IN THE WESTERN CAPE HIGH COURT

Case number: 7798/2009

In the matter between:

GLENISTER, HUGH	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF SAFETY AND SECURITY	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Fifth Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

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APPLICANT'S HEADS OF ARGUMENT

Applicant respectfully advances the following submissions:

INTRODUCTION

1. In this matter Applicant seeks an order –

   (a) declaring invalid and of no force and effect the National Prosecuting Authority Amendment Act, 56 of 2008, and the South African Police Service Amendment Act, 57 of 2008 ("the two Acts");

   (b) interdicting and restraining Respondents from implementing and enforcing the provisions of the two Acts pending confirmation of the order of invalidity by the Constitutional Court ("Concourt");

   (c) directing Sixth Respondent to pay Applicant's costs in this application, such costs to include the costs attendant upon the engagement of two counsel and the qualifying expenses of the expert witness Groeneveldt.

2. The matter was launched as one of urgency and comes before a full bench of this Honourable Court in terms of an order of the Acting Judge President made with the consent of the parties.

3. At issue in the matter is the constitutional validity of the two Acts.

4. These heads have been filed timeously in terms of the order of the Acting Judge President but without sight of what we have been given to understand

will be all of the answering affidavits. At the time of preparation of these heads the last page considered of Respondents' papers in the record was page 2145. If further answering affidavits come to hand at any stage these heads may have to be supplemented. Applicant has in correspondence reserved his rights in this regard.

PERTINENT PROVISIONS OF THE CONSTITUTION

5. Section 2 of the Constitution lays down that -

> *"This 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."*

6. The Republic of South Africa is a single sovereign democratic state which is founded on, *inter alia*, the following values:

> *"supremacy of the constitution and the rule of law"*;
>
> *"a multiparty system of democratic government, to ensure accountability, responsiveness and openness".*

Section 1 of the Constitution

7. This Honourable Court has jurisdiction to hear this matter by reason of the provisions of section 167(5) of the Constitutions, which provides:

> *"The Constitutional Court makes the final decision whether an Act of Parliament … is constitutional, and must confirm any*

order of invalidity made by … a High Court … before that order has any force."

8. In terms of section 179 of the Constitution there is a single national prosecuting authority in the Republic which has the power to institute criminal proceedings on behalf of the state and *"to carry out any necessary function incidental to instituting criminal proceedings"* [subsection (2)].

9. In terms of section 179(4) of the Constitution:

> *"National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."*

10. The National Director of Public Prosecutions ("NDPP") must determine national prosecution policy *"with the concurrence of the cabinet member responsible for the administration of justice and after consulting the directors of public prosecutions"*. It is the NDPP who (alone) must issue policy directives which must be observed in the prosecution process.

Section 179(5) of the Constitution

11. The said cabinet member must exercise final responsibility over the prosecuting authority.

Section 179(6) of the Constitution

12. Under section 205 of the Constitution it is provided that national legislation must establish the powers and functions of the police service. The objects of the police service are *"to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law".*

Sections 205(2) and 205(3) of the Constitution

13. In contra-distinction with the NPP, national policing policy must be determined by a member of the cabinet responsible for policing, *"after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives".*

Section 206(1) of the Constitution

14. The role of the National Commissioner of the police service is to *"exercise control over and manage the police service in accordance with the national policing policy and the directions of the cabinet member responsible for policing".* He or she plays no role in the formulation of policy, and unlike the NDPP, is constitutionally obliged to take directions from Second Respondent.

Section 207(2) of the Constitution

15. The following principles, *inter alia,* govern national security:

"(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want, and to seek a better life.

(c) National security must be pursued in compliance with the law, including international law."

Sections 198 and 231 of the Constitution

16. The principles governing national security overlap with the basic human rights enshrined in the Bill of Rights which affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Sections 7(1) and 7(2) of the Constitution

17. The following rights are impacted upon in circumstances where national security and the efficiency of the police and prosecution services are less than optimal and less than compliant with the requirements of section 7:

Section 9: equality;

Section 10: human dignity;

Section 11: life;

Section 12: freedom and security of the person;

Section 21: freedom of movement;

Section 22: freedom of trade, occupation and profession;

Section 23: fair labour practices

Section 25: property.

18. Both the NPA (including the DSO) and SAPS are part of the public administration and are governed by the basic values and principles governing public administration. These are set out in section 195 read with section 197(3) of the Constitution. The principles among these that are of particular relevance to this application are the following:

"(b) Efficient, economic and effective use of resources must be promoted.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated."*

19. These principles apply to administration in every sphere of government, and to all organs of state and public enterprises.

Section 195(2) of the Constitution

20. Under section 195(3) of the Constitution, national legislation must ensure the promotion of the said principles.

21. In terms of section 237 of the Constitution, all constitutional obligations must be performed diligently and without delay. Section 41 sets out the principles of co-operative government and intergovernmental relations. Encroachment upon functional or institutional integrity of government in one sphere by another is not allowed according to the express terms of section 41(1)(g) of the Constitution.

ROAD MAP TO READING THE RECORD

22. In order to assist the Honourable Court to come readily to grips with the considerable volume of papers filed of record, it is suggested that the reading of the record takes place in the following order.

(a) Consider the provisions of the two Acts under attack for their inconsistency with the Constitution;

Record pages 2048 to 2065

(b) Consider the provisions of the two preceding bills from which the two Acts sprung to note the changes made during the legislative process;

Record pages 539 to 581

(c) Consider the issue determined in the antecedent litigation in the Constitutional Court ("Concourt");

Concourt judgment, record pages 2107 to 2118

(d) ANC resolutions at Polokwane regarding the dissolution of the DSO;

Record, pages 513 to 516

(e) Communiqué, memo and minutes on the announcement of the decision to dissolve the DSO;

Record, pages 520 to 527

(f) Presentation made by Adv Billy Downer SC of the DSO on 29 May 2008, as illustrative of the manner in which the DSO functions;

Record, pages 836 to 848

(g) SAPS AN ORGANIZATION ON THE BRINK OF COLLAPSE, by former policeman Ivan Myers;

Record, pages 1237 to 1258

(h) Performance indicators of SAPS for 2008;

Record, page 634

(i) Report by SAPS on the crime situation, April to September 2007;

Record, pages 642 to 677

(j) Article by Dr Johan Burger on the 2006 to 2007 crime statistics, entitled TIME TO TAKE ACTION;

Record, pages 678 TO 684

(k) ISS Occasional Paper 150 of September 2007 by Andrew Faull;

Record, pages 691 to 717

(l) Affidavit of Daan Groeneveldt and material attached thereto;

Record, pages 1026 to 1220

(m) Final report of the Khampepe Commission in 2006 (mainly for its recommendations);

Record, pages 313 to 456

(n) Jean Redpath's analysis of the DSO, of March 2004;

Record, pages 133 to 241

(o) Applicant's founding affidavit;

Record, pages 5 to 95

(p) Article in the Financial Mail of 11 January 2008 by Matthews Phosa;

Record, page 602

(q) Interviews with Gwede Mantashe and Siphiwe Nyanda published in the Sunday Time in March and April 2008;

Record, pages 618 to 625

(r) Affidavit by Helen Zille;

Record, pages 626 to 628

(s) Answering affidavit of Manoko Nchwe on behalf of Second Respondent;

Record, pages 2000 to 2047

(t) Answering affidavit of Menzi Simelane on behalf of Third Respondent;

Record, pages 2070 to 2106

(u) Transcript of radio interview given by Menzi Simelane on 14 February 2008;

Record, page 535

(v) Information obtained from DSO staff;

Record, pages 863 to 870

(w) Information gathered from SAPS;

Record, pages 947 to 948

(x) Answering affidavits of Seswanthso Lebeya and Johannes Meiring;

Record, pages 2132 to 2145

(y) Replying affidavit by Applicant.

Record, pages 3000 *et seq*

OVERVIEW OF THE BACKGROUND TO APPLICANT'S CASE

23. Applicant's present application was preceded by an unsuccessful attempt by him to prevent the dissolution of the DSO in which the Concourt, both on appeal from the Transvaal Provincial Division and by way of an application for direct access, in upholding the doctrine of the separation of powers came to the conclusion, in all the circumstances, that it was premature to attack the impugned (and then proposed) legislation before the legislative and executive authorities had finalised their functions in respect of the two Bills. This process was completed when First Respondent signed the two Acts into law on 16 and 17 February 2009 with effect from 20 February 2009. The principles of deference to the other spheres of government no longer apply in the manner in which they were invoked by the Concourt. It is now the onerous duty of the Honourable Court to determine the validity of the two Acts.

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

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

(a) He made representations to Parliament;

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

(c) When First Respondent assented to the legislation, he requested that it not be implemented pending this application. All to no avail.

25. The application now before the Honourable Court is one in which Applicant seeks final relief declaring the two Acts to be unconstitutional and invalid. Such relief, if granted, will have to be ratified in due course by the Concourt. At the micro level the case is about the constitutionality of the scheme of the two Acts encompassing the dissolution of the Directorate of Special Operations (DSO) and the transfer of its investigative personnel to the new Directorate of Priority Crime Investigation (DPCI) in the South African Police Service (SAPS); at the macro level it is about the preservation of the rule of law and the independent ability of the National Prosecuting Authority (NPA) to continue to function in the manner required by the Constitution: *"without fear, favour or prejudice".*

JURISDICTION

26. This Honourable Court has jurisdiction to hear this matter by virtue of the provisions of sections 167(5) and 169 of the Constitution, Act 108 of 1996. Section 169 provides that a High Court *"may decide any constitutional matter except a matter that only the Constitutional Court may decide".* Section 167(5) provides: *"The Constitutional Court makes the final decision whether an Act of Parliament ... is constitutional, and must confirm any order of invalidity made by the ... High Court ... before that order has any force."* (Emphasis provided.)

27. Although several public officers have been cited, *"the real respondent is the Government of the Republic of South Africa".*

> **RICHARDS AND ANOTHER v PORT ELIZABETH MUNICIPALITY AND OTHERS**, 1990 (4) SA 770 (SE) at 776 B – F

Sixth Respondent is thus the party essentially being sued in this matter and is the only respondent against whom a costs order is being sought. The Government is everywhere but has its seat at Parliament in Cape Town. Surprisingly, the Sixth Respondent, the Government, has not given notice of its intention to oppose the matter. Menzi Simelane, the deponent for Third Respondent, suggests - without giving any reasons - that the Government is not an appropriate respondent in a matter of this nature. It is respectfully submitted that, in the light of **Richards'** case, this submission is flawed. However as the first three respondents are all opposing the grant of relief, and

Second and Third Respondents have filed affidavits in which they contend that there is no case in law for the granting of the relief claimed, nothing turns on the position adopted by the first three respondents in relation to Sixth Respondent. If the arguments advanced on their behalf are not accepted, it is open to the Honourable Court to grant the relief claimed.

URGENCY

28. Notwithstanding Applicants' faxes to the State Attorney of 4 February and 7 April 2009 seeking undertakings not to proceed with the implementation of the impugned legislation, no such undertaking has been forthcoming. Until the filing of answering affidavits, Respondents avoided engagement with the complaints spelt out by Applicant, contenting themselves with bare denials in the case of Second and Third Respondents or unresponsive silence from the remaining Respondents.

HG83, record pages 1019 to 1022;
HG84, record pages 1024 and 1025;
KAL1, record pages 1266 and 1267

29. On 15 April 2009 offers were made to existing DSO operatives regarding their futures in the South African Police Service ("SAPS") and they were required to respond thereto by 30 April 2009, indicating whether they found the offers to be acceptable or whether they wanted to be deployed elsewhere in the Public Service and, if so, where.

30. Subsequently Fourth Respondent gave investigators in the employ of the DSO until 27 May 2009 to decide their future employment choices. Sixth Respondent would appear to remain determined to proceed with the enforcement and implementation of the impugned legislation unless and until this Honourable Court orders otherwise. The targeted "fixed date" of 1 July 2009 is and remains in the sights of those driving the process and is less than a month after the date of hearing of this application. It is accordingly appropriate to request the ancillary relief set out in paragraph 1 above as considerable expenditure and the further dislocation of valuable state resources can be spared by holding up the process until the urgent convening of a confirmation hearing in the Concourt.

Nchwe, paragraphs 11 and 12, record pages 2006 and 2007

31. For these reasons the requirements of Rule 6(12)(a) and (b) are met and the matter falls to be treated as one of urgency as regards the granting of the relief set out in paragraph 1 above. Ideally, if not a judgment, at least an order is needed before the projected "fixed date" of 1 July 2009. This will enable the parties to regulate their conduct in the light of the order so made.

THE TECHNICAL POINTS TAKEN BY RESPONDENTS

32. Respondents have raised a series of points *in limine* in paragraph 5 of the answering affidavit of Nchwe and paragraph 8 of that of Simelane. It is convenient to deal with all points so raised *seriatim.*

See record pages 2001 to 2004, para 5 and page 2072 para 8

Ad paragraph 5.1

33. It is Applicant's case that the functionality previously associated with the DSO cannot properly and constitutionally be relocated within SAPS in the DPCI unit contemplated by the two Acts. Respondents are sorely mistaken in suggesting that none of the functionality or powers of the DSO will be lost. On the contrary, the DSO is a unit which is constitutionally entitled and obliged to function independently and without fear, favour or prejudice. As part of SAPS, the DPCI unit will operate under the constitutionally sanctioned political control and direction of the new Minister of Police. It will also receive policy guidelines from a Ministerial Committee consisting of at least five cabinet ministers if section 17 I of the SAPSA Act passes constitutional muster. We submit it cannot make this grade.

Compare section 179(2) and (4) with sections 205(3) and 206(1) of the Constitution

34. There are further fundamental differences between the DSO, as a unit constituted in terms of Chapter 8 of the Constitution (Courts and Administration of Justice) and DPCI, as one constituted under Chapter 11 thereof (Security Services):

(a) The former chapter deals with courts and the administration of justice; the latter with security services.

(b) In particular, the DSO was formed *inter alia* for the purpose of carrying out *"any necessary function incidental to instituting criminal proceedings"*.

Section 179(2) of the Constitution and section 7 of the NPA Act 32 of 1998 read with the preamble thereto

(c) In contra-distinction, the DPCI unit, a part of SAPS, will [among the other objects specified in section 205(3) of the Constitution] function with the object that it should *"prevent, combat and investigate crime"*. It has no power to institute criminal proceedings, this being the constitutional preserve of the NPA.

(d) The underlying intention of the scheme of the two Acts is to transfer overall control of activities formerly carried out by the DSO from the independent and professionally led NDPP and place it in the hands of the new Minister of Police (and/or the Ministerial Committee as far as "policy guidelines" are concerned) in his capacity as the party to whom the personnel of DPCI will be accountable in accordance with the established line-of-command structure of chapter 11 of the Constitution. The provisions in this chapter referred to above make it clear that the minister has the power to determine national policing

policy and to give directions to the National Commissioner of Police who in turn exercises control over and management of SAPS.

Section 207(2) of the Constitution

(e) There are profound implications which flow directly from the transfer of DSO personnel *"to be located within the SAPS"* as Nchwe puts it. The DSO has historically been involved with the investigation of organised crime, corruption and similar offences at the highest level in South Africa. It has been able to do so because it is not under the control and direction of any politician and because the last NDPP, Vusi Pikoli, took his constitutional mandate to heart and in fact led the DSO personnel in a manner which enabled them to act independently and without fear, favour or prejudice.

(f) SAPS personnel, including those in DPCI, are neither able, nor even entitled, to act without fear or favour. Their sapiential authority or "clout", in the sense of power of effective action, is of an inferior level to that of DSO personnel and it is the crucially important capacity to act **independently**, and thus also **effectively**, that will be lost as a consequence of the transfer of the functionalities of the DSO to the new DPCI unit to be located within SAPS. This point has been trenchantly made by both Adv Wim Trengove SC and Downer SC.

> *"The principle of prosecutorial independence is accordingly not only entrenched in the Constitution*

but Parliament has also gone out of its way to create a whole network of provisions designed to reinforce and protect it. It has done so firstly because the principle is such an important one and secondly because experience has taught that the executive is always likely to be tempted to interfere with the prosecutorial process for political reasons, more often than not to protect their cronies in high office."

HG67 at record, page 836 *et seq*, at page 843, paragraph 21 and 22 (Trengove)

"The same constitutionally entrenched independence does not hold true for the police. The police are traditionally an arm of the executive that operates under political control. The Constitution does not contain guarantees regarding investigation that are equivalent to prosecuting without fear, favour or prejudice. On the contrary, section 207(2) of the Constitution stipulates that the National Commissioner of the police must exercise control and manage the police service in accordance with national policing policy and the directions of the cabinet member responsible for policing."

HG67 at record, page 836 *et seq*, at page 843, paragraph 22 (Downer)

35. It should be noted that Downer spoke before the passage of the two Acts. The constitutionally sanctioned policy-making function of Second Respondent under section 206(1), which he is obliged to determine after consulting with provincial governments and after taking into account the policing needs and priorities of the provinces as determined by the provincial executives, has since unconstitutionally been diluted by the provisions of subsections 17 I(2) (a), (b) and (c) of the South African Police Service Amendment Act. These purport to give five or more cabinet ministers the power to make policy for

DPCI whereas the Constitution makes this function the preserve of Second Respondent.

36. The policy-making power in the Constitution is solely that of Second Respondent, as the term *"after consulting"* is not equivalent to *"in consultation with"* and affords no more than an opportunity to provincial executives to make their needs and priorities known to Second Respondent. Under section 17 I the provinces are completely by-passed and a veritable bevy of new talent is included in the policy-making process without regard for, or consideration of, the violence this does to the express requirements of section 206 of the Constitution.

37. Section 32 of the NPA Act, 32 of 1998, provides as follows:

> *"32.* ***Impartiality of, and oath or affirmation by by members of prosecuting authority***
>
> *(1) (a) A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.*
>
> (b) *Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions."*

Section 32(2) goes on to prescribe an oath of office / affirmation for prosecutorial personnel which they are obliged to take before embarking upon their duties. There is no similar provision applicable to the police.

38. The transfer of the functionality previously carried out by the DSO to the command structures within SAPS deprives the NPA of the capacity to carry out the constitutionally contemplated *"necessary functions incidental to instituting criminal proceedings"* [section 179(2) of the Constitution] through the DSO. This is in conflict with the Constitution's requirement that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice [section 179(4)].

39. In the result, the power to institute criminal proceedings on behalf of the state is rendered somewhat nugatory in those sensitive corruption matters in which it is necessary to employ the services of an independent investigative unit, clothed with the powers given to the DSO, to carry out any necessary function incidental to instituting criminal proceedings. Once the two Acts are operationally in place, the NPA will be without investigative staff who operate independently and will be solely reliant upon the new DPCI unit. This has absolutely no capacity to operate independently as it is answerable to the National Commissioner of Police who is given directions, and indeed the national policing policy, by a politician, namely the Minister of Police. DPCI will not in any way be obliged to take instructions from anyone in the NPA as it does not fall under the control of the NDPP. An NPA without the clout of the

DSO will be a pale shadow of its former self. Symptoms of this are already becoming evident.

40. It cannot be gainsaid that leaving the impugned legislation in place will result in an alarming and wholly unwarranted emasculation of an important institution intended by the Constitutions to protect the public weal.

Ad paragraph 5.2

41. Whilst it is so that policy choices are within the domain of the executive and legislature, both are bound by the Constitution, in particular by section 2 and, in this case, by section 179 of it. They accordingly have to exercise their policy choices lawfully and in a manner which is consistent with the requirements of the Constitution. The public administration is only obliged to *"loyally execute the **lawful** policies of the government of the day"* in terms of section 197(1) of the Constitution.

42. In this case, the diverse issues mentioned by Nchwe in this paragraph have been allowed to obfuscate the constitutional obligations in place and its structures which necessarily have to be accommodated if the two Acts are to pass constitutional muster. This stands in welcome contradiction of the position in the pre-1994 constitutional dispensation in which Parliament was sovereign and could make laws of its own choosing. Now the Constitution is the supreme law and all laws passed have to measure up to its exacting

standards, as interpreted by the Courts, if they are to pass the stringent test of consistency with the Constitution.

43. It is, in essence, the freedom from governing party political oversight which the DSO enjoyed and exercised to telling effect which has led to political conditions which made the passing of the Polokwane resolutions inevitable. The fixing in stone of the two Acts in law is not, however, an inevitability unless they are found to be constitutionally compliant, notwithstanding Applicant's various challenges to them. Any conduct or law which is inconsistent with the Constitution is invalid.

See section 2 of the Constitution

Ad paragraph 5.3

44. Applicant's case is that the entire scheme of the two Acts is fundamentally and hopelessly inconsistent with the Constitution. This is because it involves the dissolution of the DSO which was created pursuant to the requirements of section 179(4) as an entity under Chapter 8 with the functions associated with it, all constitutionally prescribed in section 179(2), and the transfer of its vital functions to a Chapter 11 unit, DPCI, located within SAPS.

Ad paragraph 5.4

45. The sections to which Nchwe refers illustrate Applicant's complaint about a Chapter 8 function being transferred to a Chapter 11 entity. A formerly independent unit will be made accountable to a politician(s) who sets the policies and gives the directions in terms of which its successor will function. Moreover, the notionally independent head of the NPA, the National Director of Public Prosecutions (NDPP), will be deprived of the services of the DSO if the two Acts are allowed to stand.

46. The requirements of section 179(4) of the Constitution are violated by such manipulation of the established legal order. Instead of "ensuring" the constitutionally enshrined position of the NPA, the scheme of the two Acts undermines it. This is constitutionally invalid. It cannot be countenance by the Honourable Court as guardian of the Constitution. The legal remedy required is to declare the two Acts invalid.

Ad paragraph 5.5

47. Whilst it is so that, in the period between the passing of the Polokwane resolutions concerning the DSO and the passing of the two Acts into law, the Executive, the President and Parliament have all failed to fulfil a variety of constitutional obligations, Applicant's complaint in this matter, as appears from the relief claimed in the notice of motion, is that the two Acts are invalid in their entirety and the substantive relief he seeks is that both be declared

invalid. For the reasons set out above this is within the competence of this Honourable Court.

Ad paragraph 5.6

48. As regards the inclusion of hearsay in the founding papers, where this has been done an explanation for its inclusion is given, steps have been taken within reason and within the time available to cure the hearsay and Applicant has been respectful of the privacy and career prospects of those vulnerable members of the public administration who have been of assistance to him in the preparation of his case. Insofar as the documents entitled *"Information Gathered From The DSO And SAPS"* are concerned, the facts ought to be regarded as common cause as they are either matters of public record or the subject matter of draft affidavits, the content of which has not been challenged in any way, and which have been made available to Fourth and Fifth Respondents. In these circumstances it is submitted that the Honourable Court will have no difficulty in exercising its discretion to receive hearsay in an urgent application.

Fey v van der Westhuizen, 2005 (2) SA 236 (C) at 241 F-G

49. *Alternatively*, it is submitted that the Honourable Court can and should receive the hearsay by virtue of the discretion conferred upon it by section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988. The factors mentioned in

the statute must, according to the Supreme Court of Appeal, be regarded as inter-related and overlapping.

Makhathini v RAF, 2002 (1) SA 511 (SCA) at paragraph [28]

50. In this regard, it is particularly significant that Respondents can surely suffer no prejudice as the result of the reception of hearsay material which has been in the possession of Fourth and Fifth Respondents since before this application was launched and which no deponent on behalf of Respondents has suggested is in any respect inaccurate.

51. The instruction that has in effect precluded members of the DSO from risking the consequences of asking for permission to make affidavits is illegal, as can be gathered from the express terms of section 18 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004, which provides, *inter alia*, as follows:

> *"Any person who, directly or indirectly, intimidates … or improperly persuades … another person with the intent to*
>
> *(a) … prevent the testimony of that person … as a witness in … proceedings before any court, or*
>
> *(b) cause or induce any person to -*
>
> (iii) *withhold testimony … at such … proceedings*
>
> *is guilty of the offence of unacceptable conduct relating to a witness."*

The penalty for this offence is a fine or incarceration for up to imprisonment for life.

52. *In the further alternative,* and only in the event of this Honourable Court declining to admit the hearsay objected to, Applicant reserves the right to subpoena persons having direct knowledge of the relevant events to give *viva voce* evidence confirming same but is loathe to do so in respect of persons currently employed by the public administration in view of the deleterious consequences this may have on their careers.

HG71, record pages 856 to 859

53. As regards allegedly argumentative matter, Respondents do not identify which parts of Applicant's case they regard as impermissibly argumentative and it is accordingly impossible to deal with this point other than to submit, with respect, that such parts of Applicant's case as may be characterised as argumentative are permissibly so.

54. As regards allegedly inadmissible opinion evidence, it would seem that Respondents are referring to the affidavit of Groeneveldt. It is denied that his opinion is inadmissible or unreliable. His offer to consider information which is not yet in the public domain in order to assist this Honourable Court in coming to a determination has not been taken up. Instead spurious excuses are tendered that *"He doesn't seem to realise that we are dealing with criminal cases, the management of undercover operations, interception of information*

and related matters. Such matters are certainly not in the public domain." Groeneveldt has no interest in anything other than the human resource management implications of the two Acts. He does not need access to the irrelevant type of documentation referred to in the words quoted above but could well derive benefit and additional insight into the matter from access to the *"full audits"* referred to by Nchwe in paragraph 70 of her affidavit, to the extent that such audits may provide evidence of efficient, economic and effective use of human resources as well as good human resource management and career development practices as required by section 195(1) of the Constitution.

Groeneveldt, paragraph 8.12, record page 1056;
Nchwe paragraph 70, record page 2045

55. A rule 35(12) notice has been issued in respect of the audits. If it is responded to timeously and positively, Groeneveldt is prepared to supplement his opinion insofar as may be relevant or necessary.

56. As regards newspaper articles, these have been verified wherever possible and where this has not been possible an explanation has been furnished. This does not render the material inadmissible in any way.

57. The objection of Second Respondent as set out in paragraph 5.6 is so vague as to render it impossible to deal more specifically with the objection as framed. This application is a matter of considerable constitutional moment and it is unfortunate that the objection has been raised at all.

Ad paragraph 5.7

58. It is so that the Applicant has not been authorised to represent any current members of the DSO, but it is also so that they have effectively been forbidden from participating as witnesses in these proceedings. However, this is a matter in which it is alleged that rights in the Bill of Rights are threatened. In such cases anyone acting in the public interest is entitled to approach a court for appropriate relief and this is what Applicant does in this matter.

Section 38(d) of the Constitution read with paragraphs 21.3 and 24 of Applicant's affidavit, record pages 15 and 18

Ad paragraph 5.8

59. As appears from his affidavit, Groeneveldt, in his capacity as a personnel practitioner, has conducted a careful analysis of the constitutional and practical human resource management implications of the two Acts. This is both relevant and admissible in that good human resource management practices must be cultivated in the public administration but, by reason of the scheme of the two Acts and the unfair manner in which they have been introduced and implemented thus far, have not so been.

60. Human resources are palpably not the subject of the promotion of efficient, economic and effective use in the overall impact of the two Acts. An excellent

unit in the NPA is being decimated. Its investigative personnel are being transferred into the admittedly dysfunctional SAPS under a control system that has no prospect whatsoever of allowing the new unit, DPCI, to function in any shape or form approximating that at which the DSO functions so effectively. Its very structure dooms it to failure.

Section 195(1)(b) and (h) of the Constitution

Ad paragraph 5.9

61. The affidavit of Myers is relevant to the determination of the irrationality and reasonableness issues raised by Applicant in this matter. His concise description of the levels of dysfunction in SAPS, unchallenged by any deponent for Respondents, illustrates the relevance of the facts deposed to by him. The document attached to Myers's affidavit marked IM2 was presented by him to the Joint Portfolio Committee in Parliament as part of the public participation process in respect of the two Acts on 8 August 2008 and the document annexed marked IM3 was submitted to the Institute for Security Studies by Myers in February 2008.

Myers, paragraphs 9 and 10, record page 1222; Documents IM2 and IM3 at record pages 1226 and 1237 respectively

Ad paragraph 5.10

62. The affidavit of Feinstein is both relevant and admissible in this matter as its content starkly shows, as a matter of fact, that there is an ongoing need for an independent unit such as the DSO which is able to function without fear, favour or prejudice. The requirements of reasonableness and accountability, as identified and discussed by the Constitutional Court in the **Metrorail** matter, are particularly germane to the content of Feinstein's affidavit. It is noteworthy, if not remarkable, that no attempt is made by any Respondent to gainsay any aspect of the facts set out by Feinstein in disturbing detail.

> **Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others,** 2005 (2) SA 359 (CC) paragraphs 75 and 76

Ad paragraph 5.11

63. Applicant's *locus standi* has been established in the founding papers across a broad range of grounds.

> **Record pages 14 to 19, paragraphs 18 to 25**

64. The Constitutional Court in the antecedent proceedings has accepted that Applicant has *locus standi*.

65. It is common cause that the DSO has successfully carried out its constitutional mandate under section 179(2) of the Constitution read with section 7 of the NPA Act 32 of 1998 (which repeatedly cross-refers to the relevant functions constitutionally prescribed) and that the SAPS is in a state of disarray. Disbanding a well-functioning unit and seeking to replace it with a pale substitute lacking independence and sapiential authority is not any guarantee that there will be *"no interruption in the combating of organised or other high priority crime"* as claimed by Nchwe.

Ad paragraph 8 of the affidavit of Menzi Simelane

66. Upon any proper conspectus of its reasoning, it is apparent that Simelane misconstrues the import of the judgment of the Constitutional Court in the antecedent proceedings which he attaches to his affidavit as **MS1** (record page 2107 *et seq*). The judgment did not deal with the merits of Applicant's arguments in this case but only with the single issue of whether, in the light of the doctrine of separation of powers, it would be appropriate to make any order setting aside the decision of the National Executive that was challenged in that case.

Judgment at record page 2110, report page 292 B

67. The court decided this sole issue in the negative and was careful to avoid dealing with the merits of the complaint now in issue as it was content to defer to the other branches of government on the basis that *"should the legislation*

as enacted be unconstitutional for the reasons proffered by the CFCR, appropriate relief can be obtained thereafter".

Record page 2117, report page 307 G

68. Not surprisingly, the CFCR's arguments as to the merits of the scheme of the two Acts are now being raised again, and supplemented, in response to the learned Chief Justice's "invitation".

69. Simelane's reliance upon the fact that Applicant has not dealt with any of the changes made to the initial bill in the course of the parliamentary process is misplaced: None of the tinkering undertaken by the Legislature to the bills as they originally existed when the matter prematurely came before the Constitutional Court has done anything to cure the unconstitutionality of the resultant legislation.

FACTUAL DISPUTES IN MOTION PROCEEDINGS

59. Any factual disputes must be resolved in terms of the rule in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 3 SA 623 (A).

The Plascon-Evans rule

70. The **Plascon-Evans** rule is of particular significance for purposes of the relief that is sought in this application. In **Plascon-Evans** the Appellate Division

held as follows:

> *"… where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court … and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks ….. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers …."*

71. The general rule in **Plascon-Evans** is that final relief may only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting of such relief.[1] There are however two exceptions to this general rule.[2]

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

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[1] **Nampesca (SA) Products (Pty) Ltd v Zaderer** 1999 1 SA 886 (C) at 892H-J; **Townsend Productions (Pty) Ltd v Leech** 2001 4 SA 33 (C) at 40E-H

[2] The two exceptions are explained by Davis J in **Ripoll-Dausa v Middleton NO** 2005 3 SA 141 (C) at 152-153, in a passage that was endorsed by the SCA in **Wightman v Headfour (Pty) Ltd** [2008] ZASCA 6 (10 March 2008) para 12

the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and may include this fact among those upon which it determines whether the applicant is entitled to final relief:

73. In the **Metrorail** case, *supra,* at paragraph 35, the Constitutional Court formulated the first exception as follows:

> *"Where however a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the court is persuaded of the inherent credibility of the facts asserted by an applicant, the court may adjudicate the matter on the basis of the facts asserted by the applicant."*

64. It is trite that *"a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases"*. [3] The reason is that, *"if by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device"*. [4]

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[3] **Room Hire Co (Pty) Ltd v Jeppe Street Mansions** (Pty) Ltd 1949 3 SA 1155 (T) at 1165

[4] **Soffiantini v Mould** 1956 4 SA 150 (E) at 154G

65. The principle has been formulated as follows:

> *"… if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being properly decided only after viva voce evidence has been heard."* [5]

66. This approach has recently been affirmed and expanded upon by the Supreme Court of Appeal in **Wightman v Headfour (Pty) Ltd** 2008 (3) SA 371 (SCA) at paragraph 13:

> *"A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. <u>But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied</u>…. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."* (emphasis added)

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[5] **Da Mata v Otto NO** 1972 3 SA 858 (A) at 882H

68. This is precisely the situation in the present case. The applicant has no personal knowledge of the relevant facts, for the obvious reason that he is an ordinary citizen and is therefore an outsider to the political process. The relevant facts lie exclusively within the knowledge of the respondents. However the respondents have in numerous respects elected not to provide countervailing evidence but rather to furnish bare denials. We shall draw attention to these bare denials below, and shall request this Court to apply the first exception to the **Plascon-Evans** rule.

69. The second exception is where the allegations or denials of the respondent are so clearly untenable that the court is justified in rejecting them on the papers. If the respondent's version is *"so improbable and unrealistic that it can be considered to be fanciful and untenable",*[6] *then it may be rejected on the papers by adopting a "robust, common-sense approach".*[7] We shall request this Court to apply the second exception to the **Plascon-Evans** rule below.

74. We point out that neither First Respondent nor either of his predecessors has filed an answering affidavit or even a confirmatory affidavit. The answering affidavits of Nchwe and Simelane do not purport to be made on behalf of First Respondent. It follows that, where allegations are made in the founding

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6 **Truth Verification Testing Centre CC v PSE Truth Detection CC** 1998 2 SA 689 (W) at 699F-G. See also **NDPP v Geyse**r [2008] ZASCA 15 (25 March 2008) para 11

7 **Soffiantini v Mould** 1956 4 SA 150 (E) read with Truth **Verification Testing Centre CC v PSE Truth Detection CC** 1998 2 SA 689 (W) at 698I

affidavit regarding First Respondent, those allegations are unanswered. Those allegations must be accepted to be correct, in accordance with the general rule in **Plascon-Evans**.[8] The Fourth, Fifth and Sixth Respondents are in default of any indication of their intention to oppose the application.

75. In this application Applicant contends that there are no genuine disputes of fact and that the matter which may be acted upon by the Honourable Court on the proper application of the rules set out above affords sound grounds for granting relief to Applicant.

FACTS PROVED BY APPLICANT:

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

Record, page 20, paragraph 30

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

Record, pages 25 and 26, paragraph 37

[8] **Gerhardt v State President** 1989 2 SA 499 (T) at 504E-H

78. When he suspended Vusi Pikoli on 23 September 2007, former President Mbeki stated that *"the machinery to fight crime was further strengthened in 2000 when Parliament adopted legislation creating the DSO in the office of the NDPP."*

Record, pages 246 to 248

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

Record, page 27, paragraph 41

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

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

Record, pages 313 to 456

82. In particular, Judge Khampepe, in her recommendation regarding the location of the DSO, held the view *"that it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO" w*here it is *"prosecution led".*

Record, page 454

83. The Government accepted the recommendations of the Khampepe Report both in a statement issued by Government Communications dated 29 June 2006 and in a similar statement regarding a cabinet meeting dated 7 December 2006.

Record, pages 457 to 463

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

Record, pages 513 to 516

85. The rationale given for this new departure was that *"the Constitutional imperative that there should be a single police service should be implemented".* There was even a resolution that *"the municipal, metro and traffic police be placed under the command and control of a National Commissioner of SAPS, as a force multiplier".* This has not been acted on.

Record, pages 513 to 516

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

Record, page 535

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

Record, page 602

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

Record, page 586 to 589

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

Record, pages 603 to 625

90. At a meeting held between Gwede Mantashe, Secretary General of the ANC and Chairman of the SACP, and Helen Zille, leader of the DA, on 15 April 2008, Mantashe made it clear that the ANC wanted the DSO disbanded because the DSO was prosecuting ANC leaders.

Record, page 627

91. The current Minister of Police, Nyati Mthethwa, then ANC Chief Whip, wrote an open letter to the Cape Times on 24 April 2008 in which he made it clear

that the decision to disband the DSO had its roots in the Polokwane resolutions.

Record, pages 629 to 631

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

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

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

Record, pages 524 to 527

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

Record, pages 678 to 684

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

Record, pages 1224 to 1228

96. The opinion of Groeneveldt has material in it which is to the same effect.

Record, pages 1026 to 1057

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

THE SEVEN LEGAL CONCEPTS RELIED UPON BY APPLICANT

98. The arguments advanced on behalf of Applicant on the merits of the application have been partially foreshadowed in dealing with the points *in limine* and objections made by Respondents. Applicant relies on seven legal concepts which pertain to the declaration of invalidity of the two Acts for their inconsistency with the Constitution. The proper application of these arguments to the facts to be accepted by the court is required. The seven concepts are:

(i) Disregard for the rule of law and in particular the principle of legality (irrationality);

(ii) Failure to comply with the constitutional requirement of reasonableness and accountability (unreasonableness);

(iii) Unfairness and breach of good human resource-management practices (unfairness);

(iv) Violation of international obligations (incoherence);

(v) Inadequate public participation in the legislative process (procedure);

(vi) Infringements of the Bill of Rights, in particular equality before the law (inequality);

(vii) Structural unconstitutionality through the undermining of the NPA (structure).

99. We turn now to deal with these 7 concepts on the basis that a finding in favour of Applicant on any one or more of them will afford grounds for all the relief claimed by Applicant.

IRRATIONALITY

100. Applicant contends that the two Acts have been passed without regard to the rule of law. This requires that all governmental conduct must not be arbitrary and must be connected to a legitimate governmental purpose, failing which it is unconstitutional in any constitutional democracy, such as ours, which functions under the rule of law.

101. In the case of **New National Party of South Africa v Government of the RSA**, 1999 (3) SA 191 (CC), Yacoob J puts it as follows in paragraph [19]:

> *"It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a Court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose."*

102. The same point is made in **Pharmaceutical Manufacturers Association of South Africa and Another: In Re ex parte President of the Republic of South Africa and Others**, 2000 (2) SA 674 (CC) at paragraphs [85] and [86], with these words:

> *"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be*

arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

103. The point was also made in pithy terms in the case of **Prinsloo v Van der Linde and** Another, 1997 (3) SA 1012 (CC) at paragraph [25]:

> *"… the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner* ***or manifest 'naked preferences' that serve no legitimate governmental purpose****, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification'."* (our emphases)

104. It is apparent on any fair conspectus of the record, including the ANC's spokespersons' statements and Maggie Sotyu's press conference of 30 July 2008, that the impugned legislation has been enacted essentially to give effect to, and under dictation of, the ANC resolution taken at its Polokwane conference to dissolve the DSO as a matter of urgency.

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

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

Ff

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

107. On a fair assessment of the material placed before the Honourable Court, and with due regard for the requirements of the law concerning disputes of fact in motion proceedings, it is plain that the reason for the dissolution of the DSO and the transfer of its investigative staff to SAPS is that the DSO was working

too well at investigating allegations of corruption or criminality against highly placed ANC politicians and their associates.

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

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

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

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

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

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

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

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

115. It is furthermore patently irrational to absorb a well functioning organization like the DSO into a dysfunctional one like SAPS. The supporting affidavit of Myers and the annexed information make it extremely obvious that there are serious functional problems within SAPS. The dilution of the excellence of the DSO into the unknown and untested DPCI, which will be required to function in a dysfunctional SAPS under political control instead of independently, makes no rational sense at all. Protecting political big-wigs does not qualify as a legitimate governmental purpose.

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

UNREASONABLENESS

117. In the context of reviewing decisions of administrative agencies, O'Regan J held in **Bato Star Fishing v Minister of Environmental Affairs**, 2004 (4) SA 490 (CC) at paragraph [48]:

> *"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."*

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

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

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

Glenister, paragraph 109, record page 68

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

(a) The nature of the duty in question;

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

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

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

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

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

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

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

123. The social and economic context is one in which there is patently a need to step up the fight against crime. Dissolving the DSO is precisely the wrong way to go about this task. By passing and implementing the two Acts, the government is behaving in an unreasonable manner in relation to the nation's obligations under international conventions; its duty to respect and protect fundamental human rights; and the upholding of the values and principles which inform the public administration.

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

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

126. The Kamphepe Commission and, at least until the post-Polokwane period, the cabinet, both supported the retention of the DSO notwithstanding certain

problems with it that are mainly attributable to the dysfunctionality of the Ministerial Co-ordinating Committee charged with managing the inevitable friction and turf wars between the SAPS and DSO, and to certain personality clashes which cannot ever form the basis for changing the law.

UNFAIRNESS

127. This aspect of the matter is raised in Applicant's founding affidavit at record pages 89 to 90, paragraphs 139 to 142. In the affidavit of Groeneveldt considerable detail relating to the human resource management aspects of the introduction of the two Acts is canvassed and submitted to analysis on the constitutional principles set out in subsections 195(1)(b) and (h) and on sound human resource management principles.

Groeneveldt, record pages 1028 to 1056

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

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

129. The concept of *"good human-resource practices"* alluded to in the provisions of section 195(1) of the Constitution has been fleshed out considerably in the affidavit of Groeneveldt. The manner in which the process contemplated by the scheme of the two Acts is being put in place reeks of unfairness, poor human-resource practices and the commission of unfair labour practices of the kind anticipated in the report of Fourth Respondent placed before Parliament and referred to by Groeneveldt. The contribution of the Society of State Advocates to the debate, introduced from an historical perspective by Groeneveldt, is also instructive from the point of view of any objective observer seeking to make good human-resource management sense of the two Acts.

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

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

131. The layers of accountability in the NPA are conducive to an independently functioning and highly professional group of investigators with optimum sapiential authority, enabling them to act diligently, skilfully and without delay as contemplated by section 237 of the Constitution. Quite the opposite can be expected from those who find their way into DPCI.

124. In the unreported case of **VUYO MLOKOTI v AMATHOLE DISTRICT MUNICIPALITY AND ANOTHER**, ECD Case No 1428/2008, Pickering J held as follows at pages 10 to 11 of his judgment:

> *"Section 195 of the Constitution is also relevant, providing as it does that public administration at all levels of government be governed by the democratic values and principles that efficient, economic and effective use of resources must be promoted (s 195(1)(b)) and that good human resource management and career development practices, to maximise human potential, must be cultivated (s 195(1)(h))."*

As the matter was a dispute concerning the deployment of an ANC cadre as a municipal manager at the behest of his party, rather than through the appropriate appointment mechanisms of municipal law, it is apparent that the learned judge - with submission correctly – regarded the reference in section 195(1)(b) to *"resources"* as including human resources.

132. In the unreported case of **CROUS V THE BLUE CRANE ROUTE MUNI-CIPALITYAND ANOTHER**, ECD Case No 1399/2008, Plasket J held as follows at paragraphs [57] and [58]:

> *"The higher duty that is imposed on organs of state by the Constitution means that they are not free to litigate as they please.*[9] ***The Constitution has subordinated them – and this includes municipalities -- to what Cameron J, in Van Niekerk v Pretoria City Council,***[10] ***called 'a new regimen of openness and fair dealing with the public'. In short, it is expected of organs of state that they behave honourably. Their decisions and their conduct must be 'informed by the values of our Constitution'.***[11]
>
> *The municipality, in this case, behaved contrary to the constitutional duties imposed on it and contrary to the values of the Constitution. It treated the applicant, whom it admits was a loyal employee of long standing, appallingly. After he had agreed to delay his retrenchment because he understood that the municipality was experiencing financial difficulties, he was treated with a lack of respect and with a level of disdain that reflects very poorly indeed on an organ of state bound by the Constitution. When he began to write letters to his employer to obtain clarity, the letters were simply ignored. Not a word of explanation for this unacceptable conduct, much less an apology, is to be found in the answering papers. When, some ten months later, the municipality deigned to reply, it raised for the first time the assertion that the retrenchment of the applicant was not authorised. That was a spurious defence and must have been known to be one by anyone who was present at the meeting of 8 June 2006. In all of its dealings with the applicant that I have outlined, it acted unethically: anyone with a basic sense of fairness would have realised that whatever the legal niceties of the situation, the applicant was being treated in a grossly unjust manner."*

133. The manner in which the scheme of the two Acts has been introduced to the staff of the DSO affected by it is a case study in mismanagement of human resources. The information obtained from this staff and the analysis of the human resources implications of what has been happening since December 2007, when the ANC resolutions were passed, made by the human resources

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[9] MEC for Roads and Transport and others v Umso Construction (Pty) Ltd CkHC undated judgment (case no. 2034/05) unreported; MEC for Roads and Public Works, Eastern Cape and another v Intertrade (Pty) Ltd 2006 (5) SA 1 (SCA), paras 20-21.
[10] 1997 (3) SA 839 (T), 850B-C.
[11] Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC), para 79

expert, Daan Groeneveldt, both point to a situation in which the right to fair labour practices have not been respected and protected as required by the Bill of Rights.

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

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

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

136. His conclusions are unimpeachable on the basis of the information actually on record and must surely be accepted by the Honourable Court. The absence of

any semblance of good human resource management practice, either in the two Acts or in the manner in which they have been introduced and implemented thus far, renders the two Acts unconstitutional.

137. From a labour relations perspective, the situation in which DSO investigators have been placed in terms of the two Acts is untenable. Those who are forced by their circumstances to submit themselves to being transferred to DPCI (consent is hardly an appropriate description for this procedure) are in effect being demoted for the reasons given by Groeneveldt. The alternative is a severance package to be determined by Government, and of unknown size at the time of the forced "election". Choosing between these options puts investigators in an invidious position which is certainly not consonant with fair labour practices. This amounts to a violation of their rights under section 23 of the Bill of Rights.

138. The Labour Appeal Court recently made a finding on the illegal effect of a forced demotion. In the course of the unanimous judgment of the court, Zondo JP held that -

> *"… the mere fact that the appellant's rank and remuneration were not going to change does not mean that the transfer to Pollsmoor could not or did not constitute a demotion. I agree, too, that the status, prestige and responsibilities of the position are relevant to the determination of whether or not a transfer in a particular case constitutes a demotion."*

This finding is relevant when considering the unhappy lot of the DSO investigators.

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

VIOLATION OF SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS

139. This topic is dealt with by Applicant from page 86, paragraph 134, to page 89, paragraph 138 of the record. The nonsensical answer given by Nchwe on behalf of Second Respondent is that a statutory obligation on individuals (those in authority actually) to report corruption (involving more than R100.000-00 actually) to the SAPS under section 34 of the Prevention and Combating of Corrupt Activities Act relieves the state of its international obligations.

See Nchwe, paragraphs 43 to 46, record page 2027

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

Simelane, paragraph 70, record page 2104

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

142. The defences raised do not stand up to scrutiny. The reliance upon the statute is entirely misplaced and Simelane does not seem to appreciate that the new unit called DPCI will not be able to function independently, as did the DSO. This is because of the radically different reporting lines and structure in the NPA. These permit, indeed demand, functioning without fear, favour or prejudice. None of these concepts feature in the reporting lines and structure of SAPS, nor of DPCI itself. If anything, DPCI is more firmly under political control than ever.

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

144. Nowhere is it suggested either in the two Acts or in the answering affidavits that a mere SAPS unit is independent. Correctly so. The institutional independence of the DSO is what distinguishes it as a unit capable of rising above political control and of doing its work in a manner which accords with the requirements of the international conventions which bind the state. The

reasoning contained in the passage quoted from the IDASA submissions to the National Council of Provinces is persuasive.

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

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

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

146. Sections 198 and 231 of the Constitution make it clear that the dissolution of the DSO and the transfer of its functions to the DPCI unit cannot be countenanced in terms of the international obligations which the state has solemnly undertaken. The duty to maintain an independent corruption fighting unit has clearly been breached by the scheme of the two Acts. There is also a patent infringement of section 41(1)(g) of the Constitution. This is because the scheme of the two Acts shatters the functional and institutional integrity of

the DSO and seeks to allow a Chapter 11 unit to encroach upon the functions constitutionally reserved for the NPA in section 179(2) by transferring the functions of the DSO to DPCI. This renders the two Acts invalid for their inconsistency with the Constitution.

FLAWED PUBLIC PARTICIPATION PROCESS

147. Ours is a participatory democracy. This has been recognized and explained in detail in the **Doctors for Lif**e and **Matatiele Municipality** cases in the Constitutional Court.

> **Doctors for Lif**e **International v Speaker of the National Assembly and Others**, 2006 (6) SA 416 (CC); **Matatiele Municipality and Others v President of the RSA and Others**, 2006 (5) SA 47 (CC)

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

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

149. There was no justifiable factual or legal basis for treating the passage of the bills as urgent. The fact that some powerful people would perhaps prefer that they not be investigated for their roles in the arms deals, Oilgate, Travelgate

or other tender irregularities and corruption is not a basis for undermining the participation of the public in the process of passing the legislation.

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

Glenister paras 82 to 84, record pages 47 to 49

INFRINGEMENT OF THE BILL OF RIGHTS

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

152. Among these rights are the rights to dignity, equality and freedom from violence, whether from public or private sources. The right to property is also guaranteed. All of these rights are placed in jeopardy by the dissolution of the most successful crime fighting unit the country has ever seen. Organised crime, the speciality of the DSO, will thrive in its absence and threaten all of the rights identified in the various notorious ways in which crime impacts

negatively on society. The dissolution of the DSO will also impact negatively on the rights of NPA staff to fair labour practices as foreshadowed in the ANDPP's submissions to the parliamentary joint select committee which considered the two bills from which the two Acts are derived.

153. Pre-eminently the right to equal protection and benefit of the law is undermined by the scheme of the two Acts. This is one of the most important rights protected in our Bill of Rights. Equality, and the right to equal treatment before the law, is at the core of the people's struggle for liberation. Equality ought not to be diluted or lost as a consequence of an elite power struggle in which the net effect is that efficient DSO operatives (in the apt and pithy phrasing of the Polokwane resolution) *"fall under"* the control and management of the less than efficient SAPS.

154. It is trite that the state bears the onus of establishing that the violation of a constitutional right is justified in terms of section 36(1) of the Constitution. The Respondents have not sought to justify the violation of constitutional rights; instead they content themselves with a bare denial of the violation of the rights protected in the Bill of Rights of which Applicant complains in the various capacities in which he brings this application.

146. In **Moise v Greater Germiston Transitional Local Council**, 2001 4 SA 491 (CC) paragraph [19], the Constitutional Court made the point as follows (our emphasis):

> *"It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. Indeed, this is such a case."*

147. In *Minister of Home Affairs v NICRO* 2005 3 SA 280 (CC) para 36, the Constitutional Court held as follows:

> *"Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the court,*

> *or to spell out the reasons for the limitation, may be fatal to the justification claim. There may however be cases where despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge."*

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

149. The Respondents have made no attempt to discharge this onus. Although the founding affidavit averred that human rights violations are anticipated by the Applicant on the basis of a perfectly reasonable apprehension on his part, the response is one best characterized as a bare denial.

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

STRUCTURAL UNCONSTITUTIONALITY AS A RESULT OF THE UNDERMINING OF THE NPA

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

156. The overall scheme of the two Acts including the transfer of investigative staff of the DSO to DPCI and the dissolution of the DSO does violence to the constitutionally sanctioned institutional independence of the NPA itself.

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

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

158. The loss of the ability to carry out the "necessary incidental" functions is a blow to the NPA which, constitutionally speaking, is intolerable. This Honourable Court has to determine whether the two Acts, dealing as they do with the functioning of the NPA, actually ensure its ability to function without fear, favour or prejudice. It is plain that they do not. There is accordingly a breach of s 179(4) of the Constitution and for this reason alone the two Acts do not pass muster.

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

160. By reason of the provisions of sections 179(2) and 179(4) of the Constitution, the structure of the NPA, a constitutionally created body, has to include a unit or personnel capable of carrying out functions which are necessarily incidental

to the institution of prosecutions. The removal of the DSO from the NPA and making it *"fall under"* SAPS in effect cripples the NPA by depriving it of the capacity to exercise the powers of such a unit. The scheme of the two Acts and their specific provisions make it clear that the NPA is to be deprived of the DSO's functions and capacity.

161. The two Acts, taken together, do structural damage to the independence of the NPA in that, in the future, and without a DSO, the NPA will not be able to function without fear, favour or prejudice in that its investigative incidental functioning will be removed, with concomitant reduction of status and the functional capacity to exercise its constitutionally conferred powers. The NPA will be at the mercy of the party-politically controlled SAPS for all investigative work it requires. The spat involving the suspended national commissioner of police, Jackie Selebi, and the DSO does not auger well, and is but a forerunner to the lack of co-operation that the NPA will in future be able to expect from the SAPS.

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

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

SUBMISSION ON THE MERITS

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

INTERIM INTERDICT

164. The requirements for an interim interdict of the kind sought in this matter to cover the interim period between the hearing of this matter and a confirmation hearing (or appeal with leave given) are well-established following on the ***Setlogelo*** case:

(a) A *prima facie* right;

(b) A well-grounded apprehension of irreparable harm to the applicant;

(c) The balance of convenience favours the granting of an interim interdict;

(d) The applicant has no other satisfactory remedy.

SETLOGELO V SETLOGELO, 1914 AD 221 at 227

165. We deal with each of these in turn.

A *prima facie* right

166. The arguments advanced on behalf of the Applicant as regards the merits of the application relate to seven concepts discussed above, all relevant to the striking down of the two Acts as invalid for inconsistency with the Constitution.

167. The entitlement to the interim relief by way of interdict is premised upon the ruling by Traverso AJP in similar though not identical circumstances in the matter concerning the RAF legislation under similar attack by the Law Society.

> **LAW SOCIETY OF SOUTH AFRICA AND ANOTHER v ROAD ACCIDENT FUND AND ANOTHER,** Western Cape High Court Case No 12209/08

Apprehension of irreparable harm

168. This flows naturally from the continuation of the implementation of the restructuring process in the period between the granting of an order in this application and the final determination of a confirmation hearing or appeal hearing.

169. In this regard, as amply evidenced in the founding affidavit, it is a notorious and regrettable fact that crime and corruption are rampant in South Africa. Applicant sues in his own interest; in the interest of a group or class of persons; and in the public interest, as respectively contemplated by subsections (a), (c) and (d) of section 38 of the Constitution.

170. In the event of interim relief not being granted pending the final determination, constitutionally required to take place in the Concourt, more of the manifest harm that Applicant has been seeking to prevent would already have been suffered by the time that the matter is heard, will largely be financially irreversible and will moreover involve the loss of well-trained and highly skilled personnel, even if the egg can eventually be unscrambled.

171. For the reasons dealt with by Applicant in his papers, the fight against serious crime will be irreparably set back for years, and the public weal will suffer untold damage.

172. Moreover, our country will risk a rapid descent from *"regstaat"* to *"magstaat"*, to the ultimate prejudice of the entire population.

Balance of convenience

173. The initial motivation of the resolution taken by the ANC in national conference at Polokwane, that the disbandment of the DSO is dealt with urgently has been overtaken by events in the political realm. Indeed the only basis for urgency was to ensure that criminal investigation of politicians by the DSO would not stand in the way of their ambitions to participate in the general election held on 22 April 2009. This purpose has been achieved.

174. There is no sound reason either in law or in fact why the implementation and enforcement of the attacked statutes cannot be delayed, and the former

status quo maintained, until the Concourt has determined the question of the validity or otherwise of the legislation.

Absence of an alternative remedy

175. As the application concerns the validity of legislation, it is only the courts, and finally the Concourt, that are able to stand in the path of the proposed dissolution scheme, as negotiated and political alternatives have been exhausted. Section 2 of the Constitution applies; there is no other way of dealing with the dispute.

COOPERATION

176. Applicant affirms his willingness to cooperate in all ways possible so as to have the issue of the constitutionality of the challenged legislation finally determined without delay.

RELIEF

177. In all these circumstances it is appropriate that an order be made in the terms set out in the first paragraph of these heads of argument.

R P HOFFMAN SC

P ST C HAZELL SC

26 May 2009.