must be viewed as unreasonable.

61. The two Acts put in place a mechanism for absorbing some of the investigative staff of the DSO into the new unit of SAPS called DPCI. This is not a reasonable way of improving performance in the discharge of the state's duty to fight against crime.

62. The social and economic context is one in which there is patently a need to step up the fight against crime. Dissolving the DSO is precisely the wrong way to go about this task. By passing and implementing the two Acts, the government behaved in an unreasonable manner in relation to the nation's obligations under international conventions; its duty to respect and protect fundamental human rights; and the upholding of the values and principles which inform the public administration. The constitutional power of the NDPP to formulate prosecution policy has also been ignored in the false belief that Parliament is sovereign.

63. South Africa is a country in which it is common cause that the level of crime is unacceptable. Our prisons are overcrowded; our courts are not properly equipped to swiftly dispense justice; the rate at which criminal cases are withdrawn now approaches 700 000 per annum; and far too many crimes go unreported, unsolved and unpunished. Almost all criminals incarcerated have little prospect

of rehabilitation and SAPS is currently an institution which lurches from crisis to crisis.

64. On each and every leg of the test of reasonableness set out in the **Metrorail** case it cannot be said that it is reasonable to dissolve the DSO and transfer some of its crucial functions to SAPS, either in the manner contemplated in the two Acts or at all.

65. The Kamphepe Commission and, at least until the post-Polokwane period, the cabinet, both supported the retention of the DSO notwithstanding certain problems with it that are mainly attributable to the dysfunctionality of the Ministerial Co-ordinating Committee charged with managing the inevitable friction and turf wars between the SAPS and DSO, and to certain personality clashes which cannot ever form the basis for changing the law.

THIRD: UNFAIRNESS

66. This aspect of the matter is raised in Applicant's founding affidavit at **record pages 89 to 90, paragraphs 139 to 142**. In the affidavit of Groeneveldt considerable detail relating to the human resources management aspects of the introduction of the two Acts is canvassed and submitted to analysis on the constitutional

principles set out in C 195(1)(b) and (h) and on sound human resources management principles.

Groeneveldt, record pages 1028 to 1056

67. The information gathered from the DSO is also instructive in this regard. The presentation by Downer to the Conference on Economic Crime, held in Sandton on 29 May 2008, places the concept of fairness, as contemplated in C 23, as well as the concepts of efficient, economic and effective use of human resources, as contemplated in C 195(1), in their appropriate context. Downer's exposition of the constitutionally compliant functioning of the DSO within the NPA stands in stark contrast to the dysfunction in the SAPS of which Myers complains.

HG73 at record, page 863 *et seq* and HG67 at record, page 836 *et seq*

68. The concept of *"good human-resource management and career-development practices"* alluded to in C 195(1)(h) has been fleshed out considerably in the affidavit of Groeneveldt. The manner in which the process contemplated by the scheme of the two Acts has been put in place reeks of unfairness, poor human-resource management practices and the commission of unfair labour practices of the kind anticipated in the report of Fourth Respondent

placed before Parliament and referred to by Groeneveldt. The contribution of the Society of State Advocates to the debate, introduced from an historical perspective by Groeneveldt, is also instructive from the point of view of any objective observer seeking to make good human-resource management sense of the two Acts.

Groeneveldt, paragraph 7, record page 1049 *et seq*; DG1, record page 1058 *et seq* at pages 1119 to 1127

69. The whole scheme of the two Acts is also inherently unfair to the investigators in the DSO who become displaced, demoted and disabled by their transfer to DPCI. In the DSO they report to an independent professional at the highest level of policy making in the NPA. In DPCI they will be reduced in their hierarchical status by two levels in that the Minister of Safety and Security functions at the same policy-making level as the NDPP, while the national commissioner of police is at a lower human resources hierarchy level than the NDPP, in that he has no policy-making jurisdiction in his official capacity.

70. The layers of accountability in the NPA are conducive to an independently functioning and highly professional group of investigators with optimum sapiential authority, enabling them to act diligently, skilfully and without delay as contemplated by C 237.

Quite the opposite can be expected from those who find their way into DPCI.

71. The case of **Mlokoti v Amathole District Municipality and Another** 2009 (6) SA 354 (E) involved a dispute concerning the deployment of an ANC cadre as a municipal manager at the behest of his party, rather than through the appropriate appointment mechanisms of municipal law. At pages at 362 and 363 Pickering J held that C195 was relevant, providing as it does that public administration at all levels of government be governed by the democratic values and principles that efficient, economic and effective use of resources must be promoted (C 195(1)(b)) and that good human resource management and career development practices, to maximise human potential, must be cultivated (C 195(1)(h)). It is apparent that the learned judge - with submission correctly – regarded the reference in C 195(1)(b) to *"resources"* as including human resources.

72. See also **Crous v the Blue Crane Route Municipality and Another** (2009) 30 ILJ 840 (Tk), at paragraphs [57] and [58], where Plasket J held that the higher duty constitutionally imposed on organs of state means they are not free to litigate as they please. They are subject to a new regimen of openness and fair dealing

with the public and must behave honourably. Decisions and conduct must be informed by constitutional values. The municipality had treated Crous appallingly.

73. The manner in which the scheme of the two Acts was introduced to the staff of the DSO affected by it is a case study in mismanagement of human resources. The information obtained from this staff and the analysis of the human resources implications of what has been happening since December 2007, when the ANC resolutions were passed, made by the human resources management expert, Daan Groeneveldt, both point to a situation in which the right to fair labour practices has not been respected and protected as required by the Bill of Rights.

Glenister, paragraph 123 and annexure HG73, record pages 80 and 863 *et seq*; Groeneveldt paragraph 7, record pages 1049 to 1053

74. The values and principles set out in C 195 have been breached in the ways highlighted by Groeneveldt, in that sound human resource management and accountability in the public service are flouted by the irrational manner in which the two Acts have seen the light of day.

75. The failure of the Respondents to deal with the content of the carefully reasoned opinions expressed by Groeneveldt means that

their reliability and admissibility are all that the Court needs to consider. The argument that Groeneveldt is unreliable is still-born if regard is had to his offer to inspect and opine upon any relevant documentation not in the public domain. Instead of promptly making such documentation available to him, the Second Respondent seeks to make a virtue of an entirely unwarranted invocation of secrecy surrounding the human resource management aspects of the two Acts and fails to deal with the basic tenets of good human resource management so painstakingly and fully explained and set out by Groeneveldt.

76. His conclusions are unimpeachable on the basis of the information actually on record and must surely be accepted by the Court. The absence of any semblance of good human resource management practice, either in the two Acts or in the manner in which they have been introduced and implemented thus far, renders the two Acts unconstitutional.

77. From a labour relations perspective, the situation in which DSO investigators were placed in terms of the two Acts was untenable. Those who were forced by their circumstances to submit themselves to being transferred to DPCI (consent is hardly an appropriate description for this procedure) were in effect being

demoted for the reasons given by Groeneveldt. The alternative was a severance package to be determined by Government, and of unknown size at the time of the forced "election". Choosing between these options put investigators in an invidious position which was certainly not consonant with fair labour practices. This amounted to a violation of their rights under section 23 of the Bill of Rights.

78. The Labour Appeal Court recently made a finding on the illegal effect of a forced demotion. Zondo JP held that the mere fact that the appellant's rank and remuneration would not change did not mean that his transfer to Pollsmoor did not constitute a demotion as *"the status, prestige and responsibilities of the position are relevant to the determination of whether or not a transfer in a particular case constitutes a demotion."* This finding is relevant when considering the unhappy lot of the DSO investigators.

> **Nxele v Chief Deputy Commissioner, Corporate Service, Department of Correctional Services and Others**, [2008] 12 BLLR 1179 (LAC)

FOURTH: VIOLATION OF SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS

79. This topic is dealt with by Applicant **record page 86, paragraph 134, to page 89, paragraph 138**. The nonsensical answer given by Nchwe on behalf of Second Respondent is that a statutory

obligation on individuals (those in authority actually) to report corruption (involving more than R100 000 actually) to the SAPS under section 34 of the Prevention and Combating of Corrupt Activities Act relieves the state of its international obligations.

Nchwe, paragraphs 43 to 46, record page 2027

80. Third Respondent takes a different line, suggesting that DPCI will fully replace any capacity which the disestablishment of the DSO may represent.

Simelane, paragraph 70, record page 2104

81. Both defences raised do not dispute the factual allegations made by Applicant in relation to the international conventions which bind the Republic. The said facts may accordingly be regarded as common cause.

82. The defences raised do not stand up to scrutiny. The reliance upon the statute is entirely misplaced and Simelane does not seem to appreciate that the new unit called DPCI will not be able to function independently, as did the DSO. This is because of the radically different reporting lines and structure in the NPA. These permit, indeed demand, functioning without fear, favour or prejudice. None of these concepts feature in the reporting lines

and structure of SAPS, nor of DPCI itself. If anything, DPCI is more firmly under political control than ever.

83. The common thread running through all three of the international conventions upon which Applicant relies is that the state is obliged to maintain an independent corruption fighting unit.

84. Nowhere is it suggested either in the two Acts or in the answering affidavits that a mere SAPS unit is independent. Correctly so. The institutional independence of the DSO is what distinguishes it as a unit capable of rising above political control and of doing its work in a manner which accords with the requirements of the international conventions which bind the state. The reasoning contained in the passage quoted from the IDASA submissions to the National Council of Provinces is persuasive.

Record page 88, paragraph 134, quoting paragraph 30 of the IDASA submissions

85. The position in practice bears this out: Both the Travelgate scandal and the Kebble murder case were initially investigated by SAPS, but were handed over to the DSO when SAPS was unable to make any progress with the investigations. All of the investigations of members of the National Executive Committee of the ANC were carried out by the DSO, not SAPS. Some of these investigations were withdrawn after the intention to dissolve the

DSO was announced, notably those in respect of Jacob Zuma, Thabo Mufamadi and Ngoako Ramatlhodi.

Applicant, paragraphs 41.3, 43.5 and 43.8 at pages 28, 30 and 31 of the record

86. C 198 and C 231 make it clear that the dissolution of the DSO and the transfer of its functions to the DPCI unit cannot be countenanced in terms of the international obligations which the state has solemnly undertaken. The duty to maintain an independent corruption fighting unit has clearly been breached by the scheme of the two Acts. There is also a patent infringement of C 41(1)(g). This is because the scheme of the two Acts shatters the functional and institutional integrity of the DSO and seeks to allow a Chapter 11 unit to encroach upon the functions constitutionally reserved for the NPA in C 179(2) by transferring the functions of the DSO to DPCI. This renders the two Acts invalid for their inconsistency with the Constitution.

FIFTH: FLAWED PUBLIC PARTICIPATION PROCESS

87. Ours is a participatory democracy. This has been recognized and explained in detail in the **Doctors for Life** and **Matatiele Municipality** cases in this Court.

Doctors for Life International v Speaker of the National Assembly and Others, 2006 (6) SA 416

(CC); **Matatiele Municipality and Others v President of the RSA and Others**, 2006 (5) SA 47 (CC)

88. The manner in which the bills that were the forerunners of the two Acts were rushed through parliament, and the way in which parliament itself was treated as a rubber stamp for the Polokwane resolution takers, is set out in detail in the founding papers. Also, the public opinion polls which favour the retention of the DSO as part of the NPA are on record.

Applicant, paragraphs 127 to 133, record pages 82 to 85; HG4 to HG, record pages 106 to 114

89. There was no justifiable factual or legal basis for treating the passage of the bills as urgent. The fact that some powerful people would perhaps prefer that they not be investigated for their roles in the arms deals, Oilgate, Travelgate or other tender irregularities and corruption is not a basis for undermining the participation of the public in the process of passing the legislation.

90. The roadshow on which the bills were taken was a farce. Pro-DSO would-be participants in the process were shouted down and elbowed aside by busloads of supporters of the bills who loudly and aggressively precluded any suggestion that the DSO be retained. This is not participatory democracy in action.

Glenister paras 82 to 84, record pages 47 to 49

SIXTH: INFRINGEMENT OF THE BILL OF RIGHTS

91. The rights enshrined in the Bill of Rights (Chapter 2 of the Constitution) must be respected, protected, promoted and fulfilled by the state.

92. Among these rights are the rights to dignity, equality and freedom from violence, whether from public or private sources. The right to property is also guaranteed. All of these rights are placed in jeopardy by the dissolution of the most successful crime fighting unit the country has ever seen. Organised crime, the speciality of the DSO, will thrive in its absence and threaten all of the rights identified in the various notorious ways in which crime impacts negatively on society. The dissolution of the DSO will also impact negatively on the rights of NPA staff to fair labour practices as foreshadowed in the ANDPP's submissions to the parliamentary joint select committee which considered the two bills from which the two Acts are derived.

93. Pre-eminently the right to equal protection and benefit of the law is undermined by the scheme of the two Acts. This is one of the most important rights protected in our Bill of Rights. Equality, and the right to equal treatment before the law, is at the core of the people's struggle for liberation. Equality ought not to be diluted or

lost as a consequence of an elite power struggle in which the net effect is that efficient DSO operatives (in the apt and pithy phrasing of the Polokwane resolution) *"fall under"* the control and management of the less than efficient SAPS.

94. It is trite that the state bears the onus of establishing that the violation of a constitutional right is justified in terms of C 36(1). To the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court. The Respondents have not sought to justify the violation of constitutional rights; instead they content themselves with a bare denial of the violation of the rights protected in the Bill of Rights of which Applicant complains in the various capacities in which he brings this application.

> **Moise v Greater Germiston Transitional Local Council**, 2001 4 SA 491 (CC) paragraph [19]; ***Minister of Home Affairs v NICRO*** 2005 3 SA 280 (CC) para 36

95. It follows that, if the two Acts violate the above-mentioned constitutional rights, Respondents bear the onus of establishing that such a violation is justified in terms of C 36(1).

96. The Respondents have made no attempt to discharge this onus. Although the founding affidavit averred that human rights violations are anticipated by the Applicant on the basis of a perfectly

reasonable apprehension on his part, the response is one best characterized as a bare denial.

97. We submit that the two Acts, designed and passed to disestablish the DSO, will unjustifiably violate Applicant's constitutional rights, the constitutional rights of the group that Applicant represents, and the constitutional rights of the public at large. This inconsistency with the state's obligation to *"respect, protect, promote and fulfil"* the rights in the Bill of Rights renders the two Acts invalid for want of compliance with C 7(2).

SEVENTH: STRUCTURAL UNCONSTITUTIONALITY AS A RESULT OF THE UNDERMINING OF THE NPA AND THE FUNCTIONS OF THE NDPP

98. The power of the NPA to act independently and without fear, favour or prejudice flows directly from Constitutional Principles XXX and XXXI set out in Schedule 4 to the 1993 Interim Constitution. As these are foundational values of our constitutional order, it is not appropriate that they be undermined in any way. The constitutional power of the NDPP to create prosecution policy is at the core of these values.

99. The overall scheme of the two Acts including the transfer of investigative staff of the DSO to DPCI and the dissolution of the

DSO does violence to the constitutionally sanctioned institutional independence of the NPA itself.

100. According to C 179, the NPA is meant to function independently and without fear, favour or prejudice. It thus has to have the capacity to function independently. In order to do so, the NPA must be able to carry out any necessary functions incidental to the institution of criminal proceedings. This is precisely what C 179(2) requires. This latter function has hitherto, and quite correctly so, been the preserve of the DSO in accordance with the mandate conferred on it in section 7 (1) of the NPA Act 32 of 1998. Without any DSO within the NPA, the capacity so to function will fall away and the NPA will become a shadow of its former self.

[Some may argue that this has already taken place in that its institutional independence has been sacrificed on the altar of political expediency but that is not a matter on which any decision is necessary in this case.]

101. The loss of the ability to carry out the "necessary incidental" functions is a blow to the NPA which, constitutionally speaking, is intolerable. The Court has to determine whether the two Acts, dealing as they do with the functioning of the NPA, actually ensure its ability to function without fear, favour or prejudice. It is plain that

they do not. There is accordingly a breach of C 179(4) and for this reason alone the two Acts do not pass muster, not least because the constitutional power of the NDPP to create prosecution policy has played no supportive role in the radical change of prosecution policy implicit in the two Acts.

102. The report of the human resources management expert, Groeneveldt, is instructive in this regard. His close analysis of the implications of the legislation, from a personnel perspective, shows that the NPA is bound to lose a vital aspect of its independence if it is obliged to carry on functioning without the presence of a unit which fulfils the functions contemplated in the second part of C 179(2). This is the effect of the scheme of the two Acts and is inconsistent with the Constitution.

103. By reason of the provisions of C 179(2) and C 179(4), the structure of the NPA, a constitutionally created body, has to include a unit or personnel capable of carrying out functions which are necessarily incidental to the institution of prosecutions. The removal of the DSO from the NPA and making it *"fall under"* SAPS in effect cripples the NPA by depriving it of the capacity to exercise the powers of such a unit. The scheme of the two Acts and their

specific provisions make it clear that the NPA is to be deprived of the DSO's functions and capacity.

104. The two Acts, taken together, do structural damage to the independence of the NPA in that, in the future, and without a DSO, the NPA will not be able to function without fear, favour or prejudice in that its investigative incidental functioning will be removed, with concomitant reduction of status and the functional capacity to exercise its constitutionally conferred powers. The NPA will be at the mercy of the party-politically controlled SAPS for all investigative work it requires. The spat between the DSO and the former National Commissioner of Police, Jacky Selebi, (recently convicted of corruption) is an illustration of how the administration of justice can adversely be affected when the police are not properly managed.

Applicant, paragraph 125, record page 81;
HG83, record page 1019, at 1020

105. The dissolution of the DSO and the removal of its investigative personnel from the ambit of control of the prosecuting authority, has diminished the NPA's capacity to exercise its functions without fear, favour or prejudice and reduced the scope of its activities.

106. This means that the two Acts have failed to ensure that the prosecuting authority exercises its functions in the constitutionally

required way. Such result is patently unreasonable, irrational and out of kilter with any notionally legitimate governmental purpose.

107. The failure of the Legislature to replace the DSO with some alternative structure within the NPA which is capable of carrying out *"any necessary function incidental to instituting criminal proceedings"* leaves the NPA less able to carry out its constitutional mandate than it was prior to the passing of the two Acts.

108. The NPA now has no say over DPCI but must cater for requests made by the National Commissioner on behalf of DPCI, and will now have to second personnel to DPCI, but only at its bidding.

Section 17F of the SAPSA Act

109. This is a complete reversal of the *status ante quo* where the troika methodology was operated on a prosecution-led basis facilitating independence and functioning without fear, favour or prejudice.

110. Respondents do not suggest that DPCI is an independent unit in any shape or form. Nor can they, having regard to the hierarchical structures of SAPS. This is in stark contrast with that formerly in place within the NPA, as are also the comparative levels of sapiential authority relevant to the efficacy of the fight against organized crime.

111. While it is so that C 179 does not make express provision for the establishment of an investigative body such as the DSO within the NPA, it is inescapable that the legislation which ensured the

independence of the NPA is the same legislation as created the DSO pursuant to the unchanged needs to combat organized crime and corruption. The law in terms of which the DSO existed was a law which gave expression to national prosecuting policy. Law is but a part of policy. It is that part of policy which has legally binding effect.

112. Having regard to the provisions of C 179(5), it is plain that the constitutionally designated author of policy in relation to prosecution is the NDPP. He or she must accordingly also be the author of any change in prosecution policy such as a decision to disband a unit under his or her control.

113. The ANDPP did not oppose the application. Moreover, the NPA strongly conveyed to Parliament the ANDPP's reservations about losing control of the investigative functions carried out by the DSO.

See annexure DS1 to Groeneveldt's affidavit, record pages 1058 to 1195, especially at 1127 and 1128

114. If the last phrase in C 179(2) and its repetition in section 7(1) of the NPA Act, 32 of 1998, are placed in their proper context, it can be seen that the requirements of the Constitution were given expression through the creation of the DSO as the vehicle through which the necessary functions incidental to instituting criminal proceedings were carried out, and had been since the inception of the DSO

insofar as organised crime and corruption are concerned.

115. Applicant joins issue with Respondents' argument *a quo* that he is wrong to contend that the NPA's ability to function independently is prejudiced by the scheme of the two Acts. It is manifestly plain that the scheme of the Acts is to place SAPS in the "driving seat" with regard to the categories of crime to be investigated by DPCI.

116. As the Khampepe Commission correctly pointed out, police corruption and corruption in general (both of which continue unabated) were among the reasons for the creation of the DSO. The notion that DPCI will be in an equivalent or better position to deal with cases in these categories needs only to be stated to be rejected.

117. Having regard to the forms of organized crime with which SAPS has previously been unable to cope, consolidating primary investigative functions within SAPS when the original rationale for forming the DSO within the NPA still exists –

(a) is not rational, in that the problem of police corruption lies within the police chain of command and cannot be eradicated when there is corruption at the highest levels within SAPS;

(b) is not a reasonable and accountable measure in terms of which a better outcome could sensibly be anticipated;

(c) is not an efficient or effective way of utilizing the human resources available in accordance with good human resource

management practices as required by the Constitution.

It was plainly constitutionally competent to confer investigative powers on the NPA. This is consistent with the meaning the phrase *"any necessary functions incidental to instituting criminal proceedings"* in both C179(2) and section 7(1) of the NPA Act prior to its amendment.

118. In an ideal society in which organized crime and corruption are not rampant, it is perhaps possible to keep prosecutorial and investigative functions separate and under the control of different government departments or institutions. That, however, is not the South African situation. The constitutional values of accountability and responsiveness dictate that appropriate measures be taken so that reasonable progress can be made in the fight against organized crime and corruption. The creation of the DSO was such a measure. Its destruction was not.

119. Applicant relies on the provisions of C 179(5), giving the NDPP sole policy-making power re national prosecuting policy, and C 206, giving Second Respondent sole policy-making power in respect of national policing policy. The change of prosecution policy comprising the dissolution of the DSO and the transfer of its powers and functions to DPCI, must be constitutionally invalid unless it carried at least the *imprimatur* of the ANDPP as a first requirement.

The *"policy choice"* is his on all matters of prosecution policy and he will enlist the cooperative assistance of other branches of government in order to transform his policy choices into law where relevant.

120. No-one suggests that DPCI is an independent unit. As part of SAPS it is under the policy making control of Second Respondent and not independent in the sense of being independent of the Executive.

121. The absence of any "buy-in" from the ANDPP is fatal to the scheme of the two Acts and renders them both invalid.

122. The pertinent question to be asked is, "Does the purpose sought to be achieved by the exercise of public power fall within the authority of the functionary?" In this regard: The "purpose" is the dissolution of the DSO. The "functionary" responsible for determining prosecuting policy is the ANDPP. The "exercise of public power" is the policy decision to disband the DSO. The "authority" of the Executive and Legislature to pass laws required to dissolve the DSO is limited by the policy-making authority constitutionally entrenched in the hands of the ANDPP insofar as prosecution policy is concerned. This power is his and his alone. The "functionary" that purported to exercise the relevant power was Parliament acting without the request / support of the ANDPP. This was constitutionally incompetent.

123. The law-making functions of the Executive and Legislature are not sovereign in nature but are limited by the requirement that they be exercised in a manner which is consistent with the Constitution. It is not lawful to make any policy choice or consequential legislative amendment concerning prosecution policy without the "buy-in" of the ANDPP. The Constitution has set its face against this by reason of the provisions of C 179(5) relating to policy-making power.

124. The requirement that the NDPP determines prosecution policy is a constitutionally sanctioned check upon the powers of other branches of government and accords with the internationally accepted notion of prosecutorial independence in any fully-fledged modern constitutional democracy.

125. The recognition and entrenchment of the firm principle of prosecutorial independence comprise a sharp break with the past. Apartheid South Africa paid no heed to prosecutorial independence. Successive Criminal Procedure Acts provided until the 1990's that the powers of the prosecuting authorities were "*subject to the control and directions of the Minister"* of Justice.[1]

126. The principle of prosecutorial independence is one which enjoys

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[1] Section 5(3) of Act 56 of 1955 and section 3(5) of Act 51 of 1977, both. replaced by Act 92 of 1992, in turn replaced by the NPA Act. Lovell Fernandes *The National Director of Public Prosecutions in South Africa: Independent Boss or Party Politician?* 2007 (1) Speculum Juris 129

widespread and growing international recognition. The Supreme Court of Canada has for instance said that it is "*a hallmark of a free society"* that nobody else should interfere with the prosecutorial decisions of the prosecuting authority.

127. Closer to home, the Namibian Supreme Court has stressed the importance of prosecutorial independence in a celebrated judgment on the division of powers between the Attorney-General who is the political head of the prosecuting authority, on the one hand, and the Prosecutor-General who is the head of the prosecuting authority, on the other. It highlighted the potential danger of political appointees allowing political considerations to influence their decisions, even subconsciously, and quoted renowned African scholar Justice Emmanuel Olayinka Ayoola on the fact that experience in many parts of Africa has shown that arbitrary and repressive use of prosecutorial powers have often been potent weapons of fostering political ends to the detriment and ultimate destruction of democracy.[2] ,

128. The line taken by Respondents in their argument *a quo* overlooked C 179(5) altogether. The policy choice to dissolve the DSO is not

[2] *Ex parte* Attorney-General, Namibia: *In re*: The Constitutional Relationship between the Attorney-General and the Prosecutor-General 1995 (8) BCLR 1070 (NmS), especially at pages 1085 and 1086

one that could properly be made without regard to the view of the constitutionally authorized policy-maker in respect of prosecution policy, the NDPP. Far from this aspect being considered at all in the conceptualization, design and formulation of the two Acts, the ANDPP's plea for an independent unit fell on deaf ears.

129. When the Khampepe Commission warned that government could discharge its agenda *"provided that such action is not inconsistent with the Constitution"*, this was a reference *inter alia* to the policy-making powers of the NDPP. Respondents lost sight of this consideration.

Khampepe Commission report, paragraph 12.4, record page 351

130. The one finding in this report with which Respondents do not deal is its finding that *"it is inconceivable the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO".* This was a strong endorsement of the prosecution-led independent troika methodology now replaced by the politically-controlled DPCI-led system unless the two Acts are struck down. Judge Khampepe benefited from inspections, evidence, hearings, argument and input from many stakeholders and was accordingly well-placed to come to the above conclusion.

131. If the two Acts are allowed to stand, the *"inconceivable"* will have

occurred. This Court is able to prevent this.

132. Constitutionally, the NPA is not under political control. It is under the control of an independent, professionally qualified functionary who is appointed for a single fixed period of 10 years.

133. In **Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the RSA**, 1996 (4) SA 744 (CC) at paragraph [146] this Court described the notion that the NPA functions *"without fear, favour or prejudice"* as comprising *"a constitutional guarantee of independence"*.

134. Prior to the two Acts, Parliament took very seriously its C 179(4) constitutional duty to ensure the independence of the prosecuting authority by including a range of provisions in the NPA Act which go much further than merely to recognize the principle of prosecutorial independence. These are sections 9; 10; 12(1); 12(5) to (7); 17(1)(a); 17(3); 22(1); 22(2)(a); 32(1)(a) and (b); 32(2); 35(1); 36(1); 39; and 41(1). These provisions are further supplemented by section 1 (ff) of the Promotion of Administrative Justice Act 3 of 2000. (Cf C 207 re control of SAPS and DPCI.)

135. The need to deal with organized crime and police corruption is an essential component of the rationale for establishing the DSO within the NPA in order effectively to fight organized crime.

136. Without an independent anti-corruption unit so placed the fight against organized crime will be set back by 20 years according to the submission of the CMG to Parliament.

137. The dissolution of the DSO radically reduces the human resource capacity of the NPA to carry out the *"necessary incidental functions"* for which the DSO personnel have hitherto been responsible.

SUBMISSION ON THE MERITS

138. The two Acts are inconsistent with the requirement of C 179(4) that national legislation ensure the independence of the NPA. On the contrary, they do quite the opposite.

139. While success on any one of the above constitutional concepts would suffice, Applicant contends that he is entitled to come home on all seven.

APPLICATION TO STRIKE OUT

140. At the time of preparation of this argument the attitude of Respondents toward their abandonment of an application to strike out, which was not dealt with at all in the judgment *a quo* is not known. Should they persist in their application, Applicant contents himself with the detailed submissions made in support of his opposition to that application in the court *a quo*, filed separately

after the said application was launched without notice at the commencement of the hearing and will make these available separately should the need arise.

CONCLUSION

141. For the reasons advanced above it is submitted that the two acts should be declared invalid with costs, including the costs attendant upon the engagement of two counsel and the qualifying expenses of the expert witness D Groeneveldt.

142. As regards transitional arrangements, Applicant defers to the discretion of the Court as to what would be appropriate.

R P HOFFMAN SC

P ST C HAZELL SC

8 July 2010

ANNEXURE C

ROADMAP TO READING THE RECORD

1. Consider the provisions of the two Acts under attack for their inconsistency with the Constitution.

   Record pages 2048 to 2065

2. Consider the provisions of the two preceding bills from which the two Acts sprung to note the changes made during the legislative process.

   Record pages 539 to 581

3. Consider the issue determined in the antecedent litigation in this Court.

   Constitutional Court judgment, record pages 2107 to 2118

4. Consider the judgment of the court *a quo.*

   Record pages 3124 to 3134

5. ANC resolutions at Polokwane regarding the dissolution of the DSO.

   Annexure HG1 to application for leave, record, pages 513 to 516

6. Communiqué, memo and minutes on the announcement of the decision to dissolve the DSO.

   Record, pages 520 to 527

7. Presentation made by Adv Billy Downer SC of the DSO on 29 May 2008, as illustrative of the manner in which the DSO functions.

Record, pages 836 to 848

8. SAPS AN ORGANIZATION ON THE BRINK OF COLLAPSE, by former policeman Ivan Myers.

Record, pages 1237 to 1258

9. Performance indicators of SAPS for 2008.

Record, page 634

10. Report by SAPS on the crime situation, April to September 2007.

Record, pages 642 to 677

11. Article by Dr Johan Burger on the 2006 to 2007 crime statistics, entitled TIME TO TAKE ACTION.

Record, pages 678 TO 684

12. ISS Occasional Paper 150 of September 2007 by Andrew Faull.

Record, pages 691 to 717

13. Affidavit of Daan Groeneveldt and material attached thereto.

Record, pages 1026 to 1220

14. Final report of the Khampepe Commission in 2006 (mainly for its recommendations).

Record, pages 313 to 456

15. Jean Redpath's analysis of the DSO, of March 2004.

Record, pages 133 to 241

16. Applicant's founding affidavit.

Record, pages 5 to 95

17. Article in the Financial Mail of 11 January 2008 by Matthews Phosa.

Record, page 602

18. Interviews with Gwede Mantashe and Siphiwe Nyanda published in the Sunday Time in March and April 2008.

Record, pages 618 to 625

19. Affidavit by Helen Zille.

Record, pages 626 to 628

20. Answering affidavit of Manoko Nchwe on behalf of Second Respondent.

Record, pages 2000 to 2047

21. Answering affidavit of Menzi Simelane on behalf of Third Respondent.

Record, pages 2070 to 2106

22. Transcript of radio interview given by Menzi Simelane on 14 February 2008.

Record, page 535

23. Information obtained from DSO staff.

Record, pages 863 to 870

24. Information gathered from SAPS.

Record, pages 947 to 948

25. Answering affidavits of Seswanthso Lebeya and Johannes Meiring.

Record, pages 2132 to 2145

26. Replying affidavit by Applicant.

Record, pages 3000 *et seq*

27. The prosecution policy document handed in by Respondents' counsel at the hearing.

Record, pages 3080 to 3102

28. The application for leave to appeal to appeal / direct access filed in this Court.

Record, pages 3103*et seq*

ANNEXURE D

LIST OF ALL AUTHORITIES CITED BY APPLICANT

1. **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**, 1984 3 SA 623 (A) *[Heads of Argument, page 15]*

2. **Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others**, 2005 (2) SA 359 (CC) paragraphs 75 and 76 *[Heads of Argument, page 16]*

3. **Wightman v Headfour (Pty) Ltd**, [2008] ZASCA 6 (10 March 2008) para 12 *[Heads of Argument, page 16]*

4. **New National Party of South Africa v Government of the RSA**, 1999 (3) SA 191 (CC), paragraph [19] *[Heads of Argument, page 23]*

5. **Pharmaceutical Manufacturers Association of South Africa and Another: In Re ex parte President of the Republic of South Africa and Others**, 2000 (2) SA 674 (CC), paragraphs [85] and [86] *[Heads of Argument, page 23]*

6. **Prinsloo v Van der Linde and Another**, 1997 (3) SA 1012 (CC) at paragraph [25] *[Heads of Argument, page 24]*

7. **President of the RSA and Others v SA Rugby Football Union and Others**, 2000 (1) SA 1 (CC) at paragraph [149] *[Heads of Argument, page 25]*

8. **Bato Star Fishing v Minister of Environmental Affairs**, 2004 (4) SA 490 (CC) at paragraph [48] *[Heads of Argument, page 29]*

9. **Mlokoti v Amathole District Municipality and Another**, 2009 (6) SA 354 (E) at 362 and 363 *[Heads of Argument, page 36]*

10. **Crous v The Blue Crane Route Municipality and Another**, (2009) 30 ILJ 840 (Tk), at paragraphs [57] and [58] *[Heads of Argument, page 36]*

11. **Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & others**, [2008] 12 BLLR 1179 (LAC) *[Heads of Argument, page 39]*

12. **Doctors for Life International v Speaker of the National Assembly and Others**, 2006 (6) SA 416 (CC) *[Heads of Argument, page 42]*

13. **Matatiele Municipality and Others v President of the RSA and Others**, 2006 (5) SA 47 (CC) *[Heads of Argument, page 43]*

14. **Moise v Greater Germiston Transitional Local Council**, 2001 4 SA 491 (CC) paragraph [19] *[Heads of Argument, page 45]*

15. **Minister of Home Affairs v NICRO** 2005 3 SA 280 (CC) paragraph 36 *[Heads of Argument, page 45]*

16. ***Ex parte* Attorney-General, Namibia: *In re*: The Constitutional Relationship between the Attorney-General and the Prosecutor-General** 1995 (8) BCLR 1070 (NmS), at pages 1085 and 1086 *[Heads of Argument, page 56]*

17. **Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the RSA**, 1996 (4) SA 744 (CC) at paragraph [146] *[Heads of Argument, page 58]*