Under the **Swinging Arch**

Perspectives on the *Glenister* anti-corruption cases by those who fought them

Compiled and edited by

Paul Hoffman

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About the Authors

This book chronicles the progress and outcomes of public interest litigation that has become known as 'the *Glenister* trilogy'. It is unusual for a single litigant to take an issue all the way to the Constitutional Court and it is unique to do so three times, with mixed results. A Johannesburg businessman, Bob Glenister, was the applicant in three cases aimed at countering corruption that all ended on appeal in the Constitutional Court. He was ably abetted at times by the Helen Suzman Foundation, first as a friend of the court (*amicus curiae*) and then as a co-litigant.

The authors are all lawyers who played a role in the litigation and concomitant advocacy at various stages. Their perspectives, given in chronologically arranged chapters, reflect on the triumphs and disasters that befell the campaign to ensure effective and efficient anti-corruption machinery of state in South Africa.

Appendices reflect the continuation of the struggle to achieve compliance with UN Sustainable Development Goal 16 which requires strong institutions of government. Advocacy of the reforms needed to give full expression to the outcome of the litigation has taken the form of lobbying for change since the litigation ended in 2014. If the lobbying does not succeed it may become necessary to litigate again. The report of the Commission of Inquiry into State Capture illustrates the need for radical reform of the criminal justice administration of South Africa as it reflects a dire situation that has worsened since 2014.

Kevin Louis is an attorney of the High Court of South Africa. He practiced in Johannesburg in the firm Wertheim Becker and was attorney of record for Bob Glenister in the first two cases that were litigated to the highest level.

Peter Leon, at the time a senior partner of the international law firm Webber Wentzel, based in its Johannesburg office, acted for the Helen Suzman Foundation in the second and third case. He also presented argument to Parliament resisting the disbandment of the Directorate of Special Operations or Scorpions as they were popularly known.

Willie Viljoen was a senior member of the Scorpions and led the Concerned Members Group of the National Prosecuting Authority with Hayley Slingers in making representations to Parliament in favour of the preservation of the Scorpions, an anti-corruption unit within the NPA with investigative and prosecutorial functions. Willie lives in retirement in Stellenbosch. Hayley

joined the Cape Bar after the Scorpions met their demise and has gone on to grace the bench of the Western Cape High Court.

Peter Hazell SC was a member of the Cape Bar who was briefed by Kevin Louis to act for Bob Glenister (as junior to Paul Hoffman SC) in his second and most successful case which ended in victory on 17 March 2011.

Paul Hoffman SC is a former member of the Cape Bar and a director of Accountability Now. He acted as senior counsel for Bob Glenister in the second and third case and was counsel for the *amicus curiae*, The Centre for Constitutional Rights, in the first case. Accountability Now is an NGO which advocates reform of the criminal justice administration to achieve proper compliance with the criteria laid down in the second *Glenister* case.

Madri du Plessis was an attorney practising with Coopers, a Cape Town firm of attorneys, when she took on the role of attorney of record in the third *Glenister* case. She has drafted suggested remedial legislation designed to enhance the capacity of the criminal justice administration to counter serious corruption.

Guy Lloyd Roberts is a former member of the Cape Bar and is also a director of Accountability Now. He acted as junior counsel in the third *Glenister* case.

Izak Smuts SC is a senior member of the Grahamstown Bar and a former Vice Chair of the General Council of the Bar in South Africa. He led team *Glenister* in the third case to make its way to the Constitutional Court.

Max du Plessis SC is both a professor of public law at the University of KwaZulu-Natal and a senior member of the Bar. He acted as junior counsel for the *amicus curiae* in the second *Glenister* case.

David Unterhalter is now a judge in the Gauteng High Court who has acted in the Constitutional Court. He led the team for the Helen Suzman Foundation in the second *Glenister* case and in its own application heard with the third *Glenister* case in his capacity as a senior member of the Johannesburg Bar.

Andreas Coutsoudes is an advocate who acted as junior counsel for the Helen Suzman Foundation in its matter, heard simultaneously with the third *Glenister* case.

All of the authors are indebted to Justice Johann Kriegler for the graceful and generous foreword to this book.

Acknowledgements

This book is the product of the combined labours of the lawyers who contributed chapters and who acted at various stages in the litigation now known as the *Glenister* trilogy. Without their collective spirit of volunteerism, the book would not have seen the light of day. The courage and tenacity of Hugh 'Bob' Glenister himself must also be acknowledged. Without him there would have been no litigation and no story to tell. Thanks are also due to the Konrad Adenauer Stiftung for the interest it has taken in supporting the publication of this book as part of its commitment to advancing the rule of law in the world. Juta and Company has participated in the endeavour with its usual professionalism and promptness and the amateur proof readers who gave their attention the drafts are also due a vote of thanks. Special thanks are due to the trustees of Accountability Now for their valuable input.

Foreword

When, in a hundred years from now, historians come to record our country's emergence from centuries of discrimination, one of the troubled features they note will be the tide of corruption that threatened the uncertain, young democracy. They will surely also note the gallant efforts of those who stood firm against the tide; and in doing so the names of the Bob Glenisters and Paul Hoffmans will surely be noted. Likely they will reach for old-fashioned English adjectives, words reminiscent of Winston Churchill a half century earlier: steadfast, indomitable, invincible, fearless and, above all, untiring.

Trying to predict what history will reveal is a risky business. Perhaps my forecast could be way off the mark. It may be that we sink ever deeper into a morass of unconscionable self-enrichment, at the helm a feckless government and below a rudderless society. But I see a different scenario, a painfully drawn-out sequence where the country manages to slow the tide, at first imperceptibly, then more forcefully and then, over time, to stem it.

Despite the gloom that currently prevails, I believe my prediction is realistic - that our track record as a society proves that we can surmount the ostensibly insurmountable, that we can confound the commentariat and somehow manage to make it. In the 1970 and 80s, who would have thought that the irresistible apartheid object and the equally irresistible liberation movements would come to terms with one another. If one had predicted that on a bright autumn morning in May 1994, Nelson Mandela would be inaugurated as the president of a united South Africa in the amphitheater of the Union Buildings, with military aircraft doing a fly-past and generals in Defence Force uniforms saluting, one would have risked certification as mentally unsound. The very election by which he had been propelled into power was a remarkable exercise, a mandatory rite of passage cobbled together and mounted at the last minute and, cutting corners and taking tremendous risks, ground out a credible result in the nick of time.

Likewise, no-one could responsibly foresee that the hodge-podge of puppet states spawned by apartheid could be seamlessly reincorporated, or that the seething peri-urban African townships, patrolled by heavily armed military vehicles, would be peacefully integrated with the adjacent leafy suburbs. Above all, who could sensibly foresee that a broad-church liberation movement, an uneasy amalgam extending from conservative African nationalists to full-blooded Stalinists, that had been languishing in

prison or in exile for a generation, and with nary a stitch of experience in governance, would faultlessly take control of the infinitely detailed business of running the country. Who would have believed that the granite-faced bureaucrats and the battle-hardened soldiers of the old regime would willingly assist and support their replacements?

When the ANC at its notorious Polokwane conference in late 2007 decided to strangle the Directorate of Special Operations, the deed was likely motivated by the party's resentment that this formidable law enforcement agency, admiringly called the Scorpions, had nipped in the bud the petty larceny of some 150 ANC parliamentarians. The historians will also note that the election at the selfsame conference of a morally flawed leader appeared to open the floodgates of corruption in high places and concomitant degrees of pilfering cascading down to lowest local government level.

That is the context in which to see the battle for the preservation of the DSO and when, despite desperate politico-legal efforts that engagement was lost, of the unending campaign to save what could possibly be saved – and what could be done to regain the lost ground. It is a tale of individual people, concerned and committed citizens of our country who saw the danger unleashed by the short-sighted folly of the ruling party at Polokwane and resolved to do what was within their power to resist it. That is the journey recorded and commemorated in *Under the Swinging Arch*.

It is in many ways a fascinating story, and the way it is recorded in this book maintains its strong personal appeal. Principally, of course, it serves to preserve the details of an important aspect of the particular phase of our country's ongoing attempts to contain a pervasive and expanding miasma of dishonesty in public administration. For that reason alone those responsible for publication of this memorial are to be commended. It is, besides, an extremely useful reminder of the labyrinthine twists and turns and multiple court cases that had to be undertaken, the setbacks and the triumphs, the sound judgments achieved and, sadly, the others. Considering the sober and depressing subject matter, it is a surprisingly good read.

Johann Kriegler
Johannesburg
14 March 2023

Chapter 1

Tilting at Windmills

Kevin Louis*

In December 2007, the African National Congress (ANC) held its National Conference at Polokwane. As South Africans, we are all acutely aware that the outcome of this conference was the ascendancy of one Jacob Zuma to the office of President of the ANC and, ultimately, the position of President of South Africa.

I remember watching the post-conference news reports with a feeling of foreboding for the country and, as a lawyer, the future of law and order in the country and our revered and (until then, to a large extent anyway) respected Constitution.

I also remember reading an article penned by Justice Malala, which was published in the *Times* (the daily print version of the *Sunday Times*) shortly after the Polokwane conference. It is an article that has stuck in my head ever since I read it and has been my yardstick for gauging the state of our country since the commencement of the Zuma presidency.

The article was headed 'Animal Farm' (if memory serves correctly), with the by-line and conclusion that with the ascendancy of Zuma to the presidency of the ANC, one could see the pigs lining up at the trough. (How prophetic, given the events that have unfolded since then: Nkandla, Pomodzi Mine, Guptagate, Nenegate, to name but a few.) Unfortunately for South Africa, Malala was spot on in his assessment of what Zuma's ascendancy to power would mean for the country.

Another outcome of the Polokwane conference was the passing of a resolution by the delegates at the conference that the Directorate of Special Operations (DSO), colloquially known as 'the Scorpions', be disbanded and that a special unit for the investigation of priority crimes be created, but under the Police Ministry.

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* Kevin Louis practises as an attorney in Johannesburg.

For me personally, this was a most cynical resolution, but hardly a surprising one, when one considers that Zuma (and a host of his henchman and cronies, the very same persons who ensured his win at Polokwane) has been investigated and/or prosecuted by the DSO.

I was aware that there was a fair amount of noise about the DSO's 'Hollywood-type' tactics of very public raids and prosecutions, but believed that the DSO was an essential weapon in our already overtaxed and incapacitated criminal justice system in the fight against crime, which the criminal justice system seemed severely incapable of addressing effectively.

It was against this background that, towards the end of January 2008 or in early February 2008, I received a telephonic message from one of my partners at the time, to call Bob Glenister regarding a matter involving the Scorpions. My dealings with Bob up until then were in relation to a property transaction in which I represented the seller and Bob's company was the purchaser.

I returned Bob's call the next day, thinking that Bob had somehow or other been subjected to the DSO's tactics. I advised him that I understood that he had a matter involving the Scorpions and still jokingly asked if he was joining the chorus of people (the ANC delegates and Zuma-ites) who were calling for the dissolution of the DSO. To my utter amazement, Bob advised that he was actually wanting to save the Scorpions from being disbanded. (I am not sure to this day whether he actually heard the thump as I quite literally fell off my chair.) I asked him whether he was serious and why he had called me. He answered that he was deadly serious and that he called me wanting to know whether I had the 'balls' to take on a matter like the one he was contemplating.

I advised Bob that what he was contemplating was an extremely serious matter and a matter that had huge implications and difficulties, and asked him whether he had the 'balls' for the fight ahead. He assured me that he did and I answered that he had then found an attorney who did, indeed, possess the 'balls' to take on the matter.

Our telephone call ended with me advising Bob that it would be necessary to engage with a 'heavyweight' senior advocate specialising in constitutional law to ascertain whether there was any merit in proceeding with such a matter. I was of the view that attempting to stop the course of legislation prior to it being passed was a difficult, if not impossible, task.

I said I would get hold of Adv David Unterhalter (who was for me the obvious choice of senior counsel) and arrange to consult with him.

I immediately telephoned David's chambers to arrange a consultation. David was overseas on business at the time, and a consultation was arranged for approximately a week later.

Bob and I met with David the following week. When we advised David why we were there, even he was surprised about the matter that we wished to undertake. He was, I must confess, far more controlled than I was when I first spoke to Bob – only his eyebrows rising to the top of his head gave any clue as to his reaction to what he had just heard.

We spent an hour or two discussing the matter and left the consultation with the advice that the matter had merit (although it was not going to be an easy matter to win) and a request from David that I contact Adv Alfred Cockrell to see whether he was available to act as his junior.

In the parking lot at David's chambers, Bob and I discussed what we had been advised and Bob instructed me to contact Alfred and bring him on board in the matter, if he was available.

I contacted Alfred the next day. He was happy to climb on board. The team was assembled.

A further consultation was arranged with David and Alfred so that we could formulate a strategy and a framework of what we would have to demonstrate in order to achieve success in the matter.

At the outset, we were all extremely aware that the biggest hurdles we would have to overcome were the doctrines of separation of powers and of judicial deference, and that the only way that we would be able to overcome these hurdles was to show that there were exceptional circumstances allowing for the court to depart from these doctrines and to intervene even before the parliamentary process had begun. All of us (David, Alfred and I) had advised Bob that it would be far more prudent to wait for the legislation to be signed into law before launching an attack on it. However, Bob was adamant that a pre-legislation attack be mounted as he had already been made aware that the members of the DSO, fearing the inevitability of the demise of the DSO, were leaving the DSO in droves for more stable positions.

And so began the mammoth task of researching what would be needed to overcome the hurdles.

I must confess that, whilst I realised that the task ahead would be an enormous one, I did not quite appreciate just how enormous. What followed were very long hours, which turned into weeks, of research, finding every bit of information available relating to the establishment of the DSO and the ANC's attitude towards the DSO at the time of inception and at Polokwane, and the exceptional circumstances that could convince a court to intervene even before the legislation had been initiated.

Once I had gathered all the information I could find, I set about putting together the first draft of the founding affidavit in the matter. It was our intention to launch the proceedings as a matter of urgency in the Pretoria High Court, with an interdict being sought preventing the executive from placing any draft legislation dealing with the disbanding of the DSO before Parliament.

Fortunately, the executive was slow in preparing the draft legislation, but we knew the clock was ticking.

Once I had finished the first draft of the papers, I forwarded them to Alfred and, after many further refinements, long hours of editing and double-checking the information to be used, we finally had a draft of the papers to forward to David.

David further refined the draft and eventually we were ready to proceed to issue the papers.

We realised early on in the process that the amount of publicity and public interest in the matter that would be generated would need to be managed. We also realised that it would be extremely important to generate as much publicity and public interest in the matter as possible. This was not only to obtain the support of the public at large, but also to insulate Bob against any potential cost orders should we be unsuccessful in our quest; our courts are generally loathe to grant cost orders against an unsuccessful litigant in public interest matters. In order to assist with this, Bob employed the services of Jennifer Cohen and Dani Cohen of FD Services, a publicity firm with a presence in Johannesburg and Cape Town, the very cities which would be at the forefront of the battle to be fought.

Obviously the timing of issuing and serving the papers to coincide with press releases was imperative. I kept in very close contact with Bob and his publicity team so that we could ensure that the timing was perfect.

We settled on a date to launch the proceedings – 18 March 2008.

I spent the weekend and the Monday preceding the launch date preparing the papers to be issued. Given the volume of the final product with annexures, it took the entire weekend and most of the Monday to prepare the documents for issuing. (Hell, it took almost two hours just to have Bob sign the papers before a commissioner of oaths!)

Bright and early on the morning of 18 March 2008, I took the highway to Pretoria, laden with a suitcase filled with the original papers and sufficient copies of the papers to serve on the various respondents, which included the President of the Republic, the Minister of Justice, the Minister of Safety and Security, the head of the NPA, the head of the DSO, the Speaker of Parliament and the Chairperson of the National Council of Provinces.

After issuing the papers, which took approximately an hour on its own, I made my way to the various sheriffs in and around Pretoria to deliver the papers to be served on the various parties. Our journey had begun.

What followed was a tornado of interviews, telephone calls, emails, news reports – the enormous publicity we had anticipated (and hoped) would be generated had become a reality.

During the course of the next week or so, I received notifications from all of the main protagonists in the matter, namely the President, the Minister of Justice and the Minister of Safety and Security, that they would be opposing the matter, whilst the NDPP and the head of the DSO notified us that they would abide by the decision of the court. No notification was received from the Speaker of Parliament or the Chairperson of the National Council of Provinces, initially. The Speaker put in a very late bid to stymie the proceedings, electing to file an answering affidavit on the eve of the hearing in Pretoria. Her attempt, rightly so, was not well received by the court.

In terms of the notice of motion, the respondents who opposed the matter were afforded 15 working days from 26 March 2008 (ie until 16 April 2008) to file their answering affidavits. However, on 9 April 2008, I received a request from the State Attorney for an extension of time to file the answering affidavits, until 30 April 2008.

It was not an entirely unexpected request, since the founding papers were extremely voluminous after all. However, there were rumours aplenty that the tabling of the Bill in terms of which the Scorpions would be dismantled was imminent and I was extremely loathe to grant any extensions and afford the respondents who were opposing the matter an opportunity to circumvent the court process, or render it nugatory.

Several discussions took place between me, David and Alfred as to the pros and cons of granting the extension and how best to mitigate against the probability that the Bill would be tabled. We were all convinced that the State Attorney was indulging in gamesmanship and intended delaying the filing of the answering affidavits long enough to enable their clients to initiate the Bill. In the end, we agreed thereto, but requested an undertaking that the Bill would not be tabled pending the hearing of the matter, which, at that stage and as a result of the delay by the State Attorney, was projected to be 20 to 22 May 2008. We also suggested that a meeting be conducted with the Deputy Judge President of the Pretoria High Court so that we could reach agreement with the State Attorney and the court with regard to the dates for the filing of further affidavits and the hearing of the matter, not only to ensure some semblance of order in the matter, but also to guard against any further gamesmanship by the State Attorney.

As it turns out, our concerns regarding gamesmanship were well-founded. The Bill to disband the DSO was placed before the Cabinet on the very day that the three respondents filed their answering affidavit (yet they somehow managed to scrupulously avoid making any mention thereof in their answering affidavits).

We realised at this point that the matter had entered the political arena, as much as we had hoped, perhaps naively so, to steer clear of the politics, and we decided that it would lend weight to the battle if we could recruit some of the opposition parties in Parliament to our cause. We also wanted to ward off some of the racist stench brought to the matter by the then Director-General of Justice, Adv Menzi Simelane (who was declared unfit to hold office as the head of the NPA some years later), who had cynically and unjustifiably (though not blatantly) insinuated that Bob and the people who supported his cause were white businessmen intent on continuing to dictate to the black people of South Africa how things ought to be run. Bob and I flew to Cape Town and in the space of two days we managed to meet with most of the major opposition parties and to convince them to come on board as *amici curiae* (or friends of the court). This was, to our minds, a major coup to unite the major opposition parties in a common goal against a common enemy and for a common cause. This was no mean feat given that the legal teams representing these parties were also of the view that we should await the passing of the legislation before attacking it.

During our trip to Cape Town, we also met with various members of the DSO to try to recruit them to our cause. Obviously with their jobs and

careers at stake, none were prepared to become directly involved, although they furnished us with a tremendous amount of information that was useful in the fight to come and confirmed the rumours that the members of the DSO were, indeed, jumping ship.

With the major opposition parties on board, we commenced working on drawing the replying affidavits. We made much of the fact that the three respondents had misled us as to the real reason for the request for an extension of time and the fact that they did not disclose the fact that the Bills were to be placed before the Cabinet on the very day that they filed their answering affidavits. The Constitutional Court would later take the respondents to task on this point when the matter came before it in August 2008.

I guess that matters of this nature invariably attract many different people for many different reasons. While we were finalising the replying affidavit, I received a telephone call from a certain academic in Germany, who seemed hell-bent on contributing to the matter in some way or another. (I have yet to understand how she heard about the matter and why she felt the need to become involved.) She offered to do a paper on why the disbanding of the DSO was the first step in South Africa becoming another failed African state and how our Constitution was about to be ripped up and tossed on the trash heap. Rightly or wrongly, she was given the go-ahead to prepare the paper, and to let me, David and Alfred have a look at it so that we could decide whether to include it or not.

Although we ended up annexing her paper to the final version of the replying affidavit, no mention nor heed was paid thereto as she had, *inter alia*, postulated therein that South Africa was on the brink of a coup by the unnamed lunatic left. (Her paper did give cause for humour though – the only comment of the United Democratic Movement's Bantu Holomisa on this point during the lunch break on day one of the hearing in Pretoria was that coups never work out, and he should know.)

Humour notwithstanding, the matter came before the Honourable Judge Willem van der Merwe and was argued on 20 and 21 May 2008. Judgment was reserved.

A few weeks later, judgment was handed down. Van der Merwe J found that, although a compelling case of exceptional circumstances was present, which would warrant the court interdicting the Cabinet from initiating the legislation prior to the Bill being tabled in Parliament, only the Constitutional

Court had jurisdiction to determine the matter. He struck the matter from the roll with no order as to costs.

Armed with such a pronouncement, we decided to approach the Constitutional Court for leave to appeal and for direct access. Although the preparation of the papers for the Constitutional Court was a mammoth task to be performed within severe time constraints (we were afforded 15 days from the handing down of the judgment in Pretoria to submit the application for leave to appeal), much of the work had already been done. We were, in the light of the legislation having already been initiated, forced to alter the relief we had sought to obtain to one of setting aside the decision of the Cabinet to initiate the legislation.

We submitted the application and waited for directions from the court. The directions came several weeks later and we were advised that the matter would be heard in late August 2008. We were, however, extremely disappointed when the court determined that it would only hear

> whether, in the light of the doctrine of the separation of powers, it is appropriate for this court, in all the circumstances, to make any order setting aside the decision of the National Executive that is challenged in this case. The sole question for decision is therefore whether it is appropriate for this court to intervene 'at this stage of the legislative process'.

This did not bode well as it signalled that the court was disinclined to depart from the judicial deference doctrine.

In the interim, the Bill had been referred to a combined Portfolio Committee on Justice and Safety and Security, and Bob was invited to make oral submissions to the portfolio committee. However, any illusions of persuading the members of the Portfolio Committee that the proposed legislation aimed at disbanding the DSO should not be passed were shattered when the chairperson of the committee, Maggie Sotyu, pronounced at a press conference before the oral submissions were to be made that it really did not matter what submissions were made and what the public had to say, as the function of the committee was to do the bidding of the ruling party, which had determined that the DSO was to be disbanded.

Bob and I were mortified at the arrogance of the pronouncement (to say nothing of a complete disregard for our constitutional dispensation and the function of Parliament in such a dispensation) and had plenty to say about it in interviews leading up to Bob's attendance in Parliament. Our outrage must have had some impact, because Maggie Sotyu suddenly 'took ill' on

the days allocated for the public submissions to the portfolio committee and the proceedings were chaired by another ANC stalwart, Yunis Carrim (who was later rewarded for his part in carrying out the ANC's decree with an appointment as Minister of Communications in Zuma's Cabinet).

The ANC members were out in force and although Bob was given a fair and proper opportunity to make his submissions, it was clear to all attendees opposing the disbanding of the DSO that the passing of the legislation by Parliament was a *fait accompli*. To be fair, the portfolio committee did recommend some amendments to the proposed legislation, but these amendments were cold comfort to all those opposing the disbanding of the DSO as the disbanding of the DSO still lay at the heart of the legislation.

After making submissions to the portfolio committee, we set about preparing for the Constitutional Court hearing – there was still plenty to do in the form of preparing authorities, heads of argument and digesting the heads of argument and authorities of the opposing parties.

The appeal was argued before the Constitutional Court on 20 August 2008. The proceedings, given the number of participating parties (we had been joined by an additional *amicus curiae*, the Centre for Constitutional Rights, headed by Adv Paul Hoffman) took a long time, but we were allocated just one day to argue the matter and we eventually walked out of court at around 19h00.

All those opposing the disbanding of the DSO left the court with feelings of extreme disappointment and resignation. Although the court had reserved judgment, it was obvious to all that the court was not at all convinced that there were exceptional circumstances that warranted a departure from the doctrines of the separation of powers and judicial deference.

The passage of the Bill disbanding the DSO continued through the parliamentary process and, soon after the Constitutional Court hearing, the date for the placing of the Bill before the National Assembly to be voted upon was set. It was clear that the ANC parliamentary caucus was not going to deviate from the ANC party line. However, during my research on the matter, it became obvious to me that there were a number of ANC members who had a personal interest in ensuring the demise of the DSO. Many of these members had been the subject of DSO investigations, including several members who had been investigated and prosecuted in the so-called 'Travelgate' scandal, in which a number of parliamentarians had fraudulently made travel claims and had fraudulently received payment for

such fraudulent claims from Parliament. A number of high-ranking ANC members had been implicated in 'Travelgate' and, to my mind, allowing these members to vote to disband the very unit which had investigated and prosecuted them was a serious conflict of interest.

With this approach, and after discussing the matter with Bob and the remainder of the legal team and being given the go-ahead, I set about investigating exactly how many members of the ANC parliamentary caucus were falling foul of this conflict of interest. It turns out that there were some 147 members (including some mentioned above, like Sotyu, and even Cabinet members) out of the 246-odd ANC parliamentarians who were, as far as we were concerned, conflicted and should not be permitted to vote on the Bill.

I wrote to the Joint Ethics Committee to bring the conflict of interest to its attention. However, at that time, the chairperson of the Ethics Committee was a certain Luwellyn Landers, who had also been implicated and investigated in the Travelgate scandal. I accepted that writing to Landers was a fool's-errand and that there was no chance of Landers taking any action in relation to our complaint. Although Landers offered to meet with Bob and I to discuss our complaint, it was obvious that he was engaging in gamesmanship as he offered to meet literally days before the Bill was to be voted upon, thereby leaving us with little or no time to do anything about the matter should Landers choose not to pay any heed to our complaint (which I suspected was the plan all along).

Accordingly, I advised Bob that we should prepare an urgent application to the Cape High Court for an order interdicting the Bill from being placed before Parliament before the conflict of interest issue had been dealt with by the Joint Ethics Committee.

Unfortunately, neither David Unterhalter nor Alfred Cockrell was available to attend to the matter and I briefed Adv Michael Osborne, who had represented the opposition parties in Pretoria and the Constitutional Court and, on his recommendation, Adv Ismail Jamie SC. We drew the papers and I flew to Cape Town a couple of days before the matter was to be heard. Parliament was not taking any chances and had briefed Adv Jeremy Gauntlett SC to act on its behalf. The matter was allocated to Judge Yekiso and he asked that the parties meet with him before the matter was to be heard. Before attending the meeting with Judge Yekiso, Gauntlett came to meet with me, Osborne and Jamie to try to convince us that we should not proceed. Gauntlett's opening comment regarding our application was

that it was akin to pursuing the Jockey Club of South Africa for failing to implement its own rules. Without hesitation, Jamie retorted that whilst that may be true, we were not dealing with the Jockey Club, but with Parliament, and that every citizen had an interest and a right to ensure that Parliament enforced its own rules – I had to stop myself giving Jamie a standing ovation.

The interdict was argued on 21 October 2008, the day before the Bill was to be placed before Parliament. We had, in the meantime, suffered a tremendous, if not entirely unexpected, blow – the Constitutional Court handed down judgment the day before and had dismissed our application, finding that the facts and argument we had placed before it did not constitute exceptional circumstances to warrant a departure from the doctrine of separation of powers.

As it was essential that our application to interdict Parliament be heard and dealt with before Parliament sat the next day, we argued late into the night. Judge Yekiso was not convinced that we should be granted the interdict we sought, and he dismissed the application.

That was it. Our attempt to save the DSO was over and a unit that had had tremendous success (which was probably its undoing) had been sacrificed on the altar of political expediency and simply to do the bidding of the new leaders of the ANC, and those intent on making the most of their turn at the feeding trough (to borrow from Justice Malala's writings).

I returned to Johannesburg and I listened to the proceedings in the National Assembly the next evening with a very heavy heart as the ANC clinically snuffed out the most successful crime fighting machine post-apartheid South Africa had ever known. I admit to having a lump in my throat and moist eyes as the final votes were tallied.

We had taken on the might of the State and although were not able to prevent the demise of the DSO, the fight was not over for Bob. Soon after the legislation was signed into law by acting President Motlanthe (President Mbeki had, in the meantime, been recalled by the ANC), we started preparing to have the legislation, or certain sections of it, set aside, a fight that we would ultimately win.

This win, whilst satisfying, was somewhat hollow – it did not signal the re-creation or recall of the DSO. The travesty of the demise of the DSO and our failed attempt to save it was that, unfortunately, the very concerns we raised and predicted would occur should the decision to disband the

DSO be permitted to stand and be allowed to be enacted, namely rampant, unchecked corruption and wholesale looting of the State coffers, have mostly come to pass. I would love Justice Malala to do a follow up on his post-Polokwane article and to demonstrate just how right he was back in late 2007/early 2008.

That notwithstanding, I am extremely proud to have played a part in an historic, necessary and exceptionally important legal battle that has had an enormous impact on the legal landscape of South Africa.

Regrets? Not one.

Chapter 2

The Helen Suzman Foundation and the parliamentary hearings on the abolition of the Scorpions

Peter Leon*

> I used to be a fan of proportional representation, but I am not at all now I have seen it in action. Debate is almost non-existent and no one is apparently accountable to anybody apart from their political party bosses. It is bad news for democracy in this country.
>
> **Helen Suzman, 2004**

While Hugh Glenister's legal struggle was underway in the Constitutional Court, the tale of the effort to save the Scorpions was unfolding in a different setting. Beyond the walls of the Constitutional Court, the integral role of the Helen Suzman Foundation (HSF) in the battle to safeguard South Africa's most successful crime fighting unit began in Parliament.

Since the Scorpions were a creature of statute,[1] the only way for the unit to be eradicated was for Parliament to amend the laws establishing it through the enactment of further legislation, a task that the African National Congress (ANC) majority in Parliament intended to execute without delay. To carry this out, the National Prosecuting Authority Amendment Bill and the South African Police Service Amendment Bill were introduced to Parliament,

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* Partner and Africa Co-Chair, Herbert Smith Freehills LLP. The author gratefully acknowledges the research assistance of Dr Heleen van Niekerk, independent legal researcher and Ernst Muller, associate, Herbert Smith Freehills LLP, in the preparation of this chapter.

[1] See National Prosecuting Authority Amendment Act 61 of 2000 which amended the National Prosecuting Authority Act 32 of 1998, so as to make provision for the establishment of the Directorate of Special Operations.

on 21 May 2008 and 3 June 2008 respectively, some six months after the ANC's Polokwane resolution calling for the abolition of the Scorpions. For these proposed Bills to become law, Parliament had to follow the proper procedure which, according to the South African Constitution, includes proper public participation through submissions by interested parties and parliamentary portfolio committee hearings.

As part of the public participation process (the authenticity of which was questioned by the HSF), two parliamentary portfolio committees, on justice and constitutional development and on safety and security respectively, invited public comments on the proposed legislation late in June 2008. With a newly appointed director and a mission 'to promote liberal constitutional democracy through broadening public debate and research', the HSF had a compelling interest in participating in the parliamentary submissions. Its new director, Raenette Taljaard, was the youngest woman to be elected to the South African Parliament at the age of 25, and had been an important member of the then Democratic Party's (DP) research team before becoming a member of Parliament in 1999.

Taljaard, in turn, engaged the services of Peter Leon, then a partner at Webber Wentzel, and prior to that, the DP's provincial leader in Gauteng and the provincial leader of the official opposition. On leaving politics in 2000, Leon was appointed by the South African government as chairperson of the ministerial advisory committee on local government transformation, in which role he advised the government on the transition to South Africa's new local government system.

The HSF had an opportunity to make two oral submissions to Parliament, on 6 August and 9 September 2008 respectively. Taljaard and Leon represented the HSF during the first submission on 6 August 2008, while only Taljaard attended Parliament on 9 September 2008.

Not least as a result of Hugh Glenister's ongoing Constitutional Court case, the disbanding of the Scorpions attracted exceptional public interest, a state of affairs that was confirmed by the circumstances that Leon and Taljaard encountered on arriving at Parliament on 6 August. To accommodate the large number of people who arrived for the public hearings, the joint sitting of the two portfolio committees had to be conducted in Parliament's Old Assembly Chamber. On the day in question, this great historic room, once the home of the apartheid-era House of Assembly, was barely large enough for all those concerned.

Despite the extent of the public's interest in the Scorpions' demise, from the start, the atmosphere in the Old Assembly Chamber from the governing party was hostile and adversarial. Before the interested parties commenced with their submissions, the DA representative, Tertius Delport, raised a point of order, questioning the haste and urgency with which Parliament seemed to treat the proposed legislation. Based on a comment made on the first day of the public hearings by Yunus Carrim, the chairperson of the Committee on Justice and Constitutional Development, that the committees would sit until 2 am if necessary to hear all submissions, Delport observed that it appeared that the legislation was being rushed through Parliament at all costs. Delport asked Carrim who had given the committees instructions to approve the draft legislation with such unseemly haste.

Carrim responded that it was not unusual for committees to take extra time and that, in the past, other parliamentary committees also sat until very late at night. He emphatically denied that he was under any instructions, stating that nobody in the ANC leadership had requested him to act in any particular way regarding the proposed legislation. Carrim passed off further comments by Delport that he had not received an adequate answer regarding the reasons for the committees to sit so late, while urging that the process should not be politicised, as 'facetious' and irrelevant.

The HSF's presentation on 6 August followed those of the South African Bishops' Conference Centre (SABCF) and the Institute for Democracy in South Africa (IDASA), with Taljaard addressing the committees before Leon. Taljaard began by examining the context in which the legislation was introduced and the duty of the State to eliminate crime. Taljaard cited the Constitutional Court's decision in the *NICRO* case[2] in arguing that the discussions about the Scorpions 'related not only to policies and institutions, but around the societal fabric and constitutional rights of all citizens'. In *NICRO*, the Constitutional Court observed that crime struck at the very core of the fabric of society, affecting a number of citizens' rights and undermining the rule of law as much as the Constitution's foundational values, whilst those committing crimes violated their own constitutional duties and responsibilities.

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[2] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* 2005 (3) SA 280 (CC).

Having established the importance of fighting crime, Taljaard stressed that the HSF was alive to the fact that the legislative process to dissolve the Scorpions was highly politicised and that Parliament was engaged in the effective rubber-stamping of an ANC decision at its Polokwane conference the previous December. According to Taljaard, the chronology of events that led to the decision to disband the Scorpions illustrated that the legislative process was flawed. This not only cast serious doubt on Parliament's fulfilment of the public participation requirement, but also on the legislature's independence. Taljaard argued that instead of Parliament acting as an independent body representing the electorate, the flaws in the process created the 'inescapable conclusion' that Parliament was participating in an attempt 'to shield members of the ANC from effective investigation and prosecution'.

The sequence of events that led to the decision to disband the Scorpions in fact began in 2005 when, following allegations about the abuse of power in the exercise of search warrants and questions about the strained relationship between the National Prosecuting Authority (NPA) and the South African Police Service (SAPS), then President Thabo Mbeki appointed the Khampepe Commission (headed by Constitutional Court Justice Sisi Khampepe) to report on the location and mandate of the Scorpions. The Khampepe Commission's report was delivered to Mbeki in February 2006. Despite criticising the Scorpions for acting outside its mandate in some cases, the report recommended that the Scorpions be retained within the NPA, which in effect meant that the unit would not be disbanded. The South African Cabinet endorsed the Khampepe Commission's report in a statement issued on 29 June 2006, but the Commission's report was not released to the public until May 2008.

Instead of acting on the Khampepe report, as Taljaard indicated, in June 2007 the ANC's National Policy Conference recommended that the Scorpions be dissolved. In December 2007, at its 52nd National Conference in Polokwane, under the pretext of the need to create a single police service, the ANC adopted a formal resolution to dissolve the investigative unit. According to the Polokwane resolution, the relevant legislation to dissolve the Scorpions had to be 'effected as a matter of urgency'. In January 2008, the newly elected National Executive Committee of the ANC decided that the legislation should be enacted by June 2008. In February 2008, in his last State of the Nation address, Mbeki referred to the impending 'restructuring' of the NPA as well as the intelligence services.

In the same month, then Minister of Safety and Security, Charles Nqakula, indicated that the Scorpions 'will be dissolved' and its work absorbed into that of the SAPS. In April 2008, the Cabinet approved the necessary draft legislation, which was then published in the *Government Gazette* in May.[3] In advance of the parliamentary hearings on the legislation, on 30 July 2008, Maggie Sotyu, the then ANC chairperson of Parliament's Portfolio Committee on Safety and Security, announced at a press conference in Cape Town that the ANC had 'taken the decision' to dissolve the Scorpions. Therefore, Taljaard argued, the only issue to be broached in public hearings would be the detail of the provisions of the Bills, an insight that later proved perceptive in the light of the committees' response to the public hearings (about which see below).

During her submission, Taljaard further questioned the rather dubious rationale that the ANC had given for the dissolution of the Scorpions: the need to create a single police service. To advance this, the ANC relied on section 199(1) of the Constitution, in terms of which the country's security services consist of, among others, a *single* police service. However, as Taljaard argued, an interpretation that section 199(1) excluded crime-fighting agencies other than the police was incongruous in view of the Constitutional Court's ruling in the *Potsane* case[4] as well as the findings of the Khampepe Commission.

In a slightly different context, in *Potsane*, the Constitutional Court held that the requirement of a single prosecuting authority in section 179 of the Constitution was not synonymous with an 'exclusive' prosecuting authority.[5] Instead, the court ruled that 'single' meant the need to bring together the diffuse prosecuting authorities that existed in the apartheid system under a single body. In the context of the police service, the Khampepe Commission interpreted *Potsane* to mean that the various police forces that had existed in Transkei, Bophuthatswana, Venda and Ciskei would be combined into a

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3 South African Police Services Amendment Bill (B30-2008), explanatory summary published in *Government Gazette* No 31016 of 9 May 2008; National Prosecuting Authority Amendment Bill (B23-2008), explanatory summary published in *Government Gazette* No 31037 of 8 May 2008.

4 *Minister of Defence v Potsane, Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).

5 The court held that the provisions of the Military Discipline Supplementary Measures Act 16 of 1999, which confers authority on military prosecutors to institute and conduct prosecutions in military courts, are not inconsistent with section 179 of the Constitution.

single police force. Following this authority, the Khampepe Commission's report concluded that the word 'single' did not connote 'exclusive'.[6]

Taljaard likewise emphasised that the Scorpions' high success rate, with more than 80% of cases prosecuted resulting in convictions, was in part due to the unit's prosecution-led and intelligence-driven investigative methodology, known as the 'troika' approach. This approach endorsed close co-operation between prosecutors (from the NPA), investigators and intelligence operatives (from the SAPS) in the fight against complex crime. In Taljaard's view, the Scorpions' pursuit of key government officials and the pending prosecutions of, among others, former police commissioner, Jackie Selebi, and incoming President, Jacob Zuma, clearly demonstrated the independent and impartial nature of this investigative approach.

Taljaard raised another concern about the draft legislation that created serious questions about Parliament's obligation to facilitate public participation in the legislative process. This was the timing of the publication of a document entitled 'Overview of the Proposed New Integrated Criminal Justice System' (Overview). Taljaard indicated that in June 2008, when the portfolio committees had called for submissions on the draft legislation, reference was made to this document for the first time. She pointed out that normally the publication of a policy decision such as the Overview would be followed by a Green Paper and a White Paper. The process of enacting legally binding law was upended by the publication of the Overview, which was published months *after* the ANC had taken the decision to disband the Scorpions.

Also, where policy decisions create high levels of public interest, it is common to allow public comment at different stages of the process, a requirement that, Taljaard argued, was not met in this case. The most revealing indication of Parliament's attitude towards public participation in the disbanding of the Scorpions is probably the date on which the Overview was publicly released. Interested parties, such as the HSF, in fact saw the Overview for the first time on 5 August 2008 – the same day on which the parliamentary hearings commenced. The public had no time to comment on the Overview and therefore, Taljaard argued, the constitutional requirement of public participation was not met. Taljaard elaborated on the

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[6] See *Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations* (February 2006) para 12.2, available at http://www.gov.za/sites/www.gov.za/files/khampepe_rpt_final-feb06_1.pdf.

lack of public participation in the development of the Overview during the HSF's second submission on 9 September (discussed below).

In his 6 August submission, Leon substantiated Taljaard's arguments regarding the Overview, drawing attention to the complete dissonance between its stated objectives and the draft legislation to disband the Scorpions. Leon pointed out that the Overview drew attention to the lack of co-ordination between the different participants in the criminal justice system, the SAPS, the NPA and different government departments, which in turn hampered crime-fighting. To address this, the Overview advanced a holistic and integrated approach to deal with crime. The government itself had failed to provide a proper review of the criminal justice system,[7] while Parliament had failed to give effect to the recommendations of the Khampepe Report, which Cabinet had accepted. According to Leon, lack of co-ordination would be exacerbated, not enhanced, by the abolition of the Scorpions.

Apart from being completely divorced from the Overview, there was another serious difficulty with the objectives of the proposed legislation, Leon argued. According to the Memorandum on the Objectives of the South African Police Services Amendment Bill, the draft legislation aimed to 'relocate' the special investigative unit by placing it under the authority of the SAPS. Leon demonstrated that the effect of the proposed legislation would not be to relocate the Scorpions, but to abolish it and to replace it with a new unit within the SAPS, colloquially known as the Hawks (formally known as the Directorate for Priority Crime Investigation).

This new unit's prospects of success were threatened not only by the destruction of the troika approach, through the abolition of the Scorpions, but also, Leon argued, by its overbroad mandate. While the Scorpions derived their mandate to investigate corruption and organised crime from the National Prosecuting Authority Act, the text of the SAPS Amendment Bill was vague and did not expressly refer to these crimes.

Leon further stressed that the SAPS Amendment Bill concentrated an enormous amount of power in the head of the police, the National Police Commissioner. The National Commissioner not only had the authority to appoint the head of the Hawks, but the responsibility of assigning cases to

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[7] The Deputy Minister of Justice and Constitutional Development, Johnny de Lange, offered an overview of the new integrated criminal justice system during the first day of the public hearings on 5 August 2008.

be investigated by the unit. The draft legislation did not authorise the new investigative unit to initiate any investigation without a referral from the National Police Commissioner.

These powers of the National Police Commissioner proved troublesome, as one of the reasons originally given by Thabo Mbeki for the establishment of the Scorpions was to investigate police corruption. Mbeki's rationale proved justified: In January 2008, Jackie Selebi, then National Police Commissioner, was placed on extended leave (and subsequently convicted in 2010) relating to corruption charges. Selebi accepted money and favours from convicted drug-dealer Glenn Agliotti in return for confidential police information. In an interview with the *Mail and Guardian* on the same day as the HSF's first submission, Leon made the following point:

> Now [Committee] members must ask and hopefully answer this question: How would Commissioner Selebi, now suspended ... as a result of the activities of the [Scorpions] ever have been investigated, had this legislation been implemented? It seems to us that this legislation is seriously undermining equality before the law by making some people more equal than others.

Another source of the Commissioner's unchecked power raised by Leon concerned national security vetting. According to the SAPS Amendment Bill, the Commissioner would have the last word[8] in deciding whether a prospective employee, or current member of the unit, presented a security risk for the country, or would be 'in any way be prejudicial to the efficiency' of the Hawks. Being a security risk in the opinion of the Commissioner meant not being appointed, being redeployed or, in some instances, being dismissed.

Leon then raised the issue of the government's conduct leading up to the introduction of the proposed legislation which he said amounted to a serious breach of the rule of law. The rule of law is a foundational provision of the South African Constitution and requires that the exercise of all public power, including actions of the executive and of Parliament, must adhere to the principle of legality and must be subject to the scrutiny of the courts. Some of the central tenets of the rule of law are the requirement of public participation (alluded to above) and the principle of legality.

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[8] The Commissioner had to 'be satisfied' that a person did not present a security risk after 'evaluating' information that was in a security screening investigation in terms of section 2A of the National Strategic Intelligence Act 39 of 1994.

The principle of legality is the minimum threshold required for government action to adhere to rule of law standards. The principle requires, first, that governmental power must be exercised in pursuit of a legitimate governmental objective. Significantly, governmental power must not be exercised to advance an improper or ulterior motive. Second, there must be a rational connection between the legitimate governmental objective and the means chosen to pursue it. The rationality test is not strict; all that is required is that the means chosen *can* achieve the legitimate governmental objective. It is not necessary that the means chosen is reasonable or the best possible option to achieve the objective. Leon argued that the adoption of the draft legislation did not meet even this low bar.

The draft legislation, argued Leon, was initiated for an improper and ulterior purpose, to protect prominent ANC members, including Jacob Zuma, subsequent to the Polokwane resolution. Governmental power was therefore not exercised in the pursuit of a *legitimate* governmental objective. This, according to Leon, was illustrated by the failure of the government to implement the recommendations of the Khampepe Report, in particular that the Scorpions be retained within the NPA. If there was not a legitimate governmental objective for the exercise of governmental power, there can, of course, be no rational connection between the objective and the means taken to pursue it. It followed that this was a violation of the rule of law.

Apart from contravening the rule of law, Leon argued that by disbanding the Scorpions, the state breached its constitutional duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. Furthermore, the draft legislation was in conflict with one of the constitutional principles governing national security: the determination of South Africans to live as equals, to live in peace and harmony, to be free from fear, to have their basic needs fulfilled and to seek a better life. Lastly, the disbandment of the Scorpions violated certain principles of co-operative government and intergovernmental relations. Its abolition certainly did not give effect to the principles that all spheres of government must preserve the peace and national unity of South Africa and must secure the well-being of the people.

The committees delivered their formal response to the HSF's initial submission, and those from other interested parties, on 9 September 2008. In general, the committees trivialised or ignored any arguments aimed at showing that the process of enacting the proposed legislation was politicised and that constitutional requirements were not met. On the first day of the

parliamentary hearings, Carrim's response to concerns[9] about politicisation was that 'interesting questions were raised about the relationship between a decision made by 4 000 delegates at a conference, a majority party that commanded 70% of the elected support, the role of Parliament and democracy'. Similarly, Carrim's only response to probing by Leon about the lack of public participation in the development of the Overview was that 'it was a work in progress' and that 'the public was not being asked to respond to the Overview'.[10] Leon responded that even if the Overview was a work in progress, it was necessary to establish its relevance for the proposed legislation to disband the Scorpions. The committees' attitude was illustrated by their failure to deliver any response to Leon's arguments about the government's failure to uphold the rule of law and the violation of its other constitutional obligations.

The only arguments to which the committees paid attention, which were later reflected in the revised SAPS Amendment Act that was signed into law on 30 January 2009 by then President Motlanthe, were those that emphasised possible complications in the actual functioning of the Hawks (the unit that would replace the Scorpions). These included the Hawks' mandate, the investigative methodology it would employ, and the powers of the National Police Commissioner.

Following requests from the acting chairperson of the Committee on Safety and Security, Dumisile Nhlengethwa, and Carrim for comments from the SAPS regarding the Hawks' mandate, Assistant Police Commissioner, Philip Jacobs, responded that the intention was to broaden the Hawks' mandate.[11] He conceded, however, that 'there was a need to streamline the provision to avoid arguments about mandate when it came to implementing' the draft legislation. Also, according to Jacobs, the failure of the SAPS Amendment Bill to provide a definition of the offences that would fall

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[9] Following concerns raised by, for example, Pieter Groenewald of the Freedom Front Plus, Tertius Delport and Dianne Kohler-Barnard of the DA, and Steve Swart of the ACDP.

[10] On the first day of the hearings on 5 August, justice committee chair Yunis Carrim indicated that he wished to avoid endless discussions about the relationship between the proposed legislation to disband the Scorpions and the review of the criminal justice system. See Justice and Correctional Services *Scorpions Closure: briefing & public hearings: Day 1* available at https://pmg.org.za/committee-meeting/9427/.

[11] For example, according to Assistant Commissioner Jacobs, the insertion of a reference to the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002, to cover serious economic offences, was an attempt to broaden the mandate of the Hawks.

within the mandate of the Hawks 'caused a lot of confusion'. In line with Jacobs' concession and the HSF's submission, the revised SAPS Amendment Act determined that the Hawks' mandate was combating, investigating and preventing national priority crimes such as serious organised crime, serious commercial crime and serious corruption.

As regards the investigative methodology that the Hawks would use, Jacobs indicated that the SAPS supported the idea of a multi-disciplinary approach and a situation where a prosecutor could be designated to support and provide guidance in an investigation. However, the SAPS would not support the suggestion that prosecutors and investigators be employees of the same organisation located in the same building. Contrary to the HSF's arguments, the revised SAPS Amendment Act did not retain the successful troika methodology followed by the Scorpions, in which prosecutors led police investigations, but rather referred to a generic multi-disciplinary investigative approach. The Act, in fact, reduced the role of prosecutors to occasional secondment to the Hawks, similar to personnel from other government departments such as the South African Revenue Service (SARS) and the Department of Home Affairs (DHA), to assist and co-operate with its members in conducting investigations.

While then Finance Minister, Pravin Gordhan, described corruption in South Africa as a 'disease',[12] the destruction of the troika investigative approach proved catastrophic for the Hawks' efforts in combating serious crime. Replying to a question from the DA parliamentary representative, Hendrik Krüger, on 11 September 2015, the Minister of Police, Nkosinathi Nhleko, confirmed a steady decline in the number of arrests made and convictions obtained by the Hawks since its inception in 2010. The numbers indicate a 60% decline in the number of arrests and, even more alarmingly, an 83% reduction in the number of cases that resulted in convictions.[13]

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[12] Business Report 'Gordhan: Act on corruption' (30 August 2012) available at http://www.iol.co.za/business-report/economy/gordhan-act-on-corruption-1372787.

[13] In 2010–2011, there were 14 793 arrests with 7 037 convictions; in 2011–2012, there were 13 146 arrests with 6 538 convictions; in 2012–2013, there were 7 620 arrests with 4 694 convictions; in 2013–2014, there were 6 257 arrests with 4 043 convictions; in 2014–2015, there were 5 847 arrests with 1 176 convictions; and from April 2015 to September 2015, there were 1 038 arrests with 288 convictions. See BusinessTech 'South Africa's top corruption unit arrest rate down 83%' (29 October 2015) available at https://businesstech.co.za/news/government/102545/south-africas-top-corruption-unit-arrest-rate-down-83/.

The committees' indifference to arguments against the disbanding of the Scorpions motivated the HSF to return to Parliament on the issue of public participation in the development of the Overview. The publication of the Overview on the eve of the August parliamentary hearings on the draft legislation made it very difficult for Taljaard and Leon, or any of the other concerned parties, to discuss it in any detail. According to Taljaard, an article that appeared in the *Sunday Times* of 17 August 2008, entitled 'We may not listen but still we'd like to hear from you', convinced her to return to Parliament on 9 September.

To illustrate Parliament's failure to comply with its constitutional obligation to facilitate proper public participation, in her second submission, Taljaard relied heavily on the Constitutional Court's decision in *Doctors for Life*.[14] In *Doctors for Life*, Justice Ngcobo clarified that the legislature has a wide discretion to decide how to facilitate public involvement in a specific case as long as it acts *reasonably* and affords the public a '*meaningful opportunity* to be heard in the making of laws that will govern them'.[15] Taljaard argued that the public would be afforded such a meaningful opportunity if members of Parliament, as public representatives, discarded their 'fears and frailties of perception' and sincerely considered the questions raised. Parliamentarians should act honourably, asking themselves whether they had considered properly all angles in arriving at a decision, or whether they had merely obeyed their party whip. Predetermined opinions that were formed before public hearings undermined public participation. Also, to participate meaningfully in the legislative process, members of the public require access to all the necessary information. In this case, their access to the broader policy framework document – the Overview – was wholly inadequate.

Once again, the committees failed to address the HSF's concerns about public participation in its response to the parliamentary submissions. For Leon and Taljaard, this confirmed their concern that Parliament was not interested in entertaining arguments opposing the disbanding of the Scorpions and was merely rubber-stamping the ANC's Polokwane resolution.

Helen Suzman served as a member of the South African Parliament for 36 years, 13 of which as the sole representative of the liberal Progressive Party. As a lonely warrior, fighting against the apartheid government from

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[14] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

[15] Emphasis added.

the inside, and often the sole voice of the disenfranchised majority, one can imagine that the right to public participation in the new democracy must have been especially significant for this formidable parliamentarian. Through their arguments and presentations, Taljaard and Leon tried to give effect to Helen Suzman's legacy, best described in her own words:

> I hate bullies. I stand for simple justice, equal opportunity and human rights; the indispensable elements in a democratic society – and well worth fighting for.[16]

[16] Helen Suzman Foundation 'Mission' available at http://hsf.org.za/about-us/mission; also see Kathleen Sheldon *Historical Dictionary of Women in Sub-Saharan Africa* 2 ed (2016) 277.

Chapter 3

Report on the inputs made by the Concerned Members Group (CMG), addressed to the Portfolio Committee of Justice, regarding the Bill and political drive to disband the Directorate of Special Operations (DSO)

Willie Viljoen

Introduction

Anyone who has some understanding of organised crime, be it related to human trafficking, drugs, violence or commercial crime, would appreciate that it can only be effectively addressed when there is close co-operation between intelligence, investigations and prosecutions. This co-operation is encapsulated in the 'troika' approach that was employed by the Directorate of Special Operations (DSO), also known as the Scorpions. Furthermore, the best results are achieved when investigations are directed by prosecutors, who carry the overall responsibility. This is necessitated by the serious complications of legal disputes about the credibility and admissibility of evidence which are often key factors in a successful prosecution.

Organised criminals normally have the funds to afford the best legal practitioners who often walk over inexperienced prosecutors, particularly those who lack a passion for justice. This formed part of the foresight of Bulelani Ngcuka in the establishment of the DSO – and did we, the DSO, not prove that point in practice?

It was not an easy ride for members of the DSO, who encountered professional jealousy from fellow National Prosecution Authority (NPA) members in the National Prosecution Services (NPS) offices, and who had no support from the SAPS – Mr Selebi and others often did their best to obstruct and undermine the DSO.

The political antagonism towards the DSO increased after members of Parliament were threatened with prosecution on charges of fraud, corruption and theft, relating to the 'Travelgate' saga. The antagonism towards the DSO increased substantially after the Travelgate saga and the environment within which the DSO operated became increasingly hostile. The DSO, its successes, its methodologies, its principles, and particularly its prosecution of persons irrespective of political affiliations ('without fear, favour or prejudice') became a thorn in the side of politicians in the ruling party. The DSO then fell under siege. When many of us had the privilege of hearing and seeing how the NPA leaned towards being politically correct, the Concerned Members Group (CMG) was formed in Cape Town, initiated and led by me and Adv Hayley Slingers, who was chosen as the chairperson of the group to address the parliamentary portfolio committee. For us, the constitutional principles about prosecutions and the passion for an independent and effective criminal justice system were the driving forces in our daily tasks and also in our opposition to the political drive to disband the DSO. We realised that the SAPS could never be independent, at least not with the same integrity as exhibited by the DSO.

The group was established in the Cape Town office of the DSO and consisted of most of the prosecutors and investigators. As the calls for the disbandment for the DSO grew louder, the CMG started getting support from the majority of the DSO members in the other regions, although many remained too afraid of the political consequences to join.

Our submissions received the positive approval of about 220 or close to 50% of the members of the DSO on a national basis. However, in the Western Cape office, 60 out of a total regional workforce of 80 supported the CMG submissions. This number included all ranks, investigators, prosecutors, support staff and administration. In KwaZulu-Natal, 56 members of all ranks expressed their support for the submissions, representing 64% of a total workforce of 87 members.

Initially we engaged the national leadership in the NPA on the position of the DSO. We did so by speaking and writing to them, but it soon became apparent that they had lost their passion for the DSO and would not fight for its continued existence. Consequently, we decided to establish the CMG. The establishment of the CMG was sternly opposed by the senior management of the NPA. In particular, a Deputy National Director of Public Prosecutions told Adv Viljoen and Adv Slingers that their conduct might be a 'career move', indicating it may result in dismissal or at least no promotion.

Unexpectedly, this was oil on the fire of people with a passion for justice and the prosecution service. It did not silence us but fuelled the fight for the continued existence of the DSO.

Adv Viljoen, the founder of the CMG, had 25 years of prosecutorial experience when the DSO was established in 2000. He had previously been involved in negotiations and prepared memoranda about the Prevention of Organised Crime Act 121 of 1998 and the Witness Protection Act 112 of 1998. Furthermore, he made substantive inputs regarding the principles and the amendment of the NPA Act, in order to establish the DSO.

Furthermore, Adv Viljoen is a principled man who performed his prosecutorial duty fearlessly and vigorously. Therefore, it was not unexpected that he, as a Deputy Director of Public Prosecutions and in charge of the organised crime investigations in the Cape Town office, was the person to drive the establishment of the CMG, assisted by a much younger, but equally principled and passionate, Adv Slingers.

After deliberations with other members of the DSO, the first memorandum of the CMG was sent to the Portfolio Committee on Justice on 28 July 2008. Here are some selective quotes from the first memorandum addressed to the portfolio committee, in which the CMG commented on the proposed Bills relating to the relocation of investigators to the SAPS and the disbandment of the DSO, dated 28 July 2008:

> **3. POINT OF DEPARTURE:**
>
> As loyal citizens of South Africa, of the NPA and the DSO, we wish to state categorically that:
>
> **3.1.** We are committed to the cause of combating organised crime, complex financial crime and corruption perpetrated at senior/high levels, in accordance with the DSO mandate, to contribute to achieve justice in our society so that everyone can live in freedom and security, to make the country a better place for all;
>
> **3.2.** That we are driven and motivated by a dedicated passion to fight crime in a professional manner and environment, in the interest of the country and all its citizens, in protection of our Constitution and the values it embodies, and in defence of our fragile young democracy, and that we are not influenced or dictated to by any party political objective, alliance, subordination or any scheme of insubordination;
>
> **3.3.** That our pride as patriotic South African citizens motivate[s] and drive[s] us to protect our fledgling democracy by embracing, upholding and supporting the constitutional values during the discharge of our

duties as investigators, prosecutors and support staff within the NPA. We believe that as such we are loyal to and serve the government of the day, and indirectly also the ruling party. We further humbly believe that the government of the day and our hard fought for constitutional values are best served when we are granted the space and freedom to conduct our work with the diligence and thoroughness we have exhibited in the past, and in accordance with the Constitution and the Law, as mentioned above;

3.4. That while we accept that no governmental structure can be perfect in all respects, and while we are open and amenable to any constructive criticism and improvement of our organization and its operations, including the consideration of an alternative structure within a different department, we humbly believe that what the DSO offers the country, as presently constituted and located, cannot be replicated in a different structure without weakening the fight against crime;

3.5. That we fully support the objective to strengthen the fight against crime, as expressed in the policy statements of the President in his State of the Nation Address and his response to questions based thereon, and expressed in statements and Parliamentary answers by the Minister for Safety and Security and guidelines provided by the JCPS Cluster of Government at a media briefing on 19 February 2008, and that whatever criticism is levelled against the proposed Bills or whatever statement is made in this memorandum, must be seen against that background and our overall objective to assist government in achieving these commendable goals;

3.6. That we do not wish to attack or disrespect any policy or political decisions that may have been taken by government or the ruling party, but that we humbly believe that some policies, decisions and conduct may have been misunderstood, which served to precipitate the unfortunate wording of the draft Bills;

3.7. That we are guided by that policy expressed by the President, the principles and values enshrined in the Constitution and what we believe to be in the best interest of the people of the country, and that we herewith wish to give our frank input on the proposed Bills, which is the first opportunity we have been granted in this respect, and which we beg to be interpreted as supportive of the presentation of the NPA and not to contradict anything expressed by our management.

The SAPS Bill

The SAPS Bill was, in the view of the CMG, fundamentally flawed in that it contained nothing that could strengthen the fight against crime, or could enhance the investigative capacity of SAPS with regard to organised crime, as it premised in its preamble. The disbandment of the DSO would rather weaken the fight against crime and lead to diminishing the country's capacity to deal with organised crime, corruption and serious economic offences. In essence, the CMG motivated its argument on the following grounds:

4.1. POLICY AND PREAMBLE:

The premise set forth for the disbandment of the DSO and the establishment of the Directorate for Priority Crime Investigation (DPCI), initiated by the President's broad policy statements, has been that it would strengthen the fight against crime. Using this premise to evaluate the Bill, it soon becomes apparent that nothing in the Bill holds any promise for strengthening the fight against crime. Rather, the proposals set forth in the Bill will act to weaken the fight against organized crime and corruption, thus not being in the best interests of the criminal justice system nor the ordinary everyday citizen who is affected by the unacceptably high crime rate.

In its preamble the Bill states that one of its objectives is to enhance the investigative capacity of SAPS with regard to organized and serious crime. The disbandment of the DSO will not achieve this objective. Thus both objectives of increasing the fight against crime and enhancing the investigative capacity of SAPS in respect of organized and serious crime do not necessitate the disbandment of the DSO. The argument which follows will attempt to show this.

4.2. MANDATE: SEC 16(2):

4.2.1. No reference to serious economic offences and corruption:

From the outset it should be noted that the DSO does not only investigate organized crime but also has a mandate to investigate serious, complex financial crime and corruption. Nowhere in the Bill is there any reference to the investigation of serious and complex economic offences and this *lacuna* is as serious as to make the proposed DPCI directorate ineffective.

Corruption has become so endemic that it should be specifically mandated, unless it is intended that the mandate of the DPCI should exclude corruption to avoid the criticism that is being levelled at the DSO as a direct result of investigating corruption at the highest levels. However, such motivation would be contrary to government policy, obligations, and the Constitution.

Instead of enhancing the fight against crime, the Bill will remove a functioning unit which addresses serious crimes of this nature (corruption and serious complex economic crimes) and will not replace it with a bigger better unit; instead, it will replace it with a unit which has no specific mandate (therefore no specialized skills or methodologies) to address these crimes.

4.2.2. Emphasis on 'serious crime', a SAPS function:

It is noted that there is no reference in the preamble to serious economic offences, but instead, a specific reference to 'organized and serious crime', which seems to take the focus from commercial crime, or the commercial nature of organized crime, which formed part of the DSO mandate, to violent crimes traditionally investigated by the Murder and Robbery units of SAPS, and which resorted squarely under the SAPS mandate, and not the DSO mandate. If that is intended to be the mandate of the DPCI, it cannot serve to replace the DSO.

While it has to be admitted that 'serious crime', which is interpreted as violent crimes such as murder, robbery and housebreaking, are at unacceptably high levels in the country for years, it must be stated that it does not reflect on the performance of the DSO, as some critics of the DSO intended to portray in the media, because it is not the DSO mandate. To the contrary, it reflects very badly on the competence and performance of SAPS. The Bill does not seem to address it in any way in terms of structure or methodology, other than including members of the DSO, who are unlikely to make a meaningful contribution to eradicate such crimes.

Irrespective of the performance of any agency to address such crimes, we suggest that such serious violent crimes demand immediate law enforcement intervention, which service can best be provided by a unit within a national police service with vast resources, local offices, and the required infrastructure and mandate to conduct immediate crime scene investigations, such as cordoning off of areas, forensic services and manpower to conduct extensive searches of an area and vehicles, roadblocks, and with general access to criminal intelligence and an extensive informant network. That has always been a SAPS function. It is only when such crimes are clearly initiated and orchestrated by identifiable criminal structures that a unit such as the DPCI could assist with investigations. The spate of violent crimes that are not perpetrated by an identified criminal syndicate should be regarded as part of 'ordinary' crime, which has always been the mandate of SAPS.

The DPCI, a statutory body in terms of section 16A(1)

There were at least eight stipulations in the Bill indicating that the DPCI would be a statutory body, which seemed to be irrational:

> Since it would not have any independence or any distinguishable and separate mandate, there is no reason for its separation from general SAPS structures, other than creating a false pretence, which is irrational. While we support the establishment of a statutory body, as motivated below, we cannot support its location under SAPS.
>
> We support the notion of a statutory body with the powers to investigate and prosecute the three categories of serious offences which form part of the DSO mandate, being organized crime, corruption and serious economic offences, amongst others for the following reasons:
>
> a) For purposes of checks and balances, independence from the general SAPS structures is considered an absolute necessity, particularly when the unit is also to investigate corruption within SAPS,
>
> b) To provide for a methodology where the multi-disciplinary functions of intelligence gathering, analysis, investigation and prosecution are combined in a single unit under a single management structure, which cannot be achieved under SAPS,
>
> c) To escape from the general bureaucratic workload of SAPS detectives and the professional jealousies that may abound, a unit has to be established where an environment and space is created for professional dedicated investigations that may take an unusual amount of time to complete,
>
> d) To escape from the normal extensive reporting lines and information sharing disciplines within the SAPS structures, which unfortunately create uncontrollable opportunities for leakages and interception by criminal syndicates,
>
> e) To provide for the inclusion of personnel with specialised skills, such as auditors, or others that do not need the normal SAPS training programmes, and to provide for special remuneration packages without the restrictions of general SAPS structures.
>
> However, from what is stated above, we cannot support the Bill where it locates the statutory body under [the] complete control and discipline of SAPS and advise that it should be a stand-alone body, including the above guidelines, albeit operating in close liaison with SAPS and all law enforcement agencies.

The DPCI indeed turned out to be nothing more than a division within SAPS. For example, many of the ex-DSO members of the DPCI were told that they would be relocated to be station commissioners at various levels, which had nothing to do with their expertise.

Lack of provisions

The powers and functions of a statutory body are derived from legislation. We pointed out that section 16B(2)*(b)* does not provide for or refer to the powers of the investigators in the new 'statutory body', which was another indication that they were assumed to be ordinary police members, making a mockery of the debate about a 'new independent body' under SAPS control to replace the DSO. There was not even a reference to general SAPS powers.

Power to summons: section 16B(5)

We pointed out that the inclusion of an interrogating process such as section 28(6) of the NPA Act is unconstitutional because it is the exercise of a prosecutorial function, and cannot be an executive function of a policeman. Secondly, we pointed out that the replacement of a compulsion to disclose information with a right to silence effectively emasculates the power, rendering it irrational and superfluous since it then equates with section 205 of the Criminal Procedure Act 51 of 1977.

4.5.1. Sec 28(6) of the NPA Act has particular legal and prosecutorial consequences and to grant SAPS members the powers to issue such summonses, would be to empower members of SAPS to take prosecutorial decisions and execute prosecutorial functions, which is an extreme example of a confusion of powers, and would be in conflict with the Constitution.

4.5.2. Sec 28(6) of the NPA Act is a very valuable instrument, but must be exercised sparingly and very responsibly, by a senior person in the prosecution services who has the power to decide on prosecutions, as the decision would have evidentiary consequences which could result in an acquittal of guilty persons if used incorrectly.

In essence and in brief, a person summonsed in terms of this section is indemnified against prosecution relating to information he provided (Sec 16B(7)(b)), as well as evidence derived from his information – 'derivative evidence' (see Park-Ross and another v Director Office for Serious Economic Offences 1995 (1) SACR 530 (C)). When a person is questioned in terms of the section, the interviewer has to be very circumspect as to how questions are formulated and what is asked. If a suspect is summonsed, or if a person is summonsed that could

be a suspect, or summonsed too early, a case could be irrecoverably compromised because no derivative evidence could be used against him/her. Since prosecutors would not be part of the new unit, and would not take part in the interviewing either, a prosecutorial decision would effectively be taken by the interviewer, a policeman. In effect, a summons i.t.o. Sec 28(6) of the NPA Act, or Sec 16B(5) of the amended Police Act, is a decision not to prosecute the interviewee, which decision cannot be taken by a SAPS investigator. The section is thus in conflict with the Constitution.

4.5.3. For unknown reasons, there is no reference to consultation or any other form of participation by the prosecution services, as one finds in Sec 417 of the Companies Act No 61 of 1973. While the new Directorate is supposed to investigate serious matters, most of which will only be heard in court after months of extensive investigation, it would be very unwise to pass such a bill where this specific section is considered unconstitutional and may compromise such serious prosecutions and render years of investigation fruitless.

4.5.4. It is provided in Sec 16B(7)(a) that such an interviewee 'shall not be obliged to answer any question if such answer would expose him or her to a criminal charge'. It leaves the discretion in the hands of the interviewee. However, the wording is such that the consequences of interrogation stretch much further than the right to silence regarding a confession or admission, and will include any derivative evidence. Any answer that may lead to further investigation, upon which that person could be indicted, would thus render the evidence inadmissible. This may in most cases not be evident while the interviewee is being questioned, and thus such power should never be left in the hands of anyone who do[es] not have the authority or expertise to decide on a prosecution.

4.5.5. While the NPA Act provides for compulsion to divulge information, even if it be self- incriminating, the unfairness of such compulsion is alleviated by the provision for indemnity of prosecution, similar to that mentioned in Sec 16B(7)(b). The amendment of the words of the NPA Act that such an interviewee 'shall not be entitled to refuse to answer any question', to the words of the Bill 'shall not be obliged to answer any question' is not motivated. The purpose of the provision in the NPA Act was to place certain persons with valuable information under compulsion to divulge that information, with the benefit that

it would not be used against him/her. When the compulsion to disclose all information is removed, the provision has no specific purpose and could be equated to Sec 205 of the CPA, and thus irrational and of no additional value.

4.5.6. The removal of the compulsion to disclose information raises the further question of whose discretion applies when the interviewee has to decide to disclose or to rely on the provision that whatever he/she discloses may expose him/her to a criminal charge. The wording implies that the decision is the discretion of the interviewee, which nullifies the effect of the provisions of Sec 16B(9)(b)(i) and 16B(9)(c)(i).

No additional manpower

We further indicated that the objective in the preamble of strengthening the country's capacity or capability to fight crime cannot be achieved by merely combining existing units of SAPS and the DSO, because no provision is made for any additional personnel.

Independence

Independence was a cornerstone of the DSO. Therefore, the establishment of a new unit under SAPS was severely criticised, where it could not have any independence at all, and where the Bill does not provide for independence.

5.1. A clean administration should be one of the objectives or guarantees a government should provide for, especially w.r.t. the ability to control serious crime, be it traditional organized crime or serious economic offences and corruption in the higher echelons of the administration. Independence of an investigation unit dealing with such offences is the only overall guarantee or 'checks and balances' that could command citizens' respect for (and assurance of) a clean administration. The provision in Sec 195 of the Constitution, that guarantees the basic values and principles governing the public administration, would be nullified if there were no independence in the investigation processes, particularly regarding corruption.[1]

[1] Upon the demise of the DSO, all prosecutions in the Travelgate saga abruptly ended.

5.2. If the proposals of the Bill are accepted, all investigations into serious crime would be functionally placed under political control, and could thus be politicized, resulting not only in different systems of justice applicable to citizens, depending on their association, but also to unnecessary insinuations and aspersions of corruption within SAPS, or amongst ruling party politicians. Such possibilities should be avoided at all costs.

5.3. Centralization of all investigative powers in SAPS opens the door for manipulation of investigations and creates an enticing opportunity for extensive and uncontrollable corruption, which should be avoided, particularly in this phase of our history where corruption is rife within SAPS. Where organized crime thrives on corruption, centralizing investigations under the exclusive control of one State department, which has allowed itself to be tainted and compromised over an extended period of time, is not advisable or functional. A constructive approach to enhancing the capacity and capability of the country to fight organized crime should rather focus on broadening the capacity and coordinating capabilities and functions of law enforcement agencies (cooperation between SAPS, DSO, NIA and other agencies), than on narrowing the crime fighting structures and compartmentalizing the functions (separation of investigation and prosecution).

5.4. In the light of the serious allegations of corruption within government, as well as within SAPS, implementation of the Bill would lead to further speculation about corruption, which could destroy the credibility of the SAPS and the government.

5.5. An independent body with the power to investigate any corruption, and specifically corruption in the higher ranks of government, is not only a natural control measure, but is absolutely essential to provide a guarantee to public and the outside world. Without such a body, all contracts with government become suspect and government loses standing and respect of the people and the international world.

Methodology: recipe for success or failure

The second most important cornerstone of the DSO was its troika methodology of uniting intelligence, investigations and prosecutions in one unit.

6.1. The relative success of the DSO could be attributed to the following factors:

a) Teamwork, where different disciplines are brought together to collectively benefit from discussions of issues, legal and operational, in an effort to seek and explore the best possible solutions w.r.t. investigations and prosecutions;

b) Methodology (troika) of unifying the three disciplines of intelligence (including analysis), investigation and prosecution in one single unit and under one command, thereby focusing on the gathering of court directed evidence;

c) Prosecutorial control, securing the admissibility of evidence and constantly ensuring that evidence gathering is court directed, in other words, that a prosecution and the nature of possible charges are directing the investigations;

d) Responsibility sharing, in that prosecutors share the responsibility for investigations with investigators, and vis a vis investigators sharing responsibility for successful prosecutions, bringing with it a natural atmosphere of responsibility and accountability;

e) Dedication of investigators and an enabling environment for them to achieve success without jealousy or competition with colleagues about workload issues;

f) Professional atmosphere created within the NPA, where investigators are considered and regarded as professionals, resulting in pride in achievement and service delivery, a professional standing in the criminal justice system, and besides ensuring thorough investigative work such as detailed statements of witnesses, also indirectly contributing to legitimacy and compliance with legal procedures;

g) Prosecution ready investigations, eliminating time consuming reviewing of dockets after investigators had completed their task;

h) The benefit of Sec 28(6) powers to put certain key role players under obligation to disclose information, which power is directly related to prosecutorial participation in the investigation process and accountability for the use of such powers;

i) The effective usage of plea bargain procedures, without which it would be extremely difficult to properly infiltrate or expose syndicates, be it in the serious economic or traditional organized crime fields;

j) Dedication to focus on the higher echelons of economic or organized crime syndicate structures, thereby addressing the management thereof, or the whole syndicate, and not merely the lower ranking criminals, for example, Masterbond, Leisurenet, Fidentia, Houtbay Fishing Co, and the Marx abalone syndicate in the Western Cape.

6.2. While a lot has been said about how relative the success of the DSO could be, the real success does not lie in statistical numbers of arrests, but in the fact that the DSO has been successful in uncovering syndicates and prosecuting all or most of those involved. A number of examples of DSO achievements could be provided if required.

6.3. The relevance hereof in context is that the DPCI would be a unit operating under SAPS command and control, with all the pitfalls of the past. While it is projected and canvassed as a revamping of the criminal justice system, it resembles a rehash of an old and failed methodology. It offers no guarantee of success and does not take the country forward. Any new statutory investigative body should include the assistance of prosecutors, who could add some independence and prosecutorial control, besides legal advice.

6.4. In the light of the alarming criminal statistics, not much can be said about the success of SAPS, and their attempts at addressing serious organized crime have not had the desired marked success (to put it mildly), in spite of SAPS holding a mandate and managing a unit to investigate such matters. It is thus necessary to look at what went wrong within SAPS, and to ensure that the same mistakes are not replicated in the new structure to be established. While we as DSO members have a high regard for our colleagues within SAPS and do not for one moment want to create the impression that we do not regard their achievements or the difficult circumstances of their operational environment, we want to suggest that a lack of better achievements in addressing serious organized crime could be attributed to one or more of the following factors:

a) No dedicated investigations, and investigators not being granted the enabling environment within which dedicated attention could be paid to lengthy investigations, without being pressurized by statistical objectives and workload jealousies;

b) Focus on Statistics and Numbers by SAPS management, an obsession with quick and short term results, and thus focusing on peddlers rather than on masterminds or syndicate structures;

c) Focus on arrests, mostly of peddlers, without properly investigating matters to ensure convictions of the syndicate leaders or organized crime structures;

d) No information security, leaking of information, and extensive reporting lines, due to the structures of SAPS;

e) Corruption, at many levels, creating an environment where information shared widely as [a] result of extensive reporting lines could easily be intercepted and shared with criminals;

f) No prosecutorial involvement or control, resulting in embarking upon legally incorrect operational methods, resulting in inadmissible evidence;

g) No prosecutorial direction w.r.t. what evidence may be needed, resulting in evidence being lost;

h) No proper adherence to prosecutorial requests w.r.t. outstanding investigations, which together with the short term objective of attention to arrests only, results in prosecutors being forced to prosecute with extremely limited evidence;

i) No shared responsibility, resulting in investigators blaming prosecutors or the law for acquittals, while prosecutors are at liberty to blame investigators for bad investigations.

6.5. While the details of the operational methodologies of the DPCI cannot be clearly ascertained from the Bill, it seems that many of the shortcomings of the past are replicated and will be perpetuated, which cannot serve to enhance the fight against crime.

6.6. Best practices have shown that while the methodology of completely separated functions (investigation and prosecution) may suffice for uncomplicated cases, it does not deliver results in the investigation of complicated matters, be it of an economic nature or organised crime or corruption.

Because the end goal of addressing organised criminal syndicates and structures is a prosecution, and because months and years may be spent on an investigation, it is an absolute necessity that a prosecutor who may be seized with the prosecution of the matter becomes involved from the beginning and steer[s] the investigation, placing a focus on what is needed as evidence for prosecution purposes, what would suffice, and what legal requirements have to be met in the investigative process to ensure the admissibility of evidence.

Independence of the prosecution

We pointed out that dissolving the DSO on the basis that investigations should be completely separated and not subjected to the independence of the prosecution could effectively diminish the independence of the prosecution, because it limits the prosecution to the information and evidence that the SAPS is prepared to disclose. That reduces the prosecution service to an inferior institution manipulated by the SAPS and its political control, and thus makes a mockery of the notion of independence.

Response to presentations

The Portfolio Committee of Justice heard presentations on 5 to 7 August 2008, and we were granted the courtesy of handing in our written arguments

and presenting oral submissions, which was done by Adv Slingers. On 20 August 2008, we responded in writing to questions put to us during the said meeting of the portfolio committee on 6 August and we also commented on other presentations:

Standpoint

Many of the CMG members have years of experience in prosecutions in all the courts of the country, including experience of all the investigative models that apply to criminal investigations. Many investigators have equal experience of investigating complex matters. While we accept that the traditional model, which forms the basis of the Bills, may work for the normal cases at lower courts, we have experience of how it cannot work when dealing with complex economic or organized crime or corruption, and we thus regard ourselves as being in a much better position than most inexperienced persons to advise government on the design principles (or success recipe) of an investigation unit to deal with these issues. This view is supported by the Society for State Advocates who work with the traditional model and experience its failing[s] in their daily dealings with serious corruption, organized crime and economic offences. In this regard we repeat that we align ourselves in essence with the submissions of the NPA, although we are less indulgent towards the compromise position adopted by the NPA regarding the future of the DSO. While we accept that some mistakes may have been made at management level in the past, we believe that the DSO embodies all the appropriate design principles and should thus not be dissolved, unless sound and rational grounds could be motivated for an even better solution to the serious crime situation in the country. However, we have not heard any such motivation during the full extent of all the submissions made during 5 to 7 August 2008.

In the course of the hearings, and after statistics of petitions had been presented, Mr Y Carrim stated that the government could not be bound by numbers and that a decision should be taken on the merits of the matter and not by means of [the] popularity of the DSO, in other words it should not be merely a populist decision, but a meritorious decision by government after careful consideration of all issues at stake. We fully support this view and responsible approach. While a number of general policies on lesser issues could be the subject of elections or referendums, we hold the view that the capacity of government and the country to combat serious crime, be it economic, organized crime or corruption, is so sensitive and of paramount importance that it should not be subject to party politics or populist ideas. While the views of vast numbers of people cannot be completely overlooked, only compelling rational considerations and arguments should be regarded as convincing motivation for government to dissolve the DSO, and/or to establish a new unit to strengthen the fight against crime. We have not heard any such compelling arguments.

COMMENTS:

We herewith further wish to comment on a number of issues raised in the course of the debate.

8. REVIEW OF CRIMINAL JUSTICE SYSTEM:

We were encouraged by the presentation of the Deputy Minister and want to support him and his team in achieving their goals. We take note of his reference (on page 10 of his presentation) to the USA judge remarking that 'The criminal justice system is a system of 200 years of tradition unimpeded by progress.' In contrast, the DSO was actually a complete break from an old stagnated CJS of a conservative previous order. It was progress. It was conceptualized by ANC members with vision and purpose and it has delivered. It deserves preservation, rather than condemnation or disbandment. We do not want to turn the clock back, as Mr Johan de Lange referred to his instructions at drafting the NPA Amendment Bill. We want to move forward, improving the DSO, or creating a new unit that could be objectively considered as an improvement.

We support the Deputy Minister in that weaknesses, blockages, obstacles and problems and resultant inefficiencies should be removed, that coordination between all law enforcement agencies should be fostered, and that a modernised CJS with a single vision and mission leading to joint objectives and priorities should be developed.

The CMG say that we already have such unity of vision and mission in the DSO, we are on board and are waiting for others to join, but we seriously question whether the objective of unity of vision and purpose could rationally motivate the disbandment of the DSO, or whether the disbandment could contribute to such goals. Where the Bills intend to separate investigations from prosecutions and do not make any provision for the role of lawyers in a complex investigation, they seem to be in conflict with the proclaimed objective of strengthening the capacity to fight serious crime.

We heard the Deputy Minister saying that there is not yet a constructive plan to deal with the challenge of white collar crime. This is obvious when one looks at the SAPS Bill. While the DSO has a working methodology and a valuable investigative instrument in the form of Sec 28(6) of the NPA Act, a *sine qua non* for serious economic investigations, implementation of the Bills would strip the country of such an effective institution, exposing the country to a new weakness, and possibly an even gloomier report on the CJS.

The exceptional[ly] high rate of serious violent crime in the country cannot be attributed to any failure on the part of the DSO because it did not resort under the DSO mandate, but under the SAPS mandate. It is thus SAPS that has failed the country and not the DSO.

There is no suggestion or any proof that the DSO prevented or obstructed the SAPS from delivering the required service, or that the DSO has been a weakness or caused any blockage in the system. Thus, the objective of the review of the CJS of eliminating key weaknesses and blockages in the system cannot be achieved by simply removing the DSO. It seems that the criticism of the DSO is not only misplaced, but is excessively exaggerated, creating the perception that the DSO is made the scapegoat for the failure of other components of the CJS, particularly SAPS, which we consider to be grossly unfair and irrational in respect of any decision to dissolve the DSO, and even worse, to relocate personnel and functions to SAPS.

The Deputy Minister listed a number of serious shortcomings in the CJS, without ever referring to the DSO as being responsible for any thereof. This is a significant observation because his department allegedly conducted a scientific analysis of the state of affairs and had access to all the issues raised in the submissions of those proposing the dissolution of the DSO.

The only aspect under which the decision to dissolve the DSO could vaguely be placed is a reference to fragmentation of the CJS, which also relates to a lack of coordination. The lack of cooperation and coordination of functions can be attributed to a deliberate policy of SAPS to refuse to work with the DSO, which is dealt with in Annexure B. The blockages to be removed are thus located within SAPS management and the SAPS policy. Once cooperation can be achieved, the legitimacy of and public confidence in the entire CJS could be regained, the image of SAPS would be improved, while retaining the expertise, efficiency and effectiveness of the DSO and the competence of its staff.

None of the criticism expressed in the submissions has indicated that the DSO model may not produce the best results or is not the best practice either. In fact, the policy followed by certain units within SAPS and the NPS is an attempt at creating a working relationship resembling the troika model of the DSO, with the difference that they follow a 'prosecutor guided' investigation (PGI) model, where the prosecutor has no final say or power in the matter and where the prosecutor has no independence w.r.t. the investigation because he/she has to depend upon the information given by SAPS. The IDOC experience has shown that such a model is fraught with serious shortcomings in control and accountability. The DSO was established because of that failure.

9. MANDATE:

The first motivation for the dissolution of the DSO concerns its alleged failure to deliver on its mandate. A number of presentations to the parliamentary portfolio committees of Justice and Safety and Security, particularly those of Ms B Madumise, the ANC, COSATU, POPCRU, SADTU, Umkhonto we Sizwe and also of Mr George Fivaz, referred to the Scorpions failing in their duty of properly

addressing their mandate to investigate organized crime. The committees were informed of an alleged general perception amongst the working class people that the Scorpions' mandate is to investigate and prosecute organized crime, and is not delivering on their mandate, as can be observed from the exceptionally high rate of violent crimes that affect society the most, such as murders, robberies, heists, ATM bombings and even rapes.

It is a mystery why even the ANC, which (as the ruling party) should have free access to all policies and principles of government institutions, does not seem to be aware of the extreme limitations of the DSO mandate and its limitation in dealing with serious violent crimes, or its policy and criteria on the selection of cases. If one excludes political malice, it seems that a lack of communication between the political leadership of the departments of Justice and of Safety and Security and the political structures of the ruling party may have contributed to misunderstandings, possibly resulting in incorrect negative perceptions of the DSO which in turn unfortunately influenced policy decisions. On the assumption that the lack of proper communication could be blamed on the leadership within the departments, we have a much better and sympathetic understanding of the emotional motivations for the relevant policy decisions, but with knowledge of the truth, these allegations are unfounded and irrational, and should not influence the future of the DSO.

The DSO does not have a general mandate to investigate all 'organized crime', but only those matters where organizations or syndicates are involved, and can only operate after receiving reliable information. This mandate was specifically restricted to reduce the overlap with the general mandate of the SAPS to investigate all crime in South Africa. (See Sec 7(1) of the NPA Act.)

The SAPS is the primary law enforcement agency and has the power and capacity to investigate crime scenes and compile information which may lead to the identification of a syndicate. However, SAPS never relayed any such information about the offences mentioned by the presenters to the DSO, because they consider it to be their exclusive mandate, thereby disabling the DSO to investigate such crimes or to fulfil the expectations of [the] public. While all these crimes that affect all communities directly fall within the mandate of SAPS, one may ask whether it is the DSO that failed the country or the police. It seems that the criticism of the DSO may be misplaced and that the SAPS, who have claimed exclusive responsibility of organized crime investigations, should be held accountable.

10. PERCEPTIONS OF INTERESTS SERVED BY THE DSO:

A second perception that was alluded to by some presenters (Me B Madumise and others) is that the DSO is not serving the interests of the working class people, which perception was presented to justify the relocation of the DSO to SAPS. However, even a superficial overview of some DSO cases in the Western Cape

would indicate that we acted and are acting in the interest of all people, including the working class, albeit not in a manner attracting the attention of all, and is thus easily ignored. The following may serve as examples:

The DSO is presently investigating the Fidentia fraud case, which includes the theft of an estimated R800 million from the Mine Workers Provident Fund, where orphans of mine workers, almost all black working class, were supposed to be beneficiaries. The rest of this investigation also concerns money of the working class that had been entrusted to Fidentia, but stolen by alleged white criminals. The first conviction has been recorded.

The first major Road Accident Fund fraud investigations and prosecutions (S v Pollard and S v Chohan & Mohammed – all attorneys) were successfully conducted by the DSO. The victims were mostly widows from the informal settlements that had lost a breadwinner in the house and were barely surviving. The perpetrators were not only convicted and sentenced, but most of the victims were compensated through the process to significantly advance their quality of life.

The successful investigation and prosecution of the directors of the Hout Bay Fishing Industry Co, where the company had been over-harvesting for a long time, benefited the smaller quota holders directly in that R60m was forfeited and made available for victim compensation, and by stopping the over-harvesting, more crayfish was available for previously disadvantaged small rights holders. This is a typical example of how the DSO dismantled and prosecuted a whole organized crime syndicate. The managers and leading officials of the fishing company were prosecuted and their proceeds of crime forfeited. The fishermen and boat owners, who conducted the over-harvesting and enabled the company to make exorbitant profits, were also prosecuted and their boats (instruments of crime) seized. Thereafter the 11 marine corrupt officials, who enabled the company to conduct its criminal activities, were also prosecuted and proceeds forfeited.

In the investigation and successful prosecution of the managers of the Golden Arrow bus company, where the subsidies granted by government on the bus routes for the disadvantaged people from the Khayelitsha area had been fraudulently misappropriated and some diverted to other routes, the DSO ensured that R46m [was] repaid to the Department of Transport and R6m paid in[to] the criminal asset recovery fund.

In the more traditional organised crime field, Colin Stanfield, one of the Cape's major drug dealers and organised crime bosses, was convicted and sentenced to imprisonment for tax fraud by the DSO, after the SAPS had attempted unsuccessfully for years to build a case of drug dealing against him. This success was mentioned in Parliament as a major breakthrough on organised crime and tax evaders.

12. FORMIDABLE FORCE:

Mr Fivaz alluded to the need for a formidable force to deal with the serious violent crimes which were conveniently referred to as organised crime.

Although the desire and need [are] supported, we wish to point out that such a force existed within SAPS in the form of Murder and Robbery units or Serious Violent Crime units. They can be resurrected without any legislative reform or affecting the DSO, and such argument is thus no motivation for the dissolution of the DSO.

Such units must have all police powers to act immediately on crime scenes and must have an extended information support structure in all local areas, as mentioned in paragraph 4.2.2. of our original submissions. The operational functions of such a unit are so vastly different from that of the DSO or any other unit that would deal with serious economic offences or the investigation of complex organised crime, that they cannot be combined in a single unit without leading to the paralysis of the one or the other and without leading to exceptional stress and discord amongst the members. The SAPS Bill intends to unify the two existing units of commercial crime and organised crime within SAPS, which would not create such a formidable force, particularly not when a strike force mentality is unnaturally combined with an auditing mentality. We suggest that the units remain separated, which suggestion is related to function and not to fragmentation.

On the assumption that 200 DSO investigators relocate, of which most have experience in investigating economic offences, it is unlikely that they would make a meaningful contribution to the 11 000 or more SAPS members in the field to create such a 'formidable force' or to enhance the capacity of SAPS to deal with the immediate serious criminal issued at hand. This objective can thus also not be obtained by dissolving the DSO.

14. PROSECUTORIAL INVOLVEMENT: THE BIGGER PICTURE:

To determine the need for prosecutorial involvement one is directed by the nature of the offence. A common law robbery docket may consist of a statement of a complainant, a possible witness to the event and may be an arrest of someone being found in possession of the stolen goods. All the evidence would relate to historic factual accounts of events and thus the traditional model of complete separation of functions between investigation and prosecution can apply. No legal input may be necessary during the taking of statements and no serious legal issues are foreseen.

When dealing with complicated or complex commercial and corruption cases the investigative scene changes completely in that the law is intertwined in the commission of the offences, because the offences normally include legal issues of interpretation, exploiting loopholes, circumventing legal requirements, bending

rules and legal prescripts, falsifying documents and applications etc. Quite often the offenders employ lawyers permanently to assist them with the legal aspects of their activities, in an effort to conceal their criminal intent. (A typical example would be the Masterbond case where the three main role players were a lawyer, a businessman and an auditor.) They constantly focus on defences against prosecution, and thus an investigation has to include legal experts, but not only w.r.t. interpreting conduct and documents, but also w.r.t. the investigative methodology used and the legal intricacies thereof. The manipulation of the law by lawyers is often part of the offence and thus the legal disentanglement thereof should be part of the investigation.

This equally applies to investigations of organized crime, particularly where covert action is taken and the admissibility of evidence gathered during covert operations is challenged. Because of the constitutional requirement of a fair trial, the State is obliged to disclose the investigation methods employed, unless there are privileges involved, which relate to the names of sources, and not the fact that sources were employed. For example, if a covert operation of some form of entrapment was involved, all detail thereof has to be disclosed, including the authorization obtained beforehand. Many cases have failed because such legal requirements were not respected by the SAPS investigating team. This is often overlooked by SAPS and has not been addressed by anyone supporting the dissolution of the DSO.

Where ordinary crime can be stopped by arrest as intervention, organized crime cannot be stopped as easily and only the successful prosecution of the leaders can bring an end to the criminal organisation. Thus a successful prosecution becomes the primary objective of the investigation and not an incidental consequence. Once a prosecution becomes the primary objective of any action, such as an investigation, it speaks for itself that a prosecutor has to be in control of the investigation, which has to be steered in accordance with prosecutorial objectives, requirements of the charges, ensuring that evidence is gathered on a focused basis and the investigation is guided in a focused manner.

When looking at the bigger picture and the serious threat of organized crime, the interests of the country are at stake and not the interests of individuals or political parties. Organized crime affects the country. For example, in the Fidentia case, the money and pension interests of thousands of people were at stake, and the criminal conduct of the perpetrators affect[s] the trust the public has in investment schemes, while our country needs investments to drive the economy and create jobs. The DSO and the methodology it employed concerns the criminal justice system, the efficiency thereof, and the respect it has in the public eye. It cannot be doubted that the DSO had huge successes in tackling organized crime, and earned the respect of the public. In the process it served the country and the present government. When deciding upon the new directorate, the CJS

has to be supported by a model that would serve the country best, and not a model driven by emotional, political (which could apply to any political party) or irrelevant motivations by people with no intention of listening or attending to the true facts. With the deliberate exclusion of prosecutorial involvement and control, the present Bill does not present the model, structure or methodology needed to successfully address organized crime, be it violent crimes, economic crimes or corruption.

16. SEPARATION OF POWERS:

The issue of a prosecutor being too involved in an investigation and that it may resemble a confusion of powers is based on a misconception of the role of the DSO prosecutor. As long as the rule that the prosecutor conducting the prosecution had not been collecting evidence him/her self and would thus not be a witness in his/her case (not fulfilling executive investigative functions) [is adhered to], no participation of a prosecutor could be seen as unconstitutional, as has been ruled by the Constitutional Court in paragraphs 51 to 68 of *S v Shaik and others* 2008 (1) SACR 1 (CC), where it was stated that even when a prosecutor is at a scene where a search is being conducted and advises an investigator as to what to seize or leave, such participation is completely admissible and does not render any evidence inadmissible or unconstitutional. His/her role in controlling or steering investigations is not unconstitutional. This case vividly illustrates the fine line to be drawn. The allegation that the DSO prosecutors are too involved in their cases is an unfounded red herring and should be ignored. In all the successes the DSO [has] had through the years, it has never been found that the prosecutor had crossed the threshold and has acted unconstitutionally. In this regard the committees are referred to the following quotation from the heading of the appellate division case of *DPP Western Cape v Killian* 2008 (5) BCLR 496 (SCA):

> The issue in essence was whether a criminal trial was unfair, to the extent of being entirely vitiated, because the person who officiated as prosecutor also interrogated the accused in an earlier statutory inquiry, the provisions regulating which denied the interrogatee the right to silence and the right against self-incrimination. [The forerunner of Sec 28(6) of the NPA Act.]

The Court on appeal held that the prosecution's mere possession of the inquiry record had not been shown to have prejudiced the fairness of the trial in fact. It would have been illogical and self-defeating, having obtained an inquiry report recommending criminal proceedings, to withhold the report and the inquiry record from the prosecutor. Presentation of the prosecution case was inevitably (and sufficiently) subject to the bar against direct use of the inquiry evidence and, further, subject to the trial court's control of the use of derivative evidence in general and derivative use of the accused's inquiry evidence in particular.

As to E's [the prosecutor's] dual role of initial interrogator and subsequent prosecutor, it was not clear, on the facts, how E was in an unfairly superior position [to] S [the former prosecutor that fell ill], in having conducted the inquiry. The only possible advantage, although not apparent from the transcript, was that E would have been aware (if they existed) of instances when first respondent appeared uncomfortable or at a loss when specific issues were canvassed, so that those could be concentrated upon in cross-examination. But first respondent would not himself have remembered such occasions and therefore have been in a position to brief counsel to object accordingly. In all other respects E would not have been able to make any better non-evidential derivative use of the inquiry proceedings than S. Derivative use was not absolutely excluded but was subject to the trial court's rulings according to what was fair. The same had to apply to non-evidential derivative use of the information obtained at the inquiry.

As to an argument that E's earlier role as interrogator robbed him of the impartiality or lack of bias required of a prosecutor, this raised an *ad hoc* issue of fact and did not compel a universal conclusion of procedural law. The additional knowledge and understanding which a prosecutor obtained in an investigatory position could not per se amount to bias or prejudice. Bias could not per se be inferred from E's dual role in the case.

There is thus no merit in the argument that the same person cannot investigate and prosecute in the same matter, and the notion of unconstitutional conduct by DSO prosecutors is thus to be excluded from the decision on the dissolution of the DSO, or the methodology to be applied by a new unit replacing the DSO.

It should also be remembered that in general, no prosecutor could conduct the prosecution in any serious matter without studying the matter in detail and 'living the case'. If that is not done, the failure rate would be much higher, which would not be in the interest of the country or justice. The PGI model advanced by the SCCU unit and the organized crime units recognizes the participation of prosecutors in investigations, also at an early stage. If the criticism does not apply to such prosecutorial involvement and is even supported by SAPS when they alleged that they accept the 'troika' principle, it equally cannot apply to the DSO. It seems the real objection against the DSO is its independence and control.

18. Political control not serving the country:

At various stages the DSO has been criticized for not being under proper political control. While that argument reflects badly on the political leadership of the Department of Justice, the criticism becomes irrelevant when parliament has to evaluate the CJS and acknowledge that the failure to curtail the serious violent crimes that affect every citizen could be attributed to underperformance of SAPS, which is the law enforcement agency responsible for the investigation of such matters, and which falls under full political control. The alarming crime rate serves

to prove that political control is no saving grace or guarantee of success, but only an escape mechanism for corruption.

Political control should not be confused with political accountability. The CMG respects the principle that there has to be political accountability for all actions and performance of the NPA. However, the Society of State Advocates has a long history of fighting for the independence of the prosecution services, dating back to 1986 when 'the democratic revolution' was at its peak. (After years of negotiations with government, it led to the Attorneys General Act of 1992, which for the first time statutorily acknowledged the independence of the prosecution services.) The independence of the prosecution services is also an internationally accepted norm. It thus should not surprise that it is protected in our Constitution. As stated in par 5 of our original submissions, independence from political control is considered a vitally important requirement for the investigating unit responsible for investigating serious corruption, which is invariably intertwined with economic offences or organized crime. The attack on the DSO for not being under political control thus raises serious questions about the true motives for the political drive to dissolve the DSO. The CMG respectfully suggests that independence from political control of the DSO or any unit in its place would serve the interests of justice and the international esteem of the country, and would be upholding constitutional values, and that it should be avoided to take a decision that may jeopardize such constitutional values.

19. Constitutional obligation to protect all citizens:

With regard to the obligation of the State (government) to protect everyone through appropriate structures and legislation, it would be appropriate to refer to the case of *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) in par 44, where it was held that the human rights enshrined in the Constitution binds and obliges the State to provide the required protection.

(Ms Carmichele successfully claimed that members of the South African Police Service and the prosecutors of Knysna had negligently failed to comply with a legal duty they owed her to take steps to prevent Coetzee (the rapist) from causing her harm.)

In par 4.2.1. of our original submissions we referred to the lack of provision for the investigation of serious economic offences or corruption. In paragraph 5 thereof we referred to the need for the independence of the unit investigating serious allegations of corruption and why it would not be wise to centralise the control over all investigations in one unit, namely SAPS. In paragraph 6 thereof we referred to the requirements of an appropriate methodology and referred to some of the explanations for the relative success of the DSO, and some explanations for some of the shortcomings of SAPS. A number of independent institutions, such as IDASA, ISS, the Helen Suzman Foundation, the Society of State Advocates,

and the Centre for Study of Violence and Reconciliation, made compelling submissions in favour of retention of the DSO, or at least a unit based on the same design principles. None of these submissions could be faulted for being biased, emotional or made with any questionable motive. The submissions were also based on solid and sound rational arguments, and not on incorrect facts or irrelevant nit-picking of isolated incidents. These impartial submissions should be seriously considered by parliament, since any decision on a new unit that may not be undisputedly a significant strengthening of the criminal justice system, may be irrational and subjected to litigation on the basis of not providing protection of all citizens through appropriate structures and legislation.

21. Political agenda:

It has been suggested that the DSO is unfairly targeting ANC members and is not focusing on its mandate to fight organized crime.

Firstly, the issue of an alleged biased political agenda concerns the policy and criteria of case selection, and the allegations against the DSO expose another lack of insight or understanding of the DSO mandate and policies, which again reflect on a lack of communication between the political leadership within the Justice Department and the ANC.

Secondly, it is noted that it was not suggested that the DSO is fabricating evidence against anyone or is prosecuting innocent people, but simply that we are exercising our discretion in case selection in a biased manner. Contrary to what can be gleaned from statistics of DSO cases through the years, it seems that organizations associated with the ANC imply that the DSO is following incorrect priorities, and that it should focus on criminal activity that may even fall outside of its mandate, but should leave politicians alone to their own devices. Such bias to favour politicians would be unconstitutional. If that argument may carry any weight, then the contrary, namely the lack of any investigations against political figures by SAPS, provides a forceful argument for not dissolving the DSO or relocating any members to SAPS. It seems the criticism of bias could be interpreted as an alarming confession of the real motive for disbanding the DSO.

Thirdly, corruption and fraud or theft by politicians and government officials should always be seen in a very serious light, irrespective of their political affiliation, because of the trust society puts in its political leadership, which trust is based on an assumption of integrity. People tend to follow the examples set by their leaders. Ironically, we note that the ANC stated in par 2 of its submission that the objectives of the national democratic revolution (NDR) cannot be realized without a significant reduction in organized crime and corruption. We support that view and have to accept that the principled position of the ANC applies to all parties, including transgressing members of the ANC itself. We are thus serving the ANC in an attempt to realize the objectives of the NDR.

> Fourthly, because the ANC is the majority party by far, it speaks for itself that simply on the basis of numbers, many more members of the ANC could be subjected to investigations. There should thus not be any sensitivity about it. In investigating corruption, the DSO is not discriminating against any political party, but is only executing its mandate without favour or prejudice.
>
> Fifthly, corruption normally implies a corruptor, who is likely to be a civilian, and a corruptee, who is likely to be a politician or a state official. Because the opposition parties do not hold any position of power, it would not serve the interests of any organized criminal to waste time on an attempt to corrupt such a member of the opposition. It should thus not surprise that if a political figure is investigated for corruption, it is likely to be a member of the ruling party.

On 1 October 2008, Mr Carrim held a teleconference with various parties, including the CMG, pretending to comply with the obligation of consultation. A debate of issues was not allowed; however, we responded in writing on 8 October 2008 by saying the following:

> At the said teleconference it was disclosed that whatever our views may be, a decision has been taken by the majority party that the DSO investigators should be relocated to SAPS and they have set their mind on the 4th model. It was mentioned that this decision was partly based on a perception, be it correct or not, that the DSO has been politically influenced in its case selection. It would not be rational for parliament to build its decisions on perceptions, rather than on fact. Secondly, this revelation creates the perception that the new unit (OCU) would be under political control to ensure that its case selection is politically sanctioned. So much for perceptions.
>
> It should also be placed on record that most of the presentations to the committee in support of the DPCI or a similar new institution to replace the DSO, referred specifically to the exceptional high rate of violent crimes in the country, such as heists, house and business robberies, ATM bombings etc. Even Mr G Fivaz referred to these crimes as the focus area for revision of the CJS. None of these major issues fall under the mandate of the DSO, but fall squarely under the obligations, functions and responsibilities of SAPS. The focus of parliament should thus be on those pressing issues, and not on reviewing an institution that has worked well and has delivered. There is thus no pressing need to push any legislative reforms through parliament without proper consultation and without guarantees that the new unit would indeed deliver the service that is required.

> The capacity and ability of the country to fight serious crime is such an important issue that fiddling with its functional institutions [has] to be considered very carefully. It is in these circumstances not of any assistance to request all DSO members to cooperate and give the intended new unit a chance. There would not be any opportunity for any reverse of decision and thus such plea has very little merit, however much its sincerity may be appreciated.

In closing

Our concern about corruption and the inability of the DPCI to address the scourge has been vindicated in recent history. All our fears and predictions have been proved correct.

Chapter 4

Glenister Two: *The litigation in the Western Cape High Court*

Peter Hazell SC*

On 16 March 2011, I sent a message to this effect to my good friend and former colleague at the Cape Bar, Paul Hoffman:

> Judgment in our Concourt appeal's being handed down tomorrow. I'll be moving house so please monitor the sitch and let me know the outcome.

Next morning, while I sat beside the driver of a removal van, *schlepping* my worldly goods from Hout Bay to Harfield Village, an SMS came in from Paul:

> You may be pleased to know that we won our appeal with costs, including your own!

I was pleased. Hugely!

These tidings, coupled with the new beginnings that come with moving into a new abode, soon elicited what, in my book, are the only two good things President Jacob Zuma has ever done as our leader. First, he paid for the state of the art 'Jacob Zuma' Samsung 44-inch flatscreen TV set that soon graced the wall facing the couch in my Harfield Village cottage. Then he paid for the 'Jacob Zuma' Samsung Blue Ray DVD player that was acquired and installed *chez moi* e'er long. Its '*seeounserroun'* from six speakers was wonderful while the undercarpet speaker wires lasted and before some *boewe* broke in and took parts of my system home with them.

(When I say Zuma paid for these fine toys, I don't mean immediately, or personally. I mean eventually – very eventually, in fact! – and, *nogal*, after much wastage of taxpayers' money!)

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* Junior counsel for Bob Glenister in *Glenister Two*.

But these events form no part of the narrative I'm *supposed* to be telling you, which started more than two years earlier.

I became involved in *Glenister Two* in January 2009. The first email in my Bob folder is dated 30 January. It's from Paul to Kevin Louis, then of Wertheim Becker Attorneys. Paul says, *inter alia*:

> If you are agreeable I would like to bring in that old activist, Peter Hazell, as my junior. He is willing to act on contingency and as we are both in Cape Town and work well together, there is some sense in having counsel sitting together settling affidavits and working up heads.

It must have been late in January that Paul asked me if I'd like to come on board as his junior on behalf of Bob Glenister in proposed litigation to challenge the legislation leading to the demise of the Scorpions and their replacement by the Hawks. The main basis for this challenge would be that the relevant laws were irrational and accordingly unconstitutional.

I jumped at the chance to help Paul take on team Zuma. Win or lose, I had no doubt that here was a sound cause for any advocate to espouse. It was aimed at protecting all of us from the rampant corruption so rife everywhere in South Africa under the wretched Zuma's watch.

(This is hardly surprising given that our head *honcho* was mired in no fewer than seven hundred and eighty-three unresolved charges of fraud, corruption, money laundering and racketeering! I know it takes less time to write '783' but I've catered for the highly unlikely eventuality of Zuma reading my contribution to this book one day – perhaps in prison! From seeing how he struggles with what his speechwriters write, most of us know how No 1 battles with reading large numbers!)

When I joined team Glenister, it was with a strong sense of the rightness of our quest but with little knowledge of the facts. With most things, Paul knows more than I do. In this instance, however, his superior knowledge stemmed from his deep immersion in *Glenister One*.

In that matter, Bob, a successful, but also public-spirited, businessman of the highest moral fibre (forgive the apparent oxymoron, which is definitely not true *in casu*!), with eyes fixed firmly on the greater good, challenged the Cabinet's announcement of its intention to implement certain resolutions taken at the ANC's December 2007 National Convention at Polokwane relating to the creation of a single police service.

The most significant of these were that the Directorate of Special Operations (DSO) or the Scorpions should be dissolved and the relevant legislative changes effected urgently.

It was clear to all right-thinking members of the South African public that there was but one reason for these resolutions: the Scorpions were being too independent in zealously going about their corruption-busting business, breathing hotly down the necks of various corrupt people in high places: Jacob Zuma, for example! But also Tony Yengeni, Bathabile Dlamini, Ruth Bhengu, Nyami Booi, Thaba Mufumadi, Nosiviwe Mapisa-Nqakula, Ndleleni Duma, Ngoako Ramathlodi and Jackie Selebi.

The De Klerk Foundation's Centre for Constitutional Rights, then headed by Paul, became involved in *Glenister One* as *amicus curiae* to the Concourt.

The court dismissed Bob's application on the basis that it was premature. In a system of checks and balances, there are three tiers of government: the executive branch, controlled by the President and his Cabinet, which prepares and initiates legislation; the legislative branch which passes laws in Parliament; and the judicial branch, where criminal and civil disputes are determined by the courts.

In such a system, it would be inappropriate for the Concourt to decide in advance that Parliament and/or the President would not perform their statutory tasks in accordance with constitutional requirements.

No order was made as to costs, but Bob had to foot his own legal bill and ended up millions of rands out of pocket.

Happily, Kevin (who later left Wertheims to practise as Kevin Louis Attorneys), Paul and I were willing to act on a 'no cure, no pay' basis in Bob's next constitutional crusade: *Glenister Two*.

As stated above, I knew little about the case when I joined the team. I gradually learned more. And the more I learned, the more convinced I became that the merits were insuperable: we must surely win!

I know that we arrogant advocates, safely closeted in our ivory towers, 'far from the madding crowd's ignoble strife', are supposed to remain dispassionate, and should look objectively at both sides of any argument. But when it comes to espousing causes, especially good ones, it's easy – at least for some of us – to be carried away by our own enthusiasm.

By the time I sat at Paul's side during the Concourt hearing on 2 September 2010, I was convinced that right was on our side and that we could only win.

At that stage I had not yet acquired my much-needed, life-changing hearing aids. In the result, I could hear the lucid arguments put up by Paul, on Bob's behalf, and by the silver-tongued David Unterhalter SC for the Helen Suzman Foundation as *amicus*. But I heard nothing that fell from the lips of various Concourt justices, whether erudite or not!

We won! 'O frabjous day! Callooh! Callay!'

But only by five votes to four. Phew!

Johann Kriegler (one of the 'Three Musketeers') later told Paul, 'A win is still a win', no matter how close. But that was scarily too close for comfort! And how did four of the Concourt Justices come to a completely wrong conclusion is what I want to know.

(Behind the scenes, Johann was always a wise and ever-willing sounding board for Paul and me. He opted to be Porthos, in case he felt like a jar or two of red wine. Paul was Aramis. I dubbed myself D'arting Jong: I liked the dash and youthfulness of my chosen *nom de guerre*!)

Kevin started putting together a draft of Bob's founding affidavit. Paul's email of 17 February included:

> Nice start Kevin, more of round two is needed: the flaws in the public participation process, the bussing in of loads of cheerleaders to the road show in the provinces to drown out reasoned opposition. The urgency now is that the assent means that the DSO eggs will be scrambled very soon and unless invalidity intervenes it will be increasingly difficult to put Humpty Dumpty together again. The correspondence recently exchanged and the significance of the refusal to let the matter take its course through the courts are the reason why we need direct access. I have not seen any changes to the draft application I sent you and Peter where invalidity of the pair of acts is all we claim besides urgency and costs.
>
> Ms Slingers and Daan Groeneveldt (a retired human resources management practitioner) are beavering away at the HR aspects, so let's get tidier with the affidavit by pruning and putting in more meat on the urgency and participatory democracy denied us. The missing refs to the international obligations are in IDASA's submission to parliament on the bills.
>
> Peter is working up direct access so may want further facts in support there and I am working on the opposition in relation to the derailing of public participation. Let's not forget the Doctors for Life stuff either.
>
> I will work through the draft founding affidavit when it is completed (hopefully tomorrow).

Things were starting to happen!

Paul's email of 21 February included:

> Peter and I met with Daan Groeneveldt, an HR boff, on Friday and he is preparing a report for the case that looks into the HR implications to show that the system is being corrupted by the two Acts.
>
> Peter has been putting final touches onto the founding affidavit, and Willie Viljoen et al are marshalling the DSO input.
>
> I have put together a first draft of the heads so we can make sure that the factual foundation for the points made is in the papers. The political parties I approached have proved useless. Kevin, can you put an intelligent secretary or clerk onto an internet search for chapter and verse (on) the roadshow. We have Maggie Sotyu off pat, but need someone who was shouted down by the ANC bussed in louts to say participation in the process was nullified by the antics of the ANC.
>
> Here are the first thoughts for the heads, tentatively offered and subject to much improvement and expansion; they are a tool to keep us on track with the weird and wonderful story we have to tell in our founding papers.

On account of the hot sun, my borderline narcolepsy, and the esoteric nature of a turgid topic, I nodded off during a meeting with Daan on Paul's stoep one summer afternoon. But a quick dunk in his pool had me up and running, alert, and taking notes again in no time.

My email of Monday, 23 February to Paul included this:

> I have made the changes we discussed on Thursday as well as various further changes I thought necessary or worth making. Some are cosmetic; others put things into the past tense to cater for the difference between the situations then and now; and others are to deal with the later passing of and assenting to the legislation.

In a fax to the State Attorney on 24 February 2009, Kevin pointed out that there was a group of employees of the National Prosecuting Authority (NPA) which called itself the Concerned Members Group (CMG). Some had drafted affidavits in support of Bob's case. Their evidence went to the rationality, reasonableness and fairness of the Acts. Management had instructed the CMG not to make these affidavits available. Kevin said this gagging was illegal. The drafts would be put before the court with an explanation *re* why they weren't attested. The right to call *viva voce* evidence was reserved.

Paul's email of 3 March included this:

> I had lunch with Willie Viljoen (of the DSO) yesterday. He tells me that July or later is the actual envisaged implementation date and the weekend reports are inaccurate.
>
> In these circumstances our urgency grounds for direct access are a little thin. Rather than run the risk of being biffed technically by the Concourt again, let's start out in the CPD, where Traverso AJP will give us a decent full bench and go from there to the Concourt. Then the technicalities will fade away and the meat will have to be dealt with properly when the matter gets to the Concourt. The allegations supporting direct access [should be] changed to plain urgency and the grounds for an interim interdict pendente lite. [If] we are right on only one of the seven points we raise, we are home – so let's not take unnecessary risks on direct access when we can get an interdict regardless of the outcome on the validity aspect.

In the final papers put before the Western Cape High Court, we advanced seven main points:

1. The passing of the NPAA and the SAPSA Acts was arbitrary, in that their enactment was not rationally connected to a legitimate governmental purpose.
2. The scheme did violence to the principle of accountability, the importance of which is asserted in sections 1*(d)*, 41(1)*(c)* and 195(1) read with section 195(2) of the Constitution.
3. Based on the evidence of the late Daan Groeneveldt, the point was taken that the legislative scheme was unfair, in that the two statutes took no proper account of the constitutional requirement of section 195(1)*(h)* that good human resources practices should be observed by the various branches of government.
4. The legislation bedevilled the Republic's international obligations. Section 231 of the Constitution, read with section 198, provides that the Republic's international agreements are binding.
5. The public participation process was flawed, to the point of being a farce.
6. The Acts defied the constitutional imperative not to undermine values enshrined in the Bill of Rights.
7. The statutes offended section 179(4) of the Constitution. This enjoins the NPA to act without fear, favour or prejudice.

Various incidents during my three years of prosecuting and 34 years at the Cape Bar are indelibly imprinted in memory. However, regarding our appearance in Desai J's court on 2 and 3 June 2009, my mind's mush!

I suspect that when we heard Desai would preside over our bench, we may have reconsidered Paul's 3 March prediction that Traverso would allocate 'a decent full bench'.

In this regard: in response to my inquiry *re* what he could dredge up about the hearing and the atmosphere in court, Paul emailed:

> The highlight for me, or lowlight perhaps, was when, with reference to the research on the acceptability of the Scorpions, Desai J said that the electorate had nullified the research by voting for the ANC and its policies around the Hawks in the general election of 2009. He assumed that the electorate reads; knows about the replacement of the Scorpions with the Hawks; and makes an informed decision. I think not.

Desai J's intervention is not one that should appropriately have left judicially impartial lips.

We both remember that Adv Willie Duminy SC, who acted for the state, dealt us a low blow by handing us an application to strike out reams of our supporting papers just as the judges were about to walk into court.

We managed to take this set-back in our stride, putting our heads together after hours to pull together a persuasive argument opposing Willie's sneaky move.

When, on 26 February 2010, Desai J eventually handed down reasons on behalf of Fourie J, Zondi J and himself, he didn't even mention the striking-out application. Such lapses happen when judges take an inordinately long time to hand down reasons in matters of crucial public importance.

(Willie forgot all about his application until he saw he was losing in the Concourt. When he tried to resurrect it, Ngcobo CJ told him, in the nicest judicial way possible, that he was not going to accept a thick wad of paper during argument. He effectively said: don't try to lumber this court with a striking-out application *after* the eleventh hour.)

On the rationality issue, Bob was *klapped* in the Cape on the basis that the establishment of the Directorate for Priority Crime Investigation (the Hawks) within the framework of the SAPSA Act was 'manifestly designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes and other crimes'. This, so it was held, was 'a legitimate

governmental purpose' sought to be achieved by means which 'appear[ed] to be rational'. The decision was thus 'rational and (could) certainly not be described as arbitrary'.

Our other six points were held to fall within the Concourt's exclusive jurisdiction.

When not launching last-minute striking-out applications, Willie is a charming chap who also produces excellent Andante gold medal-winning extra virgin olive oils on his farm, *Wereldsgeluk*, near Porterville.

He is married to the delightful Lisa. Besides being a devoted wife and mother, Lisa used to moonlight as my pianist many years ago.

(Okay, I'm wandering off the topic. I make no apology: I've admitted remembering nothing about appearing before Desai. Paul's brief said we should include the 'human interest' angle. Koko's story below is linked to Willie, both by marriage and by music albeit with the most gossamer of connective tissue. And in contrast to the boggy feeling of short shrift with which Desai's judgment left Paul and me, at least justice finally prevailed in the tale I'm about to tell.)

So, here goes:

Practically tone-deaf from birth, I decided to tackle the chromatic harmonica in 1984. Through sheer, obsessive determination, I managed to learn many classical, jazz and pop pieces over a period of about 20 years, probably forfeiting yet another wife along the way.

(On a good day, I can still play Bach's *Air on a G String*, provided only that I'm allowed to start on the first note and end on the last and that nobody asks me to read any of the dots.)

Lisa and I would practise a new piece over stolen lunchtimes and then attend monthly meetings at my teacher Vincent van Rooyen's Cape Town Harmonica Club in a hall somewhere in the northern suburbs, in order to perform our latest piece triumphantly. I was always a bundle of nerves but Lisa read music fluently and played beautifully.

(The age of many members of the club was such that it was unwise to ask them how they were, in case they told you!)

During this period, I acted *pro amico* in two appeals for Koko, the grandson of my char, Alexandrina Hleli of the 600-watt smile and the cheery 'Heh! Heh! Heh!'s, no matter how bitter the blows life dealt her.

Koko wasn't the sharpest knife in the drawer. A magistrate, relying on a *soi disant* confession, had convicted him of rape.

Koko said he'd confessed falsely because the investigating officer had told him that if he didn't, he'd not get bail. He needed his job to help support his *gogo* and the family. I was convinced he'd been framed by a lying complainant and duped into 'confessing' by the cop.

So determined was I to convince two Cape judges of Koko's innocence, and so determined were they that I would fail, that argument ran into a second day.

How, the bench kept bleating, could the confession neatly fit the complainant's case, unless Koko was guilty?

Overnight, I typed my last-ditch argument, styled 'Scenario': a postulated exchange between the cop and Koko, consistent with both the probabilities and Koko's innocence – the locations in the 'confession' had been fed to him during interrogation.

My Scenario bombed the next morning!

So, off I eventually flew to the Appeal Court in Bloemfontein. My briefcase held five copies of my maverick document: one for each of the three judges, one for the prosecutor and one for me. I didn't know if I'd use them, but at least I was prepared!

The senior judge was Grosskopf JA. One of the other two was Milne JA who, as I soon learned, had a splendid sense of humour.

For present purposes, the only important thing about Grosskopf is that he is Lisa's dad. He must have spilled the musical beans *re* Lisa's pianistic role in my life to his fellow judges.

My appeal went swimmingly. By teatime, it was clear that it was 'game over' for the State but I decided, 'What the heck, why not hand up my out-of-the-box offering!' I told the judges I wouldn't bore them by reading it, but submitted that if they'd cast a casual eye over my conjuring, they'd see that what I'd postulated as explaining Koko's innocence made sense.

Milne glanced briefly at my Scenario and, with a mischievous twinkle in his eye, wryly asked, 'Mr Hazell, does this come with any musical accompaniment?'

Litigation can have its lighter moments. And this was surely 'a gem of purest ray serene'!

There was also a heart-warming sequel: Koko's release from Pollsmoor was ordered but, due to an administrative mess, he languished there. I can't recall how I wangled it, but late in the afternoon of Christmas Eve, I managed to have him released into my care.

I drove my ears-wide-grinning *pro amico* client to his *gogo*'s home in Langa. His rapturous family came tumbling out of their tiny dwelling to embrace him as Koko emerged from my motor car, spreading joy exponentially!

I count this among the most satisfying moments of my career.

Finally, here's a shout-out to Paul's impressive ability to draft court documents. Given enough time, or under sufficient pressure, I too can draft papers that say what needs to be said, and in reasonably good English. But if time is available, I tend to use lots of it, with my mind fidgeting endlessly about what to say and how to say it.

Paul and I spent many hours together, drafting and tweaking affidavits supporting Bob's case and drawing heads of argument, etc. I was amazed by the efficiency with which he coherently dictated what needed to be said. It all seemed so effortless!

Admittedly, the man had the advantage of familiarity with the facts of *Glenister One*. But even those had to be martialled and there was also much new material. I was constantly impressed. As the late Berman J would have said, 'His mind worked like a well-oiled machine.'

You'll think mine must be wandering again when I tell you that, from mid-1963, I spent a year in De Pere, Wisconsin as an American Field Service (AFS) exchange student.

(For some historical perspective: JFK was assassinated in November 1963; the Angels made a hit of 'It's my party' that year; and the Beatles 'turned left at Greenland' and toured the States in February of the following.)

But no, my mind's not out to lunch, and I'll tell you why: I had a sponsor (of fled name) at AFS headquarters in New York. Her job included liaising with me *re* whether I was gelling with my host family (I was) and making arrangements to ship me home *toute suite* if I was ever caught driving a car, an absolute AFS no-no.

This lady was alarmed that I'd chosen Beginners' Typing as an elective subject. 'Peter,' she scolded, 'You're going on to university. You should be tackling more challenging subjects.' 'No,' said I, 'I'm here on a social exchange program, so the challenging stuff can wait till later.'

I joined the Freshmen in Miss Devine's typing class, took up my position behind an ancient Remington machine and went 'jjj space' and 'fff space' till I'd hear the moving carriage go 'ping'. Then I'd sling a silver-coloured handle to the left to send it zinging back again.

I gradually became proficient at touch typing with the three rows of letters on the QWERTY keyboard and scored well on my tests.

Given that the computer age was just around the cosmic corner, my stubborn – and (okay, I'll admit it!) lazy – insistence on that typing course must, in hindsight, have been one of the best decisions I ever made! Regrettably, I slacked towards the end when we were supposed to learn touch typing on the top row, where the numbers lurk.

If I relax and let my fingers go, I can still type fairly quickly to this day. My muscle memory works well with words. But, sadly, I have to look at the numbers.

(My bad, back in 1964! But who shall blame me? I was kissing lots of girls and having loads of fun!)

This was the way Paul and I would work together: I'd arrive in Noordhoek *circa* 09h00. ('Eggy time', we called it: we're both still children at heart!) I'd glance at the *Cape Times*; Paul would add finishing touches to our food: fresh basil from the garden for the fried tomatoes to go with runny scrambled eggs on toast, for instance.

After that, we'd grab mugs of coffee and head for the study. I'd take up my post behind Paul's laptop and he a position on a couch of sufficient comfort to encourage clarity of thought.

We'd then begin our day's work.

When he recorded Buona Vista Social Club, Ry Cooder wrote on the sleeve: 'Cuban music flows like a river.' What I say is that Paul's dictation flowed like Cuban music! Not too fast and not too slow: just so!

I managed to keep pace with my senior on the keyboard. Now and then I'd holler, 'Wait up, we need a comma back there!' Quite frequently – for I am Old School! – I'd call a halt to carefully unsplit one of Paul's infinitives. *Ag*, I mean carefully to unsplit! Sometimes, I'd suggest an alternative *mot juste* more suitable to our purpose than Paul's proposal. These would invariably find favour.

At times I'd work on researching law.

My main after-hours homework was proofreading our productions. I'd correct the typos, spelling errors and lapses in syntax that invariably creep into any long document. Sometimes I'd even come up with suggestions for improvements of a more material nature.

Where I really came into my own was in the matter of formatting: right and left justification; section headings in bold capitals; appropriate paragraph breaks, correctly numbered; putting quoted passages into indented italics, with quote marks at either end; indenting sub-paragraphs and sub-sub-paragraphs, *etc*.

For doing this, I make no apology. Content – of which Paul contributed the lion's share – is undoubtedly highly important. But, having frequently acted as an external examiner for Master's theses in the Department of Maritime Law at UCT, I can assure you that layout, tidiness and a good first impression can make a world of difference!

In the light of the above, it's small wonder that Paul has ofttimes described me – not entirely in jest! – as 'the best paid typist in Africa'. But this was only after we'd won our Concourt appeal 'with costs' – as Paul put it in that SMS of 17 April 2011 –'including [my] own'.

Chapter 5

Polokwane, the Scorpions, and Glenister One

Paul Hoffman SC*

I first met Bob Glenister in February 2008 at the breakfast buffet of the Protea Hotel in Illovo, Johannesburg, which shares a parking area with the Wanderers Club. Given our respective schedules, a breakfast meeting was all we could manage. Bob, a businessperson, was based in Johannesburg; I was based in Cape Town, and visited Johannesburg infrequently. At that time, I was still director of the Centre for Constitutional Rights, and our panel of experts was due to meet at the club later that morning. This is why I was in Johannesburg, and briefly available to meet Bob.

Bob's attorney, Kevin Louis of the firm Wertheim Becker, had phoned me and asked me to meet Bob about the ANC's resolution – passed at its National Conference at Polokwane a few weeks previously – to dissolve the Directorate of Special Operations (DSO), or Scorpions, the anti-corruption unit in the NPA, and replace it with a unit based in the South African Police Service (SAPS).

Bob, like many right-thinking South Africans, was horrified. He was also concerned about the leadership change at Polokwane, where the 'Zuma tsunami' ousted the Mbeki team. As a businessman with a considerable investment in South Africa, he feared the worst if the state machinery for combating corruption were to be abolished, and was so appalled by this prospect that he was prepared to do something about it. But what? This was the issue we met to discuss.

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* Counsel for the *amicus* in *Glenister One*, counsel for Glenister in *Glenister Two* and *Glenister Three*, a director of Accountability Now.

In *The Dream Deferred*, the Mbeki biography released in November 2007 – just before Polokwane – Mark Gevisser had written:

> I knew, from his confidantes, that Mbeki was deeply distressed by the possibility of being succeeded by Zuma, and that he believed his deputy's play for the presidency to be part of a strategy to avoid prosecution. ... Mbeki allegedly worried that Zuma and his backers had no respect for the rule of law, and would be unaccountable to the constitutional dispensation the ANC had put into place if they came to power. … For Mbeki and those around him, a Zuma presidency was a scenario far worse than a dream deferred. It would be, in effect, a dream shattered, irrevocably, as South Africa turned into yet another post-colonial kleptocracy.

By the time I met Bob for breakfast, a Zuma Presidency was a racing certainty. This was because of the relationship between the national and ANC presidencies, and how this got out of sync at Polokwane. Or, more accurately, how Mbeki sought to disrupt this relationship, and it got back in sync – albeit brutally – at Polokwane. The South African President is elected by Parliament at its first sitting after a general election. While, in theory, any member of Parliament could be elected, this effectively means the ANC elects its President. The ANC President, in turn, is elected by the ANC's National Conference, which is also held every five years. So is the party's Deputy President, who (in terms of the template established by Mandela's succession) is meant to succeed the party President, and eventually ascend to the national Presidency.

Mbeki and Zuma were elected as ANC President and Deputy President in 1997, and re-elected in 2002. They were also elected as national President and Deputy President in 1999, and re-elected in 2004. Due to the two-term limitation in the Constitution, Mbeki's national Presidency would expire in 2009. However, there is no term limit on the ANC Presidency. (At Polokwane, the ANC resolved to introduce a time limit as well.)

In ordinary circumstances, Zuma would or should have peacefully succeeded Mbeki at Polokwane, and ascended to the national Presidency two years later. However, following Mbeki's dismissal of Zuma as Deputy President in June 2005, after Zuma had been implicated in the Shaik corruption trial, Mbeki decided to contest the ANC Presidency for an unusual third term.

Had Mbeki won the leadership contest, he would presumably have determined the party's candidate for the national Presidency in two years' time, and remained the power behind the national throne. However, a month

before our meeting, the 'Zuma tsunami' (a term coined by Cosatu general secretary Zwelinzima Vavi, then one of the Zuma conspirators, who later bitterly regretted this decision) had swept Mbeki out of the ANC Presidency, and his followers out of key positions in the party and subsequently in government.

Like many businesspeople, Bob was worried about the future under the regime feared by Mbeki, and was keenly aware that the Constitution was the last line of defence. An unrestrained elite would soon steal South Africa blind, bringing all hopes of a happy and prosperous 'rainbow nation' future crashing down with it. Bob views all politicians with a healthy degree of scepticism, but detests crooked ones especially. When he arrived at breakfast, wearing his trademark black leather jacket, he was accompanied by his attorney, Kevin Louis, and Alf Cockrell, his junior counsel. The leader of his legal team, David Unterhalter SC, was out of the country. The subject for discussion was what to do about the impending dissolution of the Scorpions.

Ironically, the Scorpions were a creature of the ANC. The decision to 'urgently establish a special and adequately staffed and equipped investigative unit to deal with all national priority crime, including police corruption' was announced in June 1999 by none other than Thabo Mbeki, newly minted as national President only a week or so before. The nature of the decision and the perceived urgency surrounding it suggested, and still does, that Mbeki was privy to information which indicated that the country needed the Scorpions sooner rather than later.

Following this policy decision, the DSO was devised and established by Bulelani Ngcuka, National Director of Public Prosecutions, and the Minister of Justice, Penuell Maduna, who later became one of the panel of experts of the Centre for Constitutional Rights. Staffed by more than 500 people, the Scorpions began operating in September 1999.

The Scorpions worked in terms of a 'troika' principle under which investigators, prosecutors and forensic intelligence experts collaborated on dealing with organised crime and corruption. Global experience has taught us that criminal prosecutions are vital; there is no doubt that a culture of impunity takes root rapidly when corruption is not investigated and convictions are not secured. The Scorpions set out to combat corruption in a co-ordinated, and therefore more efficient, way.

The literature on susceptibility to corruption is similarly instructive. It shows that 10% of the global population is corrupt, no matter what; 10% is incorruptible, no matter what; and 80% can go either way, depending on the circumstances. This means that, given effective anti-corruption measures, most of the 80% can be deterred from engaging in corrupt activities. If, however, such measures are lacking, the 80% are more likely to succumb to temptation, mainly because they believe they can get away with it. In an African context, in particular, this gives rise to a culture of impunity, and the development of post-colonial kleptocracies. The morphing of popular liberation struggles into the politicians' struggle for untrammelled power is the history of much of post-colonial Africa.

By adopting a supreme Constitution, including a Bill of Rights, South Africans set out to do better than countries to our north. Significantly, however, the 'Zuma tsunami' also involved another resolution, ostensibly taken in the interest of the 'constitutional imperative for a single police service', that the Scorpions be dissolved, and that 'members performing policing functions' should fall under the SAPS. Mirroring Mbeki's concerns, but going the other way, the resolution added that the relevant legislative changes should be 'effected as a matter of urgency'.

Was the decision to disband the Scorpions the proverbial 'canary in the coalmine', a warning that the country was veering away from the rule of law and toward the failed state status of so many of its neighbours to the north? These were the issues weighing on our minds as the summer sun shone on us in the hotel eatery. Bob had a bold strategy in mind: he wanted to use public interest litigation to nip the deviation from the proper administration of criminal justice he saw in the decision to disband the Scorpions in the bud. The problem with this strategy was that, given the doctrine of the separation of powers entrenched in the Constitution, the courts usually defer to other spheres of government; when governance problems arise, they like to be approached as a last resort, and not the first.

The Polokwane resolution in respect of the Scorpions amounted to an instruction to the ANC's parliamentary caucus, and ultimately the national executive, to abolish the Scorpions and replace them with a unit in the SAPS. Parliament was still in recess, and the executive had done nothing yet to start the process of dissolving the Scorpions and creating the Hawks. It was conceivable that the executive would not act on the resolution, or that Parliament would baulk at passing the necessary legislation. The problem facing deferential judges sitting in the matter that Bob had in mind is that

they would not know how the processes of law-making would unfold, whether the Scorpions would, in fact, be dissolved and what would be put in place to replace them. The Cabinet would need to decide to act on the resolution, and instruct the government law advisers to draft the necessary legislation. The Bill would then be tabled in the two houses of Parliament, referred to the relevant standing committees, returned to the National Assembly and the National Council of Provinces in amended form, voted on, and sent to the President who, if satisfied with its consistency with the Constitution, would sign it into law.

In order to persuade a court to intervene, it was necessary for Bob to plead 'exceptional circumstances' in that, once the legislative process had been completed, it would be too late for the courts to intervene in the normal way, and that an urgent intervention in the form of an interdict and declaratory relief was indicated. Determining what 'exceptional circumstances' actually means is like asking about the length of a piece of string. As for being without a remedy, much the same applies: it depends.

Bob was aware that top Scorpions' staff were leaving in droves, unimpressed with the prospect of a future in the SAPS, and willing to sacrifice their state pensions for prospects in the private sector. The state had spent a lot of money on training the Scorpions' investigators. Some had attended courses at the FBI in the United States, and others at Scotland Yard in the United Kingdom. If the Scorpions were dissolved, its accumulated expertise would be dissipated and its institutional memory destroyed, thus fatally undermining the national project of fighting corruption. Almost certainly, the Hawks would not investigate the top politicians in whom the Scorpions were taking an interest. (This has since proved to be the case. The former National Police Commissioner, Jackie Selebi, and the Northern Cape politician, John Block, are the only 'big fish' convicted of corruption since the Scorpions were disbanded. Both, however, were still investigated by the Scorpions.)

In the Protea Hotel, the coffee grew cold as the discussion heated up in the crucible of arguments on the issues. The lawyers, as they usually do, looked at the downside of taking on the state. Bob asked me how I rated his chances of success. I replied that unless he took action, he would never know, but that if he did nothing the Scorpions would almost certainly be disbanded and their accumulated expertise dissipated, thus allowing the worst of the burgeoning feral elite to save their skins.

'Will your Centre back us if we take them on?' asked Bob. I replied that it probably would. I explained the non-confrontational and co-operative ethos of the Centre for Constitutional Rights to Bob, and promised him that I would, at the meeting I was about to attend, propose that we participate as *amicus curiae*.

The issues in the case would impact upon the extent of the constitutionally guaranteed independence of the NPA, the efficiency and effectiveness of corruption-busting and the enjoyment of guaranteed human rights by all. The separation of powers among the judiciary and other arms of government would play a decisive role, our treaty obligations related to combating corruption would be implicated, and the lot of those who depended on the state's social security net would be affected.

Money lost to corruption does not find its way to the poor; it is spent on fast cars, slow horses and loose living. In the first twenty years of democratic South Africa, some R700 billion has been swallowed up by corruption – more than twice the amount needed to eliminate the housing backlog of some 2.1 million housing units, and enough to train the competent teachers so badly needed from ECD to matric, equip them to teach in their learners' home languages, and work in properly equipped schools and classrooms.

The issues in the case that Bob was contemplating, as we asked for more coffee, were huge. It would also almost certainly cost him a lot of money. He fiddled with the sugar sachets, but showed no other signs of nerves about making a call that would change his life and those of many others. 'OK, let's do it,' he said. 'Where do we start?'

A discussion ensued on what he would need to place before the court. Evidence of the motives behind the resolution, information about the rate of attrition among Scorpions staff, and contextual information about the growth of corruption were all needed. Assembling the necessary affidavits would be a massive task. Cockrell and Louis looked at each other with a mixture of alarm and anticipation. The Cabinet would probably move more rapidly to implement the 'urgent' ANC resolution than the papers for the case could be prepared. Therefore, it seemed safe to prepare them on the basis that the Cabinet decision would be the point of attack. Section 2 of the Constitution makes it clear that any law or conduct inconsistent with the Constitution is invalid. Therefore, any Cabinet decision to forge ahead with dissolving the Scorpions via a legislative process could be characterised as conduct inconsistent with the Constitution. I went off to the panel of

experts meeting in the Wanderers Clubhouse, leaving the other three to sort out the logistics of the huge task Bob had given his lawyers.

I was pleased to find that the members of the panel were also very concerned about the ANC resolution, and supported the idea that the Centre should intervene as an *amicus*, should the opportunity present itself. An *amicus* is permitted to join in proceedings if it has something to add to the arguments already ventilated by the antagonists. It was also likely that opposition political parties would want to make capital out of the case, and would also seek to intervene as *amici*.

A few weeks later, Bob found himself in the coffee shop below Kevin Louis's office in Johannesburg. He was asked to wait there as the final touches were being put on the founding affidavit. By then, the Cabinet had indeed decided to initiate the legislation needed to disband the Scorpions, and the case was built around assailing the decision as unconstitutional. Bob was now more aware of the huge and intimidating extent of the challenge. He hesitated and pondered. He felt the need for a sign, so he selected a sugar sachet at random from a bowl on the coffee shop counter, and read the inspirational quote on the back. The quote on his sachet read: 'Be the change you want to see in the world – Mahatma Ghandi'.

This was all Bob needed; he swore to the founding affidavit without further hesitation. He was taking on the full might of the state, in an urgent application to the Pretoria High Court to stop the dissolution of the Scorpions with immediate effect. He was paying his legal team top dollar to argue the case, in the knowledge that if he did not proceed, the Scorpions would almost certainly be destroyed, with significant consequences for the country's future.

The first step was an urgent application, brought in March, in the Transvaal Provincial Division of the High Court for an interdict restraining the government from initiating legislation that would disestablish the DSO. The application was brought by Bob, with the African Christian Democratic Party, the Democratic Alliance, the Independent Democrats, the United Democratic Front and the Inkatha Freedom Party as *amici curiae*.

Predictably, the State's legal representatives argued every technical point available to them. After reserving judgment, Judge Willem van der Merwe delivered his judgment at the end of May. A strong argument, he said, had been made on the applicant's behalf that this was an exceptional case in which the separation of powers should be ignored, and a court should

interfere with the right of the executive to initiate legislation. A High Court should only interfere in this way in exceptional circumstances, and the facts in this case did not make it an exceptional one.

Besides this, the matter involved crucial political matters. Given these two factors, the High Court had no jurisdiction to decide the application. However, he said, it 'could fall within the jurisdiction of the Constitutional Court'. In line with this finding, the application was struck off the roll.

Bob was spared the costs of paying for opposing counsel. All the parties agreed that, because the matter was urgent and constitutionally significant, no order as to costs should be made. This effectively meant that Bob would pay his own legal team, and the state respondents would pay theirs. Bob's team immediately drafted an application for leave to appeal to the Constitutional Court, alternatively seeking direct access.

Following this ruling, Parliament continued to process the Bills drafted to give effect to the Polokwane resolution, and the subsequent Cabinet decision to implement the resolution. This process involved the appointment of a joint ad hoc committee drawn from the police and justice portfolio committees in the National Assembly. This procedure was necessary as amending the law in respect of the NPA involved the Justice Portfolio Committee, while establishing a new unit in the SAPS – to be called the Directorate for Priority Crime Investigation (DPCI) or Hawks – involved the Portfolio Committee on Police.

Bob organised a petition which was eventually signed by more than 100 000 people. He went to Parliament, and made representations to the joint committee. So did the Centre for Constitutional Rights, the Helen Suzman Foundation, IDASA, and even a Concerned Members Group (CMG) from within the NPA. All these interventions were to no avail; ANC MPs were only interested in how best to implement the Polokwane resolution, and not in whether it was constitutional, rational or desirable.

Maggie Sotyu, co-chair of the joint parliamentary committee, in particular, was not interested in hearing submissions regarding the advisability of the scheme to shut down the Scorpions, and only wanted to hear how this could best be done. The constitutionality of depriving the country of its independent and effective anti-corruption machinery of state and the impact of this on its place in the world, as well as its international obligations were of no concern to her. The instruction from the party bosses in Luthuli House was on the table, and it was her job to put it into effect.

This kind of conduct, widely referred to as the 'rubber-stamping' of executive decisions, has the effect of weakening Parliament as an oversight and accountability body to which the Cabinet and the public administration are answerable, and this has certainly happened in South Africa. Its weak Parliament is a direct result of the proportional representation system utilised for national and provincial elections, in terms of which citizens do not vote for candidates in their own constituencies, but for a political party, which chooses its own candidates. This does not happen at the local government level, where people vote for ward councillors as well as parties.

This national and provincial voting system has been in place since 1994. Initially provided for in the interim Constitution, it was meant to be a stop-gap measure which would allow the 1994 elections to proceed in the simplest possible way. The final Constitution carried over this system, with minor modifications, to the 1999 elections. In 2002, the government appointed a 13-member electoral task team, chaired by Frederik van Zyl Slabbert, former leader of the opposition in the apartheid era and co-founder of IDASA, to draft legislation for the 2004, and subsequent, elections. The majority of the commissioners proposed a mixed proportional representation and constituency system, similar to that in Germany. However, the government accepted the view of a minority, said to have 'toed the ANC line', that proportional representation should continue. Commenting on the outcome, Slabbert declared it was 'obvious, from the outset, that the government did not really have a serious appetite for changing the system'.

This is hardly surprising, as the current system reduces the accountability of members of parliament to voters in specific constituencies, and makes it easier to force MPs to toe the party line. Besides being nominated by their parties, and the likelihood of their getting into Parliament depending on their positions on the party lists, MPs also lose their seats when they cease to be a member of the party on whose list they were elected, unless the floor-crossing schedule to the Constitution is invoked. The prospect of losing one's parliamentary seat, salary and fringe benefits works wonderfully to concentrate the minds of parliamentarians, including finding all sorts of reasons for doing exactly what their party bosses tell them to do.

And so it was with the draft legislation to dissolve the Scorpions, and transfer its functions to the SAPS. The public participation process in Parliament was farcical, and the outcome a foregone conclusion. Outside Parliament, the Secretary-General of the ANC, Gwede Mantashe, openly acknowledged that the motivation for dissolving the Scorpions was that

ANC members under investigation by the Scorpions needed to be protected against this intrusion.

This perspective was illuminated by the parliamentary 'Travelgate' scandal, which broke in early 2005. Initially investigated to little effect by the police, but then handed over to the Scorpions, it turned into a major embarrassment for the ANC when scores of its members were compelled to plead guilty to defrauding Parliament by abusing their parliamentary travel privileges, to the tune of R18 million. MPs entered into plea bargains which saved them their jobs, on condition that they would pay back the money.

The Constitutional Court heard Bob's application on 20 August 2008. In advance of the hearing, it issued a direction that it wanted to hear argument on only one point, which it framed in a way that did not bode well for Bob's initiative:

> [W]hether, in the light of the doctrine of the separation of powers, it is appropriate for this court, in all the circumstances, to make any order setting aside the decision of the National Executive that is challenged in this case. The sole question for decision is therefore whether it is appropriate for this court to intervene at this stage of the legislative process.

The Centre for Constitutional Rights nevertheless decided to participate as an *amicus curiae*, and launched an application to do so with the kind assistance of the *pro bono* department of the legal firm Bowman Gilfillan. As it seemed likely that the case would be lost, but the legislation to follow could still be impugned, we decided to lay the groundwork for the litigation to come by attacking the structural and operational flaws in the new and pending legislation. The UDM also briefed counsel, Michael Osborne of the Cape Bar, to argue the matter as an *amicus*.

Accordingly, there was a host of counsel at court on the morning of 20 August 2008. The Chief Justice, Pius Langa, met us in the ante-room beside the court in his usual friendly and understated way. When I asked after his health, he quietly replied, 'I am well, in spite of the content of the letters you write me' – a wry reference to the correspondence about the disciplinary proceedings against the Cape Judge President, John Hlophe, who, in May 2008, had been accused by all the Justices of the Constitutional Court of interfering with their deliberations on a judgment affecting the rights of Jacob Zuma. The batting order and time allocations were quickly sorted out: Bob's team would go first, followed by the two *amici*. The state would respond after lunch, and Bob's team would get a chance to reply.

It was clear from the outset that the court felt that there were no exceptional circumstances which would justify intervening in the legislative process at this early stage. David Unterhalter is a skilled and persuasive advocate, but nothing he pulled out of the hat seemed to have an impact.

The Centre for Constitutional Rights was next up. I rose with trepidation. Again, nothing I said seemed to make the slightest difference. The Justices were not interested in deviating from their default position of deference to the executive and legislative arms of government. My submission that the court should not sit on its hands and do nothing while an institution as valuable as the Scorpions was being destroyed by a resolution passed for the basest of reasons, only seemed to irritate the judges further.

Michael Osborne rose next, with similar results. While he was arguing, Alf Cockrell lent over to me and said, *sotto voce*, that the fate of the Scorpions was sealed. It therefore came as a surprise when, after lunch, Justices Yacoob and O'Regan sharply criticised the way in which counsel for the state argued its case. Justice Yacoob was particularly severe in respect of a mendaciously worded affidavit by the then Director-General of the Department of Justice, Menzi Simelane. Simelane later became the first National Director of Public Prosecutions in the Zuma administration, only to be unceremoniously deposed by the courts.

Justice Yacoob felt the deponent was trifling with the court, and voiced his displeasure in no uncertain terms. Eventually, counsel wisely abandoned the contents of Simelane's affidavit and argued the case on points of law. The separation of powers and the deference that the courts owe to the other two main branches of government, the executive and the legislature, formed the basis of the argument presented.

With a good deal of prescience, Justice O'Regan taxed counsel with questions about the effect of the scheme to disband the Scorpions on South Africa's international obligations under the United Nations Convention against Corruption to maintain an effective and independent anti-corruption entity. They assured her that this aspect would be taken into account in drafting the new laws. Nothing that David Unterhalter argued in reply seemed to make an impact. Cases are seldom won on the strength of argument in reply, and it seemed as if Bob's case would not be an exception.

We did not have long to wait for a judgment. The court found – unanimously – that the case was premature. If Bob did not like the end-product of the legislative process which was still underway, he was free to

return to court after new laws had been enacted. The Chief Justice himself wrote the decision. Acknowledging the wide public interest in the matter, he wrote it in a way that would make the judgment accessible to lay readers as well as lawyers.

After reviewing the factual background, Justice Langa stated that the court was dealing with the constitutionally mandated power of the executive to initiate legislation, and the power of the legislature to enact it. Reasons for justifying intervention by the Constitutional Court in this instance should at least demonstrate material and irreversible harm that could not be remedied once the legislation had been enacted.

The applicant had argued that judicial intervention was appropriate because of the negative effect of the draft legislation on the daily operations of the DSO. In particular, the applicant's counsel had pointed to information that many DSO employees had resigned, and argued that this was occurring because of the plan to disestablish the DSO, which would have a material and irreversible effect on the DSO, undermine the State's capacity to render basic security, and harm the constitutional order. There would be no remedy in the future, because by then it would be too late.

First, Justice Langa noted, this argument was premised on the assumption that the legislation would be enacted without material change. However, Parliament might choose to amend the legislation, or not to enact it at all. Second, it was not clear that members of the DSO were leaving because of the decision to disestablish the DSO. Even if they were, this would not necessarily constitute irreversible harm sufficient to warrant intervention. Institutions often experienced times of change and uncertainty as well as high levels of staff turnover, which in this instance were not extreme enough to warrant intervention.

The applicant had also argued that the President and the Cabinet were seeking to disestablish the DSO because a number of ANC members had received its unwelcome attentions. Again, if this argument had any foundation, appropriate relief could be sought in due course.

The UDM had argued that the executive was following the dictates of the ruling party rather than its responsibilities in terms of the Constitution. In his view, Justice Langa noted, there was nothing wrong with the Cabinet seeking to give effect to the policy of the ruling party. In so doing, however, the Cabinet had to observe its constitutional obligations. If the eventual legislation breached the Constitution, it could be declared invalid.

The UDM had also argued that, having regard to what it refers to as 'the relative marginalisation of the legislature' and the dangers of one-party domination, the court should act because no one else would. Langa could not agree.

> 'The role of this court is established in the Constitution. It may not assume powers that are not conferred upon it. Moreover, the considerations raised by the UDM do not establish that irreversible and material harm will eventuate should the court not intervene at this stage.'

Finally, the Centre for Constitutional Rights had argued that the draft legislation posed a significant threat to the independence of the NPA, and would harm the structure of the Constitution. This argument assumed that the draft legislation would remain unchanged during its passage through Parliament. The court could not make this assumption, and had to proceed on the basis that Parliament would observe its constitutional duties. If the draft legislation did threaten structural harm to the Constitution or the NPA, Parliament would have a duty to prevent such harm, and it would be inappropriate for the court to intervene in the process of law-making on the assumption that Parliament would not observe its constitutional obligations. Again, should the legislation turn out to be unconstitutional, appropriate relief could be obtained thereafter.

Given this, the applicant had not established that it was appropriate for the court to intervene in the affairs of Parliament in this case, and had not shown that material and irreversible harm would result if the court did not intervene. In the circumstances, both the application for leave to appeal and the application for direct access to the Constitution Court were refused.

While the judgment had run against us, it opened the door for a determined litigant to take the matter further once the legislation had found its way onto the statute book. Although it was a victory for the government, it was a victory on the narrowest possible basis, with the court declining to make any unnecessary findings in refusing the relief claimed by Bob. All of the arguments concerning the validity, legality and constitutionality of the scheme to disband the Scorpions and replace them with the Hawks were still very much alive. While the government had won the first battle, there was still a war to come.

Chapter 6

Glenister Two *and the judgment of the Constitutional Court*

Paul Hoffman SC*

> There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.
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> **Moseneke DCJ and Cameron J,**
> **writing for the majority in *Glenister Two*, 17 March 2011**

Imagine identical twins, one an incurable optimist, the other an inveterate pessimist. When confronted with a large pile of fresh and steaming horse manure their reactions betray their default disposition.

The pessimist says: 'Yuck, who is going to clean up this smelly mess?'

The optimist exclaims: 'Yippee, there must be a pony nearby, let's see if we can catch it.'

Bob Glenister and Raenette Taljaard are not identical twins, but they are both optimists. Most of their compatriots (those outside the ANC) regarded its Polokwane resolution to close down the Scorpions urgently with pessimism. Few were prepared to do anything about the 'smelly mess' that the dissolution of the most successful corruption busting unit

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in the history of their country produced. Indeed, only around 100 000 out of a population of some 50 million put their signatures to a petition against the disbandment of the Scorpions which Bob promoted with his usual energy and vigour. Raenette, then the director of the Helen Suzman Foundation (HSF), took a more measured approach to the problem posed by the Polokwane resolution. She persuaded the trustees of the HSF to brief Webber Wentzel attorneys to make representations to the parliamentary committee seized with the creation of the amending legislation involved in replacing the Scorpions with the Hawks from a draft supplied by the executive branch of government. The representations were duly and ably made by Peter Leon, then a senior partner in Webber Wentzel. They, like many other representations made, fell on the deaf ears of the ANC-dominated joint committee. No amount of argument could dissuade them from implementing the resolution of their comrades.

After the law was changed, its constitutionality was challenged by Bob, first in the Western Cape High Court and then, on appeal, in the Constitutional Court. In the latter court he was joined by the HSF, by then under the leadership of Francis Antonie, as *amicus curiae* arguing the two points in the case on which success was ultimately forthcoming.

There is an interesting anecdotal story behind the decision to become *amicus* (or friend of the court). Quite by chance, Raenette — who had delivered a talk to a group gathered in the back room at 6 Spin Street, Cape Town, then the offices of IDASA — found herself in conversation with me as the meeting ended. She enquired about the progress being made with the *Glenister Two* litigation and I bewailed the fact that I had been unable, despite diligent effort, to persuade any of the usual suspects in Cape Town to join the proceedings, then pending in the Constitutional Court, as *amicus*. Nobody thought the case had any merit. She asked whether I had approached the HSF. I had not. Raenette then reminded me that on her watch the HSF had invested heavily in the campaign to save the Scorpions and had tried valiantly to persuade Parliament of the utility of so doing. I decided immediately to get in touch with her successor, and the rest is history.

As we chatted, Raenette and I were standing under an art installation depicting Archbishop Desmond Tutu swinging from the chandelier, with a big grin on his face, in celebration of freedom. The artwork is called 'The Flying Arch' or 'The Swinging Arch' after the nickname of the Archbishop and it gives this book its title. Without the chance meeting

with Raenette, and without the intervention of a respectable institutional *amicus*, the fate of the *Glenister* litigation may have been quite different. Lone mavericks in pursuit of quixotic dreams do not carry the same clout as institutional litigants.

This chapter is devoted to a discussion of the decision of the Constitutional Court in the matter which has now become known as *Glenister Two*. The case bristled with difficult points. All of the Justices sitting in the matter, nine of the eleven appointed to the Constitutional Court, were able to agree on all points, save for two. Somewhat unusually, the main judgment, supported by a minority of the Justices, was written by the then Chief Justice Sandile Ngcobo (with whom Yacoob, Mogoeng and Brand – an acting judge on secondment from the Supreme Court of Appeal – concurred) while the majority judgment was written jointly by the Deputy Chief Justice, Dikgang Moseneke, and Edwin Cameron (with whom Skweyiya, Nkabinde and Froneman concurred). As the Justices divided five votes to four on the two issues on which they could not agree, the outcome of the case could not have been closer. This is because the court always sits *en banc* with a quorum of eight of the eleven Justices as the minimum number of judges who may sit in any matter. Had only eight judges been available for the hearing of the matter instead of nine, and had they divided equally four votes to four, then the victory won by Bob would not have happened at all. You can't get closer than that.

It is perhaps unkind to liken the resolution of the ANC to disband the Scorpions to a pile of fresh horse manure. It is well known that horse manure has its constructive uses, especially as fertiliser and as food for smaller creatures like dung beetles. The resolution, on the other hand, has no constructive uses. It was passed to save the skins of well-connected individuals who enjoyed, and still enjoy, the protection of the ANC hierarchy. There is no good in it. Gwede Mantashe, Secretary-General of the ANC, went so far as to admit in April 2008, on the record, to Helen Zille, then leader of the Democratic Alliance (DA), that the unwanted attentions of investigators in the Scorpions was the reason for closing down the unit in the National Prosecuting Authority (NPA).

By the time the processes of the law had ground away at the issues in the case, the two issues on which the Justices could not agree were related to the impact of the new Hawks legislation on the culture of 'respecting, protecting, promoting and fulfilling' the rights in the Bill of Rights, as contemplated by section 7(2) of the Constitution in terms that are

mandatory, and its impact on the international obligations of the country to maintain effective and efficient anti-corruption machinery of state to prevent and combat corruption.

The Justices were all agreed that, as the Scorpions were a creature of statute, it was open to Parliament to close them down by way of a new law. Parliament made the Scorpions and could destroy them. However, the difficulty with the new law that was raised by the majority of the Justices was that the law had to comply with human rights and international obligations in order to pass constitutional muster. The minority were satisfied that the Hawks were a constitutionally adequate replacement for the Scorpions, but the majority insisted that human rights and international obligations could not be properly performed by the new police unit, the Hawks, because it was not sufficiently effective and independent to acquit itself of the tasks that the Constitution requires of the anti-corruption entity of state that specialises in the prevention and combating of corruption.

Any failure to pass constitutional muster renders a law (or conduct) invalid. This occurs through the application of sections 2 and 172 of the Constitution. The former stipulates that:

> The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

In turn, section 172 has the following provisions:

> When deciding a constitutional matter within its power, a court
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make an order that is just and equitable …

The majority of the court invoked these provisions in concluding that the new Hawks legislation did not, either structurally or operationally, create an adequately effective and independent corruption buster: one that could ensure compliance with international obligations and uphold our nascent human rights-oriented constitutional dispensation in place since 1994.

The way that the Chief Justice put the problem, writing for the minority of the court, is instructive. He said:

> Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence. I do not understand these instruments to require absolute or complete independence.

The answer to the question so posed by the Chief Justice, as given by the minority, was in the affirmative, but, fortunately for future generations, the majority baulked at this conclusion and answered in the negative. The way in which the issues were framed on behalf of the majority by the Deputy Chief Justice and Justice Cameron bears repeating:

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

The majority proceeded to discuss the need and rationale for combating corruption in terms that amount to judicial poetry and will ring down the centuries wherever and whenever the combating of corruption at the start of the twenty-first century is debated and discussed by lawyers, historians and political scientists. The judgment points out:

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

The second point on which the majority differed from the minority was in relation to the international obligations of the country. In this connection the judgment of the majority draws attention to the place that South Africa enjoys in the world after the isolation of the apartheid era. The Constitution, in its preamble, speaks of building a united and democratic South Africa able to take its place as a sovereign state in the family of nations. In practical terms, this involves agreeing to a lot of international treaties, protocols and arrangements of many kinds. This new place in the world for the country includes taking on responsibilities in relation to the fight against corruption. The majority judgment states:

> A number of international agreements on combating corruption currently bind the Republic. The UN Convention imposes an obligation on each state party to ensure the existence of a body or bodies tasked with the prevention of corruption. Moreover, Article 6(2) provides that – [e]ach State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

With these words the court embraced and made obligatory what has become known as the five elements of the STIRS criteria: specialisation, training, independence, resources and security of tenure of office. An effective anti-corruption entity of state that is able to function without undue influence or interference from the executive branch of government ought to comply with all five criteria in equal measure. The notion of specialised staff has been called 'dedicated' by some, particularly the Council for the Advancement of the South African Constitution (CASAC). Specialisation means that the anti-corruption entity should be wholly focused on corruption and organised crime involving the corrupt.

That the staff be properly trained is a requirement drawn from the work of the OECD on the combating of corruption. The Scorpions received training from the FBI and Scotland Yard before they were put on the corruption beat. The first head of the Hawks was a crime intelligence officer in the police with no training in corruption-busting. Although at the time of his appointment he went on television to assure the public of his preparedness to act without fear or favour, when he resigned from the Hawks under a cloud a few short years later, he made it clear that he was a deployed cadre of the ANC, so deployed to do its bidding.

Independence is the most pivotal criterion of the five. The ability to act without fear of the powerful, favour to the friendly or prejudice to the public interest is of the essence of corruption-busting. Often it happens that corruption occurs in high places. Between 2009 and 2018, South Africa had a President with 783 unresolved charges of corruption (investigated by the Scorpions before their demise) swirling around his head. At the time of going to press, the matter was still pending in the Pietermaritzburg High Court, with no evidence having been led. In this sort of scenario, it is of the essence of the corruption busting ethos that solid and unswerving independence is required.

The criterion that the anti-corruption entity be properly resourced in a fashion that is guaranteed is simply a device to ensure that any feral elite is not able to step on the oxygen pipe of the entity for the purpose of impeding its work.

The final criterion is secure tenure of office for corruption-busting personnel. No corruption fighter should ever be placed in a position in which his or her job is in jeopardy because of the nature of the investigation on which honest and properly directed work is being done at any given time. Vusi Pikoli, a former NPA head (previously Director-General in the justice department) was suspended by President Mbeki for going after corrupt police chief Jackie Selebi (who was later found guilty of corruption) and fired by President Motlanthe for his preparedness to charge then private citizen Jacob Zuma with fraud, corruption, money laundering and racketeering. So much for security of tenure of office.

In short, the STIRS criteria are required if corruption is to be conquered. Specialised and properly trained personnel who are operationally and structurally independent, fully resourced in a guaranteed fashion and who enjoy security of tenure of office at all times are able to prevent and combat corruption effectively and efficiently. Anything less won't do.

How then is this happy state to be achieved in the legislative scheme in place at any given time? The court was, on this aspect, mindful of the limits of its functions and of the applicability of the doctrine of the separation of powers. It eschewed juristocracy by saying:

> Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.

On the all-important aspect that concerns the independence of the anti-corruption entity, the majority judgment critically points out:

> What independence requires is freedom from the risk of political oversight and trammelling, and it is this very risk that the statutory provisions at issue create.

After a discussion of the ins and outs of the legislation under scrutiny, which is beyond the scope of this chapter because of the technical nature of the matters under discussion, the court reached the following conclusion:

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

Only two aspects of the order that the Constitutional Court made are relevant for present purposes. They are orders 5 and 6 and they read as follows:

> 5. It is declared that Chapter 6A of the South African Police Service Act 68 of 1995 is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation [the Hawks].
>
> 6. The declaration of constitutional invalidity is suspended for 18 months.

The judgment received mixed reviews. The apologists for ANC hegemonic tendencies were enraged. Leading the charge, Professor Ziyad Motala of Howard University in the United States wrote a piece in the *Sunday Times* in which he excoriated the court for exceeding its constitutional mandate and overruling the will of the duly elected majority. Professor Kadar Asmal, by then retired from the Cabinet (he retired rather than vote for the demise of the Scorpions), responded in the language of the constitutionalists who supported the good work done by the majority of the court.

Of all the critics who favoured the outcome, Professor George Devenish, emeritus professor of public law at the University of KwaZulu-Natal, was perhaps the most effusive. He wrote of the bold, convincing and well-reasoned work of the majority of the court:

> The majority judgment is a singular victory for constitutional democracy in South Africa. It is also an exceptional and exemplary triumph for Mr Hugh Glenister, his Counsel and their attorneys, who have expended a vast sum of money (about R3.8 million) and energy in a titanic litigation struggle against corruption in

order to protect and advance the cause of the fundamental values encapsulated in the Constitution. South Africa is profoundly indebted to this public spirited man, who as a libertarian, has demonstrated in no uncertain terms the right of ordinary citizens of the country to hold the government to account for its conduct measured against our supreme Constitution. This case is likely to rank with the historic Coloured voters cases, ie the Harris, High Court of Parliament and Collins cases, as a landmark decision of a courageous and sagacious Constitutional Court, giving judgment without fear or favour, and proving its worth as an illustrious Court, ranking with the American Supreme Court and the House of Lords.

Bearing in mind that the Court is intensely divided on the issue, and decided on the narrowest of majorities, namely by 5 to 4 judges, and the robust political controversy relating to the conduct and the demise of the Scorpions, the reaction of both the Executive and leaders of the ANC will be of crucial importance. Will they react in the magnanimous manner that President Mandela did in the Western Cape case, in which the Constitutional Court also invalidated a politically contentious statute of the first democratic parliament of South Africa? In the last mentioned case, President Mandela immediately responded to the Court's judgment with characteristic statesmanship by praising the Constitutional Court's judgment and observing that 'this judgment is not the first, nor the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance'. Mandela thereby with consummate maturity and tact, immediately defused a crisis situation which had arisen out of the counter majoritarian dilemma, inherent in the nature of the Interim Constitution. As a result, both the Court and the Executive emerged unscathed out of the crisis and had traversed the most 'fundamental questions of constitutional law' and 'matters of grave public moment'. This was in marked contrast to the almost belligerent attitude of the politically aggrieved Malan government in the early 1950s to the seminal decision in *Harris versus the Minister of the Interior*, referred to above.

The Western Cape case represented a consummate victory for constitutionalism, since for the first time the Constitutional Court had invalidated a highly politicized parliamentary statute, passed by a democratically elected and legitimate national legislature and a President, venerated and acclaimed both nationally and internationally for his moral and political courage and sagacity, who responded with characteristic magnanimity to the Court's decision. The great ship of state was thereby navigated by both the Constitutional Court and the President through the turbulent seas of potentially hazardous conflict to reach 'safe and certain water'.

Will the extant Executive, headed by President Zuma and more importantly, the ANC leadership, rise to the occasion and display the same kind of leadership and magnanimity that Mandela displayed? Failure to do so could herald a protracted and acrimonious constitutional crisis not dissimilar to that involving the Coloured voters in the 1950s. Time alone will tell.

Perhaps the most practical contribution to the public debate that was sparked by the delivery of a judgment that was not anticipated by all of the pundits and professionals was that made by my co-founding director of Accountability Now, the late Daan Groeneveldt, a retired human resources management practitioner. Daan had supplied his opinion in affidavit form for the benefit of the court in the deliberations on structural and operational autonomy so essential to the independence of the Hawks. His opinion was ignored and the cost of preparing it was disallowed. Nevertheless, there is merit and utility in what he said after the judgment was delivered and it is right and fitting that he should get the last word in this chapter:

> It is admirable that the *Sunday Times* has published varied views on what is now becoming known as the 'Glenister Case' – a David and Goliath campaign against legislation which Hugh Glenister considered unconstitutional. After a long struggle in three different courts it was accepted that he was right when he took the case, uniquely so, to the Constitutional Court for the second time.
>
> Last week Mandla Seleoane commented on the two previous reactions from Professors Ziyad Motala and Kader Asmal, noting that in academic debate 'it is hard to find a person you agree with completely'.
>
> In the *Glenister* case, academic debate and opinion may be useful, but it is now certainly advisable to encourage civil society to voice democratic opinions as to what the ordinary people would like the serving government to do to comply with the Court's finding, as it must in our new constitutional order in which parliament is no longer sovereign.
>
> After what must have been much deliberation, independence was the Court's core focus issue, both as regards the international treaty requirements and the actual freedom of the Hawks operatives to perform without fear, favour or prejudice.
>
> From a practical perspective the reference in the majority judgment to the Hawks operatives having to fear some form of career sanction, for 'upsetting' someone, somewhere in an undefined organizational system, should be of grave concern to all South Africans, and a serious indictment of all leaders, political and others who, after seventeen years of democracy, should be using every opportunity to build our constitutional democracy, not undermine it through intimidation.
>
> Structuring effective organizations is not difficult. Organization is the systematic planning of jobs in relation to one another in a decision system, to create a living social organism empowered to perform its mandate and to react to relevant operational circumstances.
>
> It is internationally recognised that an independent corruption fighting unit is a necessary element of any successful campaign to root out corruption, one supported by an independent judiciary and a functional criminal justice administration, that respects and implements the sentences of the independent courts. A tried and tested 'blueprint' of the structural requirements of independence exists.

A critical success requirement for corruption busting is the political will to fight for it.

The manner in which the executive and legislature respond to the requirements of majority judgment in *Glenister*'s case could see the start of the development of this political will, and a civil society groundswell of demand and vigilance could see that the right steps are taken to cure the cancer of corruption now rampant in South Africa.

Given that there are existing structural blue-prints, and civil society is entitled to a serving government that is committed to fighting corruption, the focus of creating an independent anti-corruption strategy must then shift to defining who are 'fit and proper' individuals to drive it. These individuals must be empowered by the law and the Constitution to operate within a dedicated unit that is supported by a broader organisational system that will be free of any form of influence, interference and sanction.

One of the justifications for disbanding the Directorate of Special Operations (Scorpions) was the claim that some individuals in it abused their power. The use of the word 'power' creates the wrong impression, as individuals are empowered through transparent and logical systems of structural (delegated) authority or alternatively personally through their professional scopes of practice.

Our Constitution recognises and requires that public servants be administered according to these sources of authority and other established management practices. Accordingly, if there was evidence of the abuse of power a far more cost effective solution would have been to identify the problems and address them – we have to ask 'what has been the cost of this unconstitutional exercise, and who will be held accountable for it?'

Properly structured organisations include sufficient checks and balances to ensure that problems are identified much sooner than we are accustomed to in South Africa. Perhaps the majority judgement in the *Glenister* case has been a timely reminder that the Constitution is the highest source of empowerment and where organisations are not delivering on their requirements, an organisational audit should be the first step to take.

The direct and indirect costs to South Africa of incorrect structures and appointments, is huge. The Scorpions were disbanded, the Hawks were created to replace them, but they do not meet the Constitutional requirements, and must be restructured – it is now imperative to work towards correctly implementing the judgment without wasting further time and resources both human and financial.

Professor Kader Asmal has already publicly pointed out that there are three likely locations for the anti-corruption unit – the National Prosecuting Authority (NPA) (politically somewhat unlikely, given the history of the Scorpions), the Office of the Public Protector (OPP) (this would involve an expansion of mandate and the possible watering down of the efficacy of the OPP in its other valuable work)

and a stand-alone unit – accountable, to civil society via its representatives in Parliament and to the Courts via its work in prosecuting the corrupt among us.

The formation of an all new Anti-Corruption Commission (ACC) as a new Chapter Nine institution is the solution favoured by IFAISA. The ACC will have to be led by a judge or retired judge and its staff complement will have to be imbued with the skills, experience and sapiential authority, or clout, that enables them to remain at least one step ahead of the organised, well resourced, politically connected and innovative criminals who are involved in corrupt activities, especially those in high places.

The Constitutional amendment and enabling legislation for the ACC will have to be meticulously drafted to ensure accountability to Parliament (not the Executive), transparency and independence for the new corruption busters. It is only with these features that the ACC will be responsive to the need for ordinary people to be free of the debilitating effects of rampant corruption.

Political corruption is nothing more than theft from the poor. The ability to fight corruption without fear, favour or prejudice, in much the same way as judges dispense justice, has to be legislatively and structurally ensured. This entails that institutional, financial and personal independence must be built into the laws that govern the effective and efficient replacement of the dissolved Scorpions.

The proposed ACC will have to enjoy independence akin to that of the judiciary to operate properly. As with pregnancy, it is impossible to be 'a little bit' independent in matters of this nature. The ACC ought to have powers of investigation and prosecution. The methodology of the Scorpions was so successful as to warrant emulation, without the 'law unto themselves' features that led to the demise of the Scorpions. The talent exists within the NPA and the Hawks, it simply has to be appropriately relocated in the ACC. All ACC staff will have to swear sole allegiance to the law and the Constitution.

The Hawks can be retained within SAPS to attend to a priority crimes mandate that expressly excludes combating corruption. This amendment is probably all that is needed to enable the Hawks to continue with the good work they do.

Corruption fighting will become the sole preserve of the ACC – its specialised and focused efforts can best conquer the scourge of corruption. IFAISA is ready and willing to assist in debating and preparing the changes that the Constitutional Court requires, in a constitutionally compliant and suitably swift manner. Any half baked attempt to satisfy the prescriptions of the judgment will surely be met with a further constitutional challenge, if not by opposition political parties, then by the doughty Mr Glenister. The judgment he won has to be respected in the interests of conquering corruption and promoting our constitutional democracy in which the final word on the meaning of the Constitution is that of the majority of the Constitutional Court.

Today Accountability Now campaigns for an Integrity Commission. It is regarded as preferable to be for 'Integrity' because everyone is, at least nominally, against corruption. It is hoped that an Integrity Commission under Chapter 9 of the Constitution will be the lasting legacy of the *Glenister* litigation. It is hard to see how that will be politically possible, but in politics anything is possible, as is illustrated by the demise of the apartheid regime, the fall of the Berlin Wall, and the rise of Germany and Japan after they lost World War Two. The political will required for such miraculous changes is the magical, and still missing, ingredient.

Chapter 7

Submissions to Parliament regarding the remedial legislation proposed in the wake of Glenister Two

Madri du Plessis*

Each contributor to this book became involved in the *Glenister* litigation in different ways and, as one of the youngest in the team, my experience was also a bit different from those of the rest. In the second half of 2011, reading through a community newspaper, my husband Donovan saw that Adv Paul Hoffman was going to give a talk on the Legal Practice Bill at a gathering of the arbitrators. Knowing I was an admirer of the work that Paul and the Institute for Accountability in Southern Africa (IFAISA), as it was known at the time, were involved in, he suggested we attend.

So, off we went to listen to Paul and, with some encouragement from Donovan, I approached him after the event. I introduced myself and told Paul how much I admired the work that IFAISA did and that I would be keen to help them in any way that I could. I was a bit taken aback by how quickly he asked for my contact details, and thinking I would never hear from him again, I handed over my business card.

Was I mistaken.

A week or so later, I got a call from Paul asking if I was available to assist and if we could meet to discuss it. Excited, but slightly concerned, I went to meet him, thinking that it would be a general discussion of my experience and the matters that IFAISA was involved in.

Again, was I mistaken.

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Paul immediately started telling me about IFAISA's involvement in the *Glenister* litigation and that IFAISA was going to contribute to the public participation process relating to the amendment of the Hawks legislation. They only needed help with one part of this process. As part of their participation, they wanted to submit an example of legislation creating a truly independent anti-corruption entity, created as a new Chapter 9 institution. It would be very helpful if I could draft this legislation, looking at similar legislation in other African jurisdictions and, in so doing, taking inspiration from Africa to create an anti-corruption entity that is as independent as we need it to be in South Africa. Furthermore, if I could draft the constitutional amendment which would create the Hawks as a Chapter 9 institution, that would be very helpful.

And so it started.

Drafting anti-corruption agency legislation

My first step was to scour African legislation for any reference to anti-corruption legislation. I found interesting and promising material in the statute books of Kenya, Zambia, Botswana and even Sierra Leone and set about taking the best parts and moulding it into one piece of legislation. And then I had the surreal moment of also creating a draft section to be added to Chapter 9 of the Constitution to create the Hawks as a Chapter 9 institution. These are things you never think you will be doing when studying law.

The Civilian Secretariat of the Police briefs the committee

In March 2012, the Parliamentary Portfolio Committee on Police (the committee) met to receive a briefing from the Civilian Secretariat of the Police, which was tasked with redrafting the legislation, on the first draft of the amended legislation. The committee comprised about 14 members, including Ms Lydia Chikunga (ANC) as the chairperson, Mr Mluleki George (COPE), Mr Petrus Groenewald (FF+), Ms Dianne Kohler-Barnard (DA), Mr Kenneth Meshoe (ACDP) and Ms Annelise van Wyk (ANC).

Ms Jenni Irish-Qhobosheane, from the Civilian Secretariat, with General Anwa Dramat in attendance, informed the committee that the Constitutional Court did not require a Chapter 9 institution or a unit that has judicial

independence. Neither did it require an anti-corruption agency that was situated within a specific institution, whether it be the National Prosecuting Agency (NPA) or the South African Police Service (SAPS). The court only required that the anti-corruption agency be independent.

She noted that certain aspects in what was at that time the current incarnation of the Hawks legislation were clearly problematic (which makes one wonder why the application to amend that incarnation of the Hawks legislation was so vigorously opposed). In response to questions from the committee, Ms Irish-Qhobosheane stated, among others, the following:

- under the new Bill the Ministerial Committee only plays a co-ordinating role;
- in the event the Minister removes the head of the Hawks, he or she has to report to Parliament within 14 days of Parliament sitting;
- that the Hawks' budget would be ring-fenced within the SAPS budget;
- in the event that there was a dispute between the head of the Hawks and the National Commissioner, the possibility of a third party intervening could be investigated;
- the NPA model was followed in terms of hiring and firing; and
- in terms of remuneration, the head of the Hawks should not be paid less than a Provincial Commissioner.

She also noted that she believed all the court's concerns were addressed in the amended legislation and that the drafters complied with the court's order.

The Glenister challenge

Around this time, the Glenister challenge was issued, with a media release stating:

> Johannesburg businessman and anti-corruption campaigner, Bob Glenister today posed a R100 000 challenge to all Southern African youth and universities in a bid to rally civil society in the fight against corruption. … Glenister has invited Southern Africans below the age of 30 to devise a 'best practice' implementation of the judgment in the Glenister case. The competition is open to all university faculties and students, as well as to all private entrants, south of the equator (including Indian Ocean Islands). … 'Corruption is a disease that affects every single one of

> us, no matter your age, profession, location or economic dispensation. Most of all, it affects young adults, because they are the ones that will be left to fix the mess that we have allowed to happen,' says Glenister. … Submissions will be evaluated by a panel of retired judges in South Africa, who will decide which team or individual most deserves the prize.

With a challenge deadline of 31 July 2012, and the youth of the region starting to think about better ways in which to fight corruption, we were finalising our submission to Parliament.

Written submissions to the committee

We sent our submissions to the committee and, in April 2012, oral submissions were heard. Submissions were made by about 20 institutions and individuals (the parliamentary records are not clear on the exact number) of which only one, Professor Mtende Mhango from the University of Witwatersrand, felt that the amended Bill was consistent with the Constitutional Court judgment.

While I will be dealing with the substantive submissions made by a number of institutions below, I want to take a moment here to note the individuals that participated in the process. These individuals did not have the capacity to make the substantive type of submissions made by organisations such as the Institute for Security Studies (ISS) or the Council for the Advancement of the South African Constitution (CASAC), which employ people whose job it is to do this kind of thing.

However, Andre Venter, Paul du Toit, Cronje Fourie, David Martin, Hassan Moola, Claudio Pace, Steward Stiles and Salome Streicher still made the point of obtaining and reading the Bill and following all the right channels to make a submission and to say that they did not think the Bill would give us an adequately independent anti-corruption agency.

When we talk about democracy in action and the right to be heard, we also talk about the obligation to make your voice heard and to participate in democratic processes to ensure that they are, in fact, democratic processes. It is only when individuals decide to take action, and not wait for organisations and institutions to do so, that our Constitution and our democracy truly become entrenched and protected. The individual who started all of this, Bob Glenister, can tell you a thing or two about that.

Substantive submissions

Aside from IFAISA, the following institutions or organisations made more substantive submissions and, in most cases, also made oral submissions to the committee in April 2012. Short summaries of a number of these submissions follow below:

- African Policing Civilian Oversight Forum (APCOF);
- Association of Certified Fraud Examiners (ACFE);
- Council for the Advancement of the South African Constitution (CASAC);
- Professor Pierre de Vos, Claude Leon Foundation Chair in Constitutional Governance at UCT's Faculty of Law;
- General Council of the Bar (GCB) Parliamentary Committee;
- Helen Suzman Foundation (HSF);
- Institute for Security Studies (ISS);
- Open Society Foundation – South Africa, the Legal Resources Centre and Corruption Watch (a joint submission); and
- UNISA's College of Law.

In considering the different submissions, it became clear that a number of people had the same concerns about the Bill and the independence that it was affording the Hawks.

Institute for Accountability in Southern Africa (IFAISA)

The draft legislation and constitutional amendment which I contributed were annexed to IFAISA's submission, which contained the following main points in relation to the new Bill:

- it did not ensure adequate independence for the Hawks;
- it did not include any specialisation in terms of corruption fighting;
- while the executive can decide what 'priority crimes' mean, it would be impossible for the Hawks to function independently, including in deciding what to investigate;
- there was no guaranteed budget to ensure the adequate resourcing of the Hawks;

- it lacked provision for appropriate training and education; and
- there was no security of tenure while a Minister could suspend the head of the Hawks with or without pay.

We further noted that there is a real link between corruption and organised crime, and human rights violations. Money disappearing down the black hole of corruption is money that is no longer available to ensure access to basic education, health, housing, a clean environment and every other human right entrenched in the Bill of Rights. Corruption is, therefore, very much a human rights issue.

Specifically, we noted the constitutional dilemma caused by retaining the Hawks within the SAPS and under the ultimate supervision of the National Commissioner of Police. Section 207 of the Constitution makes it very clear that the National Commissioner must be the accounting officer for the whole of the SAPS. This means that the National Commissioner must also be the accounting officer for the Hawks and, as a result, will be 'holding the purse strings' of the Hawks. However, as the National Commissioner is a political appointee, this will mean that the Hawks' budget would be controlled by a politician and that the Hawks would not be independent.

We saw only one of two solutions to this problem: if Parliament insisted that the Hawks had to stay in the SAPS, section 207 had to be amended to ensure that a politician did not control the Hawks' budget and that the Hawks would be independent. Alternatively, the Hawks should be situated outside of the SAPS.

The points made in this submission became very much part of the subsequent steps taken by the Glenister team.

African Policing Civilian Oversight Forum (APCOF)

APCOF, a network of African practitioners active in police reform and civilian oversight of policing, made the following points:

- while the Hawks remained within the existing police structure, they remained at significant risk of interference;
- the National Commissioner's control over the Hawks, budget meant that the Hawks were not independent;
- it was not clear who would select the offences to be investigated by the Hawks;

- investigations remained subject to policy guidelines issued by the Minister;
- it was inappropriate that the political head of the police had the sole discretion to appoint the head of the Hawks;
- the Bill did not set out minimum objective criteria in respect of skills, experience or commitment in respect of appointees;
- it failed to establish security of tenure; and
- while the policy guidelines were previously determined by a ministerial committee, they were now determined by a single minister, which does not reduce political influence.

They suggested that the Hawks should be created either as a new Chapter 9 institution, or located within another Chapter 9 institution such as the Public Protector, or as an independent body along the same lines as the Independent Police Investigative Directorate (formerly the Independent Complaints Directorate).

Association of Certified Fraud Examiners (ACFE) (South African Chapter)

The ACFE noted that the following issues should be considered in relation to the Bill:

- there was no reason why political accountability cannot co-exist with an independent anti-corruption agency;
- the Bill does not ensure that the Hawks is adequately specialised as it also includes 'priority crimes' along with corruption as the mandate of the Hawks;
- the fact that the National Commissioner can discharge the head of the Hawks means that the latter does not have the same protection as that afforded to a Deputy National Director of Public Prosecutions, who may only be removed by the President, and even then, with Parliament holding a veto;
- parliamentary oversight in the functioning of the Hawks is less than that of the ministerial committee and Parliament's powers are insufficient to allow it to rectify deficiencies in the independence of the Hawks; and

- guaranteed financial and infrastructural resources must be ensured, along with adequate training in the specialised function of fighting corruption.

The ACFE also recommended that the committee give consideration to the establishment of a Chapter 9 institution and the necessary constitutional amendment to facilitate it.

Council for the Advancement of the South African Constitution (CASAC)

The CASAC made the following main points:

- the location of the Hawks within the SAPS is inconsistent with the Constitutional Court judgment;
- the Hawks do not have sufficient institutional protection against political interference;
- processes relating to hiring and firing are not adequately defined and criteria for appointments are not properly described;
- the mandate of the Hawks is not specifically defined;
- security of tenure and minimum secured remuneration levels are not sufficiently provided for;
- sufficient accountability is not adequately secured; and
- the role of the ministerial committee is not clear and the National Commissioner's control over the finances of the Hawks is inconsistent with adequate independence.

The CASAC further noted that the executive and political influence over the directorate, by way of the appointment and dismissal of the head of the Hawks, the determination of policy guidelines by the Minister, and the power of the ministerial committee to request performance and implementation reports from the National Commissioner and the head of the Hawks, flies in the face of the requirements of the Constitutional Court judgment.

Professor Pierre de Vos, Claude Leon Foundation Chair in Constitutional Governance, UCT

Professor De Vos made a very lengthy and detailed submission and it is worthwhile noting more of what he said. He stated that the judgment required the measures taken by Parliament to be reasonable, that public confidence in the Hawks as a result of the appearance or perception of independence is vitally important, and that the Hawks must be sufficiently insulated from political influence. He went on to state that:

- the Bill allows too much power over the Hawks by politicians with, among other things, the Minister having a veto right over the appointment of the deputy and provincial heads of the Hawks;
- the Hawks are not sufficiently structurally independent, including as a result of a lack of security of tenure;
- the Bill fails to safeguard the Hawks' independence both in fact, and in terms of a reasonable perception of independence;
- the fact that the National Commissioner controls the Hawks' budget in terms of section 207 of the Constitution means that the Hawks have no financial independence;
- limited protection of security of employment and remuneration detracts from the independence of the Hawks' leadership, with the Minister having a wide discretion to suspend without pay and remove the head of the Hawks;
- the ability to remove the head of the Hawks by an address to the two houses of Parliament without any enquiry is basically an exercise in political discretion;
- there are no objective criteria for the minimum requirements in terms of skills, experience and commitment to independence for the head of the Hawks;
- it is unclear what the reference to the investigation of 'selected offences' means, also in respect of who will select these offences;
- the Minister's broad discretion to issue policy guidelines on which offences to investigate is anathema to the Hawks' independence; and
- while there is a complaints mechanism, the Bill does not create adequate structures to prevent political interference in the first place, and this failure in itself renders the Bill unconstitutional.

He further noted that the Bill does not impose a legally binding requirement that the head of the Hawks, or any other member of the Hawks, needs to fulfil their duties independently, without fear, favour or prejudice, and that there is no sanction for not acting independently.

When considering the above and the requirements of the judgment, it seems that a better model would be to situate the Hawks in the NPA or to create a new Chapter 9 institution. While detractors will argue that section 199(1) of Constitution renders the option of a separate unit a non-starter; because 'the security services of the Republic consist of a single defence force, a single police service and any intelligence service established in terms of the Constitution', the 2001 *Potsane* case addressed this issue. In that case the Constitutional Court made it very clear that the quoted phrase refers to a single prosecuting authority in historical context, meaning that the various prosecuting authorities of the so-called 'homelands' needed to be amalgamated into one national prosecuting authority.

Subsequently, the Khampepe Commission pointed out that the *Potsane* judgment makes it clear that there is no constitutional imperative to have only one prosecuting authority. By analogy, there is no constitutional imperative that all investigative policing functions have to be performed by the SAPS.

General Council of the Bar (GCB) Parliamentary Committee

The GCB noted specifically their reservations about the lack of statutorily secured remuneration and security of tenure. They further stated that:

- the Bill fails to protect ordinary members of the Hawks against threats of removal and political reprisals for persisting with politically unpopular investigations; and
- a number of aspects, including powers of removal, general conditions of service and guidelines in respect of what constitute 'priority crimes' and thus fall within the legislative remit of the Hawks, are left to be determined by the Minister.

Helen Suzman Foundation (HSF)

The HSF noted that:

- the head of the Hawks cannot be made subject to the control of the National Commissioner;
- the National Commissioner should not control the budget of the Hawks, which should be controlled by the head of the Hawks itself;
- the Bill's attempt to situate the Hawks in the SAPS, while stating that the Hawks do not fall under the control of the National Commissioner, is unconstitutional;
- the process of the appointment of the head of the Hawks, and the lack of security of tenure, will not ensure independence; and
- the Hawks should have the final decision-making power over which cases it will investigate.

They further noted that it is not necessary to create the Hawks as a new Chapter 9 institution, but that the location of the Hawks within the NPA will create the necessary conditions to ensure the kind of independence required by the Constitutional Court. In the alternative, the Hawks can be created as an entirely new and separate legislative body falling under an appropriate ministry. The only option that cannot be pursued is to leave the Hawks housed within the SAPS.

Institute for Security Studies (ISS)

The ISS, an African non-governmental policy research institute, also noted that the location of the Hawks within the SAPS is a cause for concern in terms of the independence of the Hawks. In addition, they noted that:

- the drafters of the Bill conflate policing with the activities of an anti-corruption entity, but that there is no requirement for an anti-corruption entity to fall within the SAPS;
- the drafters took a minimalist approach, trying to change as little as possible to the (what was at the time) existing status and location of the Hawks;
- the fact that the head of the Hawks reports to the National Commissioner and that the Commissioner remains the accounting officer of the Hawks are of major concern in respect of independence;

- independence is further thwarted by the procedures in place for the appointment and dismissal of the head of the Hawks and its other members;
- the mandate of the Hawks is not clearly defined; and
- the criteria for the skills and qualities which the head of the Hawks should possess are not adequately described and should be listed in detail in the Bill.

It recommended that the Hawks should be situated outside of the SAPS and that this can be achieved by either creating an independent structure that remains politically accountable to the Minister of Police, but is independent of the SAPS command-and-control structure, or creating a new unit within one of the existing Chapter 9 institutions such as the Public Protector or the Auditor-General, or creating a new statutory institution falling outside the SAPS and any Chapter 9 institution, or finally, creating a new Chapter 9 institution.

Open Society Foundation – South Africa, the Legal Resources Centre and Corruption Watch (a joint submission)

This joint submission noted that:

- there is no adequate security of tenure;
- the Minister must be required to submit regulations in respect of the remuneration, allowances and other conditions of service of other members of the DPCI for parliamentary approval;
- the removal of the head of the Hawks must require a resolution passed by Parliament with a two-thirds majority;
- in the Bill's current format, the head of the Hawks is not involved in determining policy guidelines for the Hawks, while the Minister's scope to determine policy guidelines is overly broad; and
- the Hawks do not have control over their own budget.

They finally noted that the placement of the Hawks within the SAPS creates a disharmonious structure and that there are no clear lines of authority. Consequently, these institutions recommended that the Hawks be established as an independent institution, structurally similar to a Chapter 9 institution such as the Auditor-General or the Public Protector.

Epilogue

Subsequent to these submissions being made, the SAPS Amendment Act 10 of 2012 was signed into law and published in the *Government Gazette* on 14 September 2012, four days before the deadline set by the Constitutional Court. One look at the final product made it clear that the concerns raised during the public participation process about the independence of the Hawks were not taken to heart and that some decisions would have to be made by the Glenister team.

In the meantime, while the Bill made its way through Parliament, the youth of the region submitted their ideas in responding to the Glenister challenge. I saw Bob again on 29 September 2012 at the prize-giving, he was wearing a clown suit in response to the promulgated legislation.

A host of idealistic, energetic and determined young people attended the event. While only some of them won prizes, I was comforted by the fact that the next generation of people standing up for our democracy, wanting leaders who sacrifice to lead their people and who want to fight for the right of people to live with dignity, are making their way to the fore.

To that host of young people, if you want to get involved, just start. Make submissions to Parliament, take a stand and don't let the lone voices out there stay alone. Add your voice and make a choir. And, in the meantime, if you want to get involved, give your business card to Paul Hoffman!

Chapter 8

'The Sleep of Reason': Glenister Three *in the Western Cape High Court*[*]

Guy Lloyd-Roberts[**]

There can be little doubt that *Glenister Three* in the Western Cape High Court represented the nadir of the public interest litigation surrounding the issue of South Africa's anti-corruption unit. Some perspective is needed, however. It is important to pay a special tribute to Hugh Glenister ('Bob'). Not that he would want this, or even expect it; but it should be recorded. We need to know how we got here.

Without the courage of Bob Glenister, there would never have been *Glenister Three*, let alone the disappointment of *Glenister One* or the unexpected triumph of *Glenister Two*. Two facts must never be forgotten.

Firstly it was Bob Glenister, using our judicial system, who alone initially amongst 50 million of his fellow South Africans, had the courage to initiate a challenge against the powerful and well-resourced South African political establishment. And you don't get more 'establishment' than the President of the Republic, two Cabinet Ministers (those for Safety and Security and Justice and Constitutional Development), the National Director of Public Prosecutions and the Government of the Republic. The declared aim of the establishment was to destroy the truly specialised, constitutionally independent and extraordinary successful 'Scorpions' anti-corruption unit, located as it was within the National Prosecuting Authority (NPA), and to replace it with the 'Hawks', a so-called 'priority crime' unit to be located within the rather less successful South African Police Service (SAPS) – and,

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* 'The Sleep of Reason brings forth Monsters' is the title of an etching by the Spanish painter and printmaker, Francisco Goya.

** Guy Lloyd-Roberts is an advocate of the High Court and a director of Accountability Now.

as such, not independent at all but subject to virtually unlimited political interference and executive control.

Secondly, four judges of South Africa's apex Constitutional Court, including then Chief Justice Ngcobo, could find no constitutional fault with the parliamentary statutes subsequently enacted to bring this about. That is about as sobering a thought as can be imagined in South African jurisprudence, though it is unlikely to be the last one. Fortunately for South Africa, five judges of the same court were not as impressed as their colleagues had been. They declared – lucidly and compellingly – the offending legislation to be unconstitutional and sent it back to Parliament to be rectified. That marked the high point of the *Glenister* litigation. But it was desperately close.

Thus it was that Bob, together with the Helen Suzman Foundation (HSF), had struck the first and telling blow against the establishment's attempts to shield its less pleasant side, as well as that of its questionably connected *rentiers* and backers, from independent scrutiny and accountability. Unfortunately the majority judgment in *Glenister Two* flattered only to deceive. By the time of the final outcome in *Glenister Three*, the sentient analysis and warnings of the majority in *Glenister Two* had been ignored or forgotten by the same Constitutional Court. South Africa is left today with, as finally sanctioned by that court, the Hawks. Not even a sense of humour can help much when pondering such a travesty. But Bob's courage, vision and tenacity ought to have been given more praise and recognition than he has received. The Constitutional Court, in reprimanding Bob in *Glenister Three*, failed to recognise sufficiently or at all his singular and selfless contribution to the health of our democracy.

In the event, the *Glenister* litigation lasted seven long years. It commenced with an unfortunate urgent resolution of the ANC at its December 2007 conference in Polokwane and ended in November 2014 with the third Constitutional Court judgment in the *Glenister* trilogy of cases. To understand *Glenister Three* in the Western Cape High Court, we need to summarise how Bob got there.

In common with many of his fellow South Africans, Bob is a person of clear vision. From the day in 2007 at Polokwane when Jacob Zuma swept to power and when the ANC resolved urgently to dissolve the Directorate of Special Operations (DSO), better known as the 'Scorpions', Bob was concerned. The mandate of the Scorpions had been to investigate and prosecute organised crime and corruption wherever it occurred, in order

to ensure a safe and secure environment which was conducive to both growth and development. A multi-disciplinary agency, its staff complement exceeded 500 and included some of the best prosecutors, investigators, as well as financial and forensic and intelligence experts in South Africa.

Would, or could, their announced successor be sufficiently independent, for its vital core purposes, from potential corporate or political interference? These would easily be the most pernicious and malevolent threats to such successor – especially as their predecessor's very independence had evidently caused such discomfort to then citizen Zuma and the ANC in the first place.

It was easy to comprehend the reluctance of citizen Zuma, as well as his backers and his likely NEC and Cabinet choices, to be scrutinised by truly independent and highly skilled investigators – still less to be held answerable and accountable, where appropriate, by independent judges empowered by the Constitution to limit the reach of their executive power. After all, barely a year earlier in 2006, the Supreme Court of Appeal (SCA) had upheld the conviction and 15-year jail sentence that had been imposed by the trial court in respect of corruption charges brought against the notorious Zuma backer, Schabir Shaik. The SCA confirmed that the evidence before the trial court had established a 'mutually beneficial symbiosis' between Mr Shaik and citizen Zuma. The SCA considered this finding central to the conclusion reached by the trial court on Count 1. It could not be denied that, on all the evidence, a corrupt relationship existed between the two men.

It is instructive, indeed salutary, to recall that 10 long years ago in 2007, nobody had even heard the terms 'Institutional' or 'State' capture applied to South African politics. Still less was anyone familiar with the family name 'Gupta', or what that name might come to embody. And the notion that the ruling party or its President, in conjunction with a family, could ever be complicit in undermining our Constitution, or in violating his Oath of Office, or in suborning Parliament to ignore its constitutional obligations? Impossible. As far from reality as a hawk from the moon ...

During 2007 and 2008, there were clear indications of how the governing party planned to deal with the Scorpions. The Polokwane resolution of December 2007 had called for the establishment of a single police service; the corollary was that the Scorpions, then located outside the SAPS, had to be dissolved. The 2008 legislative programme envisaged Bills that would give effect to this.

Initially, Bob's approach was simple. In March 2008, he approached the (now) North Gauteng High Court, asking it to interdict the respondents (as summarised earlier) from *initiating* any legislation that sought to disband the Scorpions. He grounded his case essentially upon the irrationality of disbanding the Scorpions. It would harm the fight against corruption in all its forms. The Scorpions' success rate was way better than that of the SAPS, and the mere introduction of such legislation would cause members of the Scorpions to leave in droves (a contention later confirmed, as it happened).

Whilst this court process was under way, two things occurred. First, the Cabinet approved two Bills, namely, the National Prosecuting Authority Amendment Bill and the SA Police Services Amendment Bill, as they came to be known. Their stated purpose was to replace the Scorpions with the 'Directorate for Priority Crime Investigation', now known as the 'Hawks', and to locate them within the SAPS. Second, several political parties applied for leave to be admitted to this process as *amici curiae*.

In response to the first, Bob amended his application to include a request that the respondents be interdicted from *persisting with* the legislative programme reflected in these Bills. This change didn't help, as the application was dismissed. The North Gauteng High Court, per Van der Merwe J, concluded that it had no jurisdiction to decide the matter, and that the Constitutional Court might have such jurisdiction.

Bob and his *amici* approached the Constitutional Court. By the time their applications were heard there in late 2008, both Bills were before Parliament. The *finale* to *Glenister One* was disappointing. The applications were dismissed. The court held that the applicants had failed to establish that it would be appropriate for the court to intervene in the affairs of Parliament, as they had not demonstrated that either material or irreversible harm would result if the court did not intervene at that stage.[1]

In 2009, the National Prosecuting Authority Amendment Act 56 of 2008 and the SA Police Services Amendment Act 57 of 2008 were signed into law. Amongst many changes, the following were confirmed as the most drastic:

- The Scorpions had previously formed part of the NPA, which enjoys constitutionally mandated independence. As such they were beyond the influence of the executive, save that the head of the NPA is appointed by the President, and that the Minister of Justice retains

[1] *Glenister Two* para 11, citing *Glenister One* para 57.

an 'oversight role' and final responsibility for the NPA under section 179 of the Constitution.

- Under the NPA Amendment Act, the Scorpions were done away with. They were replaced by the Hawks. This unit – shamelessly recorded in the preamble to its enabling Act as 'independent' – was to be housed within the SAPS. This would bring it directly under the control of the executive, in the form of the Minister of Police. No less important, it brought the unit under the indirect control of the President, at whose pleasure any minister, including the Minister of Police, holds office.
- The characterisations of 'priority offences', their investigation and the general operation of the Hawks would be overseen by an 'Executive Committee', consisting of Cabinet members.
- This committee had far-reaching powers to define the nature and extent of all 'priority crimes' for the purposes of the functioning of the Hawks.

In common with many of his fellow South Africans, Bob recognised that this was a stitch-up. In no accepted meaning of the word was this unit 'independent'. Reduced to basics, any anti-corruption authority was either independent of executive control, or it was subject to it. As a matter of strict logic, even the slightest level of effective executive control could never be reconciled with autonomy. There was a yawning chasm between political 'control' over the unit and the requisite political 'responsibility' and 'accountability' for it.

Unlike any of his fellow South Africans though, Bob resolved again, as a private citizen, to stop what he saw as fatally flawed legislation. The constitutional validity of both statutes was challenged, commencing this time in the Western Cape High Court in April 2009. Thus commenced *Glenister Two*.

There was a bright common thread that highlighted Bob's attack on the statutes in *Glenister Two*. He understood that Parliament, in anchoring the Hawks within the SAPS, had created a potentially dangerous conundrum. It was self-evident, indeed of critical importance to the future of South Africa, that any anti-corruption authority had to be clothed with cast-iron copper-bottomed independence from *any* source of actual or potential interference. The most visible form of interference would probably be seen through the actions and words of the incumbents of political office, no

matter how low- or high-ranking. This was not to say that Bob's attack confined itself to *political* interference with the authority. The potential for commercial interests to wish to shield themselves from the reach of an anti-corruption authority is as obvious for such interests as it is for political actors. The difference is that potential and actual political interference was actually *legislated for* by the abovementioned provisions, not merely enabled by them. And if the political actors were themselves in the pockets of commercial interests? What then? What then, indeed? Only the highest levels of independence would give an anti-corruption authority at best a fighting chance.

However, any such authority positioned within the SAPS would unavoidably be subject to direct executive and indirect presidential control over its structure and functioning. In addition, the political executive would be able to control the authority's ability to determine its own policies regarding those corrupt activities it saw as posing the greatest threat to society, as well as determining for itself the best strategies and operations to detect and disrupt these. Under the enacted scheme, these were the exclusive preserve of the political executive.

Substantive, real independence was impossible under this scheme. The safer, rational and most constitutionally compliant solution was to declare unconstitutional the location of the Hawks within the SAPS. There Bob planted his flag.

The Western Cape High Court (per Desai J) dismissed the application. It concluded that it lacked jurisdiction to determine the constitutional challenges based on an alleged failure to fulfil various constitutional obligations. Applications for leave to appeal and for direct access were brought before the Constitutional Court. The HSF joined Bob there as *amicus curiae*. Bob challenged the legislative scheme of Acts 56 and 57 of 2008 as irrational, unreasonable and unfair. He averred that the legislature had violated a number of its constitutional obligations, one of which for these purposes was to maintain an independent anti-corruption unit.

In a ground-breaking judgment, but by a razor-thin five to four majority, the Constitutional Court declared that Chapter 6A of the SAPS Amendment Act was unconstitutional. It had failed to secure an adequate degree of independence for the Hawks. The majority judgment was ground-breaking because of its painstaking and brilliant analysis of the origin, nature and content of the independence necessary for a South African anti-corruption

authority, as well as for laying bare the range of real threats posed to that independence by the political executive, amongst others.

In short, the majority identified failures to provide for the requisite degree of independence principally in two respects:

- *Structurally*: by the unremedied potential for political interference in the appointment processes for members, by the absence of secured remuneration levels for members, and by the uncertainties surrounding the manner in which members could be dismissed or induced to leave.
- *Operationally*: by the unremedied potential for political interference by the imposition of a Ministerial Committee with untrammelled powers to determine policy guidelines and to select 'national priority offences', for the Hawks.

The majority's remedy was to afford Parliament 18 months to reformulate its legislation. Most regrettably, however, from Bob's point of view, the majority agreed with the minority in declining to uphold his principal objection. They held instead that the decision to dissolve the Scorpions and to locate their replacement Hawks within the SAPS 'was not *in itself* unconstitutional' and that therefore the legislation that followed could not be invalidated '*on that ground alone*'.[2]

The logic of the majority in so holding is, with great respect, incomplete. All other things being equal, there may well have been a basic constitutional competence to have legislated thus. But the question remained: was the exercise of this competence reasonable and rational in the circumstances, given the purpose and scope of the legislation itself? That the majority attempted to deal with this question by finding other grounds upon which to invalidate the legislation did not answer the basic question: was it constitutionally rational to locate the Hawks within the SAPS in the first place? The flawed manner in which the majority explained how it believed this scheme could work strongly suggests that the legislation failed the rationality test. Developments within the Hawks following the majority's decision in *Glenister Three*, predictably, reaffirm Bob's basic position.

The irrationality remained and began to play itself out.

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[2] *Glenister Two* para 162 [emphasis added].

The majority had clearly recognised the potential for trouble created by its acceptance of the new location for the Hawks. Again, with great respect, they vainly attempted to square the circle with the following naïve exhortation:

> The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be 'responsible for policing'. *These constitutional duties can productively co-exist, and will do so, provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the state's constitutional obligations under section 7(2) of the Constitution.*[3]

The flaw in this formulation is obvious: how could the majority expect a Cabinet minister, appointed by the President and serving at the latter's pleasure, to pay 'due regard' to the independence of the Hawks, when the entire cabinet had agreed to place the Hawks under direct executive control? After all, the primary motivation for dissolving the Scorpions was precisely because they enjoyed constitutionally mandated independence from political interference by being housed within the NPA. And the best way to bring their successor under political control was to house them within the SAPS. Did the majority seriously expect any Minister of Police to keep his or her job by 'paying due regard' to the need for the Hawks to be sufficiently independent from the very control required by the Cabinet to be exercised over them? Was that, is that *rational* in all the circumstances of South Africa's developing democracy?

Of course, the majority did its best to rebalance this basic irrationality. On more than four occasions,[4] it spoke of the need for the adequate independence of the Hawks to be 'secured' by institutional and legal mechanisms against 'undue political interference' and 'management by political actors'. It also spoke its mind when it suggested that 'on a common sense approach, our law demands [an anti-corruption] body outside executive control to deal effectively with corruption'.[5] The ordinary meaning of the verb 'secure' is 'made safe from attack' or 'guaranteed'. Assuming that the majority meant what it had said, one is entitled to infer that the type of independence that the

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3 *Glenister Two* para 214 [emphasis added].

4 See eg *Glenister Two* paras 206, 231, 245, 248 and 249.

5 *Glenister Two* para 200.

court had in mind could not, therefore, merely be 'provided by' or 'reflected in' those mechanisms. If the admittedly independent Scorpions could be disappeared by a statute passed by a simple parliamentary majority, how did the majority of the court imagine these legal and institutional mechanisms would, exactly, be 'secured'? The majority, strangely, was silent about this.

It may have wished to avoid to be seen to be legislating, which would infringe the doctrine of separation of powers. Ultimately, however, the majority in effect reduced their requirements of 'adequate independence' to a box-ticking exercise in regard to their carefully outlined illustrations of the structural and operational shortcomings of the impugned legislation. Their formulation, perhaps unwittingly, provided fertile soil for the many arguments subsequently raised in defence of, as well as against, the purportedly remediating 2012 legislation.

When the final version of this legislation was signed into law in 2012, Bob considered it not fit for purpose. He dismissed the search for adequate independence for the Hawks located within the structures of the SAPS to be, in reality, a *chimera*, and one that would be easily manipulated to their advantage by the political establishment. He could do nothing legally about the constitutionality of this location. What he could do was to point out why the remediating legislation left the requisite independence of the Hawks still far short of the original ideals demanded by the majority of the Constitutional Court in *Glenister Two*. In his approach Bob was again joined by the HSF, this time as an applicant and not as *amicus curiae*.

Applying uncomplicated logic, Bob contended again that the legislation was the inevitable and unsatisfactory outcome of the clash between two competing constitutional imperatives:

- On the one hand, the State was required by the Constitution to create, by legislation, a sufficiently independent anti-corruption authority; yet
- On the other hand, the Constitution also required that the Minister of Police must determine national policing policy and that, in accordance with that national policing policy and the directions of that minister, the National Commissioner of Police had to exercise control over, and manage, the police service which now included the Hawks.[6]

[6] Sections 206 and 207 of the Constitution.

Put another way: The same minister was required both to ensure his control over the Hawks and to simultaneously secure the Hawks' structural and operational independence from that control.

Five years had passed between President Zuma's accession to power and his administration's attempts to exercise executive control over the anti-corruption authority. Bob noted ongoing media attention around President Zuma's integrity and probity. The latter had stood accused of 783 charges of fraud and corruption. Yet there was plenty of evidence that the dropping of all of these charges had been *schlentered* by Zuma and/or his backers to propel him to power. When in power, President Zuma had immediately set about terminating the Scorpions. His choices of certain ministers and other functionaries had been disturbing. In more than one instance, his decisions were held to have been irrational. His appointments of Menzi Simelane (as National Director of Public Prosecutions), Bheki Cele (as National Commissioner of Police) and Dinah Pule (as a member of the national cabinet) were found wanting following appropriate judicial intervention.

Which of the competing constitutional imperatives would prevail in such an administration? Was the Constitutional Court's formula for compromise capable of producing the desired outcome? Was it even possible for the Hawks to be insulated against the threat of interference by a Minister of Police in President Zuma's Cabinet?

The difficulties with the remediating legislation were of course not limited to concerns about the Zuma Administration, relevant though these were to the prevailing circumstances surrounding the provisions of the remediating legislation. Further criticisms of the levels of control by the executive over the Hawks were specific and aimed at any President and any members of any executive. It made no difference to the question of unconstitutionality who the President was and who comprised the President's administration.

It is important to bear in mind that Bob's primary attack on the remediating legislation was based upon the Constitutional Court's own decision that those remediating measures required that 'they fall within the range of possible conduct that a reasonable decision maker in the circumstances may adopt'.[7] That case adumbrated the content of the reasonableness or otherwise of remediating measures 'in the circumstances'. Moreover, Bob

[7] *Glenister Three* para 191, referring to *Rail Commuters Action Group v Transnet Ltd ta Metrorail* 2005 (2) SA 359 (CC).

believed that the majority in *Glenister Two* had also accepted the role of ordinary members of the public and their honest perceptions of the independence of the Hawks as a component of any subsequent enquiry into whether the remediating legislation had satisfactorily guaranteed that the Hawks were constitutionally independent.

In his affidavit Bob complied with those guidelines. He obtained information from and the views of acknowledged and independent experts in the field of governance, such as the Institute for Security Studies (ISS) and the Anti-Corruption Centre for Education and Research of Stellenbosch University (University of Stellenbosch).

Based on the evidence filed by both bodies, Bob pointed to the perception created in the public mind by evidence in the public domain of the following facts and circumstances. Namely, President Zuma together with some members of his Cabinet, particularly in the security cluster, were of questionable probity and integrity, to put it mildly. The same could be said about certain members of the National Executive Committee of the ANC. The President himself remained under suspicion of gross corruption. His then Minister of Police was alleged to have diverted public funds, earmarked for SAPS intelligence purposes, for improving his private residence. (It is by now well known that Zuma himself did something very similar at his private residence at Nkandla.) Furthermore, concerns had been expressed about the independence of deployed ANC cadres serving in the Hawks.

In particular, there was clear evidence that the SAPS was becoming dysfunctional and increasingly ineffective. This had been confirmed by the then Deputy Minister of Justice. Their decline in performance had been attributed to the ANC policy of cadre deployment, especially to leadership positions, rather than the promotion of worthy serving policemen and women.

Moreover, the Hawks themselves were under a cloud. For example, their then head, General Dramat, had apparently overtly accepted his appointment to the position as a loyal deployed cadre of the ANC. Tony Yengeni, who had been convicted for defrauding Parliament, had sat on the ANC National Executive Committee that had appointed General Dramat.

These perceptions exemplified the need, for South Africa's sake, for a far greater degree of secured structural and operational independence for the Hawks, than was contained in the remedial legislation.

Finally, reliance for constitutional invalidity was again placed on illustrating the tension created by the position of the Minister of Police, who had to both control the Hawks and ensure that their independence from his control was both adequate and protected.

The bench in the Western Cape High Court comprised the Honourable Desai, Le Grange and Cloete JJ. At the request of the ranking judge (Desai J) Bob's lead counsel Adv RP Hoffman SC was invited to commence his application. This was an unusual departure from normal practice. Bob was the second applicant in this application. Ordinarily the HSF as first applicant would have commenced.

Barely had counsel risen than Desai J (Le Grange et Cloete *tacite concurrentes*) informed him that 'I raise this as somebody who had an unconditional commitment to [the] struggle for freedom in this country. I have the highest admiration for those who fought for freedom in this country, that's a given. I accept you also accept that.'

No sooner had counsel replied affirmatively than the learned judge launched an *ad hominem* attack upon him. In a vivid and disturbing peroration, it was put to counsel that the circumstances adduced by Bob's illustrations of the shortcomings in the probity and integrity surrounding the President, his Cabinet, the SAPS and the Hawks actually constituted an attack upon the learned *judge's* dignity, as well as an attack upon the dignity of all who had fought for freedom in South Africa. This astonishing conflation continued, with the honourable judge demanding to know of lead counsel (on three separate occasions) why he had sought in his heads of argument to diminish the struggle for freedom in this country, what he had against *Umkhonto we Sizwe*, why certain named activities of General Anwa Dramat and Tony Yengeni were relevant to this case, and that he did not mind counsel disliking the government but that he objected to counsel's attempt to diminish the struggle for freedom in this country 'for which millions died and for which I suffered as a person of colour'.

Quoting further from counsel's argument, the learned judge suggested that counsel was defamatory of Mr Yengeni, though he appeared somewhat mollified at counsel's explanation regarding the relevance of the evidence in that regard.

Returning to his earlier theme, the learned judge continued:

> I stand here with all the burdens of the past and I see this blatant attack upon my dignity and the dignity of my many comrades who fought for freedom in this country, by you electing to defame people who are not here ... Would you apologise to the people of this country for insulting them? Would you apologise to this court for insulting his ... unrepresented comrades who are not here ... Is this serious litigation or an attempt simply to scandalise everybody who was tainted by the blood of freedom in this country ... You diminish them by attacking them by without giving them a chance to defend themselves ... We can't use the courts to assuage feelings of disempowerment by a minority in this country ...

Most noticeable in the entire exchange is that, throughout, the learned judge failed to afford senior counsel a reasonable chance to reply. Every time he tried to do so, he was interrupted until the very end of this extraordinary outburst. Eventually, the learned judge permitted him to point out that the purpose of the evidence in support of the application was to test the legislation against the requirements of the Constitution, when seen against the circumstances in which the executive, the police and the Hawks found themselves.

The case then continued as if the outburst had never happened. The learned judge was quick to point out, perhaps presciently, that senior counsel had merely diverted attention away from his own case by presenting his evidence in this fashion. Luckily for him, continued the learned judge, the HSF was present 'to argue the real case that your clients may have or may not have'.

In its judgment the Western Cape High Court dismissed Bob's application. It misconceived his arguments entirely. The court held, for example, that 'the complaint ... appears to be directed at the unit being located in the SAPS structure and thus under the political responsibility of the Minister. Given that this is an issue that has already been decided by the CC it requires no further comment'. The court misconceived, and hence offered no comment on, the true thrust of Bob's real objection to the location of the Hawks within the SAPS. Nevertheless, the court did uphold the bulk of the constitutional objections, including those relating to the potential for unwarranted executive interference, raised both by Bob and the HSF.

Without pointing to any supporting evidence, though, the court decided, as it had 'presciently' observed on the first day, that Bob had 'piggybacked' on the arguments advanced by the HSF and would therefore be denied his costs. (This particular ruling was overturned in the Constitutional Court and Bob was awarded his costs.)

Furthermore, and in line with its characterisation and self-imposed politicisation of the expert evidence adduced by Bob, the court struck out most of this evidential material as 'scandalous, vexatious and irrelevant'.

In a sad echo of this mistake, and as will be discussed in a later chapter, the majority of the Constitutional Court could not bring itself to recognise the force and thrust of this evidence and dismissed it as amounting to 'reckless and odious political posturing or generalisations which should find no accommodation or space in a proper Court process'.[8]

'Reckless, odious and political' are judicial characterisations of his words that Bob could absorb. What must have hurt him the most, though, was the word 'posturing'. In this context it means 'behaviour or speech that is intended to attract attention and interest, or to make people believe something that is not true'. In other words, the majority felt that Bob's attack on the legislation was a confidence trick, to serve his own interests and not those of the broader South African public.

This flies in the face of the history of Bob's involvement in this matter. And if the majority could characterise his concerns as 'odious political posturing', Bob might retort that their reasoning was myopic, anaemic and judicially sclerotic.

After *Glenister Three* was decided, the South African public witnessed the overt politicisation of the Hawks through executive interference. It is now beyond dispute that certain members of the executive, including the former President, were, through covert political machinations, procuring the Hawks to pursue their own political agendas as well as to pursue their own political enemies. If senior officers as diverse as the politically connected General Dramat and the highly effective and decorated General Booysen could be pressured into resigning from the Hawks, who indeed could be secure in their employment within the Hawks and to act with independence?

Worse than that, the Hawks continually and conspicuously failed to investigate alleged criminal activities on the part of one politically connected family and certain associates of the Zuma Administration. The justifiably maligned General Berning Ntlemeza is on record as having informed that family that none of its members or companies associated with them were under any suspicion in the minds of the Hawks.

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[8] *Glenister Three* para 29.

This immunity extended to certain members of the Cabinet. To take but one example: Defence and Military Veterans Minister Nosiviwe Mapisa-Nqakula was alleged to have used a military aircraft to illegally transport a Burundian woman from the DRC into South Africa, using fake travel documents. This amounted to the unauthorised use of a military aircraft for private purposes. These allegations were made in May 2016. They cried out for an immediate investigation by the Hawks of possible crimes involving contraventions of the Immigration Act and the Defence Act. All were allegedly committed by an individual occupying high government office and abusing that office. There was no suggestion from the Hawks that the matter was being investigated, nor was the minister publicly instructed to provide a warning statement. She was subsequently appointed as Speaker of the National Assembly.

The Constitutional Court in its unanimous *Nkandla* judgment, to be fair, was able to regain some lost ground. It found that President Zuma had acted unconstitutionally and broken his oath of office in dealing with the Public Protector's report on the subject.. He remained in office until he was forced to resign in February 2018.

It is perhaps unfair to visit the present state of the Hawks on the Constitutional Court's initial refusal to keep South Africa's anti-corruption unit within the NPA. Given the proclivities of the Zuma Administration, it may well have regarded that as simply one more obstacle to overcome to achieve its stated goal of exercising political control over that unit. Ultimately, though, this should never be the case; the independence of this unit has always rested upon the political will of an administration. As Dante observed in 'The Inferno':

> Where the instrument of thinking mind
> Is joined to strength and malice,
> Man's defence cannot avail
> To meet those powers combined.

Chapter 9

Glenister Three *in the Constitutional Court – the hearing and its outcome*

Izak Smuts*

Sometimes it may be easier for ordinary citizens who read the judgments of courts to understand and give practical effect to the content of those judgments than it is for some judges of those courts. A comparison of the majority judgments in *Glenister Two*[1] and *Glenister Three*[2] lends support to this view.

Bob (Hugh) Glenister, in his pioneering way, set out to persuade the courts in *Glenister Three* that the general aroma surrounding the Directorate for Priority Crime Investigation (DPCI) or the Hawks, the investigating authority established to replace the Directorate of Special Operations (DSO) or the Scorpions, which had been sacrificed on the pyre of political expediency at Polokwane, was more sewer than perfumery. A significant focus of his contention related to the location of the investigating authority, removed from where it had resided under the umbrella of the National Prosecuting Authority (NPA), with its constitutionally guaranteed independence, to the South African Police Service (SAPS), with its rather less than impeccable record as regards independence from political influence. In the light of the passage of time since last a career police officer had been appointed to head up the police service, his concerns were not difficult to understand or share.

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1 2011 (3) SA 347 (CC).

2 2015 (2) SA 1 (CC).

Bob Glenister met with not entirely unexpected opposition in the Western Cape High Court, although some success was achieved. Undaunted by previous run-ins in the High and Constitutional Courts, he continued his crusade to achieve for this country an effectively structured, independent, corruption-fighting authority by approaching the Constitutional Court. Such an authority, he insisted, was properly and under the prevailing circumstances, to be situated beyond the ranks of the police.

I was a Johnny-come-lately to the Glenister legal team. When circumstances suggested that it had become necessary for Paul Hoffman to withdraw from that team, I joined a talented and diverse group of lawyers steeped in the matter. The combined research talents of Niel Taljaard, the sober and long-view analysis of Guy Lloyd-Roberts and the ruthless efficiency of Madri du Plessis made it far easier to absorb and come to terms with the spirit of the fight than it would otherwise have been.

Bob Glenister's case in the Constitutional Court differed in approach from that of the Helen Suzman Foundation (HSF). They identified specific provisions in the amending legislation, which it contended still did not meet that required degree of independence for the Hawks that the judgment in *Glenister Two* had outlined. While Bob himself contested the constitutionality of various provisions in the amending legislation, he went further in focusing on express wording in the majority judgment in *Glenister Two* to seek to persuade the court that the entire scheme of the amending legislation was fatally flawed. In this paper, I concentrate chiefly on Bob's approach where it differed from that of the HSF.

Unsurprisingly, Bob looked to the language employed in the majority judgment in *Glenister Two* to determine whether the amending legislation met the required standards. Three elements of the judgment stood out on such an examination:

1. 'The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not *in itself* unconstitutional and thus the DPCI legislation cannot be invalidated *on that ground alone*'.[3]

Bob thought that the phrases 'in itself' and 'on that ground alone' should be read to have meaning. His legal team shared that view.

2. 'Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in

[3] *Glenister Two* majority judgment para 162 [emphasis added].

> the Bill of Rights. This court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker *in the circumstances* may adopt. A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, *so long as the measures taken are reasonable*.'[4]

Bob regarded the words 'in the circumstances' and 'so long as the measures taken are reasonable' as meaningful. So too did his legal team. We were all persuaded that O'Regan J had illustrated the position definitively in her judgment in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*[5] when she wrote:

> What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities.[6]

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4 *Glenister Two* majority judgment para 191 [emphasis added].
5 2005 (2) SA 359 (CC).
6 Para 88.

> 3. 'This court has indicated that the appearance or perception of independence plays an important role in evaluating whether independence in fact exists. This was said in connection with the appointment procedures and security of tenure of magistrates. By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective bench marks for its independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.'[7]

Bob believed that in this passage the Constitutional Court had made it clear that public belief in the independence of the corruption-fighting entity was a prerequisite for a finding that the entity was in fact independent. His legal team shared that belief.

Measured against the requirements spelt out by the Constitutional Court for a properly independent anti-corruption authority, Bob was satisfied that the amending legislation had not solved significant problems in the establishment of the Hawks, and set out to address these issues in his founding papers.

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

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7 *Glenister Two* majority judgment para 207 [footnotes omitted].

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

> The allegations in the struck-out material amount to reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The objective appears to be to scandalize and use the court to spread political propaganda that projects others as irredeemable crooks who will inevitably actualise Mr Clem Sunter's alleged projection that South Africa may well become a failed state. This stereotyping and political narrative are an abuse of court process. A determination of the validity of the DPCI legislation does not require a resort to this loose talk.
>
> These assertions or conclusions are scandalous, vexatious or irrelevant. Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness.[8]

In dealing with Bob's attack on the location of the Hawks within the police service, the judgment is equally strident:

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

[8] *Glenister Three* majority judgment paras 29 and 30.

> decision-maker in the circumstances may adopt'. Mr Glenister can therefore only be understood to be suggesting that the decision about the location of the DPCI in *Glenister Two* was wrong.[9]

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

Froneman J, on the other hand, adopted a more nuanced approach to the case sought to be presented by Bob:

> The main judgment finds that *Glenister Two* foreclosed both the constitutional challenge that Mr Glenister sought to bring against the SAPS Amendment Act, as well as the evidence that he sought to adduce to sustain that challenge. I disagree. *Glenister Two* does neither. If that decision needs to be revisited it must be done appropriately with reasoned discussion and justification for any change. It should not be done by a reinterpretation of its meaning that narrows its original scope without explaining the necessity for the change.[10]

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

> The judgment does not state that the creation of a separate corruption-fighting unit within SAPS will withstand any constitutional attack. It says that something else will be needed in order to sustain that kind of constitutional challenge. Mr Glenister sought to show that the additional factor was that the current extent of corruption in our body politic was of the kind that showed that the location of the DPCI within SAPS was not a possible option for a reasonable decision-maker. In other words, he contended that this evidence showed that locating the DPCI within SAPS meant that it could not have 'sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights'.
>
> His attempt to do so fell squarely within the range of approaches left open by *Glenister Two*.[11]

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9 *Glenister Three* majority judgment para 34.

10 *Glenister Three* Froneman minority judgment para 115.

11 *Glenister Three* Froneman minority judgment paras 119 and 120.

Froneman J summed up his assessment of the terms of *Glenister Two* as they applied to the case presented in *Glenister Three* as follows:

> To sum up: *Glenister Two* did not hold that there could be no challenge to the location of the DPCI within SAPS, only that the mere fact of its location within SAPS was not sufficient to sustain a constitutional challenge. Nor did it lay down that no evidence may be adduced to support a constitutional challenge that was based on something more than the fact of DPCI's location within SAPS. *Glenister Two* does not preclude the presentation of evidence of the context within which the range of possible options open to a reasonable decision-maker should be assessed. Nor does it prohibit evidence about the public perception of corruption within that context. Mr Glenister sought to introduce additional evidence of corruption in our body politic and the public perception of the extent of that corruption in order to bolster his constitutional challenge that, currently, it is not a reasonable option to locate the DPCI within SAPS. *Glenister Two*, I repeat, allowed him to do that.
>
> The main judgment finds that the evidence of public perception that Mr Glenister sought to present showed that the perception already existed at the time of *Glenister Two* and hence this evidence takes the matter no further than what that judgment already decided. I disagree. First, the evidence presented in this matter is not all the same as that which was before the court in *Glenister Two*. Second, the challenge here is predicated on what *Glenister Two* decided. The legal ground for the challenge here was created by *Glenister Two* and thus the challenge is not precluded by the application of some kind of res judicata principle.
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> It is one thing for this court to find that the case Mr Glenister presented was not convincing, but quite another to say that he is prevented by our past decision from doing so. If there are aspects of *Glenister Two* which need to be revisited or clarified it must be done explicitly, not through a reinterpretation that is at odds with what the judgment actually says.[12]

The uninitiated reader may be excused for wondering how two interpretations of the same judgment could be so diametrically opposed, particularly when it is considered that the majority judgment in *Glenister Two* was penned by Moseneke DCJ and Cameron J, with whom Froneman J amongst others concurred, while Moseneke DCJ concurred with the majority judgment in *Glenister Three*, and Cameron J concurred with Froneman J's minority judgment. Regrettably for Bob Glenister, he had failed to persuade the majority with his argument that an independent corruption-fighting entity in South Africa, in the prevailing circumstances, had to be situated outside of the police service.

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[12] *Glenister Three* Froneman minority judgment paras 123–125.

The battle was, however, not entirely lost. Although the Constitutional Court declined to confirm the High Court's order of constitutional invalidity in respect of the appointment criteria and process for the national head of the Hawks, other aspects of the declaration of constitutional invalidity were indeed confirmed. Critically, those provisions of section 17D(1)*(b)* of the amending legislation, which included amongst the functions of the Hawks the prevention and combating of 'any other offences referred to it from time to time by the National Commissioner, subject to any guidelines issued by the Minister and approved by Parliament', were amongst those struck down as unconstitutional, for vesting the National Commissioner with the power to prescribe part of what the Hawks were to do, which the majority judgment described as 'an undesirable encroachment which is exacerbated by the role that the ministerial policy guidelines play in the selection of these offences for referral'.[13]

The majority judgment was not the triumph for which Bob and his team had worked so hard, but we did manage to claw back some of the independence-related criteria that Parliament had ploughed under.

Looking back from the time of writing to the date of the judgment in November 2014, it is impossible to ignore certain events that have stirred the popular imagination since that date. These developments place in new perspective the case advanced by Bob Glenister. Amongst other occurrences, the National Commissioners of the SAPS were suspended. The national head of the Hawks, Anwa Dramat, was also suspended and eventually hounded out of office. The man appointed to replace him, Major General Berning Ntlemeza, had prior to his appointment been found by Gauteng High Court Judge Elias Matojane to be lacking 'integrity and honour'. To add insult to injury, the Hawks sent a letter to the then Minister of Finance, Pravin Gordhan, who was believed to be in a strained relationship with President Jacob Zuma, requesting him to attend upon them to deliver a warning statement in respect of what Professor Pierre de Vos has described as 'breaches of several legal provisions which do not create criminal offences'.[14] Subsequently, the NPA, ostensibly on the basis of an investigation by the Hawks, served a summons calling upon the minister to appear in court on fraud charges, the facts of which had been in the public realm for six years. The executive director of the Independent Police Investigative Directorate (IPID),

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[13] *Glenister Three* majority judgment paras 103–104.

[14] 'Who's watching the Hawks?' *Daily Maverick* (2 September 2016).

Robert McBride, was suspended and threatened with disciplinary action by the Minister of Police. He had to turn to the Constitutional Court to have these illegal steps set aside. Interviewed outside the Constitutional Court after judgment had been granted in his favour on 6 September 2016, in answer to a question from eNCA interviewer, Karyn Maughan, as to whether he believed the Hawks had been 'captured', he said, 'Well, any semblance of independence is absent at the moment.'

I have not heard Bob Glenister say 'I told you so'. In all probability, he would not say so. But who could blame him if he did?

Chapter 10

Corruption as a human rights issue: From Glenister to Allpay*

Max du Plessis**

Introduction

For South African lawyers, particularly those with an interest in public law, procurement law has taken on an increasing importance – and not (only) for the usual (lawyerly) reason that it is a fount of work. For any South African concerned about the state of the nation, public procurement is important for reasons that go to the heart of our democracy. That is because public procurement is a breeding ground for corruption, a fact that is widely acknowledged,[1] and which is (although it does not make one feel better about the scale of our local problem) an international phenomenon.[2]

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* This is an expanded version of a talk given at a conference hosted by Accountability Now in Cape Town, on 4 November 2015, and which itself draws on the following article: Max du Plessis & Andreas Coutsoudis 'Considering corruption through the *AllPay* lens: On the limits of judicial review, strengthening accountability and the long arm of the law' (2016) 133 *SALJ* 755.

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1 Note, for instance, that Article 9 of the UN Convention against Corruption (UNCAC), to which South Africa is a party, specifically provides requirements for 'Public procurement and management of public finances' given the inherent risk of corruption therein; and section 13 of the South African Prevention and Combating of Corrupt Activities Act 12 of 2004 specifically provides for 'Offences in respect of corrupt activities relating to procuring and withdrawal of tenders'.

2 For instance, the OECD has recently summarised the scale of the problem as follows: 'The financial interests at stake, the volume of transactions at the international level and the close interactions between the public and private sectors make public procurement particularly

It is therefore hardly surprising that South Africa's constitutional revolution has faced, and will continue to face, some of its biggest challenges in relation to matters of public procurement, and the corruption which it spawns. Starting with the Arms Deal,[3] which still casts a long and lingering shadow,[4] all South Africans know that serious questions are raised seemingly daily about some or other flawed or corrupt tender in relation to the public service.

I have been asked to write on corruption and human rights and to reflect on the *Glenister* decision.[5] I am confident that others more capable than I will have already given a comprehensive account of *Glenister* and its importance for South African law in the other chapters in this collection. Accordingly, I have instead chosen to use procurement law as my battleground, and the *AllPay* case as a lens for my own reflections on *Glenister*. That is not only because I participated in the case as one of the counsel for Allpay. It is also because the tender at issue – involving the payment of social grants across

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vulnerable to waste. Public procurement is more subject to bribery by international firms than other government activities such as taxation or the judicial system according to a survey of the World Economic Forum. The European Commission estimates that EUR 120 billion are lost each year to corruption in the 27 EU member countries, which is the equivalent of the whole EU budget. *In public procurement, studies suggest that up to 20-25% of the public contracts' value may be lost to corruption*' [emphasis added]. See OECD *Implementing the OECD Principles for Integrity in Public Procurement* (November 2013) 22, available at www.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement_9789264201385-en.

3 Sometimes referred to as the democratic South Africa's original sin: see eg S Grootes 'The NPS going down (in)fighting' *Daily Maverick* (26 June 2014) available at http://www.dailymaverick.co.za/article/2014-06-26-the-npa-going-down-infighting/#.VDOjYedf_yA; Staff Writers 'The Editorial: Arms probe must deliver truth' *Mail & Guardian* (23 September 2011) available at http://mg.co.za/article/2011-09-23-the-editorial-arms-probe-must-deliver-truth; S Grootes 'A ghost in the machine: Do the Zuma Spy Tapes actually exist?' *Daily Maverick* (22 October 2013) available at http://www.dailymaverick.co.za/article/2013-10-22-a-ghost-in-the-machine-do-the-zuma-spy-tapes-actually-exist/#.VDOj_udf_yB.

4 See eg *S v Shaik* 2008 (5) SA 354 (CC); *S v Shaik* 2007 (1) SA 240 (SCA); *Terry Crawford-Browne v President of the Republic of South Africa* CCT 103/10 – an order made by the court by consent required the establishment of a commission of inquiry (the Seriti Commission of Inquiry into the Arms Deal); *Zuma v Democratic Alliance* [2014] ZASCA 101 (28 August 2014) in relation to proceedings instituted by the Democratic Alliance to obtain access to the 'spy tapes', which are recordings of certain private conversations which formed part of the reason that corruption charges against then President Zuma, *inter alia*, in relation to the arms deal, were withdrawn by the then Acting National Director of Public Prosecutions.

5 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

South Africa worth some R10 billion to the winning bidder – highlights various connections between corruption and human rights, and the various challenges that we will have to confront if we are to overcome corruption in achieving human rights.

Here the Constitutional Court's warning in *Glenister* is my inspiration, and the words of the court – indicative of judicial poetry, even Sachsian in their quality and meter – are not hyperbolic: 'corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order.'[6] Nobody living in this country, not even the ANC anymore, can ignore the insidious effects of corruption on our aspirations as a nation. Both the Constitutional Court and the SCA have emphasised that corruption threatens the rule of law, good governance, democracy and fundamental rights.[7] In *S v Shaik* (the corruption prosecution of Jacob Zuma's former financial advisor, spawned by the Arms Deal), the SCA put the scope of the threat and the necessary judicial response in emphatic terms:

> The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.[8]

International conventions[9] also recognise that corruption undermines accountability, transparency and a government's ability to provide basic services. Our own domestic legislation, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Corruption Act) acknowledges that corruption undermines rights, the credibility of governments, democracy, morality, sustainable development and the rule of law.[10]

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6 *Glenister* para 166.

7 See eg *S v Shaik* 2008 (5) SA 354 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC); *S v Shaik* 2007 (1) SA 240 (SCA); and *Glenister*.

8 *S v Shaik* (SCA) para 223.

9 UNCAC, adopted on 31 October 2003; African Union Convention, adopted on 11 July 2003; Southern African Development Community Protocol Against Corruption, adopted on 14 August 2001. South Africa is a party to, and bound by, all these instruments.

10 Preamble to the Corruption Act.

I have already highlighted that, in *Glenister*, both the majority and the minority judgments of the Constitutional Court identified corruption as a scourge which poses a grave danger to democracy, accountability, the rule of law and guaranteed human rights. The minority judgment, by Ngcobo CJ,[11] held that '[c]orruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.' The majority judgment, by Moseneke DCJ and Cameron J, confirmed these dangers.

When considering the more specific effects of corruption, the Constitutional Court held:

> Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics [and] efficiency, and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of state contract for goods and services.[12]

The *AllPay* dispute revolved around a tender for the payment of social grants and the question of whether the award of a tender by the South African Social Security Agency (SASSA) to Cash Paymaster Services (CPS), for the countrywide payment of social grants to beneficiaries, was constitutionally valid. It was perhaps the largest government tender since the infamous Arms Deal in South Africa.

Approximately 16 million South Africans receive and depend on social grants from the state, which means that this most vulnerable group of South Africans, many of whom rely on grants as their principal source of income, constitute a staggering 30% of our population. Given our Constitution's commitment to dignity,[13] to social assistance,[14] the rights of children[15]

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[11] *Glenister* para 57, and also see para 83.
[12] *Glenister* para 175.
[13] Section 10.
[14] Section 27.
[15] Section 28.

(who make up the largest class of indirect grant beneficiaries),[16] and to procurement processes that are transparent, fair and competitive,[17] it was obviously critical that the process that makes social welfare possible was untainted and transparent, not least of all from insinuations of corruption or procedural irregularity. And here's the corruption angle: if evidence emerges to suggest corrupt practices occurred within the process, then it is imperative – not only for the rule of law, in the abstract, but also to ensure that the best services are obtained at the best price – that the allegations are investigated and that those who are implicated are held properly accountable.

The whiff of corruption

Given this judicial and legislative abhorrence for corruption and a clear-sighted acceptance of the real danger that it poses to our constitutional democracy, allegations of corruption in one of the biggest public tenders ever awarded, which impacts upon millions of the most vulnerable in society, and engages the state's constitutional obligations to provide social assistance (under section 27), would naturally be highly relevant, and ought rightly to be brought to the attention of a court and the state, if only to force the state to investigate and place relevant evidence before the court.

While there was no direct evidence of corruption in the *AllPay* case, the whiff of malfeasance was strongly in the air. One of SASSA's own officials provided evidence that the tender was tainted by widespread dishonesty and *mala fides*, and the official said under oath that he feared for his life; there were unexplained payments, during the tender adjudication process, by the independent tender process monitor, for luxurious spa treatments for members of the tender adjudication body; and the President's legal adviser, one Michael Hulley, was curiously co-opted in the adjudication process, and suggestions surfaced that he may have been paid by the winning tenderer, CPS.

[16] In terms of the Social Assistance Act 13 of 2004, there are over 10 million grants made, in respect of children, to their parents or guardians.

[17] Section 217.

Despite these considerations, and the specific evidence sought to be introduced before it about alleged corrupt practices at the heart of the tender, the SCA was unmoved. It found in *AllPay* that there was no reviewable irregularity (finding only what it termed 'inconsequential' irregularities). By the SCA's lights, the case had been reduced to 'yet another' tender matter.

It was not to end there, however. After an appeal to the Constitutional Court, the court rendered two judgments in *AllPay Consolidated Investment Holdings (Pty) Ltd v SASSA and Cash Paymaster Services (Pty) Ltd*.[18] The *AllPay* merits judgment and the *AllPay* remedy judgment (as I shall refer to them) bring into sharp focus a variety of questions that implicate the judiciary, its relationship with the fight against corruption in South Africa, and the extent to which the efforts to hold corrupt individuals accountable might extend beyond South Africa to foreign jurisdictions with extra-territorial jurisdiction (and duties) in respect of corruption. *AllPay* also perhaps highlights the limits of certain types of procedures, such as administrative review, to deal effectively with allegations of corruption, and thus raises questions about how else these matters should be tackled if we are to avoid – in the words of the Constitutional Court in *Glenister* – corruption felling at the knees virtually everything we hold dear and precious in our hard-won constitutional order.

Lessons from *Allpay*

AllPay is a dense and interesting duo of judgments by the Constitutional Court. For present purposes, allow me to lift out three lessons from them, which illustrate important connections between human rights and the fight for human rights.

(a) Taking corruption seriously: from relaxed to robust judicial scrutiny

What the *AllPay* saga highlights, for present purposes, is the fundamental difference in approach to the irregularities by the SCA as compared with the Constitutional Court. The SCA found that even though the tender process

[18] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) ('merits judgment'); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (4) SA 179 (CC) ('remedy judgment').

in this particular matter had irregularities, these were inconsequential irregularities, which – despite their existence – would not have affected the final outcome of the award.

The SCA reasoned that an irregularity is inconsequential when, on a hindsight assessment of the process, the successful bidder would likely still have been successful despite the presence of the irregularity.[19] According to the approach of the SCA, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. In my respectful view, through such a relaxed approach the integrity of the procurement process may all too easily be sacrificed on the altar of outcome.

The SCA's approach was therefore at odds with the Constitutional Court's jurisprudence on administrative justice and the constitutional obligations to fight corruption – certainly there was no acknowledgment at all by the SCA of these obligations. The SCA's approach is also at odds with the best of comparative jurisprudence, which confirms that a fair, equitable and transparent tender system is necessary precisely because 'it precludes any risk of favouritism or arbitrariness on the part of the contracting authority'.[20] Furthermore, as Froneman J held (prior to his elevation to the Constitutional Court), '[t]he procurement of goods and services by organs of state and the rendering of those goods and services by third parties is a public, not private matter under our constitutional system of government. *The mischief that this public gaze seeks to avoid is nepotism, patronage, "or worse".*'[21]

Similarly, Cameron JA (as he then was) has cautioned: 'The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realizing our constitutional vision of open, uncorrupt and responsive government.'[22]

Academic writers have also stressed the point: 'One of the primary reasons for the express inclusion of the five principles in section 217(1) of the Constitution is *to safeguard the integrity of the government procurement*

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[19] See *AllPay* (SCA judgment) paras 21 and 95; and *AllPay* (merits judgment) paras 17–21.

[20] *R (on the application of the Law Society) v Legal Services Commission; Dexter Montague & Partners (a firm) v Legal Services Commission* [2008] All ER 148 (CA) paras 42–43.

[21] *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd* [2007] JOL 20448 (SE) paras 29–30 [emphasis added].

[22] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 31.

process. The inclusion of the principles, in addition to ensuring the prudent use of public resources, is also aimed at preventing corruption.'[23]

Accordingly, the relaxed approach adopted by the SCA was in need of robust overturning. That came in the form of a judgment delivered by Justice Froneman on behalf of a unanimous Constitutional Court in *AllPay*; it was the perfect opportunity for the Constitutional Court to provide such light. Somewhat surprisingly, despite almost 20 years of constitutional democracy, *AllPay* was the first case where the Constitutional Court directly considered a review of a tender and pronounced on the appropriate review standard.

The Constitutional Court specifically took issue with the reasoning of the SCA regarding its approach to irregularities and found it detrimental to important aspects of the procurement process.[24] In this regard, the court held that the

> insistence on compliance with process formalities is a good in itself, and instrumentally has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.[25]

That insistence, to be sure, was all the more explicable and desirable given, firstly, the tender in issue (in *AllPay*, to provide social grants to the poorest of the poor); and secondly, the impact it may have on service delivery (and thus the achievement and fulfilment of fundamental rights to dignity and social assistance).

Between Bloemfontein and Braamfontein, then, the approach to public procurement and the appropriate review standard regarding procurement irregularities was stark. The difference in judicial approach is not only confirmation of the difficult balance to be maintained between the 'integrity' of procurement processes (which the Constitutional Court's judgment places great emphasis upon) and the ostensibly commercial need for the contracting authority to obtain what it stresses are the best services on the best terms to meet the authority's needs (a focus animating the SCA's decision to find no reviewable fault with SASSA's tender decision). The differences between the SCA and the Constitutional Court also highlights

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[23] P Bolton *The Law of Government Procurement in South Africa* (2007) 57 [emphasis added].

[24] Para 24.

[25] Para 27.

the need for wider and deeper academic discussion of public procurement law, and the related policy and commercial aspects arising.

The *AllPay* decision thus usefully reminds that in the public procurement context it is naïve at best, and dangerous at worst, to lose sight of the 'anti-corruption objective' which is best achieved through a commitment to transparency and strict compliance with regulatory requirements. Recognising that procurement is a breeding ground for corruption, the review standard set by the court in the merits judgment and the clarity provided and the insistence on strict fealty to procedural requirements and formalities (while recognising that there can still be, from a purposive perspective, immaterial procedural irregularities) is thus to be welcomed.

So that is the first and vital connection between human rights, fairness, process, procurement and the judiciary's fight against corruption. The court has confirmed the instrumental, not just intrinsic, value of upholding procedural fairness: it leads to better outcomes in tenders and guards against corruption.

(b) The limits of courts

The exacting, robust, standard of judicial review discussed above is thus necessary to serve human rights. That is not only because fairness is a human right. It is also because an overly relaxed approach to corruption is a blow to other human rights and to the constitutional project more broadly.

So here arises the second point to be made about corruption and human rights, which arises from *AllPay*. It is the limits of courts and the related difficulty of evidence. You see, evidence of corruption does not often come wrapped in a bag labelled 'smoking gun'. It is almost always deviously practised, and the evidence seldom presents itself neatly or comes sweetly packaged.

Take *AllPay*. I have already said something about the whiff of corruption in the matter. Let me add that before the High Court there were suggestions in the media that the contract had been awarded to CPS on account of questionable practices. However, when the papers in the litigation were closed and served it became clear that the evidence was all contested and SASSA had furnished no evidence of any investigations that it had undertaken (and therefore it was likely that evidence in this regard would constitute inadmissible hearsay). In order to avoid the real risk of delaying

the hearing by side-disputes about admissibility of evidence,[26] in the hearing of the merits of the matter (which had to be decided urgently because CPS, the winning tenderer, and SASSA, the government agency that awarded the tender, refused to give an undertaking to suspend the implementation of the tender pending the outcome of the High Court litigation) AllPay consented to the relevant portions of the papers being struck out. The effect was that AllPay argued the matter in the High Court without any reference to corruption.

Similarly, in the SCA, no reliance was placed on any allegations of corruption (the relevant allegations having been struck from the record in the High Court). There was no mention, direct or indirect, of corruption in AllPay's heads of argument. Thus, at the start of the SCA appeal hearing, the SCA questioned AllPay's lead counsel, Gilbert Marcus SC, about the issue of corruption. Marcus readily and rightly agreed that AllPay, for the purposes of the SCA appeal, did not rely on issues relating to corruption.

As it turned out, after the hearing in the SCA, but before the SCA had delivered judgment, AllPay subsequently received further evidence (which it sought to adduce before the SCA in a form that was admissible) of what appeared to be an admission by one of SASSA's own officials, who formed part of the secretariat for the tender and was present at all stages of the tender's evaluation and adjudication processes, that the tender was tainted by widespread dishonesty and *mala fides*. The receipt of this new evidence in an admissible form (a sworn affidavit by the person in whom the official confided together with a transcript – and tendered audio recording – of the conversation in which the admissions of impropriety were made) allowed AllPay to seek to place the evidence before the SCA, and to seek to rely on it prior to the SCA rendering its judgment.

The SCA refused that request outright, without hearing argument, and without asking SASSA to provide its own response to the evidence of one of its own witnesses in the matter (we say SASSA's own witness, since he was an official who had already provided an affidavit on behalf of SASSA in the matter). It is unfortunate that the SCA, rather than carping at AllPay for

[26] The agreed expedited hearing had already been postponed by more than a month, due to SASSA's failure to timeously provide the full review record, which necessitated AllPay bringing a separate, and successful, compelling application to produce further documentation previously withheld, including communications with Mr Michael Hulley, at the time the special advisor to President Zuma, who had apparently been appointed as 'overall strategic advisor' to the tender. More about Hulley, later.

its attempts at late admission of this evidence (which was explained by AllPay when it sought to adduce the evidence), did not grasp the nettle by dealing with the evidence and its implications. Instead, it refused to see or hear any evil in the process by its refusal to admit the evidence, and without obtaining SASSA's view on the evidence of its own witness.

In any event, by the time the matter was heard by the Constitutional Court, AllPay again attempted to place the evidence before the court (by way of a joint application for leave to appeal and leave to place the further evidence before the court). That effort drew attention from Corruption Watch (a notable NGO in South Africa), which intervened in the appeal to contend, *inter alia*, that the questions of corruption arising from the evidence required further investigation at the very least from SASSA.

In opposing AllPay's application for leave to appeal in the Constitutional Court, both SASSA and CPS, on affidavit, attempted to deal with the new evidence that AllPay sought to adduce (which was the same as that which AllPay had placed before the SCA, but which the SCA had refused to consider). While SASSA denied the import of the evidence, there were a number of salient issues, all of which pointed to the real risk that the tender was tainted with corruption, which were not answered. And in answering some of the allegations, SASSA revealed further areas of concern (such as the fact of unexplained payments, during the tender adjudication process, by the supposedly independent tender process monitor, for luxurious spa treatments for members of the adjudication body). Moreover, SASSA produced an affidavit from its official who had made the key allegations sought to be introduced by AllPay. The official, while now denying that he believed that the tender was awarded due to any impropriety or *mala fides* (yet inexplicably and ominously still indicating that he feared for his life), admitted making the statements reflected in the transcript sought to be introduced by AllPay, and did not claim that any of those statements were fabrications, but merely that the statements should not be interpreted to suggest that there had been *mala fides*. Notably, and despite his efforts to provide a gloss on his earlier evidence and fears expressed about threats to his life, he still maintained that in his view the tender process had been marked by various unexplained 'short-cuts'.

Ultimately, the Constitutional Court decided the appeal in favour of AllPay without grappling with the further evidence, which it refused to admit (*inter alia*, because it found that the evidence 'remains hearsay evidence

and introduces no new independent evidence of major irregularities'),[27] and without resolving whether SASSA had discharged its statutory obligation to properly and fully investigate the allegations in relation to corruption (on the basis, *inter alia*, that to do so would require the court to effectively sit as a court of first instance),[28] even though SASSA's own affidavits indicated that a number of issues were not resolved and had not been properly investigated.

The questions raised by the further evidence and SASSA's affidavits in answer thereto – and the accounts of corruption at the heart of the process – remain unanswered. They raise issues of accountability and the means by which to probe the alleged impropriety (including by foreign investigative agencies through extra-territorially applicable anti-corruption legislation, discussed in the final section of this paper) and the possibility of future steps to be taken to investigate those involved, including individuals such as Mr Michael Hulley, President Zuma's legal adviser, who was implicated in the award of the tender to CPS (in fact, there was a suggestion in the evidence by the SASSA official, not properly disputed by SASSA, that Mr Hulley may even have been paid by CPS), and whose involvement in the process remained shrouded in murkiness.

And so our second lesson is confirmed. The *AllPay* judgment provides some useful guidance as to the limits of judicial review to deal with allegations of corruption, and highlights the need for those who might wish to push for greater accountability in respect of the corruption allegations implicated in a tender to consider alternative processes beyond the court.

(c) Other complementary measures to tackle corruption

That then leads me to the third and final lesson. If, absent a smoking gun, courts and judicial review procedures are ill-suited to achieve a thorough-going investigation of corruption practices, then we need to think about other complementary measures. Through such complementary measures, together with existing judicial reviews of procurement failures and short-cuts through the courts, we stand a chance of tackling corruption and its insidious effects on human rights.

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[27] *AllPay* (merits judgment) para 94.

[28] *AllPay* (merits judgment) para 95.

If review courts are either unable or unwilling to deal with such allegations, what are the alternative tools of accountability? One approach, which, was proposed in *AllPay* by Corruption Watch, is for the court to specifically require the state to investigate these allegations. Particularly where the allegations are serious and the state's response thereto has been inadequate. This is arguably an appropriate approach, which does not treat the allegations (particularly where, as in *AllPay*, serious issues were left unanswered) too lightly, while on the other hand avoids the court being required to make any final pronouncements on matters where the evidence is incomplete or contested (a particular concern for the Constitutional Court, given that it was sitting not as a court of first instance but as a court of final appeal).

This middle road has the value of requiring organs of state to do their statutory duty, particularly in cases where, to avoid further embarrassment, or due to some complicity on their part, they are uninterested in undertaking any, or suitably rigorous, investigations.

It should be noted that the Treasury Regulations, promulgated in terms of the Public Finance Management Act 1 of 1999, create an obligation on organs of state to investigate even allegations of a failure to comply with the organ's supply chain management system (the constitutionally and statutorily required system that governs each organ's public procurement processes), and not merely allegations of corruption or improper conduct.[29] Each organ of state's accounting authority (for instance, the CEO of SASSA) *must*:

> *(b)* investigate *any allegations against an official or other role-player of corruption, improper conduct or failure to comply with the supply chain management system*, and when justified–
>
> (i) take steps against such official or other role-player and inform the relevant treasury of such steps; and
>
> (ii) report any conduct that may constitute an offence to the South African Police Service;
>
> …

[29] This is in line with international best practice: see, for instance, Transparency International's *Handbook: Curbing Corruption in Public Procurement* (2006) 47, which provides that: 'Whenever controls or audits demonstrate or suggest that a contractor, supplier or consultant has possibly committed any acts of corruption, the case should be fully *investigated* by the prosecution authorities. If a crime is confirmed, the contractor/supplier/consultant should be held *accountable* – by claiming an adequate amount of damages and by debarring the person or company from participation in future bidding processes' [emphasis in the original].

> *(f)* *cancel a contract awarded* to a supplier of goods or services–
>
> (i) if the supplier committed any corrupt or fraudulent act during the bidding process or the execution of that contract; or
>
> (ii) *if any official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of that contract that benefited that supplier*.[30]

Such investigations (or even the failure to so investigate) would clearly constitute the exercise of a public power. Accordingly, interested litigants, such as public interest NGOs, could challenge any failures to properly investigate in court, and perhaps force the relevant organs to effectively tackle corruption. If, in addition, the failure to properly investigate is also a violation of a (prior) court order which required such investigation, then this would of course also allow for potential knock-on challenges to enforce the court order and contempt proceedings.

The other complementary approach to deal with allegations of corruption in tenders, and one that does not require review courts to give directions in their judgments, is criminal investigations under statutes, both domestic and foreign, that deal specifically with corruption.

As to domestic statutes: The Corruption Act provides for the strengthening of measures to prevent and combat corruption and corrupt activities, and specifically codifies the offence of corruption and offences relating to corrupt activities. In particular, the Act prohibits and criminalises the payment (or promise of payment) or receipt (or promise of receipt) of gratification to achieve certain impermissible outcomes.

Section 34 creates a reporting duty, which carries a criminal sanction of its own. In particular, the section provides that:

> (1) *Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed–*
>
> *(a)* an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

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[30] Treasury Regulations, Reg 16A9.1 [emphasis added]. See also *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC), in the context of the duty created under the Preferential Procurement Regulations 2001 (now replaced by the Preferential Procurement Regulations 2011) to investigate any fraud in relation to claims of black economic empowerment credentials.

> *(b)* the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more,
>
> must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995 (Act 68 of 1995).
>
> (2) Subject to the provisions of section 37(2), any person who fails to comply with subsection (1) is guilty of an offence.[31]

The Corruption Act was amended in 2012 to ensure that the reports must be directed specifically to the Directorate for Priority Crime Investigation (DPCI), colloquially known as the Hawks, who are intended to be a dedicated independent corruption fighting unit within the South African Police Service (SAPS).[32]

The courts have not yet had occasion to interpret the ambit of section 34 of the Corruption Act, but the section's potential is an obvious means to ensure that corruption is investigated and brought to light. It also should disincentivise officials and senior managers in private companies from turning a blind eye to corruption.

As to foreign statutes: The provisions of the Foreign Corrupt Practices Act (FCPA) in the United States, in a similar fashion to the UK Bribery Act, prohibit directly or through an intermediary, offering, authorising a payment, or paying anything of value to foreign public officials or candidates for public office in order to secure or retain business.[33] A foreign official includes 'any officer or employee of a foreign government or any department, agency or instrumentality thereof … or any person acting in an official capacity for or on behalf of any such government, department, agency, or instrumentality'.[34]

However, the FCPA is only applicable to 'issuers' (a corporation that has issued securities that have been registered in the United States or that is required to file periodic reports with the Securities and Exchange

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[31] Emphasis added.

[32] The Constitutional Court recently held that the provisions of the South African Police Service Act did not provide adequate independence for the Hawks and were therefore unconstitutional, which the court remedied by removing the offending portions of the Act. See *Helen Suzman Foundation v President* 2015 (2) SA 1 (CC).

[33] Section 78dd-l*(a)*–2*(a)*.

[34] Sections 78dd-3*(f)*(2)(A).

Commission (SEC))[35] and US 'domestic concerns' (in essence US companies and the like),[36] or to foreign companies who cause, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.[37]

Korkor and Ryznar have recently summarised the jurisdictional requirements, in a US journal, as follows:

> The anti-bribery provisions apply to citizens and residents of the United States, regardless of where the corrupt conduct occurred. The provisions also extend to companies, foreign and domestic, that conduct business in the United States, as well as their subsidiaries. Also implicated are companies whose shares are traded on any U.S. exchange or that are registered with the SEC. Finally, the FCPA anti-bribery provisions cover foreign persons, including corporations, who perform *any act* within the territory of the U.S. in furtherance of an offer, promise to pay, or payment to a foreign government official.[38]

The fact that the US authorities investigated NET1 for possible corruption in relation to the CPS public tender in South Africa, which relates wholly to work to be done by its South African subsidiary (CPS) and to be paid for in South Africa, clearly demonstrates the extraordinary reach of the FCPA, and the determination by the US authorities to make use thereof.

Ironically, the South African police, and in particular the Hawks, who have an equally, if not a more exacting piece of corruption legislation at their disposal (the South African Corruption Act), have never, at least

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[35] Section 78dd-1*(a)* of the FCPA provides that the section applies to 'any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o*(d)* of this title'.

[36] The FCPA defines 'domestic concern' as follows: '(1) The term "domestic concern" means–

(a) any individual who is a citizen, national, or resident of the United States; and

(b) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.'

[37] See section 78dd-3*(a)*; see also Ashe 'Lengthening anti-bribery lasso of the United States: The recent extraterritorial application of the US Foreign Corrupt Practices Act' (2004) 73 *Fordham Law Review* 2897 at 2902; and *Foreign Corrupt Practices Act: Antibribery Provisions Guide* prepared by the Department of Justice and the Department of Commerce, available at http://www.justice.gov/criminal/fraud/fcpa.

[38] S Korkor & M Ryznar 'Anti-bribery legislation in the United States and United Kingdom: A comparative analysis of scope and sentencing' (2011) 76 *Missouri Law Review* 415 at 423–424.

publicly, indicated that they have opened any similar investigation into the allegations of corruption in the *AllPay* tender.

This raises an important but separate issue: in the fight against corruption in the public life of the country, the effectiveness thereof is largely determined by the institutional will and competence to investigate, and if necessary, prosecute such corruption. It is unfortunate to think that US officials were more interested in rooting out corruption in respect of a South African tender process (albeit through the means of NET1's holdership of CPS) than our own officials appeared to be. Nevertheless, the AllPay experience at least sounds a warning to companies and local officials that the fact that local policing and prosecutorial authorities may not vigorously pursue certain types of corruption, or corruption implicating certain parties, does not mean that foreign authorities will necessarily show equal reticence to act in response to such allegations and evidence, where their domestic legislation's very long reach allows them to do so.

Conclusion

The *AllPay* saga demonstrates that a constitutional, democratic government that is open, accountable and responsive can only be achieved by a strong and unwavering commitment to the rule of law in all areas of public endeavour. In matters of public procurement, the rule of law is of great value not merely as a principle to ensure fairness between competing private parties who wish to secure the rights to a tender. Rather, the rule of law, and its specific incarnations in public procurement (the requirements for fairness, competitiveness and transparency), ensures the realisation of important public goods: better services, at better prices, and services which are acquired and delivered free of the pervasive and corroding influence of corruption. Nothing less than the Bill of Rights and our deepest constitutional commitments depend on it.

Yet, *AllPay* has shown the limits of any one legal regime's ability to deal with allegations that a public tender has been afflicted with corruption. Review courts are generally not best placed to make any definitive factual findings in relation to corruption (particularly not on appeal), which is a crime of the shadows and hard to prove at the best of times. Nevertheless, courts dealing with public procurement can do little better, and do very well indeed, by requiring strict fealty to the prescripts of public procurement

law. By doing so, while they may never know what, if any, malfeasance they have thwarted, the possibility of such malfeasance within and its corroding influence on public procurement is nevertheless significantly checked. The Constitutional Court in *AllPay* has also made it clear that courts should not fear taking, at least in some matters, a more proactive oversight role so as to ensure that the fresh tenders which they require do lead to better, more just, outcomes for the public as well as any individual litigants. The potential remains, one hopes, that in future this will include requiring state agencies to fully and vigorously investigate serious allegations of corruption.

Of course, the fight against corruption is not limited to, or even mainly to be fought in, the realm of administrative law reviews. There exists excellent and wide-ranging domestic and foreign corruption-fighting legislation. Its success will, however, largely be determined by the institutions enforcing it. There are signs of hope in this regard too. The US authorities have shown a refreshing robustness in seeking to prosecute corruption wherever it may flourish, and domestically, the time may well come when local authorities are challenged to follow the example of their foreign counterparts or justify their failure to do so.

These developments and promises considered and reflected upon in this chapter are important to take stock of – not only as an antidote to the otherwise depressing reality facing our constitutional democracy as it confronts the scourge of corruption, but as a reminder that with proactive and creative lawyering, bold and clear-sighted judicial reasoning, and the use of available complementary tools and resources (local and foreign), the fight against corruption in the procurement realm is a fight worth having.

Chapter 11

Was it worth it? Considering the constitutional necessity of institutional public interest litigation through the prism of the Glenister cases

David Unterhalter SC[*] and Andreas Coutsoudis[**]

Introduction

South Africa is a young democracy. Its founding mothers and fathers understood that its birth marked not the end of a process to rid the country of injustice and inequality, but merely its true beginning. Thus, they crafted a transformative Constitution,[1] rather than one aimed at protecting the status

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1 The Constitutional Court has referred to the Constitution as being transformative, *inter alia*, in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) para 17; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) (*Bato*

quo.[2] The Constitution was, at its best, a covenant meant to entrench a future – a new South Africa – only then dreamed of. It is, and was meant to be, a transformative blueprint for disparate people desiring to become one open-and-democratic nation, founded upon justice, equality and peace.[3]

The Constitution provided that the Constitutional Court is the ultimate guardian of the new constitutional order.[4] It is for this reason that the Constitutional Court plays so central a role. It has, and remains, engaged, in no small way, in hammering out the shape of a nation still being formed.[5]

Star) paras 73–74; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 142; and *S v Makwanyane* 1995 (3) SA 391 (CC) (*Makwanyane*) para 26. The final Constitution (the Constitution of the Republic of South Africa, 1996), was preceded by the interim Constitution (Act 200 of 1993), which in Schedule 4 set the Constitutional Principles in terms of which the final Constitution was to be drafted. In this chapter, we will therefore refer singularly to the 'Constitution', as a collective reference, or as a reference to the final Constitution, save where the context indicates otherwise.

2 In one of its first judgments the Constitutional Court noted that '*[i]n some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different*: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. *The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic*.' See *S v Makwanyane* 1995 (3) SA 391 (CC) para 262 (per Mahomed J) [emphasis added].

3 See the preamble to the Constitution, and see also the post-amble to the interim Constitution which reads, in pertinent part, as follows: 'This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.

4 *President of the Republic of South Africa v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (*SARFU Two*) para 72; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) (*Doctors for Life*) para 38; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*) para 55.

5 We hardly need list the cases that are illustrative of this, but they would certainly include, in addition to *Glenister Two* and *Glenister Three*, which are at the heart of this book: *Makwanyane* (finding the death penalty unconstitutional); *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*First Certification Judgment*) and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (*Second Certification Judgment*) (the Constitutional Court's certification of the final Constitution);

This is not a task that the court proclaimed for itself, but was entrusted to it by the Constitution.[6] It is no easy task. The cases that the court has grappled with in the past, and will have to grapple with in the future, are difficult, consuming and often politically fraught. But there is little doubt that these ordeals are forming and firing South Africa's irresolute clay.[7]

Yet, the Constitutional Court, like all South African courts, has no independent agency. It can only correct failures to properly attain the promise of the Constitution if approached by litigants.[8] The Constitution's drafters no doubt foresaw this when they provided for generous standing grounds, including, importantly, standing in the public interest.[9] Thus public interest litigation in South Africa is critical to the Constitution's transformative power. It is a necessary incident of the courts' role as the guardians of our Constitution.

Public interest litigation takes different forms. Therefore, it is useful to divide public interest litigation into a number of categories, based on the substantive focus of the litigation. For instance, there is a well-established line of public interest cases that seek to secure that the government fulfils

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Azanian People's Organisation (AZAPO) v President of the Republic of South Africa 1996 (4) SA 672 (CC) (dismissing a challenge to the TRC's amnesty powers); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (*TAC*) (the right of access to HIV/Aids treatment); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) (*Khosa*) (right of access to social security for permanent residents); *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 (1) SA 580 (CC) (the right of African women to inherit under African customary law); *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) (unfair discrimination on cultural and religious grounds by a school for prohibiting a pupil from wearing a nose-stud); *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) (*JASA*) (unconstitutionality of the President's extension of the Chief Justice's tenure); and *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (*EFF v Speaker*) (the binding nature of the Public Protector's remedial powers, and the President's unconstitutional failure to comply therewith).

6 See heading below: 'The constitutional role of the courts and the Constitutional Court'.

7 We note our reliance on the powerful imagery in Cecil Day-Lewis's poem, 'Walking Away'.

8 In terms of section 167(4)*(c)* of the Constitution, the Constitutional Court may also consider the constitutionality of parliamentary Bills at the instance of the President in terms of section 79(4)*(b)*, and of provincial Bills at the instance of a Premier in terms of section 121(2)*(b)*.

9 See section 38 of the Constitution; *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) (*Kruger*) paras 21–23; *Ferreira v Levin NO* 1996 (1) SA 984 (CC) paras 165 and 229; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 33.

its obligations to ensure the realisation of various socio-economic rights.[10] Another category of public interest litigation focuses on the general integrity of constitutional institutions and their adherence to the constitutional framework. We term this *institutional public interest litigation*, which is at the heart of this chapter. This litigation is based on an important insight that is woven into South Africa's constitutional tapestry: in a constitutional democracy built on the rule of law, institutions matter.[11]

Increasingly, over the last decade, the courts, and ultimately the Constitutional Court, in judgments responsive to institutional public interest litigation, have played an exemplary role in recognising and supporting the institutional framework of our constitutional democracy.[12] The courts have been called upon to do so precisely because during this period the elected branches of the government[13] have engaged in actions to subvert, or threaten, this institutional framework. It has been suggested that our

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[10] See eg *TAC*; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); and *Khosa*.

[11] As the Supreme Court of Appeal (SCA) noted in *Democratic Alliance v President* 2012 (1) SA 417 (SCA) para 66: 'The rule of law is a central and founding value. No one is above the law and everyone is subject to the Constitution and the law. The legislative and executive arms of government are bound by legal prescripts. Accountability, responsiveness and openness are constitutional watchwords. *It can rightly be said that the individuals that occupy positions in organs of State or who are part of constitutional institutions are transient but that constitutional mechanisms, institutions and values endure.* To ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women' [emphasis added].

[12] See eg *Glenister Two* and *Glenister Three*; *JASA*; *Democratic Alliance v President* 2013 (1) SA 248 (CC) (the President's unconstitutional appointment of the National Director of Public Prosecutions); *Hlophe v Premier of the Western Cape Province; Hlophe v Freedom Under Law* 2012 (6) SA 13 (CC) (the case involving the intended misconduct hearing against a Judge President for allegedly seeking to influence the Constitutional Court's determination of a case in favour of Jacob Zuma); *EFF v Speaker*; and *McBride v Minister of Police* [2016] ZACC 30 (*McBride*) (the unconstitutional suspension of the executive director of the Independent Police Investigative Directorate). All these cases, save for *EFF v Speaker*, were first heard and decided in the lower courts, prior to their ultimate adjudication in the Constitutional Court.

[13] 'The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government.' See *R (on the application of ProLife Alliance) v British Broadcasting Corporation* (per Lord Hoffmann), taken from a passage quoted with approval by the Constitutional Court in

experience in South Africa is not surprising, and that the attempt to erode independent institutions is a predictable outcome of the concentration of political power.[14]

In that context, the *Glenister* litigation stands out as an important example of institutional public interest litigation and the essential role that it can play to secure the integrity of the Constitution. The *Glenister* litigation was not only worth it; it was constitutionally necessary. In elaborating on this, we consider three main themes:

- the constitutional role of the courts and in particular the Constitutional Court;
- the importance of institutional public interest litigation as an essential feature of the Constitutional Court's obligation to acts as guardian of the constitutional framework; and
- the limits of public interest litigation and the courts.

These themes are analysed through the prism of the *Glenister* triumvirate of cases, more fully discussed in the other chapters of this book.

The constitutional role of the courts and the Constitutional Court

The importance of public interest litigation flows directly from the role which the Constitution sets for the courts, particularly the Constitutional Court.

Section 2 of the Constitution, the constitutional supremacy clause, makes it clear, in terms, that the 'Constitution is *the supreme law of the Republic; law or conduct inconsistent with it is invalid*, and the *obligations imposed by it must be fulfilled*'.[15] Section 1*(c)* correspondingly indicates that one of the founding values of the Constitution is '[s]upremacy of the constitution *and the rule of law*'.[16] As the Constitutional Court has noted, '[t]his commitment to the supremacy of the Constitution and the rule of law means that the

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) para 47.

[14] See eg Sujit Choudhry '"He had a mandate": The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 1, 3.

[15] Emphasis added.

[16] Emphasis added.

exercise of all public power is now subject to constitutional control.'[17] The Constitution makes it clear that judicial authority is vested in the courts and that '*[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice*; [n]o person or organ of state may interfere with the functioning of the courts; *[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies*.'[18]

The High Court, the Supreme Court of Appeal and the Constitutional Court are all given jurisdiction to determine constitutional matters.[19] The Constitutional Court is given express and exclusive constitutional jurisdiction in 'a number of crucial political areas', which include the power to decide disputes between organs of state in the national and provincial spheres, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution, and to decide whether Parliament or the President has failed to fulfil a constitutional obligation.[20] Moreover, the Constitutional Court is required to make 'the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and *must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force*.'[21] Given the terms of the Constitution, the Constitutional Court has noted that '[i]t follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences.'[22]

That our constitutional framework always viewed courts, and in particular the Constitutional Court, and no other branch of government, as its ultimate guardian, is most dramatically revealed by the creation of the Constitution. The Constitution itself had to be approved ('certified') by the Constitutional Court. The interim Constitution contained a series of Constitutional Principles against which the Constitutional Court was entrusted to test the consistency

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17 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 48.
18 Section 167(5) [emphasis added].
19 Sections 167(3), 168(3) and 169(1).
20 Section 167(4).
21 Section 167(5) [emphasis added].
22 *SARFU Two* para 73.

of the final Constitution agreed by the Constitutional Assembly.[23] When the first version of the final Constitution was placed before the court, it begun its judgment by noting that '[j]udicial "certification" of a constitution is unprecedented'.[24] In that judgment, the court found the initial text of the final Constitution wanting in certain respects. Thus, it was only the amended text, prepared pursuant to the court's first judgment, that finally received certification from the court.[25]

Given this constitutional framework, the Constitutional Court has held that '[c]ourts are required by the Constitution to ensure that all branches of government act within the law and fulfil their constitutional obligations. *[The Constitutional Court] has been given the responsibility of being the ultimate guardian of the Constitution and its values*.'[26] And, as Ngcobo CJ opined in *Glenister One*, the courts therefore 'not only have the right to intervene in order to prevent the violation of the Constitution, *they also have the duty to do so*'.[27]

The important role of institutional public interest litigation

Notwithstanding the courts' obligation to ensure that all branches of government act lawfully and fulfil their constitutional obligations, the courts are, of course, not at large, of their own volition, to make determinations about whether any particular executive or legislative action is unconstitutional. Courts can only decide matters that are brought before them. It is particularly because of this that public interest litigation, and especially institutional public interest litigation, is essential for the proper functioning of South Africa's constitutional democracy. South African courts, including the Constitutional Court, have no independent ability to investigate and identify violations of the Constitution. Therefore, the Constitution and its values can only be protected if a court is approached by litigants to do so.

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[23] Section 71 of the interim Constitution required that the constitutional text of the final Constitution passed by the Constitutional Assembly in terms of Chapter 5 of the interim Constitution had to be certified by the Constitutional Court as complying with the Constitutional Principles in Schedule 4 to the interim Constitution.

[24] *First Certification Judgment* para 1.

[25] *Second Certification Judgment*.

[26] *Doctors for Life* para 38 [emphasis added]; see also *Pharmaceutical Manufacturers* para 55.

[27] *Glenister One* para 33 [emphasis added].

Part of the purpose of the Constitution's[28] generous approach to standing, including standing for anyone acting in the public interest, is to 'facilitat[e] the protection of the Constitution.'[29] As Chaskalson P held in *Ferreira v Levin*, the court adopted a broad approach to the question of standing, since '*[t]his would be consistent with the mandate given to [the] Court to uphold the Constitution* and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.'[30] Thus, the Constitutional Court has recognised that generous standing is a necessary corollary of the court's mandate to uphold the Constitution. This is evidently because, absent generous standing provisions, violations of the Constitution may never be placed before the Constitutional Court. Therefore, public interest litigation in particular should be understood as a necessary incident of the Constitutional Court's role as guardian of the Constitution.

The role of institutional public interest litigation is demonstrated in a number of ways by the *Glenister* litigation.

First, when the elected branches of government appear unresponsive to public disapproval of their actions, public interest litigation may bring under scrutiny the legislative curtailment of constitutional institutions. The *Glenister* litigation offers a paradigmatic example of this. There was widespread public condemnation[31] of the political and executive decisions

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[28] Section 38 of the Constitution provides that '[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are–

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.'

[29] See *Kruger* para 23, where the Constitutional Court held, in a case where section 38 (which governs standing in relation to threats to and infringements of the Bill of Rights) was not of direct application in the case, that it should 'nonetheless adopt a generous approach to standing in this case' given 'that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights. Such an approach to standing will facilitate the protection of the Constitution.'

[30] *Ferreira v Levin* para 165 [emphasis added].

[31] See Edwin Cameron 'Constitutionalism, rights, and international law: The *Glenister* decision' (2013) 23 *Duke Journal of Comparative & International Law* 389, 391–392 and

taken to pass legislation to disband the Scorpions,[32] 'an agency [situated in the National Prosecuting Authority] that was practically established for the primary purpose of combating corruption and specialised offences',[33] and to replace it with the Hawks,[34] which lacked the institutional independence of the Scorpions (and was situated in the South African Police Service (SAPS)).[35] Despite this public disapproval, the disbanding was not only approved by the ruling party, the African National Congress (ANC), at its national conference in December 2007,[36] but also by the Cabinet in April 2008.[37] Thus, had Mr Glenister not sought to challenge these actions (which bore ultimate success in *Glenister Two* and *Glenister Three*), the disbanding of the Scorpions and its replacement by the Hawks would not have been subjected to constitutional scrutiny. Thus the Hawks would today, undoubtedly, have retained all its executive-beholden features that rendered it unfit to fulfil its constitutionally mandated role as an independent corruption-fighting unit. For that reason, it appears clear that the *Glenister* litigation played an essential role in ensuring that one of the institutions necessary to safeguard South Africa's constitutional democracy from the grave threat of corruption, an independent corruption-fighting unit, was created and kept *structurally* safe from potential political interference. However, as highlighted by the recent facts considered in the next section of this chapter,[38] the structural independence of the Hawks, as a matter of law, has not necessarily ensured its independence in fact.

Second, institutional public interest litigation can have a broader, and constitutionally significant, impact beyond the determination of the immediate case before the court. The *Glenister* litigation is illustrative of this point in two respects:

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footnote 18 where Justice Cameron refers to opinion polls included by Mr Glenister in his papers in *Glenister Two*.

32 Directorate of Special Operations (DSO). In this chapter, we use the unit's colloquial name, the Scorpions.

33 *Glenister Three* para 4.

34 Directorate for Priority Crime Investigation (DPCI). In this chapter, we use the unit's colloquial name, the Hawks.

35 This was done by amending the National Prosecuting Authority Act 32 of 1998 (NPA Act) and the SAPS Act 68 of 1995.

36 *Glenister One* para 14 and *Glenister Two* para 8.

37 *Glenister One* para 1.

38 See below, 'The limits of public interest litigation and the courts'.

- The Constitutional Court's finding, in relation to the features that would ensure the necessary independence of the Hawks, established principles which were relied upon in subsequent cases, where the courts were called upon to protect the integrity and independence of constitutional institutions. For instance, in *JASA*, the Constitutional Court held that the President's renewal of the Chief Justice's term of office, and the legislation empowering this, were unconstitutional, in part because the court accepted that *Glenister Two* established that 'a non-renewable term of office is a prime feature of independence.'[39] Furthermore, in *McBride v Minister of Police*, the Constitutional Court relied on *Glenister Two* and *Glenister Three* in determining the requirements for the independence of another constitutional institution, the Independent Police Investigative Directorate (IPID).[40] IPID is the body established, pursuant to section 206(6) of the Constitution, to investigate alleged misconduct and offences, including corruption, committed by members of the SAPS. In *McBride* (in which the Helen Suzman Foundation (HSF) acted, as it did in *Glenister Two*, as *amicus curiae*), the Minister of Police had suspended Mr McBride, the executive director of IPID, and McBride had successfully challenged his suspension and the unconstitutionality of the legislative provisions allowing for his suspension in the High Court.[41] The Constitutional Court confirmed the High Court's finding, *inter alia*, that certain provisions of the IPID Act 1 of 2011, the Public Service Act 1994, and related regulations were unconstitutional, since they failed to ensure adequate independence for IPID, particularly in relation to the need for Parliament to be involved in the removal of the head of the institution. The decisions of the Constitutional Court and the High Court rely directly on the determinations in *Glenister Two* and *Glenister Three* as to the necessary constitutional requirements to secure institutional independence.[42] These requirements are so well-entrenched that in *McBride* the Minister of Police did not oppose the Constitutional Court's confirmation of the invalidity of the legislation.[43] Moreover, as an interim measure, while Parliament amended the unconstitutional legislation, the court read the relevant

[39] *JASA* para 73, relying on *Glenister Two* paras 222–223.
[40] *McBride v Minister of Police* [2016] ZACC 30 (*McBride*).
[41] *McBride v Minister of Police* 2016 (4) BCLR 539 (GP).
[42] *McBride* paras 31–44; *McBride v Minister of Police* 2016 (4) BCLR 539 (GP) paras 47–57.
[43] *McBride* para 7.

sections of the SAPS Act (in relation to the suspension and removal of the head of the Hawks) into the IPID Act.[44]

- The *Glenister* litigation required the Constitutional Court to consider and directly confront the spectre of corruption that has become a pressing threat to South Africa's constitutional democracy. In particular, in *Glenister Two*, the majority was compelled to issue the stark reminder that 'corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order.'[45] This finding articulated and animated the court's finding that the Constitution (although not in express terms) placed an obligation on the government to create a corruption-fighting unit precisely because of the invidious threat of corruption to the realisation and fulfilment of all the rights in the Bill of Rights. But it was not only the majority, which found the legislation constitutionally invalid, that recognised the clear threat of corruption to South Africa's nascent constitutional democracy, but also the minority, which did not find the SAPS legislation unconstitutional. Ngcobo CJ (writing for the minority) held that '[c]orruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.'[46] These findings also have resonance in later cases, and will no doubt underpin the court's future approach to protecting the constitutional framework that guards the country against the threat of corruption.[47] In particular, one can draw a clear jurisprudential line directly from the court's clarion call against corruption in *Glenister Two*, and the court's decision some five years later, defending the role of another independent institution integral to the constitutional framework, the

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[44] See *McBride* para 58 order 3, providing that '[p]ending the correction of the defect(s): 3.1. Section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 is to be read as providing as follows: "Subsections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 apply to the suspension and removal of the Executive Director of IPID, with changes as may be required by the context".'

[45] *Glenister Two* para 166.

[46] *Glenister Two* para 57 and also see para 83.

[47] For instance, in *Glenister Three*, Mogoeng CJ opined at the beginning of his judgment that '[a]ll South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.'

Public Protector.[48] In *EFF v The Speaker*, with rhetorical echoes of the urgent threat of corruption articulated in *Glenister Two*, the Chief Justice, writing for a unanimous court, opined that:

> the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.[49]

Third, institutional public interest litigation, while an effective means to foster government accountability and the protection of institutions, nevertheless requires persistence and determination. Holding government to account often necessitates lengthy litigation. This is well-illustrated by the *Glenister* litigation. Mr Glenister and the HSF (which acted initially as amicus in *Glenister Two*, and as a concurrent applicant in *Glenister Three*) had to walk a long road ultimately to ensure that the actions of the elected branches of government were subjected to constitutional scrutiny, and that they properly fulfilled their obligation to create an independent corruption-fighting unit. In *Glenister One*, Mr Glenister initially challenged the Cabinet's decision to initiate the legislation that disbanded the Scorpions and to require the relevant ministers to withdraw the draft legislation from Parliament,[50] but was unsuccessful both in the High Court and the Constitutional Court. The Constitutional Court found that there was insufficient justification for it to intervene in the parliamentary processes at that stage, and that it was not proven that material and irreversible harm would result if the court did not intervene at that stage.[51] Given this initial rebuff, it would have been a quite natural response to abandon the litigation. However, Mr Glenister did not do so. Once the legislation disbanding the Scorpions and creating the Hawks was enacted, Mr Glenister then proceeded to launch a fresh challenge in the High Court. This, too, was unsuccessful.[52] Undaunted by yet another finding against him, Mr Glenister appealed against the High

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[48] The Public Protector is one of the Chapter 9 institutions created by the Constitution to 'strengthen constitutional democracy' (section 181(1)).

[49] *EFF v The Speaker* para 52.

[50] The National Prosecuting Authority Amendment Bill of 2008 – disbanding the Scorpions – and the South African Police Service Amendment Bill of 2008 – creating the Hawks.

[51] *Glenister One* para 57.

[52] *Glenister v President of South Africa* [2010] ZAWCHC 92.

Court's decision to the Constitutional Court. His persistence ultimately led to the Constitutional Court's finding in *Glenister Two* that the SAPS Amendment Act was unconstitutional, since it failed to secure an adequate degree of independence for the Hawks. Yet, even that was not the end of the road. Parliament, although purportedly seeking to give effect to *Glenister Two*, when making amendments to the SAPS Act, again failed to ensure that the Hawks unit was adequately independent. In *Glenister Three*, both Mr Glenister and the HSF had to launch fresh litigation, challenging the amended SAPS Act. Their separate applications for direct access to the Constitutional Court were dismissed, the High Court was then approached, and it declared a number of sections unconstitutional;[53] all but one of these declarations were confirmed by the Constitutional Court. The Constitutional Court's findings in *Glenister Two* and *Glenister Three would not have come to pass* if it were not for Mr Glenister and the HSF's determination to pursue this litigation. Indeed, from the urgent launching of *Glenister One* in the High Court[54] to the final determination of *Glenister Three*,[55] the litigation spanned a period of six and a half years.

Fourth, institutional public interest litigation may take many forms, and one of the forms that is of particular significance is that of *amici curiae* (friends of the court). In *Glenister Two*, the HSF applied and was granted leave to be admitted as an *amicus curiae*. One of the requirements to be admitted as an *amicus* before the Constitutional Court is that the *amicus* must make useful submissions that are distinct from those already presented to the court by the parties.[56] In *Glenister Two*, the HSF's decision to seek admission as an *amicus*, and the different grounds it advanced in relation to the constitutionality of the legislation, had a decisive effect on

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[53] *Helen Suzman Foundation v President of the Republic of South Africa; In Re: Glenister v President of South Africa* 2014 (4) BCLR 481 (WCC) – Mr Glenister and the HSF launched separate applications, both challenging the legislation, that were heard together.

[54] On 18 March 2008. See *Glenister v The President of the Republic of South Africa (Amici curiae / The African Christian Democratic Party)* 2008 JDR 0569 (T).

[55] The Constitutional Court handed down judgment on 27 November 2014.

[56] See Rule 10(6)*(c)* of the Constitutional Court Rules. See eg *In re certain amicus curiae applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) para 5, where the court held: 'The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court.'

the ultimate success of the case. In summary, the HSF submitted, and the court accepted, that:

- section 7(2) of the Constitution created an obligation on the state to take reasonable steps to 'respect, protect, promote and fulfil the rights in the Bill of Rights';
- corruption undermines the rights in the Bill of Rights;
- the state therefore had to take reasonable steps to combat corruption;
- in assessing what steps would be regarded as reasonable the Constitution required the court to consider South Africa's international obligations, which included an obligation to create a corruption-fighting unit with the necessary independence;
- it therefore would be unreasonable to seek to combat corruption by creating a corruption-fighting unit that lacked the necessary independence; and
- thus, the state bore a constitutional obligation to create an corruption-fighting unit with the necessary independence.

As Justice Cameron (who together with Justice Moseneke wrote the majority judgment in *Glenister Two*) noted, 'the arguments that ultimately found favour with the Court [in *Glenister Two*] were in essence those the *amicus* advanced.'[57] Thus, absent the HSF's intervention, the court (which was evenly split, with the majority commanding five judges, and the minority, written by the Chief Justice, commanding four judges), may not have found that the Hawks legislation was unconstitutional (given its failure to ensure adequate independence for the Hawks).

Finally, public interest litigation has an important role to play to ensure that court orders and findings are properly complied with. In *Glenister Two*, the court declared the SAPS Amendment Act (which created the Hawks) unconstitutional, but suspended the declaration for 18 months, to allow Parliament to remedy the defects. As mentioned above, the consequential amendments to the SAPS Act (made in light of the judgment granted in *Glenister Two*) again failed to ensure adequate independence for the Hawks. The amendments showed a blatant failure to give effect to the Constitutional Court's decision in *Glenister Two*, such that, even if one might not say that the executive and Parliament deliberately disregarded the court's order when amending the legislation, at the very least, notwithstanding prior

[57] Edwin Cameron 'Constitutionalism, rights, and international law: The *Glenister* decision' (2013) 23 *Duke Journal of Comparative & International Law* 389 at 397.

judicial sanction, they sought to do no more than the bare minimum. Since, in its order in *Glenister Two*, the Constitutional Court had not retained any supervisory jurisdiction over the parliamentary amendment process, absent the concurrent challenges brought by Mr Glenister and the HSF in *Glenister Three*, it appears evident that the government's failure to give proper effect to the court's decision may have gone unmarked. *Glenister Three* allowed the Constitutional Court to cure the defects that it found (fewer than argued for by the litigants) in the Hawks legislation by itself amending the legislation by severing the offending provisions. Interestingly, this was not a remedy asked for by either of the parties, which had only sought a declaration of invalidity and a suspension that would have allowed Parliament to make necessary amendments. The court may have adopted this relief precisely to avoid a further situation where the executive and Parliament failed to ensure the independence of the Hawks, and in order to avoid further delay.

The limits of public interest litigation and the courts

Public interest litigation and the courts have their limits. Those limits are discernible from the Constitution, and find expression in the separation of powers doctrine inherent in the Constitution's structure. To generalise, one might say that the courts, and thus public interest litigants, can certainly stop the worst from happening, but they are not empowered to require the best (or what they believe to be the best) to come to pass.

The nature of these limits is exemplified by the *Glenister* litigation. In *Glenister One*, the Constitutional Court's rationale for its inaction can be found in its understanding of the constitutional limits of its role. The court, while affirming the role of the courts as guardians of the Constitution with a right and duty to intervene, held that:

> *[i]t is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention*. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. *But even in these circumstances, courts must observe the limits of their powers*.[58]

[58] *Glenister One* para 33 [emphasis added].

The court then went on to quote from its earlier decision in *Doctors for Life*, where it had found that:

> [c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. *They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution*.[59]

The Constitutional Court, then, ultimately held that, in the circumstances of the case, there was no proper justification to involve itself in the parliamentary process in relation to the passing of the relevant Bills disbanding the Scorpions and creating the Hawks prior to the legislation being passed.[60] This was so notwithstanding the fact that it seemed clear that the legislation would certainly be passed (as indeed occurred the day after judgment was delivered, with the President assenting thereto some three months later)[61] and that Mr Glenister had indicated the inevitable disbanding of the Scorpions was already causing harm given the anticipatory resignation of significant numbers of Scorpions personnel (the numbers were not disputed, but the reasons for the resignations were).[62]

Moreover, the victories in *Glenister Two* and *Glenister Three* still fell short of achieving everything that Mr Glenister and the HSF respectively sought. In *Glenister Two*, the Constitutional Court gave a robust and resounding judgment, finding that government was constitutionally obligated to create an adequately independent corruption-fighting unit, and that the legislation creating the Hawks was invalid to the extent that it failed to achieve this. Yet, despite the argument on behalf of Mr Glenister that the abolition of the Scorpions, situated in the NPA, itself was unconstitutional, the court found that:

> the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. *The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the [Hawks] legislation*

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59 Gl*enister One* para 34; *Doctors for Life* para 22 [emphasis added].

60 *Glenister One* para 57.

61 *Glenister One* was handed down on 22 October 2009; the impugned legislation was passed by Parliament on 23 October 2009, and assented to by the President on 27 January 2009 (*Glenister Two* para 12).

62 *Glenister Two* paras 17 and 20.

> *cannot be invalidated on that ground alone*. Similarly, the legislative choice to abolish the [Scorpions] and to create the [Hawks] did not in itself offend the Constitution.[63]

In the same way, in *Glenister Three*, although the court found that the Hawks legislation was still constitutionally wanting, it rejected the argument advanced on behalf of Mr Glenister that, given allegations of the significant level of corruption in the South African body politic, it would not be reasonable to situate the country's corruption-fighting unit in the SAPS.[64] Furthermore, in *Glenister Three*, the HSF, both in the High Court and in the Constitutional Court, challenged a number of sections in the Hawks legislation which individually and collectively failed to ensure that the Hawks had adequate independence. However, both in the High Court and the Constitutional Court, not all these challenges were upheld. One such feature was the section dealing with the appointment of the head of the Hawks.[65] The High Court had found that the appointment procedure, which required the Minister of Police, with the concurrence of the Cabinet, to appoint the head (which merely had to be reported to Parliament for noting) was unconstitutional. However, the majority in *Glenister Three* found that parliamentary involvement was not an essential requirement for adequate independence, and refused to confirm the declaration of invalidity in that respect. Cameron J, writing with the concurrence of Froneman J and Van der Westhuizen J, disagreed. In a strongly worded dissent, Cameron J drew attention to the fatal flaw created by allowing the head of the Hawks to be appointed by the executive alone. He held that the appointment should be subject to parliamentary approval (as was the case with the appropriate constitutional comparator, the Public Protector), precisely because:

> the independence of an institution depends pivotally on the independence of those who staff it. Where political considerations influence the selection of the institution's staff, its independence is, to that extent, limited. *If compliant incumbents are selected at the outset, securing their tenure and preserving the autonomy of the institution within which they work will be inadequate to secure independence*.[66]

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63 *Glenister Two* para 162 [emphasis added].
64 *Glenister Three* para 119 (per Froneman J, Cameron J concurring).
65 SAPS Act section 17CA.
66 *Glenister Three* para 153 [emphasis added].

However, this cogent argument did not sway the majority of the court. This possibly demonstrates that the court, or its majority, was only willing to require a minimum standard, rather than requiring the adoption of structural features that were best able to ensure independence.

The limits of institutional public interest litigation (and the majority judgment) were soon demonstrated. Within weeks of the judgment, the Minister of Police suspended Anwa Dramat, the respected head of the Hawks (illegally relying on a section of legislation struck out by the Constitutional Court, as was later found by the High Court),[67] appointing an acting head (Mthandazo Berning Ntlemeza), and after Dramat was ultimately pressured and apparently paid a significant amount to resign,[68] the minister proceeded to appoint Ntlemeza permanently as the head in September 2015.[69] Ntlemeza would almost certainly not have been appointed if his appointment had required parliamentary approval since, at the time of his appointment, a High Court had already issued a damning judgment in which it found, in relation to his actions while acting head, that he was 'biased and dishonest', 'lack[ed] integrity and honour', and 'made false statements under oath'.[70] At the time of writing this chapter, the HSF had instituted review proceedings to have Ntlemeza's appointment set aside on the basis that it was irrational. Ntlemeza was subsequently eased out of office without the need for further litigation.

In conclusion, in understanding the limits of institutional public interest litigation and the concomitant role of the courts in ensuring the integrity of the constitutional framework, one does well to reflect on the 'End note' included by Justice Van der Westhuizen in his separate judgment in *Glenister Three*:

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

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67 *Helen Suzman Foundation v Minister of Police* [2015] ZAGPPHC 47 (6 February 2015).

68 Pierre de Vos 'Who's watching the Hawks?' *Daily Maverick* (2 September 2016).

69 Stephen Grootes 'Ntlemeza's appointment as head of the Hawks is absurd' *Daily Maverick* (14 September 2015) available at http://www.dailymaverick.co.za/article/2015-09-14-op-ed-ntlemezas-appointment-as-head-of-the-hawks-is-absurd/#.V80jnY6RbcE.

70 See Business Day 'Ntlemeza "biased and dishonest", says judge' (24 March 2015) available at http://www.bdlive.co.za/national/2015/03/24/ntlemeza-biased-and-dishonest-says-judge.

> [221] *But courts can only do so much*. A corruption-free society can only develop in the hearts and minds of its people — particularly the ones occupying positions of political and economic power. We need dedication to the spirit and high aspirations of the Constitution. Institutions are tools designed to help people realise their ambitions. Much dedication is required on the part of those handling the tools.
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> [222] *Of course the structure of our institutional watchdogs must be made as immune to corruption as possible. But even the most sophisticated institutional design will require the exercise of discretion and therefore integrity on the part of — and trust in — the office bearer. Thoroughly closing all perceived loopholes will guarantee little. The more procedures and processes we put in place to safeguard against corruption, the more plausible the deniability we give to a corrupt actor if all the technical boxes have been ticked*. Generally, abstract institutional designs cannot be corrupt. As we know, people can be.[71]

This end note, written in late 2014, when read again in late 2016, is eerily prescient. At the time of writing this chapter, the Hawks and its head (a man found to be dishonest and lacking in integrity) were being accused of intentionally targeting the Minister of Finance in a baseless criminal investigation for purely political ends (in particular to allegedly benefit the President and his allies by ensuring that they have free access to the Treasury).[72] The President, in the midst of this crisis, issued a press statement drawing attention to the importance of strong institutions composing our constitutional democracy, and emphasising that it would be unconstitutional for him to intervene in any investigations *inter alia* by the Hawks.[73] History will no doubt judge the *bona fides* of this statement, but, as Justice Van der Westhuizen cautioned, '[t]he more procedures and processes we put in place to safeguard against corruption, the more plausible the deniability we give to a corrupt actor if all the technical boxes have been ticked.' These concerning and potentially politically motivated actions of the Hawks, which have occurred notwithstanding that in *Glenister Three* the court sought to secure the institutional independence of the Hawks as a matter of law, when

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71 Emphasis added.

72 Claire Bisseker & Natasha Marrian 'Endgame: Zuma's bid to raid the treasury' *Financial Mail* (1 September 2016) available at http://www.financialmail.co.za/coverstory/2016/09/01/endgame-zuma-s-bid-to-raid-the-treasury. In subsequent litigation the allegations against the Hawks were proved correct.

73 The Presidency 'President Zuma does not have powers to stop investigations' (26 August 2016) available at http://www.thepresidency.gov.za/pebble.asp?relid=22551.

considered within the context of Justice Van der Westhuizen's 'End note', emphasise an important point: achieving institutional independence in law does not necessarily lead to the achievement of institutional independence in fact. Nevertheless, organisations such as the HSF and Freedom under Law raised the possibility of pursuing litigation to protect against any unconstitutional arrest of the Minister of Finance.[74] As it happened, he was not arrested. And, as mentioned above, the HSF is already engaged in a review of the appointment of the head of the Hawks. At the time of writing this chapter, it was not yet certain how this latest institutional crisis would end, and whether it will ultimately be viewed as an example of the limits of institutional public interest litigation and the courts, or another resounding example of their critical role and effectiveness in guarding our constitutional democracy.

Conclusion

The *Glenister* litigation demonstrates the potency of institutional public interest litigation and the vital and essential role it plays in allowing courts to fulfil their role as guardians of the Constitution and the institutions of democracy. Ultimately, such litigation and the courts' ability to safeguard the institutions of democracy have their limits. Yet, those limits are as nothing compared to the certainty that, absent such litigation and the courts' steadfast carrying out of their constitutional obligations, South Africa's constitutional project may long since have been derailed. Within that context, the worth of the *Glenister* litigation is apparent. Mr Glenister and the HSF played no small part in this. They, together with the courts, have been the agents of the very transformation that the Constitution promised. As American anthropologist Margaret Mead famously remarked, '[n]ever doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has.'[75] The triumvirate of cases that Mr Glenister has rightly lent his name too, together, if not individually, stand as a testimony to the worth and constitutional necessity of an active citizenry that holds government to the transformative aspirations of the Constitution.

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[74] See HSF & Freedom under Law 'Press statement of 2 September 2016' available at http://hsf.org.za/resource-centre/press-statement-freedom-under-law-helen-suzman-foundation.

[75] Nancy Lutkehaus *Margaret Mead: The Making of an American Icon* (2008) 261.

Chapter 12

#Where do we go from here?

Paul Hoffman SC*

Part one – A perspective from 2016 – before the Zondo Commission was appointed

Commentators and the twitterati are abuzz describing the symptoms of the war of attrition presently in progress in and between the centres of power in the South African body politic. General anxiety in the land has spawned the local use of the hashtag '#Where do we go from here?' It is apparently trending. Martin Luther King used the phrase as the title of a book which, appropriately, had the sub-title 'Chaos or Community?'

Allegations of 'state capture' are under investigation by the Office of the Public Protector at the request of the Jesuits and others. The Finance Minister, Pravin Gordhan, is under attack by the Hawks, the apex body of corruption-busters in South Africa (SA). The key state-owned enterprises have been shovelled under the wing of President Zuma – is this 'putting the fox in charge of the hen house?', the commentariat cries. Even the usually malleable electorate has expressed some displeasure. Literally thousands of former African National Congress (ANC) local government councillors are without a job and wondering what to do next in the wake of electoral reverses on 3 August 2016. They now comprise a well-connected lobby for change within the ANC. This contribution to the national conversation is for them too.

The national leadership of the ANC has pondered long and hard, with or without the assistance of the hashtag. Gwede Mantashe owns up to assuming 'collective responsibility' and calls for 'introspection'. Joel Netshitenze, a veteran of the Mbeki inner circle and still on the National Executive Committee of the ANC, has a long list of what he calls 'the sins of incumbency'. These sins range from patronage and tenderpreneurism through the full range of cronyism, nepotism and clientele-ism. Comprador capitalists, including shy 'cash only' donors to political parties in power, do

* Counsel for the *amicus* in *Glenister One*, counsel for Glenister in *Glenister Two* and *Glenister Three*, a director of Accountability Now.

not escape his analysis. All too often, he remarks, some of the cash is kept by the cadres to whom it is delivered in brown paper bags, and only part reaches party coffers.

A major cause of much of the trouble currently besetting SA is not receiving sufficient attention, probably because the cause is, to use BJ Vorster's tired phrase, 'too ghastly to contemplate', let alone address in a constructive and patriotic fashion. The nation proceeds at its peril, toward an economic and political precipice of pandemic proportions, if it continues to stick its head in the sand and to pretend that the ship of state will somehow right itself automatically and sail serenely away from the precipice towards which it is currently hurtling, downgrade by downgrade, deficit by deficit. The state won't self-correct without targeted interventions. It is powerless to do so. All people of goodwill need to take charge of their destiny.

A major cause of the symptoms summarised above is corruption of the most widespread and corrosive kind. The moral compass of the leadership of the ANC needs to be reset. Mantashe (who rose to the rank of Cabinet Minister) knows this: he speaks of the need to deal with corruption and for the ANC to be seen to be dealing with corruption. Gauteng ANC boss Paul Mashatile (who became Deputy President in the Cabinet of President Ramaphosa) calls for responsiveness to the people crying out against corruption and the South African Communist Party has a lot to say about how serious the need to address corruption has become.

But how to get serious about taking on the corrupt is the unanswered question. Much more than the internal integrity committee of the ANC is required to address the issue. This is so because it is not only ANC members who are involved in corruption. Indeed, corruption is far more endemic worldwide than that, but it is also because corruption is a crime way beyond the jurisdiction of any private body to tackle effectively.

The culture of entitlement, what Kenyans call the 'our turn to eat' syndrome, and the impunity of those clearly behaving corruptly are colluding to bring the country to grief. The Constitutional Court warned, as long ago as March 2011, that:

> [t]here can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined

> in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.

More recently, the Chief Justice wrote in November 2014, as he introduced the judgment in the final round of the *Glenister/Helen Suzman Foundation* cases, that:

> All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.
>
> We are in one accord that South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate. And this in a way is the issue that lies at the heart of this matter. Does the South African Police Service Act (SAPS Act), as amended again, comply with the constitutional obligation to establish an adequately independent anti-corruption agency?

The 20/20 vision of hindsight, based upon the track-record and unfolding of circumstances concerning the Hawks since 2014, reveals that they have not emerged, despite all the legislature and the judiciary's panel-beating of their governing laws, as an effective and adequately independent anti-corruption agency. There is litigation pending to remove the grossly unsuitable head of the Hawks from office and much, more repetitious, litigation to keep the KZN Hawks boss, General Johan Booysen, at his desk. The latter's disciplinary troubles appear to be based upon his willingness to investigate the politically well-connected, including his provincial commissioner of police and friends of the Zuma family.

The former (and first) head of the Hawks, General Anwa Dramat, is facing criminal charges of kidnapping relating to the rendition of Zimbabweans to Zimbabwe. With prior knowledge of these allegations, the Cabinet allowed him to be paid a wonderful golden handshake to resign from his post. This exit occurred after Dramat unsuccessfully tried to get his hands on the Nkandla fraud, theft and corruption dockets which were kept from his unit by SAPS top management deployees before the November 2014 judgment left them with no excuse not to involve the Hawks in that investigation.

Needless to say, no progress has been made on the criminal complaints concerning Nkandla, based on the Public Protector's 'Secure in Comfort' report. The earliest of these was laid by Accountability Now,

a little NGO with the attitude of a Jack Russell terrier, which has been described as a thorn in the flesh of the corrupt due to its work on the Arms Deal, the constitutionality of the Hawks and for helping to break the bread manufacturers' cartel. The complaint was made in Cape Town in December 2013. In March 2014 further similar complaints were laid by the DA in Nkandla itself and by the EFF in Pretoria. All bases are covered, but no investigation has, to the knowledge of the complainants, been undertaken.

The morale of the Hawks is low. There are hundreds of unfilled vacancies within their organisation and its arrest rate has fallen steeply in recent years. Buildings occupied by the Hawks are not fit for habitation. These features speak of its lack of effectiveness as the premier corruption-busting unit in the land.

Archbishop Emeritus Desmond Tutu sums up the current situation best when he says that:

> [today] our world faces unprecedented levels of immorality, inequity, intolerance, insecurity, prejudice, greed, corruption – and impunity.
>
> Righteous people are asking: What do we do to turn back the tide of hatred, corruption and destruction? To whom do we turn for peace and security, for morality, and environmental and social sustainability?

Strong institutions are needed to address the situation. In South Africa it is constitutionally feasible to create a new Chapter 9 Institution with preventative, investigative, prosecutorial and educative powers to properly combat corruption wherever and whenever it occurs. Scorpions on steroids are possible. The Scorpions themselves would have survived had they been a creation of the Constitution rather than of mere legislation which could be, and was, repealed by a simple majority in Parliament despite stiff opposition from the DA and civil society organisations.

Combining the efforts of a constitutional Integrity Commission (often called an Anti-Corruption Commission elsewhere in Africa) with the public auditing functions of the Auditor-General and the investigations of public sector maladministration by the Public Protector (who has no jurisdiction over the private sector) could be a winning formula if the political will to pass the laws necessary can be mustered. A small but vital amendment to the Constitution itself is necessary in order to properly guard against political interference and influence, which currently so bedevils the efforts of the Hawks, in the future.

An Integrity Commission with properly trained independent-minded personnel, who enjoy guaranteed resourcing and security of tenure of office, could specialise in tackling all aspects of serious corruption without political influence or interference in much the same way as the Public Protector, also, like the Auditor-General, a Chapter 9 Institution formed to support constitutional democracy, has functioned in relation to maladministration of the state for the last seven years. The Hawks could be retained to deal with other 'priority crimes' like human trafficking, poaching and illicit drug dealing which are already in their inbox.

An Integrity Commission with the clout to take the fight to the corrupt ought not to be confused with commissions of inquiry. The latter serve as fact-gathering bodies to advise and possibly make recommendations to the executive arm of government in relation to a usually complex factual matrix (like the Arms Deal, the Marikana massacre and the costs of higher education). An Integrity Commission under the Constitution has far greater powers than that and may frequently find itself investigating, rather than advising, the executive. As a Chapter 9 body it would be accountable to report to Parliament, not the executive. This is a salutary feature that supports its independence from the executive branch.

Our National Development Plan (NDP), the vision for the country until 2030, is the means according to which the nation is intent upon making its future work. The implementation of the promises in the Bill of Rights and service delivery in general are to be effected in accordance with the NDP. Chapter 14 of the NDP is called 'Fighting Corruption' and is instructive. It was clearly compiled by the National Planning Commission before both Constitutional Court judgments quoted from above were written because it does not refer to either of them. Obviously, the findings of that court enunciate our supreme law and are binding on government. All political parties represented in Parliament except the EFF (which speaks for under 7% of those who voted in 2014) support the NDP, but none of them has, so far, done enough to create an effective anti-corruption entity which complies with the criteria (specialised, trained, independent, resourced and secure – or STIRS as the acronym goes) set in stone by our highest court during the course of the three visits that Johannesburg businessman Bob Glenister has made to the Constitutional Court on his mission to secure human rights and proper compliance with international obligations through the creation and maintenance of adequately independent anti-corruption machinery of state.

In a sense, corruption in the public sector is theft from the poor. The diversion of resources at a rate in excess of R30 billion every year is well-established in the public procurement system through the Auditor-General's monitoring and audits. Funding meant for addressing poverty, inequality and joblessness finds its way to the back pockets of those involved in corrupt activities. This scourge retards the uplifting of the disadvantaged, it exacerbates inequality, and it prevents job creation by scaring off both foreign and local investors. It impoverishes the public purse. Corruption is a cancer that needs to be excised at all levels but particularly at the highest levels in society by an entity from the top drawer of the criminal justice administration. The Hawks are nowhere near that top drawer. The public's weariness with the levels of corruption tolerated by the ANC is certainly a factor in the reverses it has suffered at the polls. Paul Mashatile has bravely conceded that this is so.

Part two – A perspective from 2023 – after the final report of the Zondo Commission

On 15 April 2016 and again on 17 March 2023, in free SA's fifth and sixth parliaments, Accountability Now was given the privilege of making submissions to the Constitutional Review Committees of the National Assembly in both parliaments on the topic of establishing a Chapter Nine Integrity Commission to prevent, combat, investigate and prosecute serious corruption. The submissions made in 2023 and the draft legislation that accompanied them are appendices to this book [see Editorial Note below]. In 2016, the Committee was chaired by Vincent Smith, no longer a parliamentarian, who is currently (in 2023) facing charges of corruption. The submissions fell on barren ground in 2016. It is to be hoped that a more propitious outcome is now possible, especially as the Democratic Alliance has embraced the notion in 2023 following the lead taken by the IFP in 2019. A perusal of the relevant appendices acquaints the reader with the rationale for the reforms sought.

All deliberations, including those of cabinet and its National Anti-Corruption Advisory Council will naturally be informed by the findings of our highest court, the suggestions of the NDP, and the domestic adoption of the UN Sustainable Development Goals, one of which (number 16) can be summarised as requiring governments to 'build effective, accountable and inclusive institutions at all levels'.

Archbishop Tutu gave the idea of an Integrity Commission his blessing. The idea is right, its time is now. Let's nickname it 'the Eagles' to encourage it to fly higher, see further and go after bigger prey than the Hawks do.

The tricky bit is creating the necessary political will in support of an Integrity Commission: this can be done through the participation of active citizens, responsible politicians (including unemployed former councillors) and civil society organisations. There is a need to build the universal awareness in society that there is no better alternative for fighting off the corrupt which is as viable and sustainable as an Integrity Commission.

The answer to the frequently posed question: '#Where are we going?' is that the hard-working members of the Constitutional Review Committee will soon make recommendations which they ought to base upon the best interests of the country, the law as expatiated in the *Glenister* cases, the implementation of the NDP and the honouring of UNSDG 16, as well as the enforcement of the international treaty obligations assumed by South Africa over the years since liberation. These obligations require the creation and maintaining of adequately independent anti-corruption machinery of state. The onerous obligations have been assumed in order to make South Africa a welcome member of the family of nations and to enable South Africa to take its proper place in the world as a law-abiding nation that respects the rule of law – the sort of nation that attracts direct foreign investment and gives confidence to local job-creators.

Properly advised, the Committee will recommend the formation of an Integrity Commission under Chapter 9 of the Constitution. If it does not, it will be necessary to give consideration to revisiting the Constitutional Court in order to render the position in relation to combating corruption constitutionally, legally and internationally compliant in South Africa. The many and various failures of the Hawks, their vulnerability to interference and their under-resourced condition both as regards infrastructure and staff would feature in that litigation.

With an Integrity Commission or similar body to tackle corruption, the nation will be enabled to take the high road to the future, without it, that precipice beckons. And yes, no one is above the law; number 1 is certainly not above the law.

Editorial note: *In the course of its advocacy of the establishment of an Integrity Commission, Accountability Now has prepared a draft constitutional amendment and draft enabling legislation. These are included as Appendices 3 and 4. The explanatory memorandum and submission to the Constitutional Review Committee are included as Appendices 5 and 6.*

Appendix 1

Extracts from the written submissions of the Concerned Members Group of the National Prosecuting Authority concerning the dissolution of the DSO

ANNEXURE A to the second memorandum of the CMG's response to the questions and submissions.

THE IDOC (ESTABLISHED IN 1998) AND LESSONS LEARNED:

We herewith provide a brief historical background and particulars of some experiences of members of IDOC in the Western Cape, which led to the establishment of the DSO in 2000, as articulated by a seasoned prosecutor, Adv Viljoen, who participated in the establishment of both IDOC and the DSO, and were in charge of many operations.

1. In the Western Cape we experienced a serious bout of urban terrorism from 1996, committed by a vigilante organization PAGAD, which was established as result of the inability of SAPS to control drug smuggling and abuse in the region, and an inability to curtail the reign of terror, intimidation and criminal activities of local gangs, resulting in many deaths of innocent people who perished in the cross-fire between gangs. It was commonly reported that whenever any specific information was relayed to SAPS, the gangs or suspects would know about it before any action could be taken by SAPS. It often occurred that when SAPS units intended to conduct a search, the suspects knew about it beforehand, rendering law enforcement operations futile, and resulting in huge frustration amongst some SAPS members and the public. SAPS seemed to be unable to maintain any secrecy of crime or operational information, which led to a perception that SAPS had been corrupted to the core. The political history of the revolutionary practice of creating an effective barrier between SAPS and the general public (the necklacing of so-called impimpis etc), resulted in SAPS being forced to approach those that were prepared to disclose information to SAPS, being criminals and gang members, which obviously came at a price because they expected to benefit from cooperation, which resultantly led to some measure of protection and which got out of hand and could not be managed after democracy. While it may not have been corruption in the true sense of the word, it surely resembled it, and rendered SAPS inefficient.

2. In 1998 IDOC (Investigating Directorate Organised Crime) was established to deal with certain specific crime phenomena in the country, for example urban terror and taxi-violence in the Western Cape, because of a perception that SAPS could not curtail serious violent and organised crime effectively and constructively on its own. A lack of resources was given as excuse, while others attributed it to allegations of deep rooted corruption at all levels of SAPS, occasionally resulting in crime intelligence being compartmentalized (intelligence not reaching investigators and intelligence units not even communicating with each other), coupled with a lack of cooperation with other role players in the criminal justice system (NIA, SANDF intelligence, SARS, NPA etc). The objective of IDOC was thus to put all resources together in a coordinated multidisciplinary unit where all relevant role players would be represented and participate in multi agency investigations. One of the driving ambitions was to prevent duplication, to bring role players closer together and to coordinate functions. IDOC investigations were to be controlled by the NPA because of its history of integrity, because of international examples of such specialist units being located under Justice, and because successful prosecutions, based on admissible and credible evidence, was regarded as the only constitutional solution to the crime phenomena, the prosecution being the end goal of an investigation.

   At the same time the Western Cape suffered under repeated violent attacks on and murders of taxi and bus drivers, which were commonly referred to as taxi violence, instigated by taxi organisations as result of a turf war.

3. While IDOC was established with good intentions as a multi discipline law enforcement agency, and was intended to operate on the troika principle, and was supposed to create the best cooperation between law enforcement agencies as well as the prosecution, and in spite of intelligence, investigators and prosecutors being in daily contact with each other, the relationships between the disciplines soured, SAPS refused to operate under any command of prosecutors, they did not comply with investigative instructions issued by IDOC prosecutors in some matters, they demanded full control and power over all investigations, and acted irregularly in some very important and life threatening investigations. The assistance we received from NIA was also limited. The following incidents (in the Western Cape only) raised serious concern and should serve as examples:

   a) Shortly after the establishment of IDOC, NIA informed SAPS investigators of an alleged PAGAD member being in possession of a pipe bomb.

Besides not providing proper particulars and not disclosing their involvement, investigation proved that a NIA source had delivered the bomb to the PAGAD member for operational purposes at the time SAPS was alerted. Thereafter it transpired that NIA operatives had handled the bomb themselves and that the source had been involved in a number of pipe bomb incidents, without Sec 252A authorisation ever being obtained for any such conduct, and without informing investigators of the activities. After exposure of the source, he was requested to lie in court to protect the identity of his NIA handler, which resulted in an acquittal.

b) When a number of allegedly PAGAD members were arrested at Prince Albert for the possession of armament, it then transpired that one of the arrested persons was a NIA source, while the investigation team had no knowledge of his activity. NIA knew about his movements but neglected to inform any of the other agencies. More alarming, it then transpired that some 14 days earlier the same source and a SAPS source, without knowing each other's affiliations, had transported a pipe bomb from Johannesburg to Cape Town without any Sec 252A authority and without the investigation team, who were SAPS members, being informed thereof beforehand or even immediately thereafter, allegedly because the persons to whom the bomb had been handed could not be identified by the sources. It was a blatant irregular operation conducted by the two intelligence agencies, without any accountability, besides the risks to life caused to citizens, and in spite of repeated appeals of prosecutors that authorisations have to be obtained beforehand. It suggests that the intelligence fraternities of NIA and SAPS operated in isolation and for purposes of intelligence reports only, while endangering the lives of people, and ignoring the good intentions of IDOC. No disciplinary steps were taken.

c) In October 2000, just before the establishment of the DSO and while we were debating drafts of IDOC bills, we received information from NIA which contained details of persons and vehicles involved in a bombing of a Cape Town police station, such detail that they must have had someone very close to the fire, who knew those involved, the vehicles and phones used, and who was unlikely to have been an innocent bystander at the street corner. But the information was useless because it was 6 months old, while NIA had the information within hours after the event. It was never shared with the investigators. This shows what can go wrong if intelligence and investigation is separated, and the prosecution is left in the dark.

d) While close cooperation had been emphasized regularly, a pipe bomb was located by SAPS investigators close to a restaurant one morning early, and during questioning of police witnesses for further information, it transpired that SAPS had been involved in unlawful interceptions or other unlawful methods of gaining access to information, which compromised the investigation and prosecution. A list of queries forwarded to SAPS was never addressed and the case was truck off the roll because the investigation had never been successfully completed. In the meantime, it was established that certain members of SAPS, responsible for the irregular conduct, received bonuses for their outstanding contribution in solving the crime! Success should be measured by convictions and not by arrests.

4. Because of a lack of coordination within SAPS, where intelligence units did not communicate with each other or with investigators, a situation of distrust within their own ranks existed, which were exacerbated by events mentioned above, and which clouded the IDOC dream.

5. SAPS had encountered internal personnel issues with the distribution of the workload of SAPS investigators and their performance evaluations. Whenever investigators in IDOC were allowed to spend time on single investigations, it was sneered upon as having a lighter workload, creating accusations of privileged positions within IDOC, which others objected against. The high profile nature of IDOC investigations also created jealousy within SAPS. It was thus not possible for SAPS to conduct all the investigations that prosecutors requested. Once the urban terror phenomenon had subsided, SAPS was prepared to operate on a task team basis, attending to 'flashpoints' whenever needed (crisis management), but not on a basis of permanence and continuity, which strained relations in IDOC.

6. The most important discord within IDOC was that it became untenable to have multiple heads of the organization and SAPS was not prepared to function in an organization governed by the NPA. Various attempts at drafting IDOC specific legislation failed because of the dispute about power and control. An understandable argument presented by SAPS was that if they carry the budget for investigative expenses, they have to be in full in control of all investigations and could afford to disregard the requests and instructions of prosecutors. Attempts at coming to an agreement on a memorandum of understanding all failed.

7. IDOC could not proceed indefinitely without proper legislation and it became impossible to have a unit with dual management and control, particularly where the objectives and operational methodologies differed. In the meantime the structures and systems of other countries were researched and the success of the FBI model played a role, although it was realized that the American historical and structural background was completely different. The intention and objective was to create a unit under proper control of the Justice Department, where:
   a) the secrecy of operational information could be guaranteed and maintained,
   b) where dedicated investigations could be conducted without the professional jealousy of colleagues that demanded even workloads based on statistics,
   c) where the admissibility of evidence (and intelligence gathering) could be ensured because of prosecutorial control, and
   d) where the focus would be on successful prosecutions as the end result, in contrast to the short-sighted SAPS approach of regarding arrest as the main objective.
8. It was envisaged that this unit would operate within the broader Intelligence framework and would have access to all crime intelligence and would cooperate closely with all other role players in the criminal justice system. However, SAPS refused to make detectives available for secondment, because they regarded the new unit to be an intrusion in their 'sole mandate' to investigate organized crime, and also because of personnel issues and jealousies mentioned above. SAPS maintained to demand full control. OSEO, which became IDSEO i.t.o. ACT 32 of 1998, was functioning effectively for years without any complaint from SAPS, even where the investigators were SAPS members, because SAPS could not regard OSEO/IDSEO as any competition. However, they maintained that investigating organised or violent crime is their exclusive domain. The result of this impasse was that the DSO was established as a NPA Directorate, merging IDOC and IDSEO and utilizing the legislation of IDSEO that had been proved and tested, without any opposition from SAPS, but with the exception that investigators had to be appointed as members of the NPA. As result hereof SAPS members were attracted to the DSO with better remuneration and the good prospects of conducting specialized investigations, which they considered challenging and promising occupational satisfaction.

ANNEXURE B to the second memorandum of the CMG's response to the questions and submissions.

COOPERATION AND COMPARISON BETWEEN DSO AND SAPS:

1. The DSO members believe that there should be close cooperation and coordination between the law enforcement institutions to prevent duplication and to ensure that crime information is put to use as effectively and constructively as possible. In so far as a perception may exist that the DSO has separated itself from the other law enforcement agencies of the State, it is incorrect. Besides pockets of cooperation at lower levels, which should serve as examples of success of the CJS, the DSO has experienced being deliberately sidelined and isolated by SAPS management. We herewith provide some particulars of experiences of the DSO organised crime team in the Western Cape, as also articulated by, Adv Viljoen, who took charge of these investigations.

2. In 2004 the DSO Cape Town relayed in some 18 cases detailed crime information that we gathered as part of our operations, to SAPS operatives involved in organised crime, and in 16 of these cases SAPS made arrests or seized contraband. This was part of our commitment to cooperation. However, we have not received the same level of cooperation from SAPS. Although we often successfully attempted to engage members at lower level, this informal relationship became strained because members were allegedly instructed not to communicate with the DSO or to share any information.

3. In March 2002 the DSO called a meeting of all stakeholders in order to launch a joint project relating to serious organised crime committed by Chinese nationals that had emerged in SA. SAPS was represented by members of head office, but once the DSO indicated that the project would be managed by the DSO, SAPS withdrew and refused to share any crime information or to be involved in a joint project with the DSO, because they disputed the investigation function of the DSO.

4. The DSO thus decided to commence with our own investigations, but to avoid duplication or competition, approached SAPS CIG in the Western Cape about known abalone syndicates, because abalone was allegedly being exchanged for drugs. SAPS strongly opposed any investigation of one F B because they had a project on him. Similarly they objected against the DSO investigating a number of other known abalone dealers.

Eventually they accepted that the DSO could proceed to investigate one E Marx and her syndicate. After a long debate with SAPS about dockets, we were able to gain access to 6 SAPS dockets against members of the syndicate, of which 3 had been closed already, some withdrawn without obvious reason and one withdrawn because they had lost the abalone exhibits before it could be analyzed. The DSO successfully investigated and completely dismantled the syndicate and have thus far successfully prosecuted 53 members already, amongst others Marx for racketeering and money laundering, relating to 437 offences. With that little cooperation of handing over 6 dockets, we were able turn the 3 pending dockets of possession of abalone into the huge success mentioned. By making use of one of the dockets as a starting point, where SAPS arrested 5 persons and had hope to successfully have only one prosecuted for possession, we have after dedicated and thorough investigation successfully prosecuted 13 accused on 158 charges, including the total dismantling of a second syndicate that operated as intermediary between Marx and the Chinese buyer in Gauteng. In the course of the investigation the corrupt activities of 2 police officials were exposed they have been successfully prosecuted. The Marx case is an example of the success the DSO achieves with the cases it takes on, and what could be achieved with cooperation, while it at the same time indicate that the same success cannot be achieved within the SAPS environment.

5. In the course of the said investigation we once conducted an authorized undercover operation by providing a transport vehicle to the syndicate through an agent. We informed SAPS of Laingsburg of the vehicle being on its way to Johannesburg and gave full particulars of the operation and requested them to assist us with an arrest. However, after the arrest, SAPS management refused to cooperate and we had a huge struggle to have the DSO vehicle returned and eventually to get the docket for prosecution purposes. While they were happy to receive information, they were uncooperative to see it through to successful prosecutions.

6. In another similar incident, we informed members of SAPS organized crime during 2007 of the full particulars of a vehicle that was on its way to Johannesburg with a huge shipment of abalone, with the understanding that they would assist us with an arrest at Beaufort West, but that we would carry the docket because the shipment formed part of a racketeering case we were investigating against F B. As the vehicle progressed we were able to locate it precisely and to obtain information of corrupt SAPS members that

escorted the vehicle through Beaufort West. Immediately after the arrest by a member of the organized crime team, we received information that the driver of the vehicle would fully cooperate with us and give evidence about his instructions from F B. However, when SAPS management got news of the arrest, they refused to make the docket or any information available and instructed the SAPS officials who cooperated with us, not to communicate with the DSO and denied us access to the suspect that was detained. An opportunity to build the case against F B and to eradicate corruption was lost.

7. In the meantime, from 2002 to date SAPS have not caused the successful prosecution of F B on a single case. Upon learning of the DSO success in the Marx matter and that the DSO wanted access to some closed dockets against members of the F B syndicate, the DPP Cape Town requested SAPS to refer all dockets that could possibly implicate F B to the DPP office, but to date no prosecution has been instituted on any of the huge box of dockets. Information received from the DPP office suggested that none of the cases had been properly investigated. While a lot can be attributed to incompetence and workload, it serves to mention that F B has family in the local police station and it is commonly accepted that corruption plays a huge part in the inability of SAPS to stop his criminal activities.

8. The SAPS, that has the general mandate and obligation to keep offences with abalone under control, had so little control that the Minister of Environmental Affairs had to close down all harvesting of wild abalone in February 2008, which caused a huge loss of jobs and the closure of 5 processing establishments, besides the legitimate divers that lost their means of income.

9. The DPP office has had huge difficulties in the prosecution of organized crime matters of so-called 'high-flyers' investigated by SAPS. For example, one M Daniels was prosecuted on 4 charges of murder and related offences a year ago, without any success. He was the leader of a gang that dealt with drugs, but allegedly caused the loss of life of a number of people on the Cape Flats. The State relied on four Sec 204 witnesses, which included the testimony of 2 hitmen. (The DSO is criticized for entering into plea bargains with murderers, but in this case murderers got off scot-free!) The court could not find the witnesses credible or corroborated by other evidence. Without going into detail, the courts have criticized the SAPS on numerous occasions recently for substandard investigations.

In comparison, a DSO prosecutor, who would be part of the team investigating crime, would consult with a witness at least 3 times. The first would be before any affidavit is signed, and with the purposes to ensure that all the witness can contribute is included, that the evidence would serve the purpose of a prosecution and that the prosecutor understands the witness's contribution to the evidence properly, that the witness is reliable and telling the truth, and that the witness would be prepared to give evidence. A second consultation will take place a week or more before trial and concerns preparation for trial, to refresh the witness's memory, to ensure he/she is still a reliable witness and to comfort the witness, because all the cases concerns syndicates or schemes where the accused are normally feared. The third consultation will take place the day of testimony and concerns a brief overview of the evidence of the witness. In many instances more consultations will be held. Repeated consultations between the prosecutor and witnesses including the complainant encourages good relationships between the public and the criminal justice system making victims and complainants feel as being treated as a person and not as a statistic. While this may be time consuming, the approach of the DSO is that it is better to spend time to secure success in one case, than to glance over a number of cases and loose many. The image of the public and criminals should be that once caught, you will be convicted and sentenced. Successful prosecution is considered a strong crime prevention strategy, deterring others. This methodology cannot be emulated in the scenario set out in the Bills, where the prosecutor has no role to play, and if he/she would be allowed to be involved, it would be at the courtesy of SAPS.

10. Shortly after the establishment of the DSO and during the investigation of matters initiated during the IDOC period the following incidents serve as examples of negative experiences that strained relationships:

    a) A Regional Court Magistrate Mr Theron was gunned down at his residence one day as he arrived home. It was commonly believed to be the work of PAGAD members because Mr Theron had presided in a number of their trials, one was part heard, and the modus operandi was similar to other PAGAD shootings. It was established afterwards that informants or agents of SAPS may have been involved. Yet, in spite of numerous requests, SAPS refused to provide the docket to the DSO prosecutor that conducted these trials or the investigators that had investigated alleged PAGAD offences before moving to the DSO. To date no-one has been arrested.

b) When information was received about a library of videos that PAGAD members had taken to record their attacks, and a search was conducted to find the evidence identifying the participants, it was established that the information about the search had leaked and the tape recordings moved. This was a particular blow to the investigation team because their safety was at stake and they did everything possible to keep a tight security on information, but yet, it leaked from within.

c) When the DSO investigated the criminal activities of a suspect involved in the management and operation of nightclubs of Cape Town and an alleged drug dealer, an undercover operation had been set up that could have led to a huge success, but when equipment was needed from NIA for operational purposes and they demanded a copy of the authorisation for the operation, the suspect abruptly ended the negotiations with the DSO agents. It was subsequently learned that the suspect was a source of NIA.

When making these comments we have no intention of belittling the SAPS or to compete with them in any field. We respect SAPS as the primary law enforcement agency that cannot be replaced, but they could be substantially complemented and assisted by an independent unit such as the DSO, if they would be prepared to cooperate, as was intended in 2000 when the DSO was established.

11. The SAPS Bill relies on intended informal agreements of cooperation between state agencies and particularly between SAPS and the NPA, as explained by the Director General of Justice. History has shown that such informal arrangements do not always work. The IDOC experience also proved that even with the best intentions and even where SAPS members' lives are at stake, they are still incapable of securing the secrecy of operational information, and refuse to listen to the advice of prosecutors, resulting in the admissibility of evidence being compromised. It must be understood that in the courts, and in upholding constitutional guarantees of a fair trial, not only the admissibility of evidence, but the whole investigative process and all procedures are at trial, rather than only the accused and the facts implicating the accused. In the result, all investigative strategies in serious organized crime operations have to be overseen by a prosecutor, while there is no such provision in the Bill. In stead, the Bill takes us back to the days before IDOC.

12. The conflict between intelligence, investigation and prosecution, cannot occur within the DSO framework, because all activities take place within a team context where the conduct of members are controlled and are discussed purposefully within the team context. No undercover operation is conducted without a prosecutor being involved and thus without authority being obtained beforehand. The DSO does not only ensure that only court directed information is gathered, but also controls the method of information gathering and the admissibility thereof in court.

    Such control cannot be exercised when functions (intelligence, investigation and prosecution) are separated and when placed under different management with different objectives and disciplines.

Appendix 2

The text of the majority judgment in *Glenister Two*

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

Citation	2011 (3) SA 347 (CC)
Case No	CCT 48/10
Court	Constitutional Court
Judge	Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Mogoeng J, Nkabinde J, Skweyiya J, Yacoob J and Brand AJ
Heard	September 2, 2011
Judgment	March 17, 2011
Counsel	*RP Hoffman SC* (with *P St C Hazell SC*) for the applicant. *WRE Duminy SC* (with *S Poswa-Lerotholi*) for the first to third respondents. *DN Unterhalter SC* (with *M du Plessis*) for the amicus curiae.

Flynote : Sleutelwoorde

Constitutional law — The State — Duties — Duty to create independent body to fight corruption — Such obligation emanating from Constitution itself and from State's constitutional obligation to comply with binding international agreements regulating fight against corruption — Legislation creating Directorate for Priority Crime Investigation (and disbanding Directorate of Special Operations) not ensuring adequate independence for DPCI in sense of sufficient insulation from political interference in its structure and functioning — Offending legislation declared invalid — South African Police Services Act 68 of 1995, Ch 6A.

Constitutional law — Legislation — Validity — South African Police Services Act 68 of 1995, Ch 6A — Chapter creating Directorate for Priority Crime Investigation (and disbanding Directorate of Special Operations) — Legislation in question unconstitutional due to its failure to ensure adequate independence for DPCI in sense of sufficient insulation from political interference in its structure and functioning.

Headnote : Kopnota

Corruption is a constitutional and human-rights issue, and the State accordingly has an obligation emanating from the Constitution itself, and in particular from its constitutional obligation to comply with binding international agreements in this regard, to take all reasonable measures to create an independent body to combat corruption and organised crime. (Paragraphs [163] – [202] and [205] at 397C – 410H and 411D – E.)

The legislation providing for the establishment of the Directorate for Priority Crime Investigation does not, due to the envisioned degree of political oversight over both its structure and functioning, comply with the above-mentioned obligation. (Paragraphs [164] and [208] – [210] at 397E – F and 412F – 413C.)

The DPCI's vulnerability to political interference is rooted in two causes: (1) its members, and particularly its head, will lack adequate security of tenure (paras [217] – [227] at 414D – 417C); and (2) its activities are to be coordinated by a Cabinet committee (paras [228] – [250] at 417D – 423G).

The impugned legislation, namely Ch 6A of the South African Police Services Act 68 of 1995, is therefore invalid to the extent that it does not secure adequate independence for the DPCI. (Paragraph [251] at 423J.) Order of invalidity suspended for 18 months to give Parliament the opportunity to remedy the defect.

Cases Considered

Annotations:

Reported cases

Southern Africa

Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC) (1996 (8) BCLR 1015): referred to

Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) (2002 (9) BCLR 891): referred to

Brummer v Gorfil Brothers Investments (Pty) Ltd and Others 2000 (2) SA 837 (CC) (2000 (5) BCLR 465): referred to

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995): dictum in para [44] applied

Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399): referred to

Glenister v President of the Republic of South Africa and Others 2009 (1) SA 287 (CC) (2009 (2) BCLR 136): referred to

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S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC) (1997 (2) SACR 540; 1997 (10) BCLR 1348): referred to

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): dictum in paras [34] – [35] applied

S v Pennington and Another 1997 (4) SA 1076 (CC) (1999 (2) SACR 329; 1997 (10) BCLR 1413): referred to

S v Sadler 2000 (1) SACR 331 (SCA): referred to

S v Salcedo 2003 (1) SACR 324 (SCA): referred to

S v Shaik and Others 2007 (1) SA 240 (SCA) (2007 (1) SACR 247; [2007] 2 All SA 9): dictum in para [223] applied

S v Shaik and Others 2008 (5) SA 354 (CC) (2008 (8) BCLR 834): dictum in para [72] applied

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC) (2001 (1) BCLR 77): dictum in para [4] applied

South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) ((1999) 20 *ILJ* 2265; 1999 (6) BCLR 615): referred to

Tongoane and Others v Minister of Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC) (2010 (8) BCLR 741): referred to

Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) (2002 (2) SACR 222; 2002 (8) BCLR 810): dictum in para [32] applied

Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) (2008 (4) BCLR 442): referred to

Women's Legal Centre Trust v President of the Republic of South Africa and Others 2009 (6) SA 94 (CC): referred to.

Australia

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Canada

Baker v Canada (Minister of Citizenship and Immigration) 174 DLR (4th) 193 ([1999] 2 SCR 817): referred to

Capital Cities Communications Inc v Canadian Radio-Television & Telecommunications Commission [1978] 2 SCR 141: referred to

R v Valente (1985) 24 DLR (4th) 161 (SCC) ((1986) 19 CRR 354): dictum at 172 applied.

England

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Kavanagh v Governor of Mountjoy Prison [2002] 3 IR 97: referred to.

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Ashby v Minister of Immigration [1981] 1 NZLR 222 (HC): referred to.

Unreported cases

Glenister v President of the Republic of South Africa and Others (WCC case No 7798/09, 26 February 2010): reversed on appeal

S v Thunzi and Others [2010] ZACC 12: referred to.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, ss 7(2), 39(1)*(b)* and 231: see *Juta's Statutes of South Africa 2009/10* vol 5 at 1-34, 1-40 and 1-69

The South African Police Services Act 68 of 1995, Ch 6A: see *Juta's Statutes of South Africa 2009/10* vol 1 at 3-402.

Case Information

Application for leave to appeal against a decision of the Western Cape High Court and for direct access to the Constitutional Court.

RP Hoffman SC (with *P St C Hazell SC*) for the applicant.

WRE Duminy SC (with *S Poswa-Lerotholi*) for the first to third respondents.

DN Unterhalter SC (with *M du Plessis*) for the amicus curiae.

Cur adv vult. *Postea* (March 17).

Judgment

Moseneke DCJ and Cameron J (Froneman J, Nkabinde J and Skweyiya J concurring):

Introduction

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

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

[162] We gratefully adopt the manner in which the main judgment disposes of certain grounds advanced by the applicant to invalidate the impugned legislation. Like it, we conclude that the impugned legislation, which created the DPCI, cannot be invalidated on the grounds that it is irrational or that Parliament had failed to facilitate public involvement in the legislative process that led to its enactment. We further agree that s 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the National Prosecuting Authority (NPA) and nowhere else. The creation of a separate corruption-fighting unit within the South African Police Service (SAPS) was not in itself unconstitutional and thus the DPCI legislation cannot be invalidated on that ground alone. Similarly, the legislative choice to abolish the DSO and to create the DPCI did not in itself offend the Constitution.

[163] However, two crucial questions remain for determination. The first is whether the Constitution imposes an obligation on the State to establish and maintain an independent body to combat corruption and organised crime. And if it does, the second is whether the specialised unit which the impugned legislation has established, the DPCI, meets the requirement of independence. In answer to the first question, unlike the main judgment, we conclude unequivocally that the Constitution itself imposes that obligation on the State. To the second question, we

hold, unlike the main judgment, that the requirement of independence has not been met and consequently that the impugned legislation does not pass constitutional muster.

[164] The sequel to these conclusions is that they lead us to an outcome that diverges from the main judgment. We uphold the appeal, find the offending legislative provisions establishing the DPCI constitutionally invalid and suspend the declaration of constitutional invalidity in order to give Parliament the opportunity to remedy the constitutional defect within 18 months.

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

The need and rationale for combating corruption

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

[167] This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own legislation, [3] in regional [4] and international [5] conventions and in academic research. [6] In a statement preceding the text of the United Nations Convention against Corruption [7] (UN Convention), Kofi Annan [8] observed:

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

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

> 'Corruption is a common feature in all political systems, despite the differences that may exist in their governing philosophies or their geography. Nation-states are increasingly aware that corruption presents a serious threat to their core principles and values, and hinders social and economic development. As a result, there has been a growing acceptance of the need to address the problem in a coordinated, comprehensive and sustainable way.' [9]

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

[170] Perhaps the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it is to be found in our own domestic legislation. The preamble to the Prevention and Combating of Corrupt Activities Act [12] (PRECCA) records that corruption and related corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardises the rule of law. It endangers the stability and security of societies; jeopardises sustainable development; and provides a breeding ground for organised crime. The preamble notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the

public and private spheres of life; and that regional and international co-operation is essential to prevent and control corruption and related crimes.

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

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

> 'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to *human dignity, the achievement of equality and the advancement of human rights and freedoms*. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.' [17] [Emphasis added.]

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

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

[174] We have noted the resolve of Parliament to battle corruption. That provokes the question: which 'effective preventative and deterrent measures' are needed for 'strictly enforcing legislation against all types

of corruption'? [20] For the narrow purpose of this case, it must be asked what is the source of the obligation to establish and maintain a corruption-fighting unit, and which structural and operational attributes must it have? To this question we now turn.

The obligation to establish and maintain a corruption-fighting unit

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

[176] Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. [21] In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. [22] Similar requirements apply to public procurement, when organs of State contract for goods and services. [23] It is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. [24] In turn, the National Prosecuting Authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices. [25]

[177] The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the State. It requires the State to 'respect, protect, promote and fulfil the rights

in the Bill of Rights'. It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The State's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms. Parliament itself has recognised this in the preamble to PRECCA. [26] All this constitutes uncontested public and legislative policy in South Africa. For it has been expressly articulated and enacted by Parliament. That, however, is not the end of the matter.

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

Independence, international obligations and our Constitution

[179] The Constitution contains four provisions that regulate the impact of international law on the Republic. One concerns the impact of international law on the interpretation of the Bill of Rights. [29] A second concerns the status of international agreements. [30] A third concerns customary international law. The Constitution provides that it 'is law in the Republic unless it is inconsistent with the Constitution or an Act of

Parliament'. [31] A fourth concerns the application of international law. It provides that, when interpreting any legislation, 'every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. [32] In this judgment we are concerned primarily with s 39(1)*(b)* and with s 231, and it is to the latter provision that we turn first.

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

[181] In our view the main force of s 231(2) is directed at the Republic's legal obligations under international law, [36] rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement 'binds the Republic', and Parliament exercises the Republic's legislative power, which it must do in accordance with and within the limits of the Constitution, [37] the provision must be read in conjunction with the other provisions within s 231. Here, s 231(4) is of particular significance. It provides that an international agreement 'becomes law in the Republic when it is enacted into law by national legislation'. The fact that s 231(4) expressly creates a path for the domestication of international agreements may be an indication that s 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. [38] It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.

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

[183] A number of international agreements on combating corruption currently bind the Republic. The UN Convention imposes an obligation on each State party to ensure the existence of a body or bodies tasked with the prevention of corruption. [39] Moreover, art 6(2) provides that:

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

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

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

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

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

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

[188] The OECD report defined independence as follows:

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

The OECD report also found that:

> 'One of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting "pre-emptive obedience". In short, "independence" first of all entails de-politicisation of anti- corruption institutions. The adequate level of independence or autonomy depends on the type and mandate of an anti-corruption institution. Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge with preventive functions.
>
> The question of independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. Police and other investigative bodies are in most countries highly centralised, hierarchical structures reporting at the final level to the Minister of Interior or Justice. Similarly, but to a lesser extent, this is true for prosecutors in systems

> where the prosecution service is part of the government and not the judiciary. In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case. Accordingly, the independence of such bodies requires careful consideration in order to limit the possibility of individuals' abusing the chain of command and hierarchical structure, either to discredit the confidentiality of investigations or to interfere in the crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions. There are many ways to address this risk. For instance, special anti-corruption departments or units within the police or the prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor.' [45] [Footnotes omitted.]

[189] The obligations in these conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the State to fulfil it in the domestic sphere. In understanding how it does so, the starting point is s 7(2), which requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This court has held that in some circumstances this provision imposes a positive obligation on the State and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'. [46] Implicit in s 7(2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.

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

[191] Now plainly there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. [49] A range of possible measures is therefore open to the State, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable.

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

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

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

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

[196] More specifically, we emphasise that the form and structure of the entity in question lie within the reasonable power of the State, provided only that whatever form and structure are chosen do indeed endow the entity in its operation with sufficient independence. Differently put, the requirement of independence does not answer the question: what form and structure must the entity take? It merely asks, does the form and structure given to the entity, ensure that it is sufficiently independent?

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

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

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

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

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

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

Limitation

[203] Any right in the Bill of Rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including the nature of the right, the importance of the limitation, and its nature and extent. [51] The respondents offered no attempt to justify any limitation of the

duty to create an independent anti-corruption unit; their argument was that the unit was indeed sufficiently independent. The absence of any attempt to justify limitation is not surprising since it would, in our view, be hard to advance. The need for a sufficiently independent anti-corruption unit is so patent, and the beneficent potential of its operation so incontestable, and the disadvantages of its creation so hard to conceive, that justification would be hard to muster.

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

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

[206] The main judgment notes that independence requires that the anti-corruption agency must be able to function effectively without undue influence. It finds that legal mechanisms must be established that limit the possibility of abuse of the chain of command and that will protect the agency against interference in operational decisions about starting, continuing and ending criminal investigations and prosecutions involving corruption. It then asks whether the DPCI has sufficient structural and operational autonomy to protect it from political influence. Here the question is not whether the DPCI has full independence, but whether it has an adequate level of structural and operational autonomy, secured through institutional and legal mechanisms, to prevent undue political interference.

[207] To these formulations we add a further consideration. This court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. [58]

> This was said in connection with the appointment procedures and security of tenure of magistrates. By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence. Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective bench marks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.

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

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

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

[210] First, it impacts on the public perception of independence. A reasonable and informed member of the public may have misgivings about the DPCI's independence, given that the features protecting it are so markedly more tenuous than those of the DSO. Second, we find it

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

[211] There is a further point. As the main judgment observes, the international instruments require independence within our legal conceptions. Hence it is necessary to look at how our own constitutionally created institutions manifest independence. To understand our native conception of institutional independence, we must look to the courts, to Ch 9 institutions, to the NDPP, and in this context also to the now defunct DSO. All these institutions adequately embody or embodied the degree of independence appropriate to their constitutional role and functioning. Without applying a requirement of full judicial independence, all these institutions indicate how far the DPCI structure falls short in failing to attain adequate independence.

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

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

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

s 206(1) with due regard to the State's constitutional obligations under s 7(2) of the Constitution.

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

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

Security of tenure and remuneration

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

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

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

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

ordinary police officials, required to perform their duty, [62] no doubt, but not enjoined or bound to do so by oath or affirmation.

[219] What is more, the head of the DPCI and the persons appointed to it enjoy little if any special job security. The provisions at issue provide that the head of the DPCI shall be a Deputy National Commissioner of the SAPS, and shall be 'appointed by the Minister in concurrence with the Cabinet'. [63] In addition to the head, the Directorate comprises persons appointed by the National Commissioner of the SAPS 'on the recommendation' of the head, [64] plus 'an adequate number of legal officers' [65] and seconded officials. [66] The Minister is required to report to Parliament on the appointment of the head of the DPCI. [67]

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

[221] The grounds for dismissal under the SAPS Act are broad. The DPCI's members enjoy the same security of tenure as other members of the police force — no more and no less. Their dismissal is subject to no special inhibitions, and can occur at a threshold lower than dismissal on an objectively verifiable ground like misconduct or continued ill-health.

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

independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.

[223] This is exacerbated by the fact that the appointment of the National Commissioner of the SAPS is itself renewable. [73] By contrast, the appointment of the National Director of Public Prosecutions (NDPP) — who selected the head of the DSO from amongst the deputy NDPPs — is not. [74] A renewable term of office, in contradistinction to a non-renewable term, heightens the risk that the office-holder may be vulnerable to political and other pressures.

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

[225] The contrast with the position under the now defunct DSO is signal. Previously, under the NPA Act, the DSO was established in the office of the NDPP, and fell within the NPA. [77] In terms of s 179(1) of the Constitution, the NDPP is appointed by the President as head of the national executive. The head of the DSO was a deputy NDPP, assigned from the ranks of deputy NDPPs by the NDPP, [78] and reporting to the NDPP. The NPA Act provides that a deputy NDPP may be removed from office only by the President, on grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office. [79] And Parliament holds a veto over the removal of a deputy NDPP. The reason for the removal, and the representations of the deputy NDPP, must be communicated to Parliament, which may resolve to restore the deputy NDPP to office. [80]

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

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

Accountability and oversight by the Ministerial Committee

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

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

[230] It is true that the policy guidelines the Ministerial Committee may issue could be broad and thus harmless. But they might not be broad and harmless. Nothing in the statute requires that they be. Indeed, the power of the Ministerial Committee to determine guidelines appears

to be untrammelled. The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate — or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating.

[231] This may be far-fetched. [93] Perhaps. The Minister for Police must submit any policy guidelines the committee determines to Parliament for approval. [94] This is a safeguard against far-fetched conduct. But if Parliament does nothing, the guidelines are deemed to be approved. [95] The point is that the legislation does not rule out far-fetched inhibitions on effective anti-corruption activities. On the contrary, it leaves them open. This is in our view plainly at odds with a structure designed to secure effective independence. It underscores our conclusion that the legislation does too little — indeed, far too little — to secure the DPCI from interference.

[232] The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They 'oversee' an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory.

[233] We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of 'priority offences'. What those crimes might be depends on the opinion of the head of the Directorate, as to national- priority offences — and this is in turn subject to the Ministerial Committee's policy guidelines. [96] The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a discretion, outside the confines of the legislation itself. This cannot be conducive to independence, or to efficacy. [97]

[234] Again, we should not assume, and we do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence. What is more, the new provisions go further than mere competence to determine guidelines. They also make provision for hands-on supervision. They provide:

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

[235] These provisions afford the political executive the power directly to manage the decision-making and policy-making of the DPCI. As with the power to formulate policy guidelines, the statute places no limit on the power of the Ministerial Committee in overseeing the functioning of the DPCI. On the contrary — the requirement that the Ministerial Committee must meet regularly, and that, on request, performance and implementation reports must be provided to it, in our view, creates the possibility of hands-on management, hands-on supervision, and hands-on interference.

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

[237] The new provisions contain an interpretive injunction: in their application 'the need to ensure' that the DPCI 'has the necessary independence to perform its functions' [99] must be recognised and taken into account. But this injunction operates essentially as an exhortation. It is an admonition in general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether. This is because the interpretive rule enjoins political

executives to take the need to ensure independence into account. At the same time other provisions place power in their hands without any express qualification — power to determine policy guidelines and to oversee the functioning of the DPCI.

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

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

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

[241] We thus make two points. First, the parliamentary oversight the new provision requires is more benign and less intrusive than that of the Ministerial Committee. Second, Parliament's powers are insufficient to allow it to rectify the deficiencies of independence that flow from the extensive powers of the Ministerial Committee. This diluted level of oversight, in contrast to the high degree of involvement permitted to

the Ministerial Committee in the functioning of the Directorate, cannot restore the level of independence taken at source.

[242] We appreciate that Parliament is unlikely to ignore its oversight role. But the provisions are nowhere designed to afford it as active an involvement in the functioning of the DPCI as that of the Ministerial Committee. In addition, the Ministerial Committee and the head of the DPCI have power to determine what the reports to Parliament contain. This is a significant power, which may weaken the capacity of Parliament to ensure a vigorously independent functioning DPCI.

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

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

[245] A beneficial feature of the new provisions is that the National Commissioner may request that prosecutors from the NPA assist the DPCI in conducting investigations. [109] But the arrangement does little to remedy the concern of politically intrusive oversight. A weakness inherent in it is that it is the National Commissioner who must exercise the power to request that prosecutors join an investigation. Whether the Commissioner will exercise this power in politically fraught investigations must be open to question. It will depend on the Commissioner, and on the terms of his or her appointment. We accept that, where

such requests are made, the prosecutors will not be subject to the same chain of command as the investigators in the Directorate, but will continue to report to the NPA. This will help secure some measure of independence and serve as a warrant against undue political influence in investigations. But it is a limping and partial mechanism, which underscores the inadequacy of the arrangements to secure the overall independence of the DPCI.

[246] The other safeguards the provisions create are in our respectful view inadequate to save the new entity from a significant risk of political influence and interference. The complaints mechanism, headed by a retired judge, [110] and backed up by power to refer a complaint for prosecution, [111] operates after the fact. It permits complaints to be made, but does not constitute a hedge in advance against their causes. It also permits a member of the public to complain about infringement of rights caused by an investigation, and permits 'any member of the Directorate who can provide evidence of any improper influence or interference, whether of a political or any other nature, exerted upon him or her regarding the conducting of an investigation' to complain. [112]

[247] This in our respectful view deals with history. It does not constitute an effective hedge against interference. What is more, s 17L(7) is clear that in the course of this investigation the retired judge may request information from the NDPP insofar as it may be necessary, but the NDPP may on 'reasonable grounds' refuse to accede to such request. That may place a considerable hurdle in the way of the retired judge's investigation. In short, an ex post facto review, rather than insisting on a structure that *ab initio* prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused, which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking.

[248] For these reasons we conclude that the statutory structure creating the DPCI offends the constitutional obligation resting on Parliament to create an independent anti-corruption entity, which is both intrinsic to the Constitution itself and which Parliament assumed when it approved the relevant international instruments, including the UN Convention.

We do not prescribe to Parliament what that obligation requires. In summary, however, we have concluded that the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the DPCI's power to investigate at the hands of members of the executive, who control the DPCI's policy guidelines, are inimical to the degree of independence that is required. We have also found that the interpretive admonition in s 17B*(b)*(ii) of the SAPS Act is not sufficient to secure independence.

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

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

Order

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

1. The applications for condonation by the applicant, the first, second and third respondents and the amicus are granted.
2. The application for leave to appeal is granted.
3. The constitutional challenge to the National Prosecuting Authority Amendment Act 56 of 2008, and the South African Police Service

Amendment Act 57 of 2008, for failure to facilitate public involvement in the legislative process, is dismissed.

4. The appeal succeeds to the extent indicated in para 5.
5. It is declared that Ch 6A of the South African Police Service Act 68 of 1995 is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.
6. The declaration of constitutional invalidity is suspended for 18 months in order to give Parliament the opportunity to remedy the defect.
7. The respondents are ordered to pay the costs of the applicant, including the costs of two counsel, in the High Court and in this court.

Applicant's Attorneys: *Louis & Associates.*

First, Second and Third Respondents' Attorneys: *State Attorney*, Cape Town.

Amicus Curiae instructed by: *Webber Wentzel*.

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

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

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

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

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

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

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

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

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

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

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

[12] 12 of 2004. The preamble states:

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

AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;

AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;

AND WHEREAS the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;

AND WHEREAS there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering;

AND WHEREAS corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities;

AND WHEREAS a comprehensive, integrated and multidisciplinary approach is required to prevent and combat corruption and related corrupt activities efficiently and effectively;

AND WHEREAS the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption and related corrupt activities efficiently and effectively;

AND WHEREAS the prevention and combating of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation, with the support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community-based organizations, if their efforts in this area are to be efficient and effective; AND WHEREAS the United Nations has

adopted various resolutions condemning all corrupt practices, and urged member states to take effective and concrete action to combat all forms of corruption and related corrupt practices;

AND WHEREAS the *Southern African Development Community Protocol against Corruption*, adopted on 14 August 2001 in Malawi, reaffirmed the need to eliminate the scourges of corruption through the adoption of effective preventive and deterrent measures and by strictly enforcing legislation against all types of corruption;

AND WHEREAS the Republic of South Africa desires to be in compliance with and to become Party to the *United Nations Convention against Corruption* adopted by the General Assembly of the United Nations on 31 October 2003;

AND WHEREAS it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all- encompassing offence of corruption, various specific corrupt activities are criminalized,

BE IT THEREFORE ENACTED

. . . . '.

[13] Id.

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

[15] Id in para 72.

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

[17] Id at para 4.

[18] 2007 (1) SA 240 (SCA) (2007 (1) SACR 247; [2007] 2 All SA 9).

[19] Id at para 223. See also *S v Kwatsha* 2004 (2) SACR 564 (E) at 569 – 570; *S v Salcedo* 2003 (1) SACR 324 (SCA) in para 3; and *S v Sadler* 2000 (1) SACR 331 (SCA) in para 13.

[20] See above n12.

[21] See s 195 of the Constitution.

[22] Section 215.

[23] Section 217.

[24] Section 205(3).

[25] Section 179(2).

[26] See above n12.

[27] Section 17B*(b)*(ii) of the SAPS Act provides that '(i)n the application of this Chapter the following should be recognised and taken into account . . . (t)he need to ensure that the Directorate . . . has the necessary independence to perform its functions'.

[28] In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1;1995 (6) BCLR 665; [1995] ZACC 3) at paras 34 – 35, this court made it plain that it is entitled to consider both binding and non-binding instruments of international law.

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

[30] Section 231 provides:

'(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self- executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

[31] Section 232.

[32] Section 233.

[33] Section 231(1).

[34] Section 231(2).

[35] Section 231(3).

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

[37] Section 44(4) of the Constitution provides:

'(4) When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.'

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

[39] Article 6(1) above n5.

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

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

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

[43] In terms of art 31(3)*(b)* of the Vienna Convention on the Law of Treaties 1969 (1969) 8 *ILM* 679, the subsequent practice of states in applying a treaty can be used to indicate

how the states have interpreted the treaty and thus give content to treaty obligations. Article 31 of the Convention reads:

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.'

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

[44] Above n41 at 6.

[45] Id at 17.

[46] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22) at para 44.

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

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

[49] Id in para 86.

[50] See Ch 9 'State Institutions Supporting Constitutional Democracy'.

[51] Section 36(1) of the Constitution. [52] 57 of 2008.

[53] Section 1*(c)* of the Constitution provides:

The Republic of South Africa is one, sovereign, democratic state founded on the following values . . . (s)upremacy of the constitution and the rule of law.'

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

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

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

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

[58] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) (2002 (2) SACR 222; 2002 (8) BCLR 810; [2002] ZACC 8) at para 32, endorsing the finding in *R v Valente* (1985) 24 DLR (4th) 161 (SCC) ((1986) 19 CRR 354) at 172 that the test for independence should include public perception.

[59] Section 206(1).

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

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

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

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

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

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

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

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

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

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

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

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

[72] Section 35 of the SAPS Act.

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

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

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

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

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

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

[79] Section 12 of the NPA Act.

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

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

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

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

[84] Section 24 of the SAPS Act.

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

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

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

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

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

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

'(1) The functions of the [DPCI] are to prevent, combat and investigate —

(a) national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the [DPCI], subject to any policy guidelines issued by the Ministerial Committee; and

(b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Ministerial Committee.'

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

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

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

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

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

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

[97] As indicated in n93, two years after the legislation was passed, we have been unable to find any guidelines published in terms of s 17I(2) of the SAPS Act.

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

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

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

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

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

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

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

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

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

[107] Section 59 of the Constitution.

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

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

[110] Section 17L of the SAPS Act.

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

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

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

Appendix 3

The draft constitutional amendment suggested by Accountability Now in August 2021

REPUBLIC OF SOUTH AFRICA

AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

CONSTITUTION EIGHTEENTH AMENDMENT BILL

GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Constitution of the Republic of South Africa, 1996, so as to establish an Integrity Commission within Chapter 9, to further regulate the jurisdiction and accountability of the Public Protector, the police service, the prosecuting authority, and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts, as follows:–

Amendment of section 179 of Constitution

1. Section 179 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by substituting the following section for section 179:

"**National Prosecuting [a]Authority**

179. (1) There is a **[single]** national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is the head of the national prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The national prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings, except where the Integrity Commission established in section 181 has the exclusive jurisdiction to institute legal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting those legal proceedings, in respect of serious corruption, and to the exclusion of the national prosecuting authority, which shall refer all matters within the jurisdiction of the Integrity Commission to that Commission.

(3) National legislation must ensure that the Directors of Public Prosecutions—

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that:

(a) the national prosecuting authority is independent and subject only to the Constitution and the law; and

(b) exercises its functions without fear, favour or prejudice**[.]**; and

(c) that other organs of state through legislative and other measures, assist and protect the national prosecution authority to ensure its independence, dignity and effectiveness.

(5) The National Director of Public Prosecutions—

(a) must determine, **[with the concurrence of the Cabinet member responsible for the administration of justice, and]** after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; **[and]**

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant; and

(e) must fulfil these responsibilities only in respect of criminal proceedings falling within his or her jurisdiction, to the exclusion of matters relating to serious corruption falling within the jurisdiction of the Integrity Commission.

(6) No person or organ of state may interfere with the functioning of the national prosecuting authority. **[The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.]**

(7) The national prosecuting authority is accountable to the National Assembly, and must report on its activities and the performance of its functions to the Assembly at least once a year.

(8)**[(7)]** All other matters concerning the national prosecuting authority must be determined by national legislation."

Amendment of section 181 of Constitution

2. Section 181 of the Constitution is hereby amended by the insertion in subsection (1) after paragraph (f) of the following paragraph:

"(g) The Integrity Commission."

Amendment of section 182 of Constitution

3. Section 182 of the Constitution is hereby amended by the substitution of the following subsection for subsection (1)(a):

"(1)(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice**[;]**, except where the Integrity Commission established in section 181 has the exclusive jurisdiction to institute legal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting those legal proceedings, in respect of serious corruption, and to the exclusion of the Public Protector, which shall refer all matters within the jurisdiction of the Integrity Commission to that Commission;"

Insertion of sections 192A of Constitution

4. The following section is hereby inserted after section 192 of the Constitution:

"Integrity Commission

Functions of Integrity Commission

192A. (1) The Integrity Commission, structured in terms of an Act of Parliament, consists of:

(a) a National Commissioner, who is the head of the Integrity Commission, and is appointed by the President, as head of the national executive; and

(b) Commissioners acting as deputies to the National Commissioner within each province,

together referred to as the members of the Integrity Commission.

(2) The Integrity Commission has the power, as regulated by national legislation:

(a) to prevent, combat, investigate and prosecute any conduct that is alleged, reported or suspected to involve serious corruption, being conduct by a person holding public office or any other person, that, as a result of corrupt activities, as further defined in national legislation:

(i) deprives a particular social group or substantial part of the population of the Republic of a fundamental right; and/or

(ii) causes loss or damage that in the estimation of the Integrity Commission is greater than the sum of R5 million and/or

(iii) threatens the security of the Republic;

(b) to institute legal proceedings on behalf of the state in respect of such conduct; and

(c) to carry out any necessary functions incidental to investigating serious corruption and instituting legal proceedings with the aim of eventually eradicating serious corruption,

in the Republic.

(3) The members of the Integrity Commission are appointed for a non-renewable period of:

(a) 10 years if that member is the National Commissioner; and

(b) 12 years if that member is a Commissioner.

(4) The Integrity Commission shall not investigate and litigate matters falling within the exclusive jurisdiction of the Public Protector, the police service or the national prosecuting authority, and shall refer such matters to the Public Protector, the police service or the national prosecuting authority as appropriate. In all matters in which the alleged, reported or suspected serious corruption is accompanied by other crimes,

the Integrity Commission shall have jurisdiction to prosecute the entire case, unless the National Commissioner decides otherwise, in which event the national prosecuting authority will prosecute all charges including those of serious corruption.

(5) The National Commissioner:

(a) must determine, after consulting the Commissioners, investigation and prosecution policy in respect of serious corruption, which must be observed in the investigation and prosecution process;

(b) must issue policy directives which must be observed in the investigation and prosecution process;

(c) may intervene in the investigation and prosecution process when policy directives are not complied with;

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Commissioner and after taking representations within a period specified by the National Commissioner, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Commissioner considers to be relevant.

(6) Each year, from 2023, the National Commissioner must require, in a format determined by him or her, that all organs of state, state owned enterprises and municipalities furnish a written report to the Commission, by 1 March each year, reflecting measures taken by them for the prevention, combating and eradication of corruption, during the preceding calendar year.

(7) In addition to the reporting described in section 181(5), the Integrity Commission shall report to the National Assembly on its decisions to prosecute or not to prosecute.

(8) National legislation must provide a cooperation framework to govern the interaction between the Integrity Commission, Public Protector, the police service and the national prosecuting authority, and to prevent jurisdictional conflicts.

(9) The Integrity Commission has the additional powers and functions prescribed by national legislation."

Amendment of section 193 of Constitution

5. Section 193 of the Constitution is hereby amended---

(a) by the substitution of the following subsection for subsection (4):

"(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—

(a) the South African Human Rights Commission;

(b) the Commission for Gender Equality; **[and]**

(c) the Electoral Commission**[.]**; and

(d) the Integrity Commission."

(b) by the substitution of the following section for subsection (5):

"(5) The National Assembly must recommend persons—

(a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote—

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector**,** **[or]** the Auditor General, or the National Commissioner of the Integrity Commission; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission, excluding the National Commissioner of the Integrity Commission."

(c) by the insertion of the following subsection after subsection (6):

"(7) When appointing members of the Integrity Commission fit and proper persons who are duly qualified and experienced in law, law enforcement and the forensic countering of corruption must be appointed."

Amendment of section 194 of Constitution

6. Section 194 of the Constitution is hereby amended by the substitution of the following subsection for subsection (2):

"(2) A resolution of the National Assembly concerning the removal from office of—

(a) the Public Protector, **[or]** the Auditor-General or the National Commissioner of the Integrity Commission must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a commission, excluding the National Commissioner of the Integrity Commission, must be adopted with a supporting vote of a majority of the members of the Assembly."

Amendment of section 205 of Constitution

7. Section 205 of the Constitution is hereby amended—

(a) by the substitution of the following subsection for subsection (3):

"(3) The objects of the police service are to prevent, combat and investigate crime, excluding any conduct that is alleged, reported or suspected to involve serious corruption, which falls within the jurisdiction of the Integrity Commission, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

(b) by the insertion of the following subsection after subsection (3):

"(4) The police service shall refer any conduct that is alleged, reported or suspected to involve serious corruption to the Integrity Commission."

Amendment of section 206 of Constitution

8. Section 206 of the Constitution is hereby amended by the substitution of the following subsection for subsection (2):

"(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces, and shall make provision for the referral of any conduct that is alleged, reported or suspected to involve serious corruption to the Integrity Commission by national, provincial and municipal police services."

Short title and commencement

This Act is called the Constitution Eighteenth Amendment Act 2021, and takes effect on a date determined by the President by proclamation in the *Gazette*.

Appendix 4

The draft enabling legislation for Accountability Now's proposed Chapter Nine Integrity Commission dated August 2021

REPUBLIC OF SOUTH AFRICA

INTEGRITY COMMISSION BILL, 2021

ACT

To provide for matters regulating the Integrity Commission as contemplated in the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith.

PREAMBLE

WHEREAS sections 181 and 192A of the Constitution of the Republic of South Africa,1996 (Act 108 of 1996), provide for the establishment of the Integrity Commission;

AND WHEREAS the Integrity Commission has the power, as regulated by national legislation, to prevent, combat and investigate serious corruption, and to institute and conduct legal proceedings in respect of serious corruption, and to carry out any necessary functions incidental thereto with the aim of eventually eradicating serious corruption, in order to strengthen and support constitutional democracy in the Republic;

AND WHEREAS sections 193 and 194 of the Constitution provide for a mechanism for the appointment and removal of the National Commissioner and Provincial Commissioners of the Integrity Commission;

AND WHEREAS the Constitution envisages further legislation to provide for certain ancillary matters pertaining to the Integrity Commission;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

CHAPTER 1: INTERPRETATION

1 DEFINITIONS

In this Act, unless the context otherwise dictates, the following definitions will apply:

(1) **"close associate"** shall mean an individual who is closely connected to a person suspected of serious corruption, either personally or professionally;

(2) **"Commission"** shall mean the Integrity Commission;

(3) **"Constitution"** shall mean the Constitution of the Republic, 1996 (Act 108 of 1996), as amended from time to time;

(4) **"corrupt activities"** shall mean those activities described in chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2003 (Act 12 of 2004), as amended from time to time, read together with the interpretation section of that Act;

(5) **"family member"** shall mean a person related by marriage (including a person in a relationship akin to marriage), or related by consanguinity to the third degree (where consanguinity includes a stepchild or step parent), or any person who is similarly related by marriage or in a relationship akin to marriage to such a person so related by consanguinity;

(6) **"Government"** shall mean the Government of the Republic;

(7) **"Information"** shall mean any information as generally understood, and shall include, without limitation, books, documents, records, reports, notes, working papers, presentations, spreadsheets, materials, emails, data (whether stored on hard drives or in the cloud or anywhere else), techniques, models, templates, methodologies, technologies, programmes, processes and facts, whether in hard copy or electronic format or verbal;

(8) **"Investigation Unit"** shall mean a unit within the Commission which is responsible for the investigation of corrupt activities and which shall carry out any necessary functions incidental thereto;

(9) **"legal officer"** shall mean an attorney or advocate appointed in a Legal Services Unit;

(10) **"Legal Services Unit"** shall mean a unit within the Commission which is responsible for the instituting and conducting of legal proceedings and which shall carry out any necessary functions incidental thereto;

(11) **"Member"** or **"Members"** shall mean the National Commissioner and the Provincial Commissioners of the Commission collectively;

(12) **"National Assembly"** shall mean the National Assembly of the Parliament of the Republic;

(13) "**National Commissioner"** shall mean the National Commissioner of the Commission;

(14) **"Office of the National Commissioner"** shall mean the Office of the National Commissioner established in terms of section 6;

(15) **"Office of the Provincial Commissioner"** shall mean the Offices of the Provincial Commissioners established in terms of section 7 in each province;

(16) **"person"** shall mean a natural or juristic person;

(17) **"police service"** shall mean the South African Police Service;

(18) **"Provincial Commissioner"** or **"Provincial Commissioners"** shall mean the commissioners appointed in each of the provinces as deputies to the National Commissioner;

(19) **"Republic"** shall mean the Republic of South Africa; and

(20) **"serious corruption"** shall mean conduct as described in section 192A(2) of the Constitution.

CHAPTER 2: MANDATE, ESTABLISHMENT AND COMPOSITION

2 MANDATE OF THE COMMISSION

(1) The Commission shall, on behalf of the Republic:

(a) receive reports of alleged or suspected corrupt activities, or attempted corrupt activities, meeting the definition of serious corruption, from any person and by any means as the Commission may allow with a view to making the Commission accessible to all persons;

(b) in response to receiving a report as referred to in subsection (1)(a), or on its own initiative:

(i) investigate alleged or suspected corrupt activities that may meet the definition of serious corruption as set out in section 192A(2);

(ii) investigate any alleged or suspected attempts to conduct corrupt activities that may meet the definition of serious corruption as set out in section 192A(2); and

(iii) advise, where necessary, any complainant regarding appropriate remedies;

(c) upon conclusion of an investigation, institute and conduct legal proceedings on behalf of the State where such legal proceedings support the mandate of the Commission in respect of serious corruption; and

(d) carry out any necessary functions incidental to investigating, instituting and conducting legal proceedings in respect of such activities.

(2) In furtherance of its mandate, the Commission shall:

(a) provide adequate and relevant training to all staff members of the Commission;

(b) raise public awareness about serious corruption and the impact thereof;

(c) provide guidance to the general public and the public service on the prevention, detection and response to serious corruption; and

(d) refer all matters that fall outside of its mandate to the authorities that have the relevant and appropriate jurisdiction.

(3) Where any person, law enforcement authority or institution created in Chapter 9 of the Constitution, become aware of the existence of any matter that falls or may fall within the mandate of the Commission, that person or the head of the law enforcement authority or institution created in Chapter 9 of the Constitution shall as soon as is reasonably possible report the matter to the National Commissioner.

3 COMPOSITION

(1) The Commission shall consist of:

(a) ten Members being:

(i) a National Commissioner who shall be the head of the Office of the National Commissioner; and

(ii) Provincial Commissioners, as deputies to the National Commissioner, who shall be the heads of the Provincial Offices of the Commission established at the seat of a High Court in each province;

(b) an Investigation Unit staffed with specialised investigators who are qualified to investigate serious corruption;

(c) a Legal Services Unit staffed with specialised legal officers who are qualified to institute and conduct legal proceedings in respect of serious corruption on behalf of the State;

(d) any other staff members appointed at or seconded to the Commission, in terms of Section 8(1); and

(e) any individual engaged to perform services for the Commission in specific cases, in terms of Section 9.

(2) Together, the individuals referred to in subsection (1) shall be referred to as **"all staff members of the Commission"**.

4 APPOINTMENT AND REMOVAL OF MEMBERS

(1) The President shall, whenever it becomes necessary, appoint Members of the Commission in accordance with the provisions of section 193 of the Constitution.

(2) The Members of the Commission shall be individuals who are fit and proper to hold such office, and who:

(a) meet the requirements with regard to the Commission as set out in Chapter 9 of the Constitution;

(b) are citizens of the Republic;

(c) hold a degree from a university recognised in the Republic;

(d) have knowledge and experience of not less than 15 years in one or more of the following fields:

(i) law;

(ii) law enforcement;

(iii) forensic countering of corruption; or

(iv) the combating of financial crime; and

(e) are individuals of honesty and integrity who have passed the relevant testing prescribed by the National Commissioner.

(3) An individual shall qualify to be considered for appointment as the National Commissioner if that individual, in addition to the qualifications set out in subsection (2) is, or has served as, a High Court Judge, including in an acting capacity.

(4) An individual shall not qualify to be considered for appointment as a Member if that individual:

(a) is or was a member of a governing body, office bearer or employee of a political party;

(b) is or was a member of Parliament, the National Assembly or National Council of Provinces;

(c) is an unrehabilitated insolvent or has at any time in his or her life been declared insolvent;

(d) has been declared by a court to be mentally ill or unfit;

(e) has at any time in his or her life been convicted of an offence involving dishonesty; or

(f) by virtue of his or her personal or professional history, can reasonably be expected to-

(i) diminish the independence of the Commission; or

(ii) the perception of independence of the Commission; or

(iii) bring the Commission into disrepute.

(5) Whenever the National Commissioner is, for any reason, unable to perform the functions of his or her Office, or while the appointment of an individual as National Commissioner is pending, one of the Provincial Commissioners, appointed by majority vote of all the Provincial Commissioners currently serving, shall perform such functions and shall be supported in those functions by all other Provincial Commissioners currently serving.

(6) Whenever any of the Provincial Commissioners are, for any reason, unable to perform the functions of their Office, or while the appointment of an individual as a Provincial Commissioner is pending, the National Commissioner shall appoint one of the other Provincial Commissioners currently serving to fulfil the functions of the Provincial Commissioner that are unable to perform his or her functions, and shall support him or her in the fulfilment of those additional functions.

(7) Subsection (4)(a) and (b) shall cease to apply to an individual after two general elections have been held since the individual ceased to hold such office.

(8) The remuneration and other terms and conditions of employment of the Members shall from time to time be determined by the National Assembly upon the advice of the committee of the National Assembly: Provided that such remuneration:

(a) shall not be less than that of a judge of a High Court; and

(b) shall not be reduced, nor shall the terms and conditions of employment be adversely altered, during their term of office.

(9) Members may be removed from the Commission in accordance with the provisions of section 194 of the Constitution.

5 FUNCTIONS OF THE NATIONAL ASSEMBLY COMMITTEE

(1) The National Assembly shall refer to a committee of the National Assembly the:

(a) nomination of individuals in terms of section 193 of the Constitution to be appointed as National Commissioner and as Provincial Commissioners; and

(b) consideration in terms of section 194 of the Constitution of the removal from Office of the National Commissioner and the Provincial Commissioners.

(2) The National Assembly or, if Parliament is not in session, the committee of the National Assembly may allow a Member to vacate his or her office:

(a) on account of continued ill-health; or

(b) at his or her request: Provided that such request shall be addressed to the National Assembly or the committee, as the case may be, at least 3 calendar months prior to the date on which he or she wishes to vacate such office, unless the National Assembly or the committee, as appropriate, allows a shorter period in a specific case.

(3) If the committee allows a Member to vacate his or her office in terms of subsection (2), the chairperson of the committee shall communicate that fact by message to the National Assembly for its ratification.

(4) The National Commissioner may, at any time, approach the committee with regard to any matter pertaining to the Commission.

6 OFFICE OF THE NATIONAL COMMISSIONER

(1) The seat of the Office of the National Commissioner shall be determined by the President.

(2) The Office of the National Commissioner shall consist of:

(a) the National Commissioner who shall be the head of the Office and shall manage and control the Office;

(b) the Chief Administrative Officer;

(c) members of the Investigation Unit;

(d) members of the Legal Services Unit; and

(e) other staff members of the Commission, including administrative staff, appointed at the Office of the National Commissioner.

7 PROVINCIAL OFFICES OF THE COMMISSION

(1) The Commission shall establish an Office at the seat of a High Court in each province.

(2) In provinces with more than one High Court, the seat of the Office in that province shall be determined by the President.

(3) Each of the Offices established in terms of this section shall consist of:

(a) a Provincial Commissioner, designated by the National Commissioner, who shall-

(i) be the head of the relevant Office;

(ii) manage and control that Office; and

(iii) exercise the functions delegated to him or her by the National Commissioner,

subject to the management, control and directions of the National Commissioner;

(b) members of the Investigation Unit;

(c) members of the Legal Services Unit; and

(d) other staff members of the Commission, including administrative staff, appointed or assigned to the Commission at that Office.

CHAPTER 3: COMMISSION STAFF

8 STAFF MEMBERS OF THE COMMISSION

(1) The Commission shall, subject to the directions and control of the National Commissioner, in the performance of the Commission's functions under this Act and the Constitution, be assisted by:

(a) a suitably qualified and experienced individual as Chief Administrative Officer, appointed by the National Commissioner for the purpose of assisting in the performance of all financial, administrative and clerical functions pertaining to the Commission;

(b) members of the Investigation and Legal Services Units-

(i) who shall be appointed by the National Commissioner in consultation with the Provincial Commissioner who is the head of the Office at which those members of the Investigation and Legal Services Units are being appointed, and subject to the laws governing the public service; or

(ii) who shall be appointed by the National Commissioner at the Office of the National Commissioner in support of his or her powers, duties and functions set out in Chapter 5 and anywhere else in this Act or the Constitution; and

(c) such staff, seconded in terms of subsection (7) or appointed by the National Commissioner in terms of Section 9, as may be necessary to enable the Commission to perform its functions.

(2) The National Commissioner shall determine a uniform recruitment procedure for the Commission which procedure shall, through an open, transparent and competitive recruitment process, ensure the appointment of staff members of the Commission who are appropriately qualified, possess the capabilities required to support the mandate of the Commission, and have passed such integrity and ethics testing as the National Commissioner may prescribe for all potential candidates.

(3) The National Commissioner may from time to time, in consultation with the Provincial Commissioners, and considering the mandate of the Commission, prescribe the appropriate qualifications for the appointment of the members of the Investigation and Legal Services Units.

(4) An individual shall qualify to be considered for appointment as an investigator in the Investigation Unit if that individual:

(a) is a citizen of the Republic;

(b) has specialised knowledge and experience of not less than 10 years in one or more of the following fields:

(i) law enforcement;

(ii) forensic countering of corruption; or

(iii) the combating of financial crime; and

(c) is an individual of honesty and integrity.

(5) An individual shall qualify to be considered for appointment as attorney or advocate in the Legal Services Unit if that individual:

(a) is a citizen of the Republic;

(b) holds a degree in law from a university recognised in the Republic;

(c) has the right of appearance to appear in any court within the Republic in terms of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995);

(d) is admitted as an advocate or an attorney and has, for a cumulative period of at least 5 years after having been so admitted, practised as an advocate or an attorney, or is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 5 years after having so qualified, lectured in law at a university;

(e) has specialised knowledge and experience of not less than 5 years in one or more of the following fields:

(i) instituting and conducting prosecution of criminal matters;

(ii) instituting and conducting legal proceedings relating to recovery of damages or losses;

(iii) forensic countering of corruption; or

(vi) the combating of financial crime;

(f) is an individual of honesty and integrity; and

(g) is a fit and proper individual in good standing with the relevant legal profession's regulatory body.

(6) Staff members of the Commission shall have such powers as the National Commissioner may delegate to them.

(7) The Commission may, in the furtherance of its mandate and in the performance of the functions contemplated in Section 2, at the request of the National Commissioner:

(a) be assisted by officers in the Public Service seconded to the service of the Commission in terms of any law regulating such secondment;

(b) be supported by the Crime Intelligence Division of the police service to gather, correlate, evaluate, co-ordinate and use crime intelligence in the performance of its functions, and the head of the Crime Intelligence Division of the police service shall upon a request of the National Commissioner make available crime intelligence capacity to assist the Commission in specific investigations; and

(c) be assisted by personnel from any other Government department or institution, which may include personnel from the South African Reserve Bank, the South African Revenue Service, the Financial Intelligence Centre, the Department of Home Affairs and the Asset Forfeiture Unit.

(8) If the National Commissioner so requests, any individual seconded in terms of subsection (7) shall retain the powers, duties and functions endowed by any law governing the powers, duties and functions of that department or institution, and that individual may exercise such powers, duties and functions under the command of the National

Commissioner or his or her delegate, but subject to such conditions as may be determined by the head of the seconding Government department or institution.

(9) Individuals seconded in terms of this section shall in the performance of their functions act in terms of the laws applicable to the Government department or institution from which they are seconded, subject to such conditions as may be agreed upon by the National Commissioner and the director-general of the Government department or head of the Government institution.

9 ENGAGEMENT OF INDIVIDUALS TO PERFORM SERVICES IN SPECIFIC CASES

(1) The National Commissioner may in consultation with the Provincial Commissioners, on behalf of the State, engage, under agreements in writing, individuals having suitable qualifications and experience to perform services in specific investigations or legal proceedings.

(2) The terms and conditions of service of an individual engaged by the National Commissioner under subsection (1) shall be as determined from time to time by the Minister of Finance, except where the engagement of an individual contemplated in subsection (1) will not result in financial implications for the State.

(3) For purposes of this section, *'services'* include the conducting of an investigation or legal proceedings under the control and direction of the National Commissioner or Provincial Commissioner, as appropriate.

10 CONDITIONS OF SERVICE

(1) The individuals appointed by the National Commissioner in terms of Section 8, and where appropriate in consultation with Provincial Commissioners, shall receive such remuneration, allowances and other employment benefits and shall be appointed on such terms and conditions and for such periods, as the National Commissioner may determine.

(2) The National Commissioner shall inform the Minister of Finance of the outcome of decisions taken in exercising his or her powers in terms of Section 8 and 10(1).

(3) A document setting out the remuneration, allowances and other conditions of employment determined by the National Commissioner in terms of this section, shall be tabled in the National Assembly within 14 days after such determination: Provided that-

(a) if the National Assembly disapproves of any determination such determination shall cease to be of force to the extent to which it is so disapproved; and

(b) if a determination ceases to be of force as contemplated in subsection (3)(a):

(i) anything done in terms of such determination up to the date on which such determination ceases to be of force shall be deemed to have been done validly; and

(ii) any right, privilege, obligation or liability acquired, accrued or incurred up to the said date under and by virtue of such determination, shall lapse upon the said date.

(4) The Members and all staff members of the Commission shall:

(a) serve impartially and independently and exercise, carry out or perform their powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law; and

(b) serve in a full-time capacity to the exclusion of any other duty or obligation arising out of any other employment or occupation or the holding of any other office, whether remunerated or not: Provided that an individual contemplated in Section 9 may be exempted from the provisions of this subsection.

(5) No staff member of the Commission shall conduct an investigation or institute or conduct legal proceedings, or render assistance with regard to such investigation or legal proceedings in respect of a matter in which they, or any family member or close associate have any pecuniary interest or any other interest which might preclude them from performing their functions in a fair, unbiased and proper manner.

(6) If any staff member of the Commission fails to disclose an interest contemplated in subsection (5), while having an interest in the matter being investigated, the National Commissioner may take such steps as he or she deems necessary to ensure a fair, unbiased and proper investigation.

(7) Notwithstanding anything to the contrary contained in any law no individual shall disclose to any other individual-

(a) the contents of any document in the possession of any staff member of the Commission, or the record of any evidence given to the Commission during an investigation or legal proceeding;

(b) the details of an investigation under this Act, including the identity of anyone being investigated, or

(c) any Information relating to the activities of the Commission;

except with leave of the National Commissioner.

11 SECURITY SCREENING AND INTEGRITY MEASURES

(1) Any individual who is considered for appointment in, or secondment to, or engagement with, the Commission, shall be subject to a security screening investigation in terms of and in accordance with Section 2A of the National Strategic Intelligence Act, 1994 (Act 39 of 1994) as amended.

(2) No individual may be appointed or seconded to, or engaged with, the Commission unless:

(a) a security clearance has been issued to that individual in terms of Section 2A(6) of the National Strategic Intelligence Act, 1994 (Act 39 of 1994), by any Intelligence Structure referred to in that Act as may from time to time be determined by the Minister for Safety and Security; or

(b) a security clearance on the required level and which is still valid, has been issued to the individual in question in terms of Section 2A(6) of the National Strategic Intelligence Act, 1994.

(3) Whenever the head of the Intelligence Structure referred to in subsection (2) acting in terms of Section 2A(6) of the National Strategic Intelligence Act, 1994, upon reasonable grounds, degrades, withdraws or refuses a security clearance, of a staff member of the

Commission, the National Commissioner may on his or her own initiative or on request of any of the Provincial Commissioners, discharge that staff member.

(4) Any staff member of the Commission may from time to time, or at such regular intervals as the National Commissioner may determine, be subjected to a further security screening investigation: Provided that if, upon Information at the disposal of the National Commissioner, he or she reasonably believes that such individual poses a security risk, he or she may require that individual to undergo a further security screening investigation.

(5) Staff members of the Commission must, in the prescribed manner and at the prescribed intervals, disclose their prescribed financial and other interests and those of their family members which may in any way impede their ability to serve impartially and independently and perform their functions in good faith and without fear, favour or prejudice.

(6) The National Commissioner shall prescribe measures:

(a) for integrity testing of any staff member of the Commission, which may include random entrapment, testing for the abuse of alcohol or drugs, or the use of the polygraph or similar instrument to ascertain, confirm or examine in a scientific manner the truthfulness of a statement made by an individual; and

(b) to ensure the confidentiality of Information obtained through integrity testing in terms of this section.

(7) The necessary samples required for any test referred to in subsection (6), may be taken, but any sample taken from the body of a staff member of the Commission may only be taken by a registered medical practitioner or a registered nurse.

(8) The National Commissioner shall prescribe any further measures that may assist him or her to make decisions in respect of the employment, secondment or engagement, or continued employment, secondment or engagement, of any individual, but not limited to psychometric testing and assessment of competencies and skill.

12 IMPARTIALITY AND OATH OR AFFIRMATION

(1) Subject to the Constitution and this Act , no organ of state and no member or employee of an organ of state, nor any member of the cabinet, including the President, nor any other person shall-

(a) improperly and wilfully interfere with, hinder or obstruct the Commission or any staff member thereof in the exercise, carrying out or performance of its or their powers, duties and functions; or

(b) unduly influences, or attempt to unduly influence any staff member of the Commission.

(2) All staff members of the Commission, before commencing to exercise, carry out or perform their powers, duties or functions in terms of this Act, take an oath or make an affirmation, which shall be subscribed by them, in the form set out below, namely:

'I ..... (full name) do hereby swear/solemnly affirm that I will in my capacity as National Commissioner/Provincial Commissioner/investigator/ legal officer/ staff member of the Integrity Commission, uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law. (In the case of an oath: So help me God.)'.

(3) Such an oath or affirmation shall:

(a) in the case of the National Commissioner or Provincial Commissioner, be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the National Commissioner is located; and

(b) in the case of an investigator, legal officer or any other staff member, be taken or made before the Provincial Commissioner in whose Office the investigator, legal officer or any other staff member concerned has been appointed, and who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

CHAPTER 4: COMMISSION FINANCES

13 COMMISSION EXPENDITURE

(1) In order to give effect to the mandate of the Commission, the National Commissioner, in consultation with the Provincial Commissioners, shall prepare and provide the Minister of Finance with the necessary estimate of expenditure of the Commission.

(2) The expenses incurred in connection with the exercise of the powers, the carrying out of the duties and the performance of the functions of the Commission shall be defrayed out of monies appropriated by Parliament for that purpose. In each fiscal year Parliament shall be obliged to so appropriate not less than 0,3% of the Republic's national budget in the preceding fiscal year, as determined by the Minister of Finance.

(3) The National Commissioner may, with the specific or general approval of the Minister of Finance or any individual authorised by the said Minister to so approve, order that the expenses or a portion of the expenses incurred by any individual in the course of or in connection with an investigation by the Commission, be paid from State funds to that individual.

14 FINANCIAL ACCOUNTABILITY

(1) The National Commissioner shall manage and have control over the money received or paid out for or on account of the Commission.

(2) The Chief Administrative Officer referred to in Section 8(1)(a)–

(a) shall, subject to the Public Finance Management Act, 1999 (Act 1 of 1999):

(i) be charged with the responsibility of accounting for money received or paid out for or on account of the office of the Commission;

(iii) cause the necessary accounting and other related records to be kept; and

(b) may exercise such powers and shall perform such duties as the National Commissioner may from time to time confer upon or assign to him or her and shall in respect thereof be accountable to the National Commissioner.

(3) The records referred to in subsection (2)(a)(ii) shall be audited by the Auditor-General.

CHAPTER 5: NATIONAL COMMISSIONER

15 POWERS, DUTIES AND FUNCTIONS OF NATIONAL COMMISSIONER

(1) The National Commissioner shall have oversight of all activities of the Commission and shall exercise control over and manage:

(a) the duties and functions of the Commission including all investigations and legal proceedings and shall perform any legal act or act in any legal capacity on behalf of the Commission and in the execution of, and the furtherance of, the mandate of the Commission; and

(b) all staff members of the Commission in accordance with this Act and any other applicable legislation.

(2) The National Commissioner may:

(a) have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by individuals referred to in Section 6(2)(e) of this Act; and

(b) at his or her discretion, be supported in his or her functions by investigators and legal officers at the Office of the National Commissioner.

(3) The National Commissioner shall, after consultation with the Provincial Commissioners:

(a) frame a code of conduct which shall be complied with by all staff members of the Commission: Provided that the code of conduct may from time to time be amended and must be published in the Gazette for general information; and

(b) develop and implement ongoing training programmes for all staff members of the Commission to ensure the building of relevant skill and institutional knowledge to effectively investigate, and institute and conduct effective legal proceedings, in respect of serious corruption.

(4) The National Commissioner, in consultation with the Provincial Commissioners, shall determine uniform rules and operating procedures for the Commission, which operating procedures shall set out consistent and measurable standards in terms of which the activities of the Commission must be carried out: Provided that-

(a) the National Commissioner may create separate rules and standards for the Investigation and Legal Service Units;

(b) any decisions or actions in respect of the outcomes of any security screening and integrity measures as set out in Section 11 shall form part of such uniform rules and operating procedures;

(c) all uniform rules and operating procedures so created must be published in the Government Gazette; and

(d) all uniform rules and operating procedures so created shall be tabled in the National Assembly.

(5) In support of the eradication of corruption, including in the public service, the National Commissioner shall:

(a) table at Parliament guidance and suggestions in respect of the selection and training of individuals in positions in the public service which may be considered vulnerable to corruption every 5 years;

(b) implement public programmes to raise awareness and provide guidance in respect of the prevention, detection and combating of corruption in the public service and among private entities;

(c) report to Parliament on specific measures that may be put in place to prevent the misuse of procedures regulating private entities, including subsidies and licenses for commercial activities every 5 years; and

(d) shall ensure that all staff members of the Commission render the necessary assistance, free of charge, to enable any person to report corrupt activities which meet or which may meet the definition of serious corruption, to the Commission.

(6) The National Commissioner may at any time request Provincial Commissioners to submit reports with regard to specific activities relating to their powers, duties or functions.

(7) Where, during the course of the Commission's engagement with any matter, the National Commissioner becomes aware of, including as a result of a report by any Provincial Commissioner, evidence relating to a matter which falls outside the mandate of the Commission, the National Commissioner shall ensure that such evidence is referred to the authority with the relevant jurisdiction, and as soon as is reasonably possible.

(8) Further to the provisions of Section 192A(4) of the Constitution, the National Commissioner shall, in respect of any matter in which the alleged, reported or suspected serious corruption is accompanied by other crimes, make a determination on whether the entire case, including any charges relating to serious corruption, shall be prosecuted by the Commission or the national prosecuting authority. As soon as is reasonably possible once such determination has been made, that matter shall be referred to the relevant authority who shall prosecute the entire case, including any charges relating to serious corruption.

16 POLICY AND POLICY DIRECTIVES

(1) The National Commissioner shall, in accordance with Section 192A(5) and any other relevant section of the Constitution, and after consultation with the Provincial Commissioners-

(a) determine policies and issue policy directives for the functions and activities of the Commission;

(b) determine policies and issue policy directives in respect of investigations and the instituting and conducting of legal proceedings;

(c) exercise such powers and perform such functions in respect of the policies as determined in this Act or any other law; and

(d) may intervene in any Commission process when policy directives are not complied with.

(2) The policies and policy directives shall be observed by all staff members of the Commission.

(3) The policies, directives and any amendments to them must be included in the report referred to in Section 27(2): Provided that the first policies issued under this Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Commissioner.

17 COOPERATION FRAMEWORK

(1) Further to the provisions of Section 192A(8) of the Constitution and Sections 2(2)(d) and 2(3), and in order to promote cooperation and prevent jurisdictional conflicts between relevant national law enforcement bodies and institutions, and in fulfilment of the Commission's mandate, the National Commissioner:

(a) shall participate in the creation of a national legislative cooperation framework, which process shall be overseen by Parliament, governing the interaction between the Commission, the Public Protector, the police service and the national prosecuting authority and any other body or institution whose lawful duties and functions may be impacted by the mandate of the Commission;

(b) maintain contact with such bodies and institutions to promote and ensure consistency in policies and practices; and

(c) may consider such recommendations, suggestions and requests concerning the Commission as he or she may receive from any source.

(2) The Commission shall be assisted in the achievement of its mandate by Government departments or institutions, which shall take reasonable steps to do so on request of the Commission.

(3) Further to Section 192A(6) of the Constitution, the National Commissioner shall require all organs of state, state owned enterprises and municipalities to furnish the Commission with a report by 1 March each year, in a format as determined by the National Commissioner, setting out all measures taken by them in respect of the eradication of serious corruption during the preceding calendar year: Provided

that if such report indicate an increase in corruption in respect of the areas of jurisdiction of such reporting body, that reporting body shall also report on the reasons why that is the case and how it is going to combat corruption more effectively in the next calendar year.

(4) The National Commissioner shall ensure that the Commission maintain good working relations with the South African Reserve Bank, the South African Revenue Service, the Financial Intelligence Centre, the Department of Home Affairs, the Asset Forfeiture Unit and any other national body or institution which could support and provide assistance to the Commission in the fulfilment of its mandate.

(5) Further to the Republic's obligations in respect of the combating of corruption under international law, the National Commissioner shall promote, facilitate and support international cooperation and technical assistance in the detection, prevention and combating of corruption, including in respect of asset recovery.

CHAPTER 6: PROVINCIAL COMMISSIONERS

18 MANAGEMENT OF PROVINCIAL OFFICES

(1) Provincial Commissioners shall exercise their powers:

(a) subject to the provisions of the Constitution and this Act, and the oversight, management, control and directions of the National Commissioner;

(b) in respect of the province for which they have been appointed; and

(c) in respect of any serious corruption which have not been expressly excluded from their jurisdiction, either generally or in a specific case, by the National Commissioner.

(2) Provincial Commissioners may exercise or perform any of the powers, duties and functions of the National Commissioner which they have been authorised by the National Commissioner to exercise or perform.

(3) Subject to the provisions of Section 192A and any other relevant section of the Constitution, this Act or any other law, Provincial Commissioners shall, in respect of the province for which they have been appointed:

(a) supervise, manage, control and direct the day to day activities of the Office of which they are the head;

(b) supervise, manage, control, direct and co-ordinate the work and activities of the Investigation and Legal Services Units in the Offices of which they are the heads and carry out functions incidental thereto;

(c) furnish directions and guidance on activities in respect of matters under investigation or which are the subject of legal proceedings;

(d) at the request of the National Commissioner, submit reports to and assist the National Commissioner in connection with any matter in relation to this Act; and

(e) carry out all duties and perform all functions conferred or imposed on or assigned to them under any law which is in accordance with the provisions of this Act.

(4) The Provincial Commissioners shall have the power, on their own initiative or on receipt of a complaint or an allegation or on the ground of Information that has come to their knowledge and which points to conduct such as referred to in Section 2(1)(b) of this Act, instruct investigators of the relevant Investigation Unit to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or Information and the manner in which the matter concerned should be dealt with.

(5) The Provincial Commissioners shall provide to the National Commissioner a copy of the directions given or guidelines furnished under subsection (3)(c).

(6) The Provincial Commissioners must annually, not later than the first day of March, submit to the National Commissioner a report on the activities of the Offices of which they are the heads, and on all their activities during the previous year.

(7) Provincial Commissioners may, at any time, submit a report to the National Commissioner with regard to any matter, if they deem it necessary.

(8) Where, during the course of the Commission's engagement with any matter, Provincial Commissioners become aware of evidence relating to a matter which falls outside the mandate of the Commission, they shall report the matter to the National Commissioner as soon as is reasonably possible.

19 ESTABLISHMENT OF INVESTIGATION AND LEGAL SERVICE UNITS

(1) Provincial Commissioners, after consultation with the National Commissioner and further to the uniform rules and operating procedures provided for in Section 15(4), shall establish Investigation and Legal Service Units at the Offices where they are the heads.

(2) Subject to the Constitution and with due regard to the fundamental rights of every individual, investigators and legal officers shall exercise such powers and shall perform such duties and functions as are delegated to them by the National Commissioner or the Provincial Commissioners who are the heads of the Offices at which the investigators and legal officers are employed and in compliance with any uniform rules and operating procedures determined by the National Commissioner.

(3) Where investigators or legal officers become aware of corrupt activities which may constitute serious corruption, they shall inform the Provincial Commissioners who are the heads of the Offices where the investigators or legal officers are employed, as soon as is reasonably possible.

(4) The Members shall insure effective cooperation and support between the members of the Investigations Units and the members of the Legal Services Units in fulfilment of the mandate of the Commission.

CHAPTER 7: INVESTIGATION UNITS

20 FUNCTIONS OF INVESTIGATION UNITS

(1) Investigation Units shall have a duty to investigate corrupt activities meeting the definition of serious corruption and shall function under the management, control and directions of the relevant Provincial Commissioner.

(2) Investigators may, after notifying the Provincial Commissioner, at any time prior to or during an investigation, request any individuals-

(a) at any level of government, subject to any law governing the terms and conditions of employment of such individuals;

(b) performing a public function, subject to any law governing the terms and conditions of the appointment of such individuals; or

(c) otherwise subject to the jurisdiction of the Commission,

to assist the Commission in the performance of the functions of the Commission with regard to a particular investigation or investigations in general.

(3) Investigators may-

(a) direct any individuals to submit an affidavit or affirmed declaration or to appear before them to give evidence or to produce any Information in their possession or under their control which has a bearing on the matter being investigated, and may examine such individuals;

(b) request an explanation from any individuals whom they reasonably suspect of having Information which has a bearing on a matter being or to be investigated;

(c) require any individuals appearing as witnesses before them under this section to give evidence on oath or after having made an affirmation; and

(d) administer an oath to or accept an affirmation from any such individuals.

(4) Investigators shall have power to arrest any individuals for and charge them with the offence of serious corruption, and, with the assistance of the police service, to detain them for the purpose of an investigation.

(5) A direction referred to in subsection (3) shall be by way of a subpoena containing particulars of the matter in connection with which the individual subpoenaed is required to appear before the relevant investigator and shall be signed by the relevant Provincial Commissioner and served on the individual subpoenaed either by a registered letter sent through the post or by delivery by an investigator authorised thereto by the relevant Provincial Commissioner.

(6) Any individual appearing before the relevant investigator by virtue of the provisions of this section may be assisted at such examination by an advocate or an attorney and shall be entitled to peruse such Information as is reasonably necessary to refresh his or her memory.

(7) For the avoidance of doubt, the Commission shall not have the power to require the disclosure of anything that is protected by legal professional privilege.

(8) Where investigators who perform official duties are authorised by law to use force, they may use only the minimum force which is reasonable in the circumstances.

21 USE OF SEARCH WARRANTS, ENTERING OF PREMISES AND SEIZURE BY INVESTIGATION UNITS

(1) The provisions of Sections 19 to 36 of the Criminal Procedure Act, 1977 (Act 51 of 1977) as amended from time to time, shall apply mutatis mutandis in respect of the functions of the Investigation Units: Provided that-

(a) any reference to a *'police official'* shall be construed as reference to an *'investigator'* of the relevant Investigation Unit;

(b) due regard shall be given to the execution of the mandate of the Commission; and

(c) the requirements of this Act shall prevail notwithstanding anything contained in the Criminal Procedure Act, 1977 (Act 51 of 1977) as amended from time to time.

(2) Investigators shall be competent to enter any building or premises and there to make such investigation or inquiry as they may deem necessary, and to seize anything on those premises which in their opinion have a bearing on the investigation into serious corruption.

(3) The premises referred to in subsection (2) may only be entered by virtue of a warrant issued by a magistrate or a judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified in the furtherance of the mandate of the Commission.

(4) The entry and search of any premises under this section must be conducted with strict regard to decency and order, including the protection of the individual's right to-

(a) respect for his or her dignity;

(b) freedom and security; and

(c) his or her personal privacy.

(5) Investigators must identify themselves at the request of the owner or the individual in control of the premises and hand to such owner or individual a copy of the warrant: Provided that if no such owner or individual is present, they must affix a copy of the warrant to the premises at a prominent and visible place.

(6) Investigators may, subject to the provisions of this section if they wish to retain anything contemplated in subsection (2) for further examination or for safe custody, remove it from the premises against the issue of a receipt: Provided that any Information or object so removed and which is not intended to be presented as evidence in subsequent proceedings before a court of law, must be returned as soon as practicable after the purpose for which it was removed, has been achieved: Provided further that if there is no individual present to receive the receipt when it is issued, it must be affixed to a prominent place on the premises.

(7) If during the execution of a warrant or the conducting of a search in terms of this section, an individual claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the investigator executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains Information which is relevant to the investigation or inquiry and that such Information is necessary for the investigation or inquiry, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the Information concerned is privileged or not.

22 INVESTIGATIONS OUTSIDE THE REPUBLIC

(1) If the National Commissioner deems it necessary for the purposes of performing the functions of the Commission, and in consultation with the relevant Provincial Commissioner, he or she may direct any investigator to perform service at any place outside the Republic.

(2) An investigator in respect of whom a direction has been issued under subsection (1), shall perform service in accordance with such direction and shall, while so performing service, remain, unless the National Commissioner in a particular case otherwise directs, subject to the provisions of this Act as if performing service within the Republic.

CHAPTER 8: LEGAL SERVICES UNITS

23 DUTIES OF THE NATIONAL COMMISSIONER

(1) The National Commissioner may review a decision to institute and conduct legal proceedings, or not to do so, and after consulting the relevant Provincial Commissioner and after taking representations, within the period specified by the National Commissioner, of the accused person, the complainant and any other individual or party whom the National Commissioner considers to be relevant, may conduct any investigation he or she may deem necessary in respect of actions taken in respect of legal proceedings.

(2) The National Commissioner or an individual designated by him or her in writing, may: authorise any competent individual in the employ of the public service or any local authority to conduct legal proceedings, subject to the control and directions of the National Commissioner or an individual designated by him or her.

(3) The National Commissioner or any Provincial Commissioner designated by the National Commissioner shall have the power to institute and conduct legal proceedings in any court in the Republic in person: Provided that the National Commissioner or Provincial Commissioner has the right of appearance to appear in any court within the Republic in terms of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995).

24 FUNCTIONS OF LEGAL SERVICES UNITS

(1) Legal Service Units shall have a duty to institute and conduct legal proceedings in respect of corrupt activities meeting the definition of serious corruption and shall function under the management, control and directions of the relevant Provincial Commissioner.

(2) Provincial Commissioners shall, after considering the outcome of investigations by the relevant Investigations Unit, and after consultation with the National Commissioner, direct legal officers in the Legal Services Unit in the Offices of which they are the heads, to institute and conduct legal proceedings in fulfilment of the mandate of the Commission.

(3) Legal officers shall have the power and the duty, under the direction of the relevant Provincial Commissioner, to:

(a) institute and conduct criminal proceedings on behalf of the State in order to prosecute corrupt activities that meets the definition of serious corruption, and subject to the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977);

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) if required in fulfilment of the mandate of the Commission, to discontinue such criminal proceedings.

(4) Legal officers shall have the power and the duty, under the direction of the relevant Provincial Commissioner, to:

(a) institute and conduct civil proceedings on behalf of the State in order to recover assets lost as a result of serious corruption;

(b) carry out any necessary functions incidental to instituting and conducting such civil proceedings; and

(c) if required in fulfilment of the mandate of the Commission, to discontinue such civil proceedings.

(5) No Member or prosecutor who has been suspended from his or her office under this Act or any other law shall be competent to exercise any of the powers referred to in this section for the duration of such suspension.

25 CERTIFICATES TO SHOW VALUE OF CRIMINAL PROCEEDS

(1) In any legal proceeding under this Act, a certificate by the National Commissioner as to the value of criminal proceeds, is admissible and is prima facie proof of that value unless the contrary is proven.

(2) A Court shall presume, in the absence of evidence to the contrary, that a certificate purporting to be the certificate of a value by the National Commissioner is such a certificate.

26 POWERS AND DUTY TO INSTITUTE CIVIL PROCEEDINGS

(1) The Commission shall have the power to-

(a) institute and conduct civil proceedings against any person (including a natural person in their personal capacity, and whether or not an employee of a State Institution) in any court of law for-

(i) the recovery of any assets, damages or losses, and the prevention of potential damages or losses, including the loss of assets, which may be, suffered by a State Institution as a result of serious corruption;

(ii) any relief relevant to any investigation of the Commission; and

(iii) any relief relevant to the interests of the Commission; and

(b) charge and recover fees and expenses from a State Institution for anything done in terms of this Act in respect of that State Institution or a State Institution identified by that State Institution, together with legal costs relating to the Institution and conducting of civil proceedings in terms of this Act, and interest, calculated at the rate prescribed in terms of Section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), from the date of demand.

(2) A State Institution which is unable to pay the fees, expenses or legal costs or any part thereof, charged or to be recovered in terms of subsection (1)(b) for a specific financial year or any part thereof, may apply to the National Treasury or, when applicable, the relevant provincial treasury as contemplated in the Public Finance Management Act, 1999 (Act No. 1 of 1999), to be exempted from the payment of such fees, expenses or legal costs or any part thereof.

(3) The National Treasury or relevant provincial treasury, which receives an application in terms of subsection (2) must, after consultation

with the National Commissioner and after considering the financial position of the State Institution-

(a) make a finding regarding the ability of the State Institution to pay the fees, expenses or legal costs or any part thereof charged or to be recovered in terms of subsection (1)(b) for a specific financial year or any part thereof; and

(b) inform the National Commissioner and the State Institution concerned of the outcome of the application.

(4) A State Institution which applies for an exemption in terms of subsection (2), is liable to pay the fees, expenses or legal costs as provided for in terms of subsection (1)(b) to the extent determined by the National Treasury or relevant provincial treasury in terms of subsection (3)(a).

(5) For the performance of the functions referred to in subsection (1), Legal Services Units may-

(a) through an investigator require from any individual such particulars and Information as may be reasonably necessary;

(b) order any individual by notice in writing under the hand of the Provincial Commissioner or an investigator delegated thereto by him or her, addressed and delivered by an investigator, to appear before a legal officer at a time and place specified in the notice and to produce to it specified Information or objects in the possession or custody or under the control of any such individual: Provided that the notice shall contain the reasons why such individual's presence is needed;

(c) through an investigator, administer an oath to, or accept an affirmation from, any individual referred to in subsection (5)(b), or any individual present at the place referred to in subsection (5)(b), irrespective of whether or not such individual has been required under the said subsection to appear before a legal officer, and question him or her under oath or affirmation.

(6) The law regarding privilege as applicable to a witness subpoenaed to give evidence in a criminal case in a court of law shall apply in relation to the questioning of any individual in terms of subsection (5): Provided that an individual who refuses to answer any question on the ground that the answer would tend to expose him or her to a criminal charge, may be compelled to answer such question.

(7) No evidence regarding any questions and answers contemplated in the proviso to subsection (6), shall be admissible in any criminal proceedings, except in criminal proceedings where such individual stands trial on a charge of perjury or on a charge contemplated in Section 319 (3) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

(8) Any individual appearing before a legal officer by virtue of subsection (5(b) and (c), may be assisted at such examination by a legal representative.

(9) Notwithstanding anything to the contrary in any law and for the performance of any of its functions under this Act, the Commission may institute and conduct civil proceedings in its own name or on behalf of a State Institution in any court of law.

(10) Without limiting the provisions of subsection (9), if, during the course of an investigation, any matter comes to the attention of the National Commissioner which, in his or her opinion, justifies the institution of civil proceedings by a State Institution against any individual, he or she may bring such matter to the attention of the state attorney or the State Institution concerned, as the case may be.

(11) Nothing in this Act precludes a person from instituting and conducting civil proceedings for any loss suffered by that person as a result of any serious corruption, notwithstanding that proceedings in that regard by the Commission have or have not commenced.

CHAPTER 9: ACCOUNTABILITY AND LIABILITY

27 ACCOUNTABILITY TO PARLIAMENT

(1) The National Commissioner may, subject to the provisions of subsection (3), this Act, the Constitution and any law, in the manner he or she deems fit, make known to any individual any finding, point of view or recommendation in respect of a matter investigated by the Commission.

(2) The National Commssioner shall report in writing on the activities of the Commission, including on decisions to prosecute or not to prosecute, to the National Assembly at least once every year: Provided that any report shall also be tabled in the National Council of Provinces.

(3) The National Commissioner shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if he or she-

(a) deems it necessary;

(b) deems it in the public interest;

(c) determines that it requires the urgent attention of, or an intervention by, the National Assembly;

(d) is requested to do so by the Speaker of the National Assembly; or

(e) is requested to do so by the Chairperson of the National Council of Provinces

(4) The National Commissioner shall ensure any guidance, suggestions and reporting in terms of Section 15(5) are tabled and reported to Parliament.

(5) Any report issued by the Commission shall be open to the public, unless the National Commissioner is of the opinion that exceptional circumstances require that the report be kept confidential.

(6) If the National Commissioner is of the opinion that exceptional circumstances require that a report be kept confidential, the committee of the National Assembly must be furnished with the reasons therefor and, if the committee concurs, such report shall be dealt with as a confidential document in terms of the rules of Parliament.

(7) For the purposes of this section, *'exceptional circumstances'* shall exist if the publication of the report concerned is likely-

(a) to endanger the security of the citizens of the Republic;

(b) to prejudice any other investigation or pending investigation of the Commission;

(c) to be prejudicial to the interests of the Republic; or

(d) in the opinion of the National Commissioner to have a bearing on the effective functioning of his or her office.

28 LIABILITY OF THE COMMISSION

(1) The Commission shall be a juristic person.

(2) The State Liability Act, 1957 (Act 20 of 1957), shall apply with the necessary changes in respect of the Commission, and in such application a reference in that Act to *'the department'* shall be construed as a reference to the Commission and a reference in that Act to *'the Minister of the department'* shall be construed as a reference to the National Commissioner.

(3) Nothing done in good faith by any staff member of the Commission, in terms of this Act or the Constitution, and in the course and scope of his or her duties for the Commission and while working under the direction of any Member, shall render that staff member personally liable for any action, claim or demand, whether it be civil or criminal or otherwise.

(4) For the avoidance of any doubt, nothing in this section shall protect any staff member of the Commission for anything done outside the ambit of the duties of the Commission.

29 STAFF MEMBERS OF THE COMMISSION ANSWERING QUESTIONS

(1) Staff members of the Commission shall be competent but not compellable to answer questions in any proceedings in or before a court of law or any body or institution established by or under any law, in connection with any Information relating to an investigation of the Commission which has come to his or her knowledge.

(2) Subject to the provisions of this Act, no staff member of the Commission shall be called to give evidence before any court or tribunal in respect of anything coming to such staff member's knowledge in the exercise of his or her duties under this Act.

CHAPTER 10: COMMISSION SECURITY

30 UNAUTHORISED ACCESS TO OR MODIFICATION OF COMPUTER MATERIAL

(1) Without derogating from the generality of subsection (2):

(a) *'access to a computer'* includes access by whatever means to any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the Commission;

(b) *'contents of any computer'* includes the physical components of any computer as well as any program or data contained in the random access memory of a computer or stored by any computer on any storage medium, whether such storage medium is physically attached to the computer or not, where such storage medium belongs to or is under the control of the Commission;

(c) *'modification'* includes both a modification of a temporary or permanent nature; and

(d) *'unauthorised access'* includes access by an individual who is authorised to use the computer but is not authorised to gain access to a certain program or to certain data held in such computer or is unauthorised, at the time when the access is gained, to gain access to such computer, program or data.

(2) Any person is guilty of an offence if he or she wilfully-

(a) gains, or allows or causes any individual to gain, unauthorised access to any computer which belongs to or is under the control of the Commission or to any program or data held in such a computer, or in a computer to which only certain or all staff members of the Commission have access in their capacity such staff members of the Commission; or

(b) causes a computer which belongs to or is under the control of the Commission or to which only certain or all staff members of the Commission have access in their capacity as such staff members of the Commission, to perform a function while such individual is not authorised to cause such computer to perform such function; or

(c) performs any act which causes an unauthorised modification of the contents of any computer which belongs to or is under the control of the Commission or to which only certain or all staff members of the Commission have access in their capacity as such staff members of the Commission with the intention to-

(i) impair the operation of any computer or of any program in any computer or of the operating system of any computer or the reliability of data held in such computer; or

(ii) prevent or hinder access to any program or data held in any computer.

(3) Any act or event for which proof is required for a conviction of an offence in terms of this section and which was committed or took place outside the Republic is deemed to have been committed or to have taken place in the Republic if:

(a) the accused was in the Republic at the time when he or she performed the act or any part thereof; or

(b) the computer, by means of which the act was done, or which was affected in a manner contemplated in subsection (2) by the act, was in the Republic at the time when the accused performed the act or any part thereof; or

(c) the accused was a South African citizen or domiciled in the Republic at the time of the commission of the offence.

31 PROTECTION OF WHISTLEBLOWERS

(1) The Protected Disclosures Act, 2000 (Act 26 of 2000) shall *mutatis mutandis* apply to any individuals who, in good faith, provide Information to the Commission in respect of corrupt activities that may meet the definition of serious corruption: Provided that the requirements of this Act shall prevail notwithstanding anything contained in the Protected Disclosures Act, 2000 (Act 26 of 2000) as amended from time to time.

(2) No action or proceeding, including a disciplinary action, may be instituted or maintained against any individual in respect of:

(a) assistance given by the individual to the Commission or any staff member of the Commission; or

(b) a disclosure of Information made by the individual to the Commission or any staff member of the Commission:

Provided that such individual acted in good faith.

(3) In any legal proceedings under this Act, no witness shall be required to identify, or provide Information that might lead to the identification of, an individual who assisted or disclosed Information to the Commission or any staff member of the Commission.

(4) In any legal proceedings under this Act, the Court shall ensure that Information that identifies or might lead to the identification of an individual who assisted or disclosed Information to the Commission or any staff member of the Commission is removed or concealed from any Information to be produced or inspected in connection with the legal proceeding.

(5) Subsections (3) and (4) shall not apply to the extent determined by the court to be necessary to ensure that justice fully prevails.

32 OFFENCES AND PENALTIES

(1) Individuals who are untruthful or misrepresent in any way their qualifications, experience, capability, skills, honesty or anything else which the Commission may consider during the appointment or secondment process of such individuals as staff members of the Commission, including as members of the Investigation or Legal Services Units, as contemplated in Section 8, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

(2) Staff members of the Commission, and where appropriate any individuals engaged in terms of Section 9, who contravene Section 10(4) by, during their employment or secondment at, or engagement with, the Commission, act in bad faith, allowing bias to impact their actions or decisions, not acting without fear, favour or prejudice, carrying on any other duty or obligation outside of their employment or secondment at the Commission and in any way allowing the Commission's independence and integrity to be called into question, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

(3) Staff members of the Commission who fail to disclose any interest that is required to be disclosed in terms of Section 10(5) or 11(5), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

(4) Staff members of the Commission who disclose any Information contemplated in Section 10(7), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

(5) Persons who improperly and willfully interfere with, hinder or obstruct the Commission or any staff member thereof, in the exercise, carrying out or performance of its or their powers, duties and functions or unduly influences, or attempt to unduly influence such staff member, shall be guilty of an offence, and shall, on conviction, be liable to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(6) Persons who improperly and in a fraudulent manner cause any person to provide any kind of payment or exchange of goods in order to allow that person to report serious corruption to the Commission as contemplated in Section 15(4)(d) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

(7) Individuals who become aware of corrupt activities which may constitute serious corruption and do not inform the Provincial Commissioners who are the heads of the Offices where the individuals are employed or seconded to or engaged at, as contemplated in Section 19(5), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

(8) Persons who, without just cause-

(a) refuse or fail to comply with a direction, order or request by any Member, investigator or legal officer; or

(b) refuse to answer any question put to them or give to such question an answer which to their knowledge are false; or

(c) refuse to take the oath or to make an affirmation at the request of any Member, investigator or legal officer; or

(d) refuse to produce any Information or object after having been required to do so,

shall be guilty of an offence, and liable on conviction to a fine or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment: Provided such direction, request or question was issued by that Member, investigator or legal officer in the course and scope of the execution of their powers in respect of this Act.

(9) Persons who, in connection with any activity carried on by them, in a fraudulent manner take, assume, use or publish any name, description, title or symbol indicating or conveying or purporting to indicate or convey or which is calculated or is likely to lead other persons to believe or to infer that such activity is carried on under or by virtue of the provisions of this Act or under the patronage of the Commission, or is in any manner associated or connected with the Commission, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

(10) Persons who are guilty of an offence in respect of the unauthorised access to or modification of equipment of the Commission as contemplated in Section 30 shall be liable on conviction to a fine or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

(11) Persons who institute any action or proceeding, including disciplinary actions or proceedings, against any individual who assisted the Commission or disclosed Information to the Commission as contemplated in Section 31, and any persons who subject, or who cause to subject, any individual who assisted the Commission, in any way to harassment or threats of any kind, shall be liable on conviction to a fine or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment.

(12) Persons who destroy any Information or dispose of any assets relating to, or in anticipation of, any investigation or proceedings in terms of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment

33 APPLICATION OF ACT

The commencement of this Act shall not affect prosecutions currently pending before the courts in which serious corruption is being tried. All current investigations and prosecutions not yet pending in court shall be transferred to the Commission by the police and NPA upon the commencement of this Act if they involve serious corruption.

34 SHORT TITLE

This Act shall be called the Integrity Commission Act, 2021.

Appendix 5

The explanatory memorandum which accompanied the legislative drafts for a Chapter Nine Integrity Commission in August 2021

Memorandum on a constitutional amendment and enabling legislation for anti-corruption machinery of state in SA.

Executive summary

(a) *Serious forms of corruption like grand corruption, state capture and kleptocracy in South Africa are criminal violations of fundamental constitutional and human rights. They are literally killing many South Africans, mostly the poorest.*

(b) *The anti-corruption machinery of state in SA is currently not fit for purpose especially regarding serious corruption in all its forms. The NEC of the ANC has called for the urgent creation of a new entity that is permanent, specialised, independent and stands alone to deal with corruption.*

(c) *Our prosecutors and police, due to the ravages of attempted state capture, lack the required capacity to counter the corrupt efficiently and effectively*

(d) *The Constitutional Court, in the Glenister cases, has provided* binding *criteria for the establishment of functional corruption-busters who are fully able to carry out the international treaty obligations of SA*

(e) *That court has called upon parliament to make "the reasonable decision of a reasonable decision-maker in the circumstances" regarding the countering of corruption.*

(e) *The current circumstances in SA dictate that a best practice reform is urgently required in order to bolster the country's vulnerable culture of respect for human rights and boost confidence in its governance and economic prospects.*

(f) *The ANC, DA and IFP all favour the notion that a new body needs to be established to deal with corruption.*

(g) *Accountability Now has already prepared draft enabling legislation and a constitutional amendment so that the necessary* constitutionally-compliant *next steps can be taken to save the country from the scourge of serious corruption — and the imminent potential of failed state status. The current drafts accompany this memorandum*

Introduction

The ability of the SA state to deal with grand corruption, kleptocracy and state capture has been compromised during the two successive Zuma administrations following the election of Jacob G Zuma as leader of the ANC at Polokwane in December 2007. Despite his resignation on 14 February 2018, the legacy of the leadership of Zuma lives on in the criminal justice administration where his appointees in the police and prosecution services continue in office and perpetuate the agenda of Zuma and his cronies.

New leadership in the NPA, appointed by President Ramaphosa, describes the institution as "hollowed out" and infested with "saboteurs" intent upon protecting Zuma era malfeasance against investigation and prosecution. Many facets of the state capture project have emerged from the shadowy reaches of the Zuma administration and into the sanitizing light of the State Capture Commission. Much illuminating evidence has been given. The evidence has emerged from brave whistle blowers and various investigators The deceitful, deliberate and delinquent refusal of Zuma to co-operate with the commission has not prevented the commission from exposing industrial scale malfeasance. His refusal has led to his civil law incarceration due to his contempt for the order of the Constitutional Court that he comply with a summons from the commission.

The Ramaphosa administration supports the work of the commission and has contributed about a billion rand to its investigations in the form of fees for forensic investigators, the evidence leaders and the commission secretariat and venue. The head of the commission, Deputy Chief Justice Raymond Zondo, is due to report on his findings of fact and on his recommendations to government around the end of September 2021. His findings and recommendations are not of a binding nature. However, they will be instructive and informative to those who favour good governance under the rule of law and the Constitution in the place of the capture of the state by kleptocratic forces bent on satisfying their own greed rather than promoting the public good.

There is an urgent need to rake back the loot of state capture and to hold those responsible for grand corruption and kleptocracy associated with it to account in both the civil and criminal courts of the land.

Following the disturbances in Kwa Zulu Natal and Gauteng in July 2021, there is also a need to re-establish business confidence in the future of SA so that much needed investment in the rebuilding of the vision of the Constitution can be made from both local and foreign sources. While grand corruption holds sway all forms of confidence and investment wane, when corruption is dealt with decisively they wax.

The UN Sustainable Development Goals, to which SA subscribes, require strong institutions of government. The UN points out that:

Conflict, insecurity, weak institutions and limited access to justice remain a great threat to sustainable development.

Currently the SAPS and NPA are constitutionally mandated to deal with corruption. The police, via the post-Scorpions Hawks unit, must investigate all forms of corruption. The NPA must prosecute the corrupt identified in police investigations or in the work of its new Investigating Directorate, a body introduced by presidential proclamation to serve for up to five years with a limited mandate. Because it lacks independence and is under executive control, it is questionable that the ID passes constitutional muster.

The SAPS has been identified by the Institute for Security Studies and by Corruption Watch as the most corrupt of state institutions. Expecting the police to act as effective and efficient corruption busters is akin to asking Kaiser Chiefs supporters to vote for Pirates.

- **Constitutional requirements for countering corruption**

The word "corruption" does not appear in the Constitution. However, the Constitutional Court has been obliged, in the Glenister trilogy of cases, inter alia, to consider the place of corruption in our legal dispensation. In its majority judgment in Glenister II, delivered in March 2011, the court identified corruption as a human rights issue due to the obligation of the state to respect and protect human rights guaranteed to all in the Bill of Rights which is Chapter Two of the Constitution. [C7(2)]. The court reasoned that delivery of the promises of the Bill of Rights is financially demanding. This was anticipated by the drafters of the Constitution as regards the provision of certain of the rights by the state "within

its available resources, to achieve the progressive realization of each of these rights" [C 27(2)]

These words, quoted from the section dealing with health care, food, water and social security, make it plain that the diversion of available resources of the state to the pockets of the corrupt thwarts the progressive realization of rights to the detriment of poverty alleviation and the achievement of equality, a foundational provision of the Constitution [C1(a)].

In addition, the court identified solemn undertakings by the state in international treaties adopted by it and domesticated by parliament. These undertakings oblige the state to maintain adequately independent machinery of state to counter corruption effectively and efficiently. These obligations are reinforced by the values and principles of the Constitution as they apply to the public administration. [C195(1)]. Ethics, efficiency and accountability are all mentioned in this section.

In the course of the judgment in Glenister II the criteria by which to measure the constitutionality of anti-corruption bodies were set out in terms that are and remain binding on the state. The main criteria, there are others, set out in the majority judgment have become known as the STIRS criteria. This acronym identifies:

Specialisation in the sense of being dedicated to the issues around corruption to the exclusion of all else.

Training for recruits to empower and enable them to match the wiles of cunning corrupt operators.

Independence of the institution at both structural and operational levels to ensure that political influence and interference are not brought to bear on corruption-busters and that they are able to function without fear, favour or prejudice.

Resources that are adequate to the reasonable needs of the corruption-busters and are guaranteed so that their non-payment cannot be used as a means of stifling their functioning and performance.

Secure tenure of office for all corruption-busters so as to remove the threat of dismissal or disbandment such as happened to former NDPP Vusi Pikoli and the entire Scorpions unit of his NPA which was dissolved immediately Zuma came to power. Had the Scorpions enjoyed the protection of Chapter Nine status they would still be in existence and the whole trajectory of state capture in SA would have been less stellar. This happy state would have

been due to the fact that a two thirds majority in parliament was needed to close them down had the Scorpions enjoyed Chapter Nine status. Instead, they were a mere creature of an ordinary legislation and could be dissolved with a simple majority. This in fact happened when, in the face of all parliamentary opposition and widespread public misgivings, the ANC used its majority to dissolve the Scorpions.

- **How to legislate using the STIRS criteria.**

The court in Glenister II required parliament to make "the reasonable decision of a reasonable decision-maker in the circumstances" without the court being prescriptive as to the exact means used to comply with the STIRS criteria.

How to get to a reasonable decision when making laws or policy was discussed previously by the court in the Rail Commuters' Action Group case, para 84 to 88, where a unanimous court observed that:

> [88] *What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer.*

Corruption has always posed a grave threat to human rights. As Judge Navi Pillay has observed:

> "Make no mistake about it, corruption kills."

In SA today, following the disturbances that took place after former president Zuma was incarcerated, the increased threat to fundamental human rights places a more onerous responsibility on parliament than has existed since the liberation of the country.

There is no doubt that the instigators of the July 2021 disorder in Kwa Zulu Natal and Gauteng fear being held to account for their corrupt activities and would much prefer that the culture of impunity put in place by Zuma should continue. If it does continue the prospects of SA failing as a state increase to the detriment of the vast majority of the people of SA.

It accordingly behoves parliament to consider the reform of the criminal justice administration to better deal with the corrupt who threaten constitutionalism and the rule of law in SA today. Parliament's task is not only law-making, it also involves proper oversight of the criminal justice administration.

- **Some necessary constitutional amendments**

The NPA is neither fish nor fowl in our current constitutional dispensation. While enjoined to function "without fear, favour or prejudice" [C179(4)] its independence is called into question by two features of section 179 that have no place in a successful constitutional democracy of the kind envisaged in our transformative dispensation. First, the requirement of the concurrence of the "Cabinet member responsible for the administration of justice" in prosecution policy is inconsistent with the independence of the NPA. Secondly, and in similar vein, the exercise of "final responsibility" over the NPA by the same minister [C179(6)] has served to undermine the independence of the NPA and to deprive it of its leadership in both the case of Vusi Pikoli, suspended for prosecuting Jackie Selebi and dismissed for charging Jacob Zuma, as well as Mxolisi Nxasana, for indicating his willingness to prosecute Zuma. Those provisions, in effect, politicise the prosecution policy of the NPA.

It is preferable, given this sorry history, that the NPA report directly to parliament and that the cabinet should have no role in its policy making and its independent operations. All of the Chapter Nine institutions are obliged by the Constitution to report only to parliament and not to cabinet.

President Ramaphosa envisages (in his 2021 SONA) that a "new statutory body" reporting only to parliament will be established to deal with serious corruption after a proposed "advisory council" deliberates on its formation for at least two years. These two years are no longer available to SA. There is no good reason for this new body to be better off than the NPA when it comes to the creation of reporting lines.

The current hollowed out and compromised status of the NPA and the presence of many Zuma era "saboteurs" in its ranks will take many years to correct. The Zuma era freeze on recruitment of young prosecutors only serves to exacerbate this problem. Not only is there a lack of relevant experience, the presence of the saboteurs discourages all but the most idealistic prosecutors of the past from re-enrolling to serve as prosecutors again. SA simply does not have the time to allow the NPA to rebuild insofar as the countering of corruption is concerned.

This is urgent business with neither the ID nor the NPA and certainly not the DPCI or Hawks is able to conduct.

No one is currently suggesting that the Hawks are up to the task of countering grand corruption. The Hawks are not STIRS compliant and never will be, even with the best will in the world.

In these currently applicable circumstances, the best practice means of complying with the constitutional requirements set by the courts in the Glenister litigation is to establish a new Chapter Nine Institution that is enabled to both investigate and prosecute grand corruption, kleptocracy and state capture.

President Ramaphosa called this notion "refreshing" when questioned about it during his question time in parliament in March 2019 by the IFP Chief Whip Narend Singh. He undertook to mull it over at the time.

In August 2020 the NEC of the ANC, its highest decision making body between conferences, passed a resolution calling on cabinet to establish urgently a single, permanent, independent and stand-alone body to deal with corruption. The best practice means of doing so in a constitutionally compliant way is to establish the new Chapter Nine Institution which has been dubbed "The Integrity Commission" by Accountability Now in order to distinguish it from the "Anti-Corruption Commission" proposed to parliament in 2012, a body with only investigative powers and no prosecutorial powers.

The 2021 private members bills of the DA on this topic go further than the president did in SONA 2021 but not as far as the NEC in August 2020. The DA concedes that the NPA is in disarray, correctly so, but is not prepared to go so far as to remove the prosecution of grand corruption from its mandate. This is an error that will serve to create friction between the NPA and the DA's envisaged new Chapter Nine investigative body. single entity covering both the investigative and prosecutorial function is, in the submission of Accountability Now, the best way forward. It also accords with the stance taken by the ANC's NEC as set out above.

The deterioration of the position on the ground as regards countering corruption within the NPA has driven Accountability Now to propose that the new Chapter Nine Institution should attend to prosecutions free of the interference of the "saboteurs" who still lurk within the NPA. A fresh start using sensible recruitment procedures of the kind deployed in the SIU is preferable to the long and drawn out process of cleaning up and reforming the NPA.

In order to draw bright lines between the work of the Ch9IC and the work that the NPA and SAPS will continue to do, it will be necessary for parliament to devise a definition of grand corruption and kleptocracy as the work of the new body. Accountability Now favours a cut-off point of R 5 million; all matters below that threshold can be dealt with by the Hawks and NPA, and those above that amount by the Ch9IC.

Means of achieving compliance with the criteria laid down in Glenister II are suggested in the draft enabling legislation and in the draft constitutional amendments to Chapters Eight and Nine of the Constitution. In Chapter Eight the revision of the mandate of the NPA is dealt with, in Nine the establishment of the Ch9IC.

The legislated mandate of the Hawks will also have to be adjusted to exclude grand corruption from the ambit of the priority crimes it was created to investigate.

The draft enabling legislation has been prepared with a view to setting out the mandate of the new Ch9IC.

- **The way forward to constitutionally compliant anti-corruption machinery of state**

The draft amendments to the Constitution and the draft enabling legislation for the Ch9IC accompany this memorandum. They are suggestions from Accountability Now which has, since 2009, done a considerable amount of anti-corruption work, not only in the Glenister cases but also on the arms deals of 1999, the collusive bread manufacturers cartel (which led to the development of a general class action in SA) and other matters concerning the probity of the current Minister of Police and Public Protector.

It must be stressed that the drafts are mere suggestions. It is the duty and function of parliament to apply itself to the task of complying properly with the international obligations of the country and with the binding rulings of its highest court in the Glenister litigation.

Making the reasonable decision of a reasonable decision-maker in the circumstances, which have changed considerably since the litigation ended, can obviously take various forms because there is no single reasonable way of dealing with the challenges of grand corruption. SA deserves, after nine wasted years, to have a best practice solution to the problems posed by corruption. In this way confidence in the probity of governance can be restored and with it the

desire to invest in SA in ways that will serve to end poverty, create employment and ensure a better life for all.

The work of the Constitutional Review Committee and the Justice Portfolio Committee of the National Assembly on the necessary and urgent reform of the criminal justice administration involves properly processing the loud and clear messages from the Constitutional Court in Glenister II and III and applying them to the parlous state on the ground in SA in 2021. It is possible to bring SA back from the brink of failure and into the realms of a better life for all if the scourge of corruption can be conquered. This reform must be achieved by diligently and without delay [C237] attending to the various initiatives of the President, the NEC of the ANC, the DA and Accountability Now. They must be considered and synthesised into a coherent, and constitutionally compliant reform package of legislation of which the people of SA can be proud.

Accountability Now

August 2021

Appendix 6

The written part of Accountability Now's submission to the Constitutional Review Committee of the National Assembly made orally on 17 March 2023 in support of the drafts relating to the establishment of a Chapter Nine Integrity Commission

In the Parliament of the Republic of South Africa;

Before:

The Constitutional Review Committee of the National Assembly

Submission by Accountability Now concerning the establishment of a Chapter Nine Integrity Commission

In the Parliament of the Republic of South Africa;

Before:

The Constitutional Review Committee of the National Assembly

Submission by Accountability Now concerning the establishment of a Chapter Nine Integrity Commission

1. INTRODUCTION

1.1. Accountability Now welcomes the opportunity to interact with the Constitutional Review Committee on the subject of introducing a new Chapter Nine Institution in the Constitution; a standing commission that is given a mandate to prevent, combat, detect, investigate and prosecute serious corruption. The abbreviation Ch9IC is used in this submission.

1.2. The concept "serious corruption" will have to be given a legislated definition after debate during the parliamentary law-making process. A suggested minimum value of R 5 million in loot has been made in the drafts published and supplied to Parliament and the Executive in August 2021 by Accountability Now.

1.3. The National Prosecuting Authority (NPA) has noted the drafts without commenting on the cut-off minimum value. The NPA will retain its current jurisdiction to prosecute corruption that falls below the minimum value. The Ch9IC will take over corruption cases involving more than the minimum amount decided upon after debate in parliament, including public participation in that debate.

1.4. The Chief Justice has remarked that "an army of prosecutors" will be needed to follow up on the recommendations in relation to serious corruption prosecutions that have been made in the report of the State Capture Commission (SCC) which he chaired. The NPA does not have such an army nor will it be able, with the best will in the world, to muster the expertise, experience and skilled human resources required for successful prosecution of serious corruption cases. (See paragraphs 11.2 to 11.6 below.)

1.5. Like the SCC, most of the larger political parties accept that there is a need to reform the criminal justice administration due to the ravages of state capture on it and the current deliberately contrived and ongoing dysfunction in it. These missteps were intended and designed to extend impunity indefinitely for those implicated in serious corruption. The NEC of the ANC resolved in August 2020 that cabinet urgently establish an independent, stand alone, specialised and permanent anti-corruption entity. See: https://accountabilitynow.org.za/paul-hoffman-has-anc-finally-had-its-eureka-moment-on-corruption/. The IFP has been asking for the establishment of the Ch9IC since president's question time in March 2019 https://accountabilitynow.org.za/corruption-now-more-than-ever-we-need-an-integrity-commission-ifp/. The DA has joined these calls in 2022, having initially campaigned for reform of the Hawks only. The DA is in the course of preparing a private members bill (which may become a committee bill) on the topic of creating the Ch9IC. https://accountabilitynow.org.za/?s=By+George&submit=Search.

1.6. Civil society actors, the faith-based community and the business sector all favour reform that addresses serious corruption See, e.g. https://accountabilitynow.org.za/critical-action-needed-to-keep-south-africa-afloat-on-its-pool-of-corruption/.

1.7. In what follows in this submission it will be assumed that the reader is familiar with the explanatory memorandum, its executive summary, and the drafts of the necessary constitutional amendments and enabling legislation that were provided to the CRC in August 2021 by Accountability Now. They are all available electronically on the internet here: https://accountabilitynow.org.za/memorandum-on-a-constitutional-amendment-and-enabling-legislation-for-anti-corruption-machinery-of-state-in-sa/.Chapter 9 Institution – Accountability (accountabilitynow.org.za). In short: a cure to the current circumstances brought about by state capture, kleptocracy and serious corruption in SA is suggested by way of the establishment of the Ch9IC. The powers of the NPA are accorded greater independence from the executive. However, the mandate to counter serious corruption currently shared between the Hawks (investigation) and the NPA (prosecution) is conferred on the new Ch9IC . This step would render the system constitutionally compliant in accordance with the binding criteria laid down in the Glenister litigation. This "best practice" reform is required because the current circumstances in SA demand it; the risk of failure as a state will be diminished if the reforms are made; that risk will be increased if Parliament declines to have due regard to the current circumstances of SA as regards the need for countering corruption. The highest court has ordered Parliament to create efficient and effective ant-corruption machinery of state that is adequately independent. What it requires, and what is currently conspicuously absent is the "decision of a reasonable decision-maker in the circumstances". The current circumstances as outlined in the SCC report cry out for the reforms suggested.

1.8. The Executive has developed a sense of urgency in relation to corruption as reported in the Sunday Times and commented on by Accountability Now here: https://accountabilitynow.org.za/john-jefferys-sense-of-urgency-on-corruption-must-translate-into-tangible-action/. It also has instructions from the NEC of the ANC to move to reform urgently; see: https://accountabilitynow.org.za/ramaphosa-presidencys-dithering-over-rampant-corruption-is-the-stuff-of-legend/.

1.9. This submission is divided into sections with self-explanatory headings thus:

Introduction,

Problem Statement,

Historical Overview of Corruption-busting,

The Effect of Corruption on Economic Transformation in SA,

The Effect of Corruption on the socio-political goals of the Constitution.

The binding nature of the findings in the Glenister litigation,

The oversight and law-making functions of parliament,

The decision of "a reasonable decision-maker *in the circumstances,"*

The draft constitutional amendment explained,

The draft enabling legislation explained,

The urgency of the need for reform in relation to:

The prevention, combatting, detection, investigation and prosecution of serious corruption,

The protection of whistleblowers and

Non-trial resolution of international corruption cases,

The way forward.

2. PROBLEM STATEMENT

2.1. The adoption of the Constitution, in December 1996 in Kliptown, was the culmination of a negotiation process that led to a National Accord, the abandonment of apartheid-era parliamentary sovereignty and its replacement with constitutional democracy under the rule of law. It was accepted by the vast majority of South Africans that "we the people" prefer to be governed by a supreme Constitution in which laws and conduct inconsistent with the Constitution are invalid. [Preamble, C 1 and C 2]

2.2. Under the Constitution the rule of law is supreme. Obedience to court orders is a given. [C 1 and C 165]. The state is bound to respect, protect, promote and fulfil the various rights guaranteed in the Bill of Rights which is Chapter Two of the Constitution. Some of the rights are subject to progressive realization within the state's available resources and many rights are expensive to deliver. [C 1, C 7(2) and C 27, e.g.]

2.3. When the state's resources are not available because they are looted on a grand scale, its ability to deliver on its human rights and other obligations is stunted with deleterious consequences for the poor. Dignity, the promotion of equality and the enjoy of human rights all suffer [C 1 C 9 and C 10]. Instead poverty, unemployment and inequality curse our land [Glenister majority judgment March 2011:

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

2.4. The loot of state capture is estimated to be between R1 and R2 trillion.

2.5. As Chief Justice Mogoeng remarked, on behalf of the majority in the last Glenister case in November 2014:

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

"We are in one accord that SA needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that the entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate."

2.6. The problem is that there is no such agency at present. There are "Hubs" and "Fusion Centres", "Task Teams" Hawks and prosecutors, even an investigating directorate (ID) in the NPA, but there is no agency that complies with the criteria, the STIRS requirements, laid down in binding fashion in the second Glenister case and confirmed in the third.

2.7. The scheme of the legislation in place is to split the responsibilities of the agency to which the Chief Justice refers between the Hawks, for investigation of corruption and the NPA, for the prosecution of corruption. No Hubs or Fusion Centres, no ACTTs (Anti-corruption Task Teams) were contemplated by the Legislature when it made the laws applicable, being the SAPS Amendment Act of 2012 and the NPA Amendment Act of 2009 which dissolved the Scorpions unit within the NPA. The ideas around Hubs, Fusion Centres and even the ID in the NPA are all the work of the Executive branch of government. The legislation trumps the proclamation of the ID and also the more informal arrangements called the Hub, the Fusion Centre and the ACTT. A veritable tower of Babel has been the result of tinkering at the system.

2.8. What is required by the courts is "the reasonable decision of a reasonable decision-maker in the circumstances".

2.9. The circumstances that pertain at present are set out in great detail in the report of the State Capture Commission (SCC).

2.10. It is clear from the SCC report that effective and efficient corruption-busting has not been the order of the day for some ten years or more in SA. Certainly not while the current legislation has been in place.

2.11. Under C 55 it is the duty of the National Assembly to maintain oversight of the national executive authority, including the implementation of legislation such as the SAPS and NPA amendment Acts here under consideration. The National Assembly can initiate or prepare legislation under C 55(1)(b).

2.12. The relevant circumstances that inform the need for reform of the criminal justice administration are that the state capture phenomenon came close to destroying "all we hold dear" in SA. The NPA and SAPS are not capable of containing or eradicating corruption, have not done so since the inception of the current legislated dispensation in 2012 and will not be able to do so within the foreseeable future due to the capacity constraints, lack of resources and saboteurs in the ranks. Recruitment of suitably trained and specialised personnel is impossible because suitable personnel do not want to be part of the toxic environments that exist in the corrupted SAPS and NPA ranks.

2.13. It is the constitutional duty of the National Assembly to initiate and prepare legislation that addresses the failures in the criminal justice administration as regards anti-corruption functions[C55(1)]. It must do so while respecting the rulings of the courts that pertain to the countering of corruption [C 165]. The reform of the criminal justice administration in a manner that remains constitutionally compliant is the urgent business of the National Assembly. The groundswell of opinion in the larger political parties supports the need for urgent reform.

2.14. The Executive is not currently in a position to give proper and objective leadership on the issues that impact on the reform of the criminal justice administration due to its compromised if not paralysed status. Far too many past and present members of cabinet belong in the dock in a criminal court. During the Zuma era the state capture project thrived. In the current Ramaphosa led dispensation SA has endured "farmgate", "covidpreneurism", even at cabinet level, and has seen the introduction, by presidential proclamation, of the ID of the NPA. The ID is an unconstitutional body that contradicts the scheme of the legislation in place and is not STIRS compliant in that it serves at the pleasure of the president. The ID is no solution to the problem. It should be disbanded. The Hawks are not STIRS compliant and the NPA is infested with saboteurs according to its own leadership.

2.15. In these circumstances the problem is best addressed by radical reform of the criminal justice administration that equips it to deal with serious corruption efficiently and effectively in the manner contemplated by the courts. The fact that parliament is bound by the decisions of the courts is an added spur to reforming the system in a manner that appropriately addresses "the circumstances" set out above and in the SCC report by the current Chief Justice.

2.16. It is suggested that the best practice way of doing so is by establishing, as a matter of urgency, a Ch9IC to investigate and prosecute serious corruption. Petty corruption can be entrusted to the Hawks and the NPA, serious corruption requires a specialist agency of trained experts who are independent of the Executive, report only to Parliament and enjoy secure tenure of office. The agency must be properly resourced in guaranteed fashion.

2.17. It is the task, and indeed the duty, of Parliament to establish, via the decision of a reasonable decision-maker in the circumstances, the type of machinery of state contemplated in the binding decisions of the Constitutional Court mentioned above. The political will to do so already exists, the urgency of the matter demands swift action.

3. HISTORICAL OVERVIEW OF CORRUPTION-BUSTING IN THE NEW SA

3.1. No useful purpose is served by devoting attention to the position that pertained prior to 1994. Democracy in SA dawned for the first time in April 1994 when the first free and fair election in which all citizens were allowed to participate was held. The post-1994 Parliament is only accountable for the post-1994 machinery of state to counter the corrupt.

3.2. In colonial and apartheid times the SA state was abused by colonialists and those who operated the apartheid regime for the purpose of exploiting the natural, mineral and human resources of SA so as to extract value for themselves.

3.3. Moeletsi Mbeki, brother of the second democratic SA president, has recently suggested that the purpose of the national democratic revolution, which motivates the tripartite alliance that has governed at national level since 1994, has been to continue the corrupt projects of colonial and apartheid times. It has done so for the benefit of those involved in the revolution and in the state capture project that saw its heyday during the Zuma administration.

3.4. What is relevant for present purposes is that the concept 'corruption' was not mentioned in the Constitution at all.

3.5. The closest references are those in C 179(2) and C 205(3) in which the general mandates of the National Prosecuting Authority and the SAPS are set out in broad terms that are sufficiently wide to allude indirectly to corruption in all its forms.

3.6. During the Mbeki presidency, as early as 1999, it was recognised that corruption was presenting a challenge to the success of the democratic project in the new SA and steps were taken by the then NDPP, Bulelani Ngcuka, and the then Minister of Justice,

Peneull Maduna, to address what were dubbed "priority crimes" appropriately https://accountabilitynow.org.za/paul-hoffman-has-anc-finally-had-its-eureka-moment-on-corruption/.

3.7. This decision led to the passing of ordinary legislation in terms of which the Directorate of Special Operations (or Scorpions as they were popularly known) was established as a unit within the National Prosecuting Authority.

3.8. The Scorpions enjoyed a high level of success in their prosecutor-led activities achieving a 94 % success rate in their troika style activities in which investigators and forensic experts worked closely with prosecutors all under one structure. This methodology turned out to be effective and efficient in the countering of corruption. Both the chief of police, Jackie Selebi and Jacob Zuma (then a private citizen following the conviction of Shabir Schaik on charges of corrupting Zuma) were investigated by the Scorpions leading to criminal prosecutions.

3.9. At the end of the second Mbeki presidency a commission of inquiry into the Scorpions, chaired by Justice Sisi Khampepe, recommended their retention despite "turf wars" with the police.

3.10. Upon the election of Jacob Zuma, at the December 2007 Polokwane conference of the ANC, to the presidency of the ANC, an urgent resolution was passed to dissolve the Scorpions.

3.11. This decision was justified by the then Secretary General of the ANC, Gwede Mantashe, in an interaction he had with Helen Zille, then leader of the opposition. He said, in April 2008, that the ANC wanted the Scorpions disbanded because they were a 'political unit made up of apartheid security branch members who treated the ANC as the enemy.' Secondly, the investigation of Jacob Zuma was regarded as ' an abuse of power'. Thirdly, the ANC would ensure that its Polokwane resolution was implemented. Lastly, the ANC wanted the Scorpions disbanded because they were 'prosecuting ANC leaders.'

3.12. The dissolution of the Scorpions was duly effected by way of fiercely contested legislation that required the investigative staff of the DSO to be transferred to the SAPS and created the Directorate of Priority Crime Investigation (or Hawks) as a unit within the police.

3.13. The dissolution of the Scorpions survived a challenge impugning the constitutionality of the decision to do so, but the creation of the Hawks did not pass constitutional muster. The most relevant parts of the judgment of the Constitutional Court are collected here: https://accountabilitynow.org.za/what-the-concourt-majority-judgment-found-in-glenisters-case/.

3.14. Remedial legislation was passed within the 18 months allowed by the court and it survived, with some tinkering by the Constitutional Court, further attempts at impugning its constitutionality [https://www.pa.org.za/hansard/2012/may/23/proceedings-of-the-national-assembly-wednesday-23-/south-african-police-service-amendment-bill-second.]

3.15. The State Capture Commission missed the opportunity to comment on the failure of the criminal justice administration effectively and efficiently to combat corruption because it misconstrued the binding majority judgment, which it praised, as a minority judgment.

[https://accountabilitynow.org.za/the-evidence-is-clear-state-capture-crime-scene-number-one-is-luthuli-house/.]

3.16. In order to better understand the lack of efficiency and effectiveness of the Hawks as corruption busters it is instructive to have regard to the statistics. In 2008/9, the first full year of operations by the Hawks the number of new investigations fell by 85% when compared with the work of the Scorpions in the previous year. The value of loot seized by the Hawks was 99% lower in value than that seized by the Scorpions. In reply to a parliamentary question asked on 11 September 2015, the minister of police released figures which showed that the arrests made by the Hawks had declined from 14,793 in 2010/11 to 5847 in 2014/15. These statistics are described as "startling as well as dismaying" on page 143 of the book "Confronting the Corrupt" that was published by Accountability Now in 2016. Certainly, the ability of the Scorpions to seize assets of R4 billion compares favourably with the R35 million seized by the Hawks and even the R 5 billion of the NPA in the last year.

3.17. The underperformance of the Hawks did not seem to bother the Zuma administration. No remedial steps were taken to address the manifest shortcomings in their productivity. Litigation concerning the

security of tenure of office of various leaders of the Hawks, ranging from Anwa Dramat and Berning Ntlemeza to Johann Booysen was contested by the Zuma administration. It is arguable that the disbandment of the Scorpions facilitated much of state capture during the Zuma years. Impunity for corrupt activities became the order of the day. The culture of impunity has manifested more recently in the totally immoral phenomenon of "covidpreneurism".

3.18. In an effort to address the decline in anti-corruption activities the current president, by way of proclamation in April 2019, established the Investigating Directorate in the NPA. [https://www.justice.gov.za/legislation/notices/2019/20190404-gg42383pr20-NPA-ID.pdf.]

3.19. This new unit, which serves at the pleasure of the president, illegally takes over parts of the legislated mandate of the Hawks. The constitutionality of the ID is questionable as it can hardly be regarded as independent when it can be closed down at the will of the president. The illegality and unconstitutionality of the ID have been tolerated on the basis that the unit is not permanent and constitutes a somewhat small step in the right direction.

3.20. The security of tenure of the ID's initial leader was tested and failed when she was asked to resign and did during 2021.[https://accountabilitynow.org.za/mayday-the-npas-hermione-cronje-is-navigating-treacherous-waters/.] [https://accountabilitynow.org.za/hermione-cronje-npa-resignation-impunity-6-accountability-0-game-and-first-set-to-the-corrupt/.] [https://accountabilitynow.org.za/the-ineffable-sadness-of-the-national-prosecuting-authority-as-frustrated-hermione-cronje-resigns/.]

3.21. The National Anti-Corruption Strategy adopted by cabinet in November 2020 is the product of Zuma-era thinking. It gives the binding STIRS criteria, which ought to be at the centre of reform, no more than a footnote. It also advocates the multi-agency approach that was so ineffective during the Zuma years, an approach now rejected by the NEC of the ANC in its August 2020 resolution calling for reform. [https://accountabilitynow.org.za/the-road-to-a-national-anti-corruption-strategy-is-paved-with-outmoded-intentions/.

3.22. The current anti-corruption efforts of the NPA are dealt with in an article by DNDPP Anton du Plessis [https://www.dailymaverick.co.za/opinionista/2022-07-07-npa-is-finally-reaching-solid-ground-to-deliver-justice/.] He summarises the latest available annual report of the NPA and discusses statistics that unintentionally reveal that an "army of prosecutors" (to use the phrase of the Chief Justice) is required on the anti-corruption front – an army which the NPA has not been able to muster, indeed, will not and cannot muster. The necessary expertise to deal with serious corruption is not available to the NPA and will not be available in any realistic or appropriate time-frame. [https://accountabilitynow.org.za/its-not-now-or-never-for-the-npa-its-never-ever/.]

3.23. Nobody today suggests that the Hawks, given their ever declining productivity, have the necessary sapiential authority to be part of the solution required to counter serious corruption. The Hawks could attend to many other priority crimes if they are relieved of their mandate to investigate serious corruption. They ought to be allowed to concentrate on the categories of crime that they are equipped to deal with. Due to structural and operational flaws affecting independence and security of tenure of the Hawks, and also other challenges in SAPS, they are not up to the task of investigating serious corruption.

3.24. The emerging political consensus (between ANC, DA and IFP) around the establishment of the specialist anti-corruption body, that is clothed properly with the STIRS criteria, points to the way forward from the ravages of state capture and "covidpreneurism" toward a future in which rampant corruption in SA is a feature of the past.

4. THE ECONOMIC ISSUES AS AFFECTED BY CORRUPTION IN SA

4.1. It is notorious that half of the population in SA lives in poverty with joblessness at all-time highs and inequality, as measured by the Gini coefficient, the highest in the world.

4.2. The encouragement of new investment in SA is accordingly a priority for government as it has the potential to address the triple threats to the better life for all promised in the Constitution.

4.3. As long ago as November 2020 Accountability Now had occasion to write to the president to highlight the link that corruption has to these challenges:

Dear Mr President,

1. *Your weekly letter to South Africans published by "Politicsweb" on 17 November 2020 refers.*
2. *It is both timely and appropriate for you to encourage new investment in SA at this delicate stage in our history, given the ravages of the pandemic and of state capture.*
3. *In order to get new investment, it is necessary to build public trust in government institutions and to enhance business confidence in the profitability of making new investments in the post-Covid19 environment the world will enter once vaccines are available.*
4. *There is no better way to build public trust and business confidence than by demonstrating that the rule of law is intact and the criminal justice administration is functioning optimally.*
5. *It is monotonously conceded by the NDPP that all is not well with the NPA. It is underfunded, short-staffed, lacking in facilities and capacity and incapable of dealing with the tidal wave of corruption both in relation to "PPE" procurement and in general. Adv Batohi has indicated to parliament that the anti-corruption work of the criminal justice administration is like a "pinpoint on an iceberg". Her metaphor is both accurate and bound to cause consternation in the minds of prospective new investors while also perplexing public trust in government in SA.*
6. *As you know, the NEC of the ANC is alive to the problems currently being experienced by the criminal justice administration as a consequence of the ravages of state capture within it. This dysfunction includes the hollowing out of the NPA which is thoroughly compromised by the "saboteurs" (Adv Hermione Cronje's term for Zuma era deployees) in its own ranks. Furthermore, the Hawks have proved to be unsuccessful at replacing the investigative functions previously carried out by the Scorpions, a NPA unit which was closed down by President Motlanthe in 2009, when he was in office.*
7. *The location of the Hawks within the SAPS has not been a successful substitute for the Scorpions troika system of investigation and prosecution by one entity operating free of executive control, influence and interference in a structural and operational environment conducive to acting without fear, favour or prejudice.*

8. *You are also very much alive to the dangers of the executive becoming involved in anti-corruption work. You have warned the Leader of the Opposition to "run for the hills" should that ever occur. We agree with you.*
9. *The NEC of the ANC has resolved in August in favour of the urgent establishment of a stand-alone, permanent and independent agency to deal with corruption and organised crime.*
10. *In so doing it has embraced the "single agency" approach used in many countries that have successfully combated corruption. It has also followed the line taken by the majority of the Constitutional Court in the Glenister litigation in which the criteria for success in corruption-busting activities of state have been prescribed in binding terms. The multi-agency of the Zuma era will be history once the NEC resolution is implemented.*
11. *The multi-agency approach of the Zuma era has not worked successfully in performing "diligently and without delay" (C 237) the work now necessary to end the culture of corruption with impunity that is abroad in the land.*
12. *In our respectful view, the best practice way of achieving that which the NEC has resolved be done is to set up a new Chapter Nine Institution, perhaps called "The Integrity Commission" to prevent, combat, investigate and prosecute grand corruption and organised crime in the effective manner envisaged by the resolution of the NEC. This approach is favoured by Archbishops Tutu and Makgoba as well as Professor Thuli Madonsela. Adv Willie Hofmeyr has proposed useful tamper-proof ways of appointing and dis-appointing key personnel whose integrity is essential to success in countering the corrupt.*
13. *While the envisaged step will involve the removal of the prosecution of those suspected of grand corruption from the mandate of the NPA and a second constitutional amendment to create the Integrity Commission, it is nevertheless apparent that the Hawks will be able to continue with investigation of the other priority crimes falling within their mandate. The NPA will continue to prosecute all other crime. It might even be indicated to fold IPID and the SIU into the new institution in the interests of efficiency and economy in these fiscally straitened times.*
14. *The location of the Integrity Commission in Chapter Nine will enable it to function with a constitutional guarantee of independence in the manner wanted by the NEC, (and the courts) namely without fear, favour or prejudice.*

15. *The National Anti-Corruption Strategy (NACS), so long in the making, will have to be adapted to take into consideration the NEC resolution and ought not to be published in a form that in any way contradicts the criteria set by the NEC, these are criteria which happily coincide with those required by law and by the rulings of the courts as well as by international best practice. Having made submissions to the Working Groups tasked with formulating the NACS, we fear that the groups are infested with Zuma-era thinking and a disregard for the findings of the Constitutional Court in the Glenister cases, findings which are binding on the state. The NEC resolution must have come as a shock to many members of the working groups who remain stuck in outdated "multi-agency" thinking.*
16. *A NACS formulation that contradicts the NEC resolution (as announced on 4 August 2020) and the law will sow confusion. It will also increase lack of trust in government to do what the governing party's highest decision-making body between conferences requires of it. Falling around of this kind will also undermine the level of business confidence required by you to encourage much needed fresh investment with success.*
17. *It is necessary to ensure that the NACS working groups are on the same anti-corruption mission as the NEC by the time that the next iteration of the strategy is published. It will be hugely detrimental to your investment encouragement efforts if it is not.*
18. *The legislation necessary to effect the change to a Chapter Nine Integrity Commission already exists in draft form on the website of Accountability Now. We commend it to your attention as you mull the implementation of the NEC resolution.*

4.4. No reply was received from the president and the NACS was published in its Zuma-era format after the letter was written and after the ANC NEC resolution was passed on 4 August 2020.

4.5. New investment has not been attracted at levels that would revive SA's failing economy. While there are many reasons for the lack of new investment, it is unarguable that the culture of serious corruption, with impunity abroad in the land, has prejudiced the chances of SA to attract new investment. Potential investors regard the risks around corrupt activities as unacceptable.

4.6. There is currently a danger that the FATF will grey list SA which will have deleterious effects on economic growth.[https://www.businesslive.co.za/bd/opinion/letters/2022-07-19-letter-grey-listing-would-turn-sa-red-with-wrath/.]

4.7. Experts estimate that GDP falls by 1% in most countries that are grey listed. This is a drop SA cannot afford. In effect it would halve the projected growth of the economy [https://www.businesslive.co.za/bd/economy/2022-07-21-reserve-bank-signals-sharper-rate-hikes-ahead-as-it-confronts-inflation/.] [https://www.politicsweb.co.za/documents/repo-rate-increased-by-75-basis-points-to-550–les.]

4.8. Cabinet could avoid grey listing by announcing its acceptance of the ANC NEC resolution of 4 August 2020 and by publishing bills based on the drafts circulated by Accountability Now in August 2021 with a view to kick starting the process of law making needed to address the need for reform.

4.9. Should cabinet remain paralysed, as it has been since 2020, it falls to parliament to initiate the necessary legislation. The DA has been preparing private members bills since mid-2021 which could be converted into committee bills if the necessary political will and co-operation is generated.

4.10. The apparent paralysis of the Executive branch of government may be explained by the high number of compromised members of cabinet and factionalism in the ANC. This unfortunate fact is good reason for Parliament to exercise its own law-making capacity as conferred in C 55 (1)(b).

4.11. While poverty, joblessness, inequality and the threat of grey-listing stalk the land, it is incumbent upon parliament to alleviate the situation by initiating the legislation urgently needed to reform the criminal justice administration so as to better equip it to counter serious corruption. The loot of corruption is a severe drain on resources of the country better spent on poverty alleviation, job creation and the promotion of the achievement of equality. These steps are all constitutional goals the achievement of which will remain elusive while serious corruption runs rampant in SA. An Arab spring is predicted by both Thabo Mbeki and Julius Malema https://www.youtube.com/watch?v=AFFlKRuRm_s.

5. THE EFFECT OF CORRUPTION WITH IMPUNITY ON THE SOCIO-POLITICAL GOALS OF THE CONSTITUTION.

5.1. It is variously estimated that the looting involved in State Capture in SA has, in a mere four years, cost the country between R1 and R2 trillion.[1] [https://www.dailymaverick.co.za/article/2019-03-01-state-capture-wipes-out-third-of-sas-r4-9-trillion-gdp-never-mind-lost-trust-confidence-opportunity/.] [https://ddp.org.za/blog/2020/10/06/implication-of-corruption-on-economic-growth-in-south-africa/]

5.2. The national debt in SA is roughly R4 trillion, so the effect of the looting is marked, whatever its finally determined amount may be. Recovery of all of the loot could halve the national debt! [https://www.statssa.gov.za/?p=11983&gclid=EAIaIQobChMIy_DnwYOe-QIVRe7tCh02mwMMEAAYASAAEgI_qfD_BwE.] As of 2021/22 total South African government debt was **R4.3 trillion**. The country's debt to GDP ratio in October 2020 was calculated at 82.76% of GDP by the International Monetary Fund.

5.3. A trillion is a difficult concept to visualise. A billion seconds is about 31 years. A trillion seconds is 31,688 years. By way of contrast, a million seconds is equivalent to 0.031709792 years . In short, R1 trillion is a great deal of money which SA can ill-afford to allow the corrupt to retain.

5.4. When corruption takes the form of State Capture then it is fair to describe corruption as "Theft from the Poor."

5.5. Judge Navi Pillay put it well when she said:

"Make no mistake about it, corruption is a killer… The money stolen through corruption is enough to feed the world's hungry 80 times over… Corruption denies them their right to food and, in some cases, their right to life."

5.6. Kofi Annan, when he was [2] Secretary General of the UN put it thus:

"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish."

5.7. The socio political goals of SA are clear. They are spelt out in the Preamble and the first chapter of the Constitution.

5.8. The Bill of Rights provides that the state must respect, protect promote and fulfil the rights guaranteed to all in it. [C 7(2)]

5.9. Honouring human dignity, promoting the achievement of equality, and enjoying those human rights are all fundamental to the constitutional project in SA. [C 1]

5.10. Poverty, unemployment, corruption and inequality (PUCI) all stalk the land in 2022. A former president, Thabo Mbeki, complained in July 2022 that the government has no plan and no social compact to deal with PUCI.

5.11. About half the population lives in poverty, the unemployment rate is over 34%, corruption with impunity remains largely unaddressed and our Gini co-efficient, a measure of wealth disparity, reveals SA as the one of the most unequal societies in the world.

5.12. SA has been ranked as the country with the lowest level of income equality in the world, thanks to a Gini coefficient of 63.0 when last measured in 2014. That said, in 2005, the Gini coefficient was even higher, at 65.0. In South Africa, the richest 10% hold 71% of the wealth, while the poorest 60% hold just 7% of the wealth. Additionally, more than half of South Africa's population lives in poverty. [https://worldpopulationreview.com/country-rankings/gini-coefficient-by-country.

5.13. The former president's complaints seem to be well-founded. [https://www.dailymaverick.co.za/article/2022-07-22-thabo-mbeki-slams-anc-for-failing-on-unemployment-poverty-inequality/.]

5.14. The many and varied challenges posed by PUCI will not be adequately addressed while corruption with impunity is allowed to continue. It follows that the "better life" for all envisaged in C 198 will not be secured until reform aimed at countering serious corruption are put in place.

5.15. The "resolve of all South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony and to be free from fear and want and to seek a better life" are, in effect, unattainable while serious corruption with impunity remains unaddressed [C198(a)]

5.16. The founding values of accountability and responsiveness in governance are also hamstrung in any situation in which serious corruption is not tackled with vigour and determination. The words of Chief Justice Mogoeng Mogoeng, writing for the majority in Glenister 3 in November 2014, when the term State Capture was not yet used to describe the lot of SA, are apposite:

"… corruption is rife in this country and stringent measures are required to contain this malady before it graduates into something terminal.

"We are in one accord that SA needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that the entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate."

The socio political impact of unchecked corruption is also dealt with in the joint judgment of Moseneke DCJ and Cameron J in Glenister 2 in March 2011:

"There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project.

"It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights.

"When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk."

5.17. A basic income grant, the stimulation of job creation and the improvement of health and educational services in SA will all be unaffordable while serious corruption is allowed to persist.

5.18. It is a socio-political imperative that reform of the criminal justice administration be effected to better equip it to deal with serious corruption. At its July 2022 policy conference the ANC debated reform of this kind. Its spokesman, Pule Mabe, announced on the eve of the conference that: *""the NEC Peace and Stability Committee and the NEC Constitutional and Legal Affairs Committee are together considering the recommendations around a new anti-corruption agency, the protection of whistle blowers and deferred prosecution agreements, among others."*

5.19. It is not entirely clear which recommendations Mabe is referring to in his media announcement. His attention will be drawn to the suggestions made by Accountability Now.

6. THE BINDING NATURE OF THE FINDINGS IN THE GLENISTER LITIGATION.

6.1. The main features of the judgment of the majority in Glenister II that are relevant to reform of the criminal justice administration are collected here: [https://accountabilitynow.org.za/what-the-concourt-majority-judgment-found-in-glenisters-case/.]

6.2. The orders relevant to the work of Parliament are clear in their terms:

> *"5. It is declared that Ch 6A of the South African Police Service Act 68 of 1995 is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.*
>
> *7. The declaration of constitutional invalidity is suspended for 18 months in order to give Parliament the opportunity to remedy the defect."*

6.3. The purpose of giving Parliament 18 months to remedy the defect was to afford Parliament sufficient time to consider the ramifications of independence for anti-corruption machinery of state and its ability to function in accordance with the values and principles that are set out in C 195(1) and in particular in C 195(1)(b).

6.4. Corruption, especially corruption in the state itself, cannot easily be countered when the corruption-busters are subject to influence, interference and impedance by the executive branch of government. Influence: when they are dissuaded in various ways from doing their work properly either in selected cases or at all. Interference: when steps are taken to stop a particular line of inquiry, attacks are made on faithful and loyal corruption-busters and disciplinary steps are abused. Impedance: when resources and budget necessary to function optimally are denied to corruption-busters. All three were present in abundance during the height of State Capture. The current need for reform is recognised by the majority of parliament.

6.5. The process on which Parliament embarked between March 2011 and September 2012 was designed by the executive to result in as little tinkering with the existing struck down legislation as possible to render it constitutionally compliant. Despite further tinkering by the majority of the Constitutional Court in November 2014 in the HSF/Glenister case, it is safe to observe now in 2022 that the scheme of the legislation has not been a success and that interference, influence and impedance continued to the detriment of independence and to the cost of the state in respect of the loot of State Capture and the damage done to the fabric of constitutional democracy under the rule of law since 2011.

6.6. The manner in which the legislation currently in place has been implemented leaves much to be desired. Oversight by Parliament of the implementation of the legislation has not ensured the effect of addressing the rampant serious corruption issues still present in SA to this day. The initiation of replacement legislation by Parliament is long overdue.

6.7. In terms of C 165(5) "An order or decision issued by a court binds all persons to whom and all organs of state to which it applies."

6.8. Parliament is accordingly bound to ensure adequate independence of corruption investigators[3] as it is the organ of state that has been ordered to put in place the necessary remedial legislation.

6.9. As an organ of state Parliament is also bound to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts." [C165(4)]

6.10. When a court order aimed at achieving adequate independence for corruption investigators is not properly implemented the consequences are dire, as can be seen from the report of the SCC and its recommendations. It is fair to suggest that State Capture would not have taken place or would have been nipped in the bud had there been full and proper compliance with the orders quoted above from the judgment in Glenister II.

6.11. It should also be noted that SA is obliged to comply with its international treaty obligations as regards the countering of corruption. This topic is dealt with in the joint judgment of March 2011 in the Glenister II case. It is clear from the SCC report and the activities of FAFT that SA has been in breach of these international obligations for years

7. THE OVERSIGHT AND LAW-MAKING FUNCTIONS OF PARLIAMENT

7.1. The National Assembly may initiate or prepare legislation, except Money Bills, under the powers afforded it by C 55(1)(b).

7.2. Committee Bills and Private Members Bills are the form that legislation prepared or initiated by Parliament usually takes. It is for this reason that Accountability Now has suggested the two drafts that address the dysfunction in the criminal justice administration insofar as countering serious corruption is concerned.

7.3. The National Assembly must ensure that the Executive is accountable to it and must maintain oversight of the implementation of legislation as well as oversight over organs of state. [C 55(2)]

7.4. In EFF v The Speaker the Constitutional Court held that the National Assembly is the voice of all South Africans and *"… the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office…. No doubt, it is an irreplaceable feature of good governance in South Africa."*

8. THE DECISION MAKING PROCESS FOR DEVISING ADEQUATE INDEPENDENCE

8.1. It is plain that the legislation currently in place which reserves the investigation of serious corruption to the Hawks and its prosecution to the NPA is not working optimally. Some might argue that it is not working at all.

8.2. The circumstances in SA are now different to what they were in 2011. There has been a pandemic, unemployment is higher than it has ever been, great expense has been incurred both directly and

indirectly as a consequence of the pandemic, the economy of the world is in turmoil due to conflict in Ukraine and State Capture was attempted in SA on a widespread and ruinously expensive scale. Covidpreneurism has also taken its toll.

8.3. The Constitutional Court does not prescribe to the National Assembly. Instead, it has enjoined Parliament to make the "reasonable decision of a reasonable decision-maker in the circumstances"

8.4. It is now, with the benefit of hindsight, plain that the decision making in response to the court order is no longer the decision of a reasonable decision-maker, given the change in circumstances that has occurred in SA since 2011.

8.5. The implementation of the legislation aimed at countering the corrupt has not been effective and efficient as required by C195(1)(b).

8.6. The question is how does Parliament comply with the type of decision making process that the court requires? The answer was given by the court itself, in the context of administrative decision making in the earlier decision in the Rail Commuters Action Group case in which O'Regan J wrote the unanimous judgment of the court. She put it thus:

"[88] What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of

state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."

8.7. It can be seen from the various headings of the sections of this submission that the relevant circumstances are sketched in broad outline and not as a comprehensive list.

8.8. It is certainly not reasonable to do nothing and allow the current unsatisfactory situation to persist.

8.9. It is for Parliament to decide upon the reasonable decision of a reasonable decision maker in the circumstances and for the courts to determine the constitutionality of the decision actually made, if it is challenged or impugned for want of constitutionality.

8.10. Hindsight shows that the decisions made to separate investigation (police) and prosecution (NPA) have not worked optimally and in the interests of the people of SA.

9. THE DRAFT CONSTITUTIONAL AMENDMENT EXPLAINED

9.1. The amendment of the constitution is required in order to afford the new anti-corruption entity the protection of the status that comes with being a Chapter Nine Institution. Under the Constitution it is impossible to close down or change such an institution without a two thirds majority in the National Assembly.

9.2. As "secure tenure of office" is one of the binding STIRS criteria, it is both necessary and important to fashion the law in such a way as to guarantee secure tenure of office. Any entity created in terms of an ordinary statute, such as that which set up the Scorpions and the Hawks, is vulnerable to dissolution or curtailment of its activities at the behest of a simple 50% plus one majority in the National Assembly. This disadvantage has the effect of limiting the security of office of the entity and of rendering it less effective and efficient due to the need to "look over one's shoulder" when tackling well connected and politically exposed persons.

9.3. There is no mechanism, short of Chapter Nine status, by which the entity can be insulated against the influence and interference that is possible if an ordinary statute is used to create it. The experience of the Scorpions teaches us that this vulnerability in inherent in an entity created by way of an ordinary statute.

9.4. The fates of individuals within the Hawks and the NPA illustrate the lack of secure tenure of office in the current dispensation. Dramat, Sibiya, Booysen and even Ntsemela are good illustrations in the Hawks. Vusi Pikoli, Glynnis Breytenbach and Hermione Cronje are all leading former prosecutors who have been eased out of office instead of enjoying secure tenure of office as required by the judgment in Glenister II.

9.5. The adjustments to C 179 set out in the draft constitutional amendment are aimed at curing defects in the independence of the NPA. This topic has been publicly debated in the columns of the Daily Maverick and elsewhere. See https://www.dailymaverick.co.za/article/2022-06-20-its-now-or-never-for-the-national-prosecuting-authority/. And https://accountabilitynow.org.za/its-not-now-or-never-for-the-npa-its-never-ever/. See also:

https://accountabilitynow.org.za/no-more-npa-tinkering-paul-hoffman/ and

https://accountabilitynow.org.za/is-the-npa-really-independent/.

In essence, the "final responsibility" of the minister of justice and the fact that the Director General of the justice department is the accounting officer of the NPA render it less than truly independent. Adequate independence is the hallmark of a true and useful anti-corruption entity and of all prosecutors. Answering to the executive and being accountable to the minister are not optimal measures for ensuring the independence of the NPA. If it is to heal from the drubbing it took during the State Capture period, the NPA will have to start reporting to

Parliament, not to the Executive, and it will need to find its own accounting officer, not have one imposed on it by the Executive from outside its own ranks.

Effective corruption-busting requires a level of independence which neither the Hawks nor the NPA currently enjoy under the existing dispensation, hence the need for reforms of the kind suggested by Accountability Now in its drafts.

10. THE DRAFT ENABLING LEGISLATION EXPLAINED

10.1. At the inception of the democratic project it was plain to the founders of the new SA that it would take some effort to bed down the new institutional arrangements that replaced the parliamentary sovereignty of the apartheid era.

10.2. The population was habituated to a system in which passive subjects bowed before an authoritarian regime. In the new arrangements, the Constitution is regarded as the supreme law and active citizenship of a participatory nature is encouraged. Politicians are constrained by the constitutional requirement that all laws and conduct have to be consistent with the Constitution.

10.3. In order to help bed down constitutionalism institutions were created in Chapter Nine as new mechanisms for supporting constitutional democracy. Protection of the public, promotion of human rights guaranteed in terms of the Bill of Rights and an independent Auditor General are the main Chapter Nine Institutions. They serve to counter maladministration, prevent violations or threats to human rights and ensure that public money is well spent.

10.4. There is no specialist Chapter Nine Institution which has the prevention, combatting, investigation and prosecution of serious corruption as its mandate. Despite the need for specialists to deal with corruption, these functions have been left to the police and the prosecution service in the 1996 final Constitution.

10.5. The Constitutional Court has identified the need for a specialist body in the Glenister litigation, one that is STIRS compliant and sufficiently independent to effectively and efficiently counter serious corruption.

10.6. The suggested enabling legislation drafted by Accountability Now has regard to the way in which enabling legislation for other Chapter Nine Institutions has been fashioned and legislated.

10.7. The draft addresses the need to appoint staff of probity and integrity. The leadership of the Ch9IC is to be of impeccable standard and protected against executive interference and will report only to parliament. The mandate and functions of the Ch9IC are spelt out in the draft as are the manner in which it will function. Appointment procedures are designed to ensure that the right people are appointed and are able to withstand pressure, interference and malign influence.

10.8. The explanatory memorandum which accompanied the drafts when they were first published in August 2021 contains details about the enabling legislation which need not be repeated here.

10.9. The drafts are a suggestion, the task of finalising the reform of the criminal justice administration is that of Parliament. It must be guided by the STIRS criteria set in Glenister II and is bound by the decisions in both Glenister II and Glenister III. Parliament is required, by order of court, to make the reasonable decision of a reasonable decision-maker in the circumstances. The relevant circumstances are contained in the report of the SCC, The Sandy Africa report on the insurrection in July 2021, the reports of the Nugent and Mpati commissions and in the reported work of the SAHRC, AG and OPP.

10.10. It is clear that the FATF and OECD have given attention to the situation in SA. The ratings agencies have also given SA a series of downgrades that make recovery more difficult in economic terms.

10.11. The reality is that until corruption is effectively and efficiently countered in SA the attraction of new investment that stimulates economic activity will be difficult. The necessary trust in government and the business confidence required to unlock new investment will remain absent and elusive until steps are taken to address corruption with impunity in SA.

10.12. It is accordingly the urgent business of parliament to fashion laws that better address the incidence of serious corruption with impunity in SA.

11. THE URGENCY OF THE SITUATION AS REGARDS COUNTERING SERIOUS CORRUPTION IN SA

11.1 It is convenient to consider the manifest urgency of the situation under three headings. Firstly as regards reform of the criminal justice administration to establish a Ch9IC urgently, secondly the alleviation of the current plight of whistleblowers and finally the introduction of Non-Trial Resolution (NTRs) of bribery and corruption matters.

11.2. Of the three, the introduction of a Ch9IC is clearly the most urgent. This is because the loot of state capture will be dissipated or further hidden before the current administration is able to muster the specialised staff, the effort and the necessary expertise required to get on top of the preparation required to rake back the loot. The contribution of Andrea Johnson, the new head of the ID in the NPA to a recent conference at US is instructive. See: https://www.dailymaverick.co.za/article/2022-07-28-pigmentation-has-nothing-to-do-with-lack-of-progress-in-steinhoff-case-investigating-directorate/.

11.3. Johnson is quoted as saying:

> *"What it's about is the extent of the corruption, the levels at which it took place, the period over which it took place, the sophistication with which it happened and the time and resources required to actually uncover the scheme that was Steinhoff. It is not an easy matter."*

11.4. *Johnson said that when law enforcement agencies try to build cases of this nature, they run up against the problem of the small size of the talent pool available — in terms of the tiny number of investigators and prosecutors with the relevant financial knowledge and experience. "Here's the travesty: we are all fishing in the same gene pool for the same resources: the ID, the Hawks, SAPS, SARS … any law enforcement in the country," Johnson said.*

11.5. *An additional problem is that the relevant individuals are ageing, without the necessary "new growth" in the development of these skills in the next generations."*

11.6. A single agency solution that does not have the baggage of the current criminal justice administration will be able to attract those in the private sector and elsewhere who are prepared to serve with honour and integrity in a new institution which is not haunted by the ghosts and saboteurs of State Capture.

11.7. A Ch9IC would be attractive to many in the private sector and to former Scorpions, top members of the ID, the SIU and the Hawks. An elite body with the necessary esprit d 'corps can bring back the success levels that the Scorpions enjoyed prior to their dissolution. It is not that the talent does not exist in SA, the skills are out there, they are simply not attracted to joining the current dysfunctional system, as is admitted by Johnson above in paragraph 11.2.

11.8. With cross party co-operation in the parliamentary system it will be possible to complete the legislative process properly in a matter of months, as was done with the floor crossing legislation in the past.

11.9. Establishing the new Ch9IC ought to be the number one priority of the current parliament.

11.10. The lot of whistleblowers in SA is not a happy one. Yet, they are the lifeblood of corruption investigations and without their evidence prosecutions for corruption cannot succeed. The draft enabling legislation contains some suggestions, but others are working on the matter with greater dedication and expertise than Accountability Now has been able to muster, given its limited resources. Attention is drawn to the publicity received by others active in the field of improving the lot of whistleblowers in SA in Daily Maverick: https://www.dailymaverick.co.za/article/2022-07-31-activists-gather-to-remember-babita-deokoran-and-demand-a-protection-action-plan/? It is at the same time plain that whistle-blowers are still regarded as impimpis by some in authority. See: https://www.politicsweb.co.za/politics/dr-tim-de-maayer-gets-written-warning-for-his-open?utm_source=Politicsweb+Daily+Headlines&utm_campaign=ebb63e976a-EMAIL_CAMPAIGN_2022.

11.11. Cynthia Stimpel, the SAA whistleblower, of Whistleblower House and Accountability Now who has written a chapter in the KAS sponsored book titled "Countering the Corrupt", https://accountabilitynow.org.za/countering-the-corrupt/, has also contributed to this submission.

11.12. It is urgent that attention be given to improving the legislative framework for the protection of whistleblowers. This step does not require a constitutional amendment but it does require engagements with those mentioned by Mark Heywood in his article referenced in paragraph 11.10 above and especially with the "White Paper" produced by GIBS.

11.13. It would be sensible to study NTRs around the world and especially their introduction in developing countries like Kenya before embarking upon the legislative reform that is necessary to add NTRs to the armoury of the criminal justice administration in SA. A great deal of careful research is required to get this novel methodology in place on a basis that is successful in SA. The work of Colette Ashton and those who interact with the OECD at Primerio is of relevance to the consideration of NTRs. See https://accountabilitynow.org.za/graft-settlements-time-for-south-africa-to-join-the-global-movement-towards-non-trial-resolutions/. And https://mg.co.za/opinion/2022-06-12-taking-aim-at-corruption-and-bribery/.

11.14. The contributions of Stimpel, (whistleblower protection) Ashton and Primerio (NTRs) to this submission are attached marked "A" and "B".

12. THE WAY FORWARD

12.1. The final paragraphs of the explanatory memorandum that accompanied the drafts published by Accountability Now in August 2021, while still valid, require some amplification.

12.2. In the last year there have been developments that justify accelerated attention to the reform of the criminal justice administration to better equip it to counter serious corruption and to rake back the loot carried off by the corrupt, including those who were involved in the serious corruption of State Capture.

12.3. The sub-committees of the NEC of the ANC are giving attention to recommendations for reform, as was announced by ANC spokesman Pule Mabe on the eve of the ANC policy conference held in July 2022.

12.4. The text of the media announcement made by Mabe is available here: https://www.politicsweb.co.za/documents/anc-will-deal-honestly-and-openly-with-zondo-commi. Of particular relevance in the current context is his statement that:

" the NEC Peace and Stability Committee and the NEC Constitutional and Legal Affairs Committee are together considering the recommendations around a new anti-corruption agency, the protection of whistle blowers and deferred prosecution agreements, among others."

12.5. It is hoped that the suggestions by Accountability Now have received the attention of the two sub-committees. The have been emailed to Mabe with a request that he make them and this submission available to the members of the committees.

12.6. The DA has moved ahead from its earlier position on the necessary reforms and has given instructions to the parliamentary legal drafting team to prepare its version of the reforms which hopefully ought to be not unlike those offered by Accountability Now. https://accountabilitynow.org.za/by-george-shes-got-it-the-das-breytenbach-lauded-for-supporting-radical-reform-of-the-npa/.

12.7. The EFF continues, in line with its manifesto, to decry corruption https://www.britannica.com/topic/Economic-Freedom-Fighters.

12.8. The stance of the IFP in favour of the Ch9IC suggestion by Accountability Now remains steadfastly unchanged.

12.9. The economy of SA has changed for the worse in the last year. Inflation is higher than it has been for fourteen years, stoked by higher fuel and food prices. Poverty and unemployment are at record levels and a former head of state, on whose watch SA made more money than was spent, warns against an "Arab Spring" in SA due to the dire state of financial and social distress in which the poor and the vulnerable member of SA society find themselves. https://www.youtube.com/watch?v=CkJApgpJ15w. Recouping the loot of state capture could be used to alleviate poverty or even fund a basic income grant.

12.10. The FAFT has placed an October 2022 deadline on action needed to avoid grey listing of SA How it happened that the Guptas may actually end up in… (dailymaverick.co.za). And https://www.businesslive.co.za/bd/opinion/letters/2022-07-19-letter-grey-listing-would-turn-sa-red-with-wrath/.

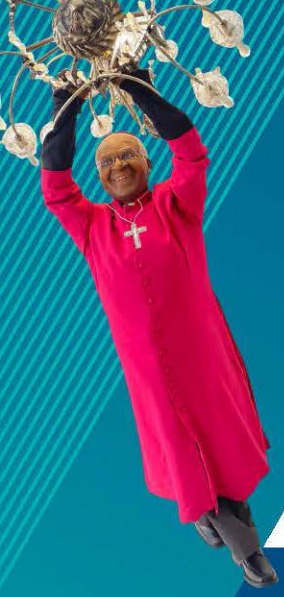
12.11. The national cabinet appears to be paralysed or at least dithering in the face of the recent developments and perhaps because of pre ANC election manoeuvring and factionalism https://accountabilitynow.org.za/ramaphosa-presidencys-dithering-over-rampant-corruption-is-the-stuff-of-legend/.

12.12. Recent developments around the protection of whistle-blowers and the development of NTRs in SA are sketched in the documents attached to this submission marked "A" and "B".

12.13. The National Assembly is under a constitutional duty to act urgently to reform the criminal justice administration by taking steps for the necessary legislation and constitutional amendment to be prepared as rapidly as is humanly possible in order to arrive at a best practice solution to a long-standing problem. As all major political parties that are represented in the National Assembly are ad idem that there is a need for reform, the debate concerning the form of the new legislation is overdue with such steps as have been taken lacking in urgency and penetration. It is two years since the NEC of the ANC instructed cabinet to attend to reforms urgently.

Accountability Now, August 2022.

(www.accountabilitynow.org.za)



Under the **Swinging Arch**

Perspectives on the *Glenister* anti-corruption cases by those who fought them

When the last of the trilogy of cases was finally determined in 2014, Chief Justice Mogoeng Mogoeng, writing for the majority, commenced the judgment with the words: 'All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.'

'This collection tells an intriguing story of how committed individuals can influence change for the good in our world. However, they also force us to realise that in the end it is political will and the moral judgment of our leaders that are essential to making our world a better one. I recommend this book to all interested in the fight against corruption in South Africa.'
Justice Richard Goldstone

'The disbandment of the Scorpions had catastrophic consequences for South Africa - consequences which persist to this day. This book is essential reading for all persons interested in knowing why it happened, what was done in an attempt to prevent it and what can be done to correct it.'
Judge of Appeal Ian Farlam

'This books offers insider accounts, often colourful, of the seven year long "Glenister" litigation … [T]he book is also forward-looking with its detailed arguments and proposals for an "Integrity Commission", envisaged as an even more effective agency than the Scorpions. As such the book will be of interest not only to lawyers but to anyone concerned with legal measures to help combat the cancer of corruption so prevalent in South Africa today."
Judge Lee Bozalek

As the up-to-date appendices to the essays in this book show in detail, advocacy of reform of the criminal justice system in South Africa, aimed at putting in place effective and efficient anti-corruption machinery of state, continues and will continue until it prevails.

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