IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Western Cape High Court
Case no: 23874/2012

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER OF POLICE	Second Appellant
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Appellant
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Appellant
and	
THE HELEN SUZMAN FOUNDATION	Respondent

AND

Western Cape High Court
Case No. 23933/2012

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER OF POLICE	Second Appellant

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT

Western Cape Division of the High Court

Case no: 23874/2012

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER OF POLICE	Second Appellant
THE HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Appellant
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Appellant
and	
THE HELEN SUZMAN FOUNDATION	Respondent

AND

Western Cape Division of the High Court

Case No. 23933/2012

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER OF POLICE	Second Appellant
THE MINISTER OF JUSTICE AND	

CONSTITUTIONAL DEVELOPMENT	Third Appellant
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Appellant
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Appellant
and	
HUGH GLENISTER	Respondent

NOTICE OF APPEAL IN TERMS OF RULE 16(2) OF THE CONSTITUTIONAL COURT RULES

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1. **TAKE NOTICE THAT** the President of the Republic of South Africa, the Minister of Police, the Minister of Justice and Constitutional Development and the Government of the Republic of South Africa ("the appellants") hereby appeal against the order of constitutional invalidity contained in paragraph 1 of the order made by the Full Court of the Western Cape Division of the High Court, Cape Town, per Desai J, Le Grange J and Cloete J ("the High Court") on 13 December 2013 under case numbers 23874/2012 and 23933/2012. The said order of invalidity relates to section 16 of the South African Police Services Act 68 of 1995 ("the SAPS Act"), as well as sections 17A, 17CA, 17D, 17DA and sub-sections 17K(4) to (9) contained in Chapter 6A of the SAPS Act, as amended by the provisions of the South African Police Service Amendment Act No 10 of 2012 ("the 2012 SAPS Amendment Act")).

2. The applicants also note an appeal against paragraph 2 of the High Court's said order which suspends the declaration of constitutional invalidity for twelve months in order for Parliament to remedy the defects, as well as against paragraph 4 thereof, in terms of which the respondents in case number 23874/2012 (the appellants in these proceedings) were ordered to pay the costs of the Helen Suzman Foundation jointly and severally, on the scale between party and party, and including the costs of three counsel where employed.

A

FINDINGS OF FACT AND/OR LAW APPEALED AGAINST:

3. The appellants appeal against the following findings of fact and/or law made by the High Court, namely:

3.1 **Re section 17A (Definitions):**

The conclusion that the definition section, particularly the definition of a 'national priority offence', is unconstitutional in that they play some role in securing an adequate degree of independence for the Directorate for Priority Crime Investigation ("the Directorate").

3.2 **Re section 17CA (appointment of members of the DPCI):**

3.2.1 The finding that "*the appointment process of the (National) Head (of the Directorate) lacks adequate criteria for such appointment and vests an unacceptable degree of political control in the Minister of Police and Cabinet, which is also in conflict with the standard of international practice.*" (For convenience this finding is referred to as "the first summary conclusion". It is numbered paragraph 122.1 in the judgment);

3.2.2 The finding that Parliament has no veto power over the appointment of the Head. (Paragraph 49 of the judgment);

3.2.3 The finding that appellants' reliance on the judgment in Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa intervening) 2002 (5) SA 246 (CC) at paragraphs [108] – [109], where this Court endorsed the principle that appointment of a Magistrate by the Executive – or in combination with Parliament – is constitutionally acceptable, is not comparable to the appointment of the Head insofar as securing an adequate degree of independence for the appointee is concerned. (Paragraph 50 of the judgment)

3.3 **Re section 17CA(15) (extension of tenure of the Head):**

3.3.1 The finding that "*the power vested in the Minister to extend the tenure of the Head and Deputy Head is intrinsically inimical to*

the requirement of adequate independence." ("The second summary conclusion", numbered paragraph 122.2 in the judgment);

3.3.2 The finding that section 17CA(15) provides for the "renewal/renewability" of the term of office of the Head at the behest of the Minister (paragraphs 68 and 72 of the judgment), and that the sub-section "*injects a clear element of Ministerial discretion into such renewal*". (Paragraph 70 of the judgment).

3.4 **Re section 17DA (suspension or removal of the Head from office):**

3.4.1 The finding that "*the suspension and removal 'process' (of the Head) not only vests an inappropriate degree of control in the Minister, but also allows for two separate and distinct processes, determined on the basis of arbitrary criteria, each able to find application without any reference to the other*" ("The third summary conclusion" numbered paragraph 122.3 in the judgment);

3.4.2 The conclusion that findings of an inquiry by a judge or retired judge, into the fitness of the Head to hold office, (in terms of sub-section 17DA(2)(d)), are not binding on the Minister, and the finding that an unduly subjective and broad discretion is afforded the Minister by the provisions of section 17DA(2), (paragraph 80

of the judgment); and the finding that the Minister is not required to conduct the removal process in accordance with the provisions of the Promotion of Administrative Justice Act ("PAJA"). (Paragraphs 82 and 84 of the judgment)

3.4.3 The finding that Parliament does not serve as a check and a balance on the Minister's power to remove the Head. (Paragraphs 87 and 88 of the judgment).

3.5 **Re sections 16, 17D and 17K(4) to (9) (jurisdiction of the DPCI, political control of the DPCI by the Executive, including the making of policy guidelines):**

3.5.1 The finding that "*there is an unacceptable degree of political oversight in the jurisdiction of the DPCI, and the relevant provisions are themselves so vague that not even those responsible for the implementation are able to agree on how they should be applied.*" (The fourth summary conclusion, numbered" paragraph 122.4 in the judgment);

3.5.2 **Re section 16 (National prevention and investigation of crime):**

The finding that, despite the wording of section 17AA, the impugned legislation does not ensure that the DPCI's jurisdiction

is exclusive or primary and that corruption, if it is perpetrated in more than one province, need not be referred to the DPCI by SAPS. (Paragraph 94 of the judgment.)

3.5.3 **Re section 17D: (Functions of the Directorate):**

The conclusion that the DPCI's mandate to fight corruption is something which has been left to politicians in the Executive and Parliament to determine. (Paragraph 101); and that section 17D(i)(a)A) weakens, rather than strengthens, the jurisdiction of the DPCI over corruption (Paragraphs 102 to 107); and that it is not the function of the Directorate to investigate crimes such as theft and forgery. (Paragraph 106).

3.5.4 **Re 17K(4) to (9) (the determination of policy guidelines by the Minister with the concurrence of Parliament, their tabling in and submission to Parliament and the duty of the Minister to report to Parliament on the appointment of the Head**

(a) The upholding of the submission that one member of the Executive, as opposed to the Ministerial Committee, is empowered to impose guidelines as to how, where and when the Directorate should act (against corruption) (paragraph 96); and that the requirement for guidelines,

in section 17K(4) has a very real potential to constrain the Directorate's work or even to direct the Directorate's work towards, or away from particular targets. (Paragraph 97).

(b) The finding that the approval by Parliament of policy guidelines for the selection of national priority offences by the Head, and for the referral to the Directorate by the National Commissioner of any offence or category of offence for investigation by the Directorate, (in terms of sub-sections 17(4)(a)(i) and (ii)), adversely affect the investigation of corruption of members of Parliament by the Directorate. (Paragraph 101 of the judgment).

4. That the Speaker of the National Assembly ("NA") and the Chairperson of the National Council of Provinces ("NCOP") were not necessary parties to proceedings for the granting of the relief claimed by the present respondents (paragraph 23 of the judgment).

B

GROUNDS OF APPEAL:

5. The grounds on which this appeal is brought are set out below.

6. Firstly, the High Court misdirected itself by holding that the impugned provisions, namely sections 16, 17A, 17CA, 17D, 17DA and 17K(4) to (9), either collectively or individually fail to secure an adequate degree of independence for the Directorate. Therefore, and in any event, no human rights are violated by the impugned legislation.

7. Secondly, the Court exceeded the limits of its judicial authority over Parliament and was prescriptive as to the measures that Parliament should adopt.

8. Thirdly, the Court misdirected itself by holding that the impugned provisions did not meet the requirements of the very tests it applied in the matter.

9. The tests applied (per paragraph 28 of the judgment) were:

   (a) to have regard to the findings already made by (this Court) in *Glenister 2*; and

   (b) to apply the test of objective validity as set out in the "*New National Party* case."

APPLICATION OF JUDGMENT IN *GLENISTER 2* TO THE IMPUGNED LEGISLATION

10. Insofar as the first leg of the test is concerned the High Court misdirected itself by failing to conclude that the defects that had previously existed at the

time of the judgment in *Glenister* 2, and were identified by this Court, had been adequately cured by the 2012 SAPS Amendment Act.

Defects found in *Glenister 2*:

10.1 In *Glenister* 2 this Court declared Chapter 6A of the SAPS Act, as constituted by provisions of the 2008 SAPS Amendment Act, to be unconstitutional and invalid on two broad grounds.

10.2 In paragraphs 248, 249 and 250 of its judgment this Court summarised the reasons for which it had concluded that the 2008 statutory structure offended the constitutional obligation resting on Parliament to create an independent anti-corruption unit.

10.3 The Court stated in paragraph 248 that "*we have concluded that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the sub-ordination of the DPCI's power to investigate at the hands of members of the executive, who control the DPCI's policy guidelines are inimical to the degree of independence that is required. We have also found that the interpretive admonition in s.17B(b)(ii) of the SAPS Act is not sufficient to secure independence*".

10.4 Thereafter the following statements were made which are relevant for present purposes:

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

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

10.5 The two substantial grounds of unconstitutionality had been addressed earlier in the judgment under the headings "*Accountability and Oversight by Ministerial Committee*" (paragraphs 228 to 247) and "*Security of Tenure and Remuneration*" (paragraphs 217 to 227).

Executive influence

11. The capacity for executive influence, and in particular the Ministerial Committee's powers, have been severely curtailed. Previously the Ministerial Committee had been authorised, by s.17I of the 2008 Amendment Act, to determine policy guidelines in respect of the functioning of the Directorate (s.17I(2)(a)); and for the selection of national priority offences by the Head (s.17I(2)(b)); and for the referral to the Directorate by the National Commissioner of any offence or category of offences for investigation by the Directorate (s.17I(2)(c)). The Committee had also been required to "*oversee the functioning of the Directorate*" (s.17I(3)(a)).

12. Presently, the power of the Ministerial Committee established under s.17I by the 2012 Amendment Act is limited solely to determining procedures to co-ordinate the activities of the Directorate and other relevant Government departments or institutions. Authority to determine policy guidelines for the selection of national priority offences or for referrals by the National Commissioner is vested in the Minister, but he now requires the concurrence of Parliament (s.17(K)(4)). Thirdly, no policy role is given to the Minister over the functioning of the Directorate with regard to corruption *per se*, as corruption is defined in Chapter 2 of the Prevention and Combating of Corrupt Activities Act No.12 of 2004 ("PRECCA"), that is, upon a proper interpretation of s.17D(1)(aA) of the SAPS Act.

13. The High Court misdirected itself in interpreting and applying the last-mentioned section. Whereas s.17K(4) authorises the Minister to determine policy guidelines as referred to in s.17(D)(1(a) (selection of national priority offences by the Head) and in s.17D(1)(b) (referrals to the Directorate by the National Commissioner), the functions of the Directorate to prevent, combat and investigate "selected offences" in terms of its mandate under s.17D(1(aA), which relate specifically to offences referred to in Chapter 2 of PRECCA are not subject to policy guidelines issued by the Minister as sub-sections 17D(a) and (b) are.

14. Therefore the High Court misdirected itself by failing to recognise that the provisions of s.17D(aA), that were introduced by the 2012 Amendment Act, not only constituted the Directorate as a dedicated anti-corruption entity (compare paragraph 223 of *Glenister 2*), but also allow the Directorate to investigate corruption free of Ministerial policy control.

Security of Tenure

15. In *Glenister 2* this Court found that the appointment, discharge and tenure of members were, under the 2008 Amendment Act, indistinguishable from ordinary members of SAPS and at the whim of the National Commissioner (paragraphs 219 to 224 and 227).

16. The following position pertains under the 2012 Amendment Act.

16.1 The Head is appointed for a non-renewable fixed term of not shorter than seven years and not exceeding ten years (s.17CA(1)), for a period to be determined at the time of appointment (s.17CA(2)); and the position for the Deputy and Provincial heads is the same (s.17CA(4) and (6));

16.2 In terms of s.17DB the Head determines the fixed establishment of the Directorate and the number and grading of posts, in consultation with the Minister and Minister for Public Service, and appoints the staff of the Directorate;

16.3 Section 17CA(19) provides that any disciplinary action against the Deputy National Head, Provincial Head, member or employee in the service of the Directorate must be considered and finalised within the Directorate's structures subject to the relevant prescripts.

16.4 Section 17CA(20) provides that no Deputy National Head, member or administrative staff may be transferred or dismissed from the Directorate, except after approval by the Head. The *bona fides* of the Head (as a "fit and proper" incumbent) must be accepted in this situation.

17. Furthermore, whereas this Court found in *Glenister 2* that there were flexible grounds for dismissal of members that did not rest on objectively verifiable grounds like misconduct or ill-health (paragraphs 221 and 248), the removal

from office, of the Head, in terms of s.17DA, by the Minister or Parliament requires objectively verifiable grounds. The Head and members can no longer be removed from office by the National Commissioner like any other member of SAPS in terms of s.35(b) of the SAPS Act if, for reasons other than unfitness or incapacity, such discharge will promote efficiency or economy in the Service, or will otherwise be in the interests of the Service.

Remuneration

18. In *Glenister 2* this Court held (in paragraph 227) that the absence of statutorily secured remuneration levels gave rise to problems similar to those occasioned by a lack of secure employment tenure.

19. Presently the following situation pertains:

19.1 Remuneration, allowances and other terms and conditions of service and service benefits of the Head are determined by the Minister with the concurrence of the Minister of Finance, by notice in the Gazette (s.17CA(8)(a)); and of a Deputy National Head and Provincial Heads by the Minister after consultation with the Head and with the concurrence of the Minister of Finance (s.17CA(8)(b));

19.2 The salary of the Head must not be less than the salary of the highest paid Deputy National Commissioner; of the Deputy Head not less than a salary level of the highest paid Divisional Commissioner; and of the

Provincial Head not less than the salary level of the highest paid Deputy Provincial Commissioner (s.17(A8)(b)(i), (ii), (iii)).

19.3 The Minister must submit the remuneration scale payable to the Head, the Deputy and Provincial Heads to Parliament for approval, and such remuneration scale may not be reduced except with the concurrence of Parliament (s.17CA(9));

19.4 In terms of s.17G the remuneration, allowances and other conditions of service of members must be regulated by the Minister in terms of s.24. In terms of S17CA(18) these regulations must be submitted to Parliament for approval.

Appointment of members:

20. Whereas this Court found in *Glenister 2* that the appointment of members was not sufficiently shielded from political influence (paragraph 249) important differences exist in the current provisions regarding appointment:

20.1 Whereas previously the Head was appointed as a Deputy National Commissioner in the centralised hierarchical structure of SAPS he or she is now appointed as Head of a Directorate located in the service and structured autonomously within it (see s.17C(1A));

20.2 The appointee must meet an objective jurisdictional requirement of being "*a fit and proper person with due regard to his or her experience, conscientiousness and integrity.*" This leaves no room for political influence to be used to appoint a person who is not fit and proper;

20.3 The Minister must report to Parliament on the appointment of the Head (s.17K(9)) within fourteen days of the appointment if Parliament is in session or, if Parliament is not, within fourteen days after commencement of its next ensuing session (s.17CA(3)). Parliament may remove an appointee that is incapable or incompetent. (S.17DA(3))

21. The High Court therefore misdirected itself insofar as it failed to recognise that the defects in the 2008 Amendment Act, which formerly vitiated the independence of the Directorate, have been remedied.

APPLICATION OF THE TEST OF OBJECTIVE VALIDITY TO THE IMPUGNED PROVISIONS

The test itself

22. The High Court erred in failing to apply the test laid down by this Court in Van Rooyen's case (*supra at paragraph 34*) to the question of whether or not the 2012 SAPS Amendment Act established a Directorate with an adequate degree of independence; namely "*an objective test properly contextualised*". The notion of public perception that ought to have been applied should have

been based on a balanced view of all the material information asking how things appear to the well informed, thoughtful and objective observer.

Unconstitutionality of section 17A

23. The High Court misdirected itself by declaring s.17A to be unconstitutional in that this section does nothing more than define "Directorate", "Ministerial Committee", "National Priority Offence" and "Operational Committee". It is an entirely benign section. It has no effect whatsoever on the securing or otherwise of an adequate degree of independence for the Directorate. Furthermore, its validity was not challenged in the applicants' papers in the High Court.

Unconstitutionality of section 17CA as a whole

24. Section 17CA deals with the appointment, remuneration and conditions of service of members of the Directorate under 22 subsections. The High Court misdirected itself by declaring the whole of this section unconstitutional without any reference to or analysis of ss.17CA(8), (9), (10), (11), (12),(13), (17), (18), (19), (20), (21) and (22).

The first summary conclusion of the High Court relating to appointment of Head

25. The High Court misdirected itself in finding that the appointment process lacks adequate criteria for appointment and vests an unacceptable degree of political control in the Minister and Cabinet for the following reasons.

26. The criteria in question (fit and proper person) accord with those required for the appointment of a judge (in terms of s.174(1) of the Constitution), as well as the Public Protector and the Auditor-General (in terms of s.193 thereof). The further requirements of "*due regard to his or her experience, conscientiousness and integrity*" constitute further particular criteria which are sufficient for the appointment of a National Director of Public Prosecution. No legal or further qualification is necessary in order to exercise the Directorate's functions independently.

27. In particular the Court misdirected itself by relying on the following authorities as support for its conclusion; namely, **Dawood v Minister of Home Affairs 2000 (3) SA 936 CCC**; and **Freedom of Expression Institute and Others v Presidency, Ordinary Court Martial N.O. and Others 1999 (2) SA 471 CC**. The rationale, facts and circumstances of these cases are distinguishable from the present matter. The

28. In DA v President of the RSA 2013 (1) SA 248 CC this Court dealt with identical appointment criteria to those regulating the appointment of the Head

in s.17CA(1); namely, the provisions for the appointment of a National Director contained in section 9(1)(b) of the National Prosecuting Authority Act No. 32 of 1998. The Court concluded that the requirement that the National Director must be a fit and proper person constituted an objective jurisdictional fact (Paragraph 20 of the judgment). If the fitness of a person, with due regard to his or her experience etc. is a jurisdictional fact, the Minister's power of assessment, in the exercise of such discretion as he has in making an appointment, is irrelevant to the fitness and propriety of the appointee. The appointment can only be made from among fit, proper, and independent persons. The Minister is not authorised to appoint any person who does not meet these jurisdictional requirements.

29. Should the Minister appoint a person who is not fit and proper he would act unlawfully for want of jurisdiction and would be subject to sanction by the Courts. Should the appointee be incapable or incompetent he may be removed by the National Assembly (see s.17DA(3)&(4)).

30. Section 17CA(1) ensures the fitness for office of the appointee. The fact that it is possible for the Minister to abuse his functions in terms of the section does not affect its validity (see **Van Rooyen** case (supra) at **paragraph 37).**

31. In the **DA** case (*supra*) this Court also held, in factual circumstances that are comparable to the present, that where an appointee (the National Director) was appointed by the Executive (the President) it did not follow that this

rendered the incumbent of that office "*a political appointee*". (Paragraph 16 of the judgment.)

32. The mere fact that the Executive and the Legislature make or participate in the appointment of the Head is not inconsistent with the independence that the Constitution requires. (See **Van Rooyen's** case (supra) at paragraph 106.)

The second summary conclusion of the High Court: extension of tenure of a Head (ss.17CA(15)&(16)

33. In considering sub-sections 17CA(15) and (16) the High Court misdirected itself for the following reasons.

34. Section 17CA(1) provides that the Minister must appoint the Head "*for a non-renewable fixed term of not shorter than seven years and not exceeding ten years*".

35. S.17CA(15) authorises the Minister to retain the Head in office beyond the age of 60 years for such period which shall not exceed the (aforementioned) "period determined in s.17CA."

36. Because the appointment is expressly required to be "non-renewable" and for a fixed term there is no room to imply that the fixed term is renewable. (Either from the use of the word "*retain*" or at all).

37. The High Court misdirected itself by holding otherwise and by declaring these sub-sections unconstitutional on the basis of the judgment of this Court in **Justice Alliance of South Africa v President of the Republic of South African & Others 2011 (5) SA 388 (CC)**. That case dealt with a genuine "renewal", namely, of the terms of office of the Chief Justice. The purpose of s.17CA(15) is to accommodate retirement provisions which appear elsewhere in the SAPS Act. (Section 45(1)(a) of SAPS Act provides that a member must retire on the date when he or she attains the age of 60 years.)

The third summary conclusion of the High Court: the suspension and removal process (s.17DA)

38. For the reasons that follow the High Court misdirected itself by holding that the suspension and removal process vests an inappropriate degree of control in the Minister, allows two separate and distinct processes without any reference to the other, which are determined on the basis of arbitrary criteria.

Arbitrariness

38.1 The Head may be removed from office on a finding of misconduct, incapacity and incompetence by a Committee of the National Assembly. These grounds warrant the removal from office of the Public Protector, the Auditor-General or a member of the Human Rights Commission. The High Court therefore misdirected itself insofar

as it regarded the criteria for removal by the National Assembly, in terms of the s.17DA(3) and (4), to be arbitrary.

38.2 The criteria for removal by the Minister also include misconduct and incapacity (to carry out duties inefficiently). Identical criteria apply to the removal of the National Director of Public Prosecutions in terms of s.12(6) of the National Prosecuting Authority Act. Other criteria are continued ill-health and being no longer a fit and proper person to hold office. These grounds too are not arbitrary. The fact that the incumbent is no longer a fit and proper person to hold office negates a jurisdictional requirement for his or her appointment.

Control by the Minister:

39. The Minister's power of control is limited either by PAJA (insofar as the suspension and dismissal may constitute administrative action within the meaning of PAJA) or by the right to fair labour practices vested by s.23 of the Constitution. (See respectively, **Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 CC at para 101 and Gcaba v Minister of Safety & Security 2010 (1) SA 238 (CC) at paragraph 64.)** These rights of an incumbent check any inappropriate control that the Minister may seek to exercise in dismissing the Head.

40. Insofar as a dismissal by the Minister constitutes an administrative decision it must be exercised in a manner that is consistent with PAJA. To the extent

that s.17DA(2) authorises administrative action it must be read together with PAJA. The contrary finding by the High Court is misdirected. Insofar as dismissal may not be administrative action the incumbent may assert rights under the Labour Relations Act.

Separate and distinct processes

41. The overlap between the powers of removal of the National Assembly and the Minister provide a check and balance on the exercise of the Minister's powers and makes him more directly answerable to the elected Legislature. (Compare **In re Certification of the Constitution of the RSA: 1996 (4) SA 744 CC para 111**).

42. Should the Minister retain a Head in office who is guilty of relevant misconduct, or is incapable or incompetent (or incapable of resisting executive political influence in the exercise of his or her functions,) the representatives of the people (in the National Assembly) may remove the incumbent from office.

43. Conversely, the Minister cannot act to remove an incumbent without a judicial check and balance by a judge or retired judge acting with procedural fairness to determine whether the jurisdictional requirements for removal exist.

44. The Minister would be hard pressed to remove an incumbent after a judge has found that the criteria for removal contained in sections 17DA(2)(i) to (iv)

do not exist. He would be acting unreasonably and unlawfully and contrary to s.6(2)(h) of PAJA. Alternatively, such conduct could not be considered as being fair within the purview of the labour relations provisions contained in s.23(1) of the Constitution. A dismissal in such circumstances could not be attributed to a defect in Chapter 6A of the SAPS Act. It would be the result of the Minister's delinquency. (See **Van Rooyen's** case (supra) at paragraph 37.)

Suspension

45. The fact that suspension may take place before inquiry by a judge is not necessarily open to objection. The nature of the allegation against the Head may be so serious as to make it inappropriate for the incumbent Head to hold office while the allegation is being investigated. (See **Van Rooyen's** case – supra – at paragraph 17.) For the reasons stated above the Minister would be bound to act fairly in regard to such suspension.

The fourth summary conclusion of the High Court: unacceptable degree of political oversight in the jurisdiction of the Directorate (ss16, 17D and 17K(4) to (9)

46. The High Court misdirected itself in concluding that an unacceptable degree of political oversight existed in the jurisdiction of the Directorate for the reasons below. In particular the High Court failed to place a proper interpretation upon ss.17D(1)(aA) and 17K(4).

47. By enacting s.17D(aA) the legislature entrenched the offences referred to in Chapter 2 and s.34 of PRECCA as subject matter for the functioning of the Directorate and as specific offences which the Directorate is required to prevent, combat and investigate.

48. In terms of s.17D(1)(aA) the selection of offences described in Chapter 2 of PRECCA must be made by the National Head of the Directorate for the following reasons. From the numbering and context of this section it must be read together with s.17D(1)(a), to which it is connected. Section17D(1)(a), in turn, is directly connected to s.17K(4)(a). The latter section expressly provides that policy guidelines "*for the selection of national priority offences by the National Head of the Directorate referred to in s.17D(1)(a)*" must be determined by the Minister. Section 17D(1)(a) deals with national priority offences which "*in the opinion of the Head need to be addressed by the Directorate*". The exercise of this "opinion" is in fact the "*selection*" referred to in s.17K(4)(a).

49. The national priority offences selected by the Head in terms of s.17D(1)(a) are subject to policy guidelines issued by the Minister, whereas offences selected by the Head under s.17D(1)(aA), including corruption, are not subjected to any policy guidelines in terms of the Act; that is, the Head makes an independent selection of corruption offences.

50. Furthermore, the statutory process determines that corruption must be reported directly to the Directorate. This leaves no room for the fettering of

the Directorate's jurisdiction by members of SAPS pursuant to s.16 or otherwise. The schedule to the SAPS 2012 Amendment Act amended s.34 of PRECCA so as to require any person who holds a position of authority and knows or ought reasonably to know or suspect that any other person has committed an offence under Parts 1, 2, 3 or 4 or s.20 or 21 of PRECCA (or theft, corruption, extortion, forgery or uttering involving an amount of R100 000,00 or more) to report such knowledge of suspicion to any police official in the Directorate.

51. The effect of this provision is that corruption must be referred directly to the Directorate for selection of offences by the Head for purposes of investigation without the intercession of other members of SAPS.

52. The exercise of direct unfettered jurisdiction by the Directorate over corruption is therefore entrenched by s.17D.

53. By virtue of the provisions of s.17AA this mandate of the directorate, which is contained in the provisions of Chapter 6A, applies to the exclusion of any section outside of the Chapter.

54. The provisions of s.16 of the SAPS Act, which are contained in Chapter 6 of the Act, cannot in any way affect the mandate of the Directorate as it has been described above.

55. By virtue of the amendment of s.34 of PRECCA neither the Provincial Commissioner nor the members of SAPS in various Provinces can intrude upon the exercise of jurisdiction over corruption by the Directorate as referred to above.

56. As the selection of corruption offences contemplated in s.17D(aA) are not subject to approved policy guidelines, the provisions of s.16(3) do not apply to the investigation of corruption, in that the preference in any determination by the Head in terms of that section relates to "*selection in accordance with policy guidelines*".

57. The High Court therefore misconceived the meaning of ss. 16 and 17D as well as ss.17K(4) to (9), and misdirected itself in reaching all of its conclusions.

THE PERIOD OF SUSPENSION

58. In the event of this Court confirming the order or any part of the order made by the High Court it will be submitted that the period of twelve months afforded to Parliament to remedy the defects identified by the Court is inadequate and misdirected. Firstly, amendment is complex. The provisions of the SAPS Act are intricately related to one another. Change in one area may well impact on another. Secondly, the period afforded to Parliament coincides with an imminent national election.

59. In the circumstances the High Court misdirected itself by not affording Parliament eighteen months to complete the process of legislative amendment, as this Court did in *Glenister 2* .

JOINDER OF THE SPEAKER OF THE NA AND CHAIRPERSON OF THE NCOP

60. In *Glenister 2* this Court found that in creating the Directorate (under the 2008 Amendment Act) Parliament had breached a constitutional obligation to create an independent anti-corruption entity, which is both intrinsic to the Constitution itself and which Parliament assumed when it approved the relevant international instruments. (Paragraph 248).

61. Chapter 6A of the SAPS Act was therefore declared to be inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the Directorate. The declaration was suspended for eighteen months in order to give Parliament an opportunity to remedy the defect and its own breach.

62. The application before the High Court involved the question of whether Parliament had done so. The applicants there contended that Parliament should be afforded another opportunity to remedy its violation. An order to that effect was sought.

63. The challenge directed at Parliament was therefore indistinguishable in legal principle from the challenge dealt with by Ngcobo CJ in paragraph 29 of the

minority judgment in *Glenister 2*: namely, a challenge directed at Parliament in which it was alleged that it failed to comply with its constitutional obligation (in that case to facilitate public involvement in this legislative process).

64. Accordingly, as found by the Chief Justice in paragraph 29 of the minority judgment:

"Both the National Assembly and the National Council of Provinces have a direct and substantial interest in the outcome of this challenge. They should therefore have been joined in the proceedings."

65. Although the Government of the Republic of South Africa was cited as the fourth respondent, the Government of the Republic is constituted, according to s.40 of the Constitution, as national, provincial and local spheres of Government which are distinctive, interdependent and interrelated. The Government is therefore not the national Legislature.

66. This Court has held that in a constitutional democracy, the Court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that that arm of Government is given the proper opportunity to consider the constitutional challenge and to make such representations to the Court as it considers fit; and furthermore that the different arms of government ought to respect and acknowledge their different Constitutional functions. (See **Mabaso v Law Society, Northern Provinces & Another 2005 (2) SA 117 (CC) at para 13**).

67. In the circumstances the Speaker of the NA and the Chairperson of the NCOP ought to be joined in these proceedings before this Court is called upon to confirm the order of invalidity made by the High Court.

C

THE ORDER THAT OUGHT TO HAVE BEEN MADE

68. The appellants contend that the following orders ought to have been made:

68.1 (Prior to the hearing of the merits of the matter), an order that the Speaker of the National Assembly and the Chairperson of the National Council of Provinces are to be joined as parties to the proceedings.

68.2 An order that the application by the *Helen Suzman Foundation* under case number 23874/2012 is dismissed.

68.3 An order that the application by *Hugh Glenister* under case number 23933/2012 is dismissed.

DATED AT CAPE TOWN ON THIS DAY OF JANUARY 2014

THE STATE ATTORNEY

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AND TO: **THE REGISTRAR**
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