THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1065/2019

In the matter between:

HELEN SUZMAN FOUNDATION **APPELLANT**

and

ROBERT McBRIDE **FIRST RESPONDENT**
THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE **SECOND RESPONDENT**

MINISTER OF POLICE **THIRD RESPONDENT**

PORTFOLIO COMMITTEE ON POLICE: NATIONAL ASSEMBLY **FOURTH RESPONDENT**

Neutral citation: *Helen Suzman Foundation v Robert McBride and Others* (1065/2019) [2021] ZASCA 36 (7 April 2021)

Coram: NAVSA ADP and DAMBUZA, SCHIPPERS and PLASKET JJA and GOOSEN AJA

Heard: 15 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 April 2021.

Summary: Amicus curiae persisting in appeal despite settlement by parties – amicus impermissibly seeking to expand issue for adjudication – interpretation of s 6 of the Independent Police Investigative Directorate Act 1 of 2011 – renewal of tenure of executive director of Independent Police Investigative Directorate not at instance of incumbent but within remit of Parliamentary Committee on Policing – events overtaking settlement agreement – order sought by amicus not viable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance)

The appeal is dismissed.

JUDGMENT

Navsa ADP and Plasket JA (Dambuza and Schippers JJA and Goosen AJA concurring)

[1] This is a peculiar appeal. It does not involve as primary participants the disputants in the court below. Rather, it is an appeal by an amicus curiae, after the dispute in the court below was settled and an agreement between the litigating parties was made an order of court. The peculiarity is amplified because of an attempt by the amicus, before us, to extend the scope of the initial dispute. The appeal was pursued on the basis that the court below ought not to have acceded to the settlement agreement, as it offended against applicable legislation and the Constitution and that courts are thus precluded from authorising such agreements. The background culminating in the present appeal, which is before us with the leave of this court, is set out hereafter.

Background

[2] The first respondent, Mr Robert McBride, was the executive director of the Independent Police Investigative Directorate (IPID), appointed to that position on 1 March 2014, in terms of s 6 of the Independent Police Investigative Directorate Act 1 of 2011 (the Act). That section provides for the appointment of the executive director of IPID, and for the

renewal of the incumbent's tenure after the expiry of the first five years in office. Section 6(1), (2), and (3) of the Act read as follows:

'(1) The Minister must nominate a suitably qualified person for appointment to the office of Executive Director to head the Directorate in accordance with a procedure to be determined by the Minister.

(2) The relevant Parliamentary Committee must within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.

(3) In the event of an appointment being confirmed—

(a) the successful candidate is appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and

(b) such appointment is for a term of five years, which is renewable for one additional term only.'

[3] Shortly before Mr McBride's five-year term of office ended, he engaged the Minister about its renewal. The correspondence referred to below concerning this issue is important, because it explains how the dispute between him, on the one hand, and the Minister and the Parliamentary Committee on Policing (the PCP), on the other, arose and explains why the settlement agreement took the form that it did.

[4] On 5 September 2018, Mr McBride wrote to the Minister to inform him that his term of office was coming to an end that he wanted to know whether the Minister intended to 'retain or extend [his] contract'. It is not clear what transpired between this date and 13 November 2018, when Mr McBride wrote to the Minister again. He recommended that a process be started to fill his position – whether by 'retention, extension or not' – so that IPID could function properly.

[5] On 16 January 2019, the Minister responded in writing, as follows:

'I hereby inform you that I have decided not to renew or extend your Employment Contract as Executive Director of IPID. You are hereby advised that your last official working day will be on Thursday, the 28th of February 2019.'

[6] Mr McBride sought legal advice before he replied to the Minister on 22 January 2019. He accused the Minister of acting unlawfully and demanded a retraction of the decision. His

letter addressed to the Minister, after recording the Minister's response, commenced by asserting that '[b]y unilaterally determining whether my tenure . . . should be renewed or extended, and terminating my holding of the office, you have acted unlawfully and in violation of the constitutionally-entrenched independence of IPID'. He added that the decision taken by the Minister was 'not yours to take', because it was 'a decision that vests in the relevant Parliamentary Committee as the body ultimately responsible for appointing the Executive Director'. He demanded, on threat of an urgent application for the appropriate relief, that the decision taken by the Minister be withdrawn and that the matter be referred to the PCP for its decision.

[7] On the same day, Mr McBride wrote to the chairperson of the PCP, attaching a copy of his letter to the Minister. He was adamant that it was for the PCP to take the decision as to the renewal of his term of office, and not the Minister. He requested the opportunity to place relevant information before the PCP, concerning his performance as executive director of IPID, before any decision was to be taken.

[8] The Minister then wrote to Mr McBride on 24 January 2019. His position appeared to have altered. He said that he wished to place on record that 'I do not intend to remove you from office' and that his earlier letter had merely been intended to point out to Mr McBride that his term of office was due to expire on 28 February 2019 and that he could not 'claim any right or legitimate expectation to the renewal of your contract'. The Minister concluded by saying that his decision 'not to renew your employment contract will be forwarded to the relevant Parliamentary Committee for consideration' and that he would be advised, in due course, of the outcome.

[9] Mr McBride responded to the Minister on the same day, copying the PCP and the Speaker of the National Assembly (the Speaker) into the correspondence. After noting the Minister's undertaking to refer the matter to the PCP for its consideration, he proceeded to state:

'Until you have withdrawn your binding decision, it is not clear what you expect the PCP to do. You communicated to me a final decision which you again confirm in your letter under reply. You must either withdraw or stand by your decision not to withdraw or renew my term in office.'

He put the Minister on terms to withdraw his decision and to request the PCP to take a decision and repeated his threat to approach the high court for relief if the Minister failed to comply with his demand. He also sought reasons for the decision not to 'extend or renew' his term of office.

[10] The Minister wrote to the chairperson of the PCP on the same day. With reference to Mr McBride's assertion that the PCP, and not the Minister, had the power to renew his term of office, the Minister stated that, in order to 'avoid protracted litigation between myself and Mr McBride, it is requested that [the PCP] either confirm or reject my decision not to renew the term of office of Mr McBride'.

[11] Mr McBride's attorneys wrote to the chairperson of the PCP on 29 January 2019, copying the Speaker of the National Assembly into the correspondence, to inform him that the Minister's refusal to withdraw his decision not to renew or extend his contract left Mr McBride with no choice but to approach the high court for urgent relief and that an order would also be sought to direct the PCP to take a decision on or before 28 February 2019.

[12] On 4 February 2014 the Speaker wrote to Mr McBride in response to his letter to the Minister of 22 January 2019, referred to in para 7 above, and apparently also in response to the copy of the letter she received from his attorneys, referred to in para 11 above. She berated Mr McBride for having written to the chairperson of the PCP and insisted that all correspondence intended for a Committee of Parliament should be addressed to her. The Speaker also wrote to the Minister on 4 February 2019, referring to his request that the PCP 'either confirm or refuse his decision' not to extend or renew Mr McBride's contract. She informed him that he was free to make recommendations concerning either the extension or non-renewal of Mr McBride's term of office for onward transmission to the PCP. The Minister replied to the Speaker on 5 February 2019. The material part of his letter reads as follows:

'In terms of your directive I herewith request that my recommendation not to renew the contract of employment of Mr McBride be considered by the National Assembly.'

[13] The Minister failed to comply with Mr McBride's demand to withdraw his 'decision', which resulted in an urgent application being launched by him against the Minister and the PCP on 29 January 2019, whilst the abovementioned correspondence was being exchanged. The substantive relief that was sought consisted of orders: (a) declaring that the decision of the Minister not to renew Mr McBride's appointment was 'unconstitutional, unlawful and invalid, and that it be set aside; (b) directing the PCP to take a decision before 28 February 2019 on whether to renew Mr McBride's appointment; and (c) '[t]o the extent necessary', to declare s 6(3)*(b)* of the Act to be 'unconstitutional and invalid to the extent it confers the power to renew the appointment of the Executive Director of IPID on the Minister of Police, rather than on the [PCP]'.

[14] In his affidavit in support of the relief sought, Mr McBride emphasised the important constitutional role of IPID, as an independent investigative body, mandated by s 206(6) of the Constitution to investigate police misconduct and offences. He noted that it was important that IPID be perceived and experienced by the public as an independent entity and that this was not possible if critical decisions, such as the appointment of the executive director, were made by the executive arm of government, without oversight. In this regard, Mr McBride relied on the decision of the Constitutional Court in *McBride v Minister of Police and Others (Helen Suzman Foundation as amicus curiae)*[1] in which, with reference to the legislative and constitutional scheme, the importance of IPID's establishment as an independent investigative body was recognised and highlighted. Mr McBride stressed that the executive director should be insulated from undue political interference.

[15] In his founding affidavit Mr McBride accepted unequivocally that he had no right, automatic or otherwise, to be re-appointed. His purpose, in applying to court for relief, so he said, was to ensure that the proper process in relation to his possible re-appointment or the

[1] *McBride v Minister of Police and Others (Helen Suzman Foundation as Amicus Curiae)* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC).

rejection thereof, be followed. He had a right, he said, ‘to have the decision regarding renewal taken lawfully by the body lawfully vested with this power’, and that body, he asserted, was the PCP and not the Minister.

[16] The Minister opposed the application. He did so on the basis that he had not made a final decision in relation to Mr McBride’s re-appointment. He described his decision as ‘preliminary’. The Minister referred to his letter of 24 January 2019 in which he had informed Mr McBride of that decision and that he would be ‘forwarding’ that decision to the PCP for its consideration and a final decision. He also referred to the letter he later received from the Speaker in which she pointed out that the Minister’s role was simply to make recommendations to the National Assembly regarding the renewal or otherwise of Mr McBride's employment as executive director; and that it was up to the PCP to make a decision on whether Mr McBride should be re-appointed. In opposing the application, the Minister took the view that his decision was not reviewable because it was not final and, consequently, that Mr McBride's application was premature.

[17] The PCP also opposed Mr McBride's application. Its chairperson referred to a letter written by the Speaker to the Minister in which she pointed out that the decision on Mr McBride’s re-appointment was within the PCP’s remit and not the Minister’s. As was evident from the letter, she had informed the Minister that he was welcome to make ‘any recommendations’ he wished for consideration by the PCP. The PCP was willing to abide the court’s decision, to the extent that the Minister’s decision was a reviewable decision, which it denied.

[18] The PCP opposed Mr McBride’s demand that it had to take a decision by 28 February 2019. It contended that there was no basis in law for the court to compel it to make a decision within a particular time frame. It pointed out that IPID could continue functioning and fulfilling its statutory obligations in the event that the position of executive director was not filled before Mr McBride’s first term of office was completed. The PCP took the view that an order in the terms sought would offend against the doctrine of the separation of powers.

[19] Enter the amici. Early in February 2020, before the matter was heard in the court below, the appellant, the Helen Suzman Foundation (the HSF), a non-governmental organization, whose objectives are to defend the values of our democracy and promote respect for human rights, applied to the court below to be admitted as an amicus. So too did Corruption Watch, also a non-governmental organisation. (It played no part in this appeal.) At the commencement of the hearing of the matter in the court below, Hughes J first heard and decided the applications of the HSF and Corruption Watch to be admitted as amici. She granted both applications.

[20] The terms on which the HSF sought and was granted leave to participate as an amicus are important. In its application the HSF said that the case turned on an interpretation of s 6(3)*(b)* of the Act and that the HSF would, if admitted as an amicus, show that neither of the interpretations contended for by Mr McBride, on the one hand, and the Minister, on the other, were 'correct or constitutionally compliant'. It propounded a third interpretation which, it said, was one which 'best vindicates the constitutional imperatives'. That interpretation was that the 'appointment of the Executive Director of IPID is renewable at his instance and not at the instance of either of the respondents'. It stated that it 'fully supports' the relief claimed by Mr McBride in para 2 of the notice of motion, namely the setting aside of the Minister's purported decision. It will be recalled that Mr McBride insisted that it was for the PCP to take the decision and not the Minister.

[21] For completeness and for the purpose of placing the history of the matter in proper perspective and to better assess whether the HSF is justified in the position adopted in this appeal it is necessary to quote from the material parts of Corruption Watch's affidavit in support of its application to be admitted as an amicus:

'6 CW seeks leave to intervene as an *amicus curiae* in support of the relief sought by the applicant in which he asks that the second respondent, the Parliamentary Committee of Police ("the PCP") makes a determination on the renewal of his term of office before his contract expires on 28 February 2019. It contends that the PCP is in a position to determine whether the applicant's contract should be renewed and further, that it is constitutionally obliged to do so.

7 CW submits that the obligation arises squarely from the nature of the oversight function imposed on the National Assembly, which it exercises through the PCP in terms of sections 42(3) and 55(2)(b)(i)-ii) of the Constitution. Section 42(3) of the Constitution obliges Parliament to among others "scrutinise and oversee executive action", whilst 55(2)(b)(i) and (ii) enjoins Parliament to maintain oversight over the exercise of national executive authority, including the implementation of legislation and any organ of state. The manner in which Parliament through the PCP carries out its oversight function is set out in the 9th Edition of the Rules of the National Assembly.'

[22] After the admission of the amici, Mr McBride, the Minister and the PCP informed the court that they had agreed to a settlement which resolved their dispute. They sought leave to have their agreement made an order of court. Essentially, the parties had agreed that the PCP was the entity, in terms of s 6(3) of the Act, to take the decision on whether to re-appoint Mr McBride and the PCP had undertaken to do this by 28 February 2019.

[23] The HSF objected to the agreement being made an order of court, contending that the interpretation of s 6(3) of the Act by Mr McBride, now agreed to by the Minister and the PCP, was incorrect. They contended that the interpretation was contrary to constitutional prescripts and thus bad in law. The essence of the HSF's objection was that the interpretation placed the power to renew the appointment of the executive director of IPID in the hands of politicians, in the guise of the PCP. This, according to the HSF, is constitutionally untenable as it compromises the independence of that office.

[24] It was submitted in the court below, on behalf of the HSF, consistently with its application for admission as an amicus, that a constitutionally viable interpretation is that the re-appointment should be at the instance of the incumbent. Put differently, what was argued by the HSF was that the re-appointment should not be subject to the whims of any political actor or actors and that the incumbent had a free and unfettered option to renew his or her contract of employment.

[25] Hughes J, in considering the HSF's objections to the settlement agreement, had regard to *Eke v Parsons*,[2] in which the Constitutional Court held that a court could only properly make a settlement agreement an order of court if it related to the dispute between the parties, was capable of enforcement and was in harmony with the Constitution, the law and public policy.[3] We pause to note that, unlike in this case, the appeal in that case was at the instance of one of the parties who later considered that the terms of the settlement agreement were egregious.

[26] The court below also took into consideration that a person applies in terms of rule 16A(6)*(b)* of the Uniform rules to be admitted as an amicus and that the HSF had indicated in its affidavit in support of its application to be admitted as an amicus, that it would advance its interpretation of s 6(3) of the Act, in contrast to the interpretation advanced by the parties. However, Hughes J took the view that in objecting to the settlement agreement, HSF was venturing into new territory, not canvassed in the papers. She accepted the submission on behalf of the Minister and the PCP that the propriety of the settlement agreement was not in issue when the HSF was admitted as an amicus and in the event of the HSF persisting in its objection the parties should be afforded an opportunity to respond to it. The court below went on to conclude as follows:

'As things stand before me I am satisfied that the terms of the agreement are legitimate, practically achievable, not against public policy and do not infringe either the law or Constitution. In the result the terms of the agreement between the parties before me, is made an order of court.'

[27] In terms of the agreement between the parties the court below made the following order:

'[1] It is declared that the decision taken by the First Respondent not to renew the appointment of the First Applicant as the Executive Director of the Independent Police Investigative Directorate (IPID) is a preliminary decision that must still be confirmed or rejected by the Second Respondent.

[2] It is recorded that the Second Respondent intends to take a decision regarding the renewal of the First Applicant's appointment on or by 28 February 2019.

[3] The matter is postponed to the urgent role on 26th February and for that purpose:

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[2] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).

[3] Paras 25-26.

3.1 The Second Respondent will report on affidavit by 22 February 2019 on its progress on taking a decision regarding the renewal of the First Applicant's appointment; and

3.2 All parties will be entitled to make submissions to this Court on whether any further just and equitable orders should be granted, including but not limited to whether the Second Respondent should be given a further period to make a decision on the renewal of the First Applicant's appointment and whether the First Respondent's term of office ought to be extended pending the Second Respondent's decision.

[4] There is no order as to costs.'

[28] The court below refused the HSF leave to appeal against that order. As stated earlier, the appeal serves before us with the leave of this court. It is opposed by the Minister and the PCP. Mr McBride has taken no part in the appeal. In its notice of appeal, the HSF seeks an order in the following terms:

'1 The appeal is upheld.

2 The order of the High Court dated 12 February 2019 is set aside and replaced with the following:

2.1 declaring unlawful and setting aside the preliminary decision taken or recommendation made by the Minister of Police not to renew the appointment of Robert McBride as the Executive Director of the Independent Police Investigative Directorate ("IPID");

2.2 declaring that Mr McBride's tenure as the Executive Director of IPID is renewed for a five year period from 1 March 2019 to 28 February 2024.

3 The costs of the appeal (including the costs of two counsel) shall be paid by the third and fourth respondents, jointly and severally, the one paying the other to be absolved.'

The first hearing of the appeal

[29] When we first heard this appeal on 6 November 2020, we were concerned that we lacked important information, potentially relevant in respect of parties not before us, such as Mr McBride. We were informed, for instance, that while Mr McBride took no part in the appeal, he had launched an application to review the decision taken by the PCP, pursuant to the order of Hughes J, not to extend his tenure. We had no information concerning the state of play of that application. It appeared too that Mr McBride may have been appointed to another post and, if that was so, that may have had a bearing on whether the appeal

raised a live issue. We did not know whether the post of executive director at IPID had been filled.

[30] In order to be apprised of facts relevant to the matter, we postponed the appeal and requested the parties before us to facilitate the obtaining of information as to the current position of Mr McBride. As a result, Mr McBride filed an affidavit.

[31] In his affidavit, Mr McBride confirmed that he had been appointed as the head of the Foreign Branch of the State Security Agency, and that he currently holds that position. His appointment commenced on 1 July 2020 and terminates on 30 June 2023.

[32] In respect of the application to review the PCP's decision, he reported that '[d]ue to the challenging personal circumstances I faced, I was unable to instruct my legal representatives to take any further steps in this review'. A new executive director of IPID has now been appointed.

[33] While Mr McBride stated that his 'removal' as the executive director of IPID had certain adverse financial implications for him, he abided the decision in this appeal. He made the point that Hughes J's order was made with his 'blessing and agreement'. He stated:

'At this stage, I seek to assure the Court that I will abide by the decision reached by it and will extend myself in whatever manner appropriate to ensure the effectiveness of its order. That said, at this stage I am not able to offer a definitive answer to whether I would be prepared to return as Executive Head of IPID. My current position as the Foreign Branch Head of the State Security Agency is one which requires certainty for its continuity and it would be inimical to my duty to this role, to adopt any definitive position for hypothetical propositions, especially if those propositions would require me to jeopardise my employment and livelihood. This would not be fair on me or my current employer.'

[34] It is evident that the outcome of the appeal could have a bearing on two parties not before us – Mr McBride who, we believe it is fair to assume, will not be in a position to resume his duties as executive director of IPID if the appeal was to succeed, and who abides

our decision; and his successor as executive director of IPID, who was never cited as a party.

The issues

[35] During the course of the hearing, the number of issues requiring decision grew from one to three. We shall deal with the first two together and then turn our attention to the issue we consider to be central to this appeal.

The absence of guidelines and the Minister's 'decision'

[36] During the course of the hearing, counsel for the HSF raised for the first time that the PCP's decision-making process was irregular because of the absence of guidelines as to how its discretion was to be exercised. Although he assured us that he had raised this point in the court below, it was not raised in the HSF's affidavit in support of its application for admission as an amicus, or in any other papers. It does not warrant a mention in the three sets of heads of argument filed by the HSF.

[37] This is a factual issue that had to have been raised on the papers. If it had been, the PCP and the Minister could have answered the challenge. Without the opposing parties having had an opportunity to explain themselves and be heard on this issue, it is not properly before us. In any event, it seems to us that it is misplaced in this appeal, where the regularity of the PCP's decision not to renew Mr McBride's tenure was not in issue and is the subject of Mr McBride's review application that is in abeyance and not expressly abandoned. We pause to note that we were informed from the bar that the HSF had that application served on it but chose not to participate in that litigation. That would have been the proper forum for it to raise and fully explore the issues it now seeks to have ventilated in this appeal on an uninformed basis.

[38] The HSF also challenges para 1 of the order of Hughes J, which declared that the Minister's 'decision' not to renew Mr McBride's appointment was 'a preliminary decision that must still be confirmed or rejected' by the PCP. The HSF argued that Hughes J should not have made this order because its effect is to undermine the guaranteed independence of

IPID by giving the Minister a role in the renewal process that amounts to a jurisdictional precondition for the exercise of the PCP's power.

[39] A reading of para 1 of the order in the context of the correspondence that we have referred to between the principal protagonists leads us to a different interpretation. It is clear from the correspondence that after Mr McBride had put it to the Minister that the decision on renewal was not his to take, the Minister accepted the correctness of this assertion. Instead, he claimed that he could make a recommendation to the PCP, which the Speaker, the PCP and, eventually, Mr McBride accepted. The settlement, and the order embodying it, was intended to capture this consensus, and none of the parties to the dispute suggested that the Minister's view on renewal was a jurisdictional precondition for the PCP's exercise of power. From the correspondence between the Speaker and interested parties the opposite is clear, namely, that it was for the PCP to make a decision acting independently but taking into account Mr McBride's representations and the Minister's views as well as the views of any other interested parties.

[40] The parties, perhaps unfortunately and certainly not entirely accurately, referred in the settlement to the Minster's 'decision' being a 'preliminary decision'. What they meant, and this is clear from the context, is a 'recommendation'. That recommendation does not bind the PCP and, if the PCP blindly followed it without applying its collective mind as it is required to, it would commit a reviewable irregularity: it would have been guilty of having acted under dictation.[4] And if the Minister refuses to give his view or delays unduly in doing so, that cannot prevent the PCP from taking a decision. Given the Minister's role as political head of the South African Police Service, his view on whether the executive director's term should be renewed or not, and his reasons for holding that view, would be relevant considerations for the PCP to take into account, along with all other relevant considerations. It will accord the Minister's view the weight that is its due. Mr Ngcukaitobi, who appeared for

[4] That is a ground of review in terms of s 6(2)*(e)*(iv) of the Promotion of Administrative Justice Act 3 of 2000, if the decision to renew is an administrative action. See *Mlokoti v Amathole District Municipality and Another* 2009 (6) SA 354 (E) at 379J-380F; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) para 81. It is also a common law ground of review if the decision is reviewable in terms of the rule of law's principle of legality. See *Chotobhai v Union Government (Minister of Justice) and Another* 1911 AD 13 at 26; *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117F-G and 125D-E.

both the Minister and the PCP, accepted that the Minister's recommendation was not a jurisdictional precondition for a valid decision to be taken by the PCP.

[41] Subject to what is said below concerning the proper interpretation of s 6(3), we conclude that para 1 of the order is unobjectionable and the HSF's challenge to it must fail. Put differently, subject to what appears hereafter, the parties were agreed and, on the face of it, the applicable legislation accords with their consensus, that the PCP was the proper decision-maker. The question ultimately, from the perspective of the primary disputants, would be whether that entity made a valid decision. On what we have before us there is no way of adjudicating that issue, which accounts for the review application by Mr McBride, the details of which are unknown to us.

The interpretation of s 6(3) of the Act

[42] This appeal raises one central issue. It is whether s 6(3) of the Act can be construed in the way that the HSF contends. It is the third of three interpretations that have been put forward so far. First, the Minister claimed that s 6(3) gave him the power to renew the executive director of IPID's term after the initial term had ended. He backed down from this position soon enough and accepted, as did Mr McBride and the PCP, a second interpretation of s 6(3). It was that the power to extend the incumbent's tenure for a second term was vested in the PCP. Now, the HSF contends that the incumbent has an unfettered option to continue in office for second term.

[43] In the first *McBride* case,[5] concerning the suspension and disciplining of Mr McBride by the Minister, the judgment of the Constitutional Court focused on the independence of IPID as an institution. That independence stemmed from s 206(6) of the Constitution, which envisages the creation of 'an independent police complaints body established by national legislation' that is empowered to 'investigate any alleged misconduct of, or offence

[5] Note 1.

committed by, a member of the police service . . .'. The IPID Act is the legislation referred to in the Constitution. Section 4 of the Act provides:

'(1) The Directorate functions independently from the South African Police Service.

(2) Each organ of state must assist the Directorate to maintain its impartiality and to perform its functions effectively.'

[44] The Constitutional Court affirmed that the Constitution and the Act required IPID to be an independent body, and that this requirement meant that it enjoyed, in the words of Ngcobo CJ in *Glenister v President of the Republic of South Africa and Others*,[6] 'an adequate level of structural and operational autonomy',[7] or 'sufficient structural and operational autonomy so as to shield it from undue political influence'.[8] The court proceeded to hold:[9]

'On the other hand, s 6 of the IPID Act gives the Minister enormous political powers and control over the executive director of IPID. It gives the Minister the power to remove the executive director of IPID from his office *without parliamentary oversight.* This is antithetical to the entrenched independence of IPID envisaged by the Constitution, as it is tantamount to impermissible political management of IPID by the Minister. To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister's political orientation. This might lead to IPID becoming politicised and being manipulated. Is this compatible with IPID's independence as demanded by the Constitution and the IPID Act? Certainly not.'

[45] The court was concerned with the process of removing the executive director from office. From the passage cited above it is clear that what was objectionable was the power of the Minister in this process, who was able to remove the executive director 'without parliamentary oversight'. That is significant because, on the interpretation of s 6(3) that Mr McBride, the Minister and the PCP agree on, the Minister's role is limited to making a recommendation and the PCP, a select committee of Parliament, makes the decision

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[6] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) paras 125 and 121.
[7] Para 125.
[8] Para 121.
[9] Note 1 para 38. Emphasis added.

whether to renew the executive director's tenure. The HSF maintains that this is objectionable because, in order to safeguard IPID's independence and thus make it constitutionally compatible, the renewal process must be removed from the remit of any political actor, including the legislature.

[46] In our view, this argument is overstated. It postulates a higher degree of independence than that required by the Constitutional Court in *Glenister*, namely adequate or sufficient independence to enable IPID to fulfil its mandate effectively. Secondly, the principal threat to IPID's independence lies in the executive having exclusive powers over it without oversight on the part of the legislature. As we shall demonstrate, a role played by the legislature in relation to independent bodies is not inimical to the independence of those bodies.

[47] *Glenister*[10] concerned the independence of the Directorate of Priority Crime Investigation (the Hawks), an anti-corruption unit that had replaced the Directorate of Special Operations (the Scorpions). While the Scorpions had been located within the National Prosecuting Authority, an independent institution, the Hawks were located within the South African Police Service (SAPS), an institution whose independence was not legislatively secured. The case turned on whether, in these circumstances, the Hawks were sufficiently independent, as required by the Constitution and certain international instruments.

[48] In the course of arriving at the conclusion that the Hawks were not sufficiently independent, Moseneke DCJ and Cameron J, for the majority, compared the position of the Hawks to that of the Scorpions. They highlighted that members of the Hawks, including its head, enjoyed no employment security, which 'adequate independence' required.[11] The head of the Scorpions, on the other hand, being a deputy National Director of Public Prosecutions (deputy NDPP), enjoyed special security of tenure that enhanced the independence of the institution.

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[10] Note 6.
[11] Para 222.

[49] He or she could only be removed from office, by the President, on grounds of misconduct, continued ill-health or incapacity, or if he or she was no longer a fit and proper person. But, the court held, 'Parliament holds a veto power over the removal of a deputy NDPP'. The President's reasons for removing a deputy NDPP, as well as that person's representations 'must be communicated to Parliament, which may resolve to restore the deputy NDPP to office'.[12] The significance of these safeguards was spelt out as follows:[13]

'These protections applied also to investigating directors within the DSO. The special protection afforded the members of the DSO served to reduce the possibility that an individual member could be threatened — or could feel threatened — with removal for failing to yield to pressure in a politically unpopular investigation or prosecution.'

[50] *Helen Suzman Foundation v President of the Republic of South Africa and Others*[14] concerned the constitutionality of the legislation passed by Parliament to rectify the defects identified by the Constitutional Court in *Glenister*.[15] When Mogoeng CJ considered the provisions concerning the suspension and removal of the head of the Hawks, he noted that in terms of s 17DA(1) and (2), the Minister was granted the power to suspend him or her, appoint a judge or retired judge to enquire into the person's fitness to continue to hold office, and then to decide on whether or not to remove the person from office. The section required that Parliament be informed of the process, but it had no power to do anything.

[51] This state of affairs, Mogoeng CJ held, was 'inimical to job security' and it enabled the Minister 'to exercise almost untrammelled power to axe the National Head of the anti-corruption entity'.[16] He contrasted this with the removal process contemplated by s 17DA(3) to (6), a removal process initiated by a committee of the National Assembly. Although, in that process, the Minister still had the power to suspend the head of the Hawks, his or her

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[12] Para 225.
[13] Para 226.
[14] *Helen Suzman Foundation v President of the Republic of South Africa and Others* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC).
[15] In *Glenister*, the court had suspended its declaration of invalidity for 18 months so that Parliament could rectify chapter 6A of the South African Police Service Act 68 of 1995.
[16] Para 89.

removal was triggered by a recommendation to this effect being approved by a two thirds majority of the members of the National Assembly.[17] Mogoeng CJ concluded:[18]

'This suspension by the minister and removal through a Parliamentary process guarantee job security and accord with the notion of sufficient independence for the anticorruption entity the state creates. That portion of s 17DA(1) that refers to ss (2) and ss (2) itself are, however, inconsistent with the constitutional obligation to establish an adequately independent corruption-busting agency. They must thus be set aside. The balance of s 17DA passes constitutional muster and would thus continue to guide the suspension and removal process of the national head.'

[52] In *Justice Alliance of South Africa v President of the Republic of South Africa and Others*[19] the validity of the extension of the tenure of the Chief Justice by the President was in issue. Section 176(1) of the Constitution provides that a Constitutional Court judge holds office 'for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge'. Section 8*(a)* of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 vested a power in the President to extend the tenure of the Chief Justice beyond the time of his or her retirement. The President had acted in terms of this section to extend the tenure of Ngcobo CJ.

[53] The Constitutional Court found that s 8*(a)* of this Act was in conflict with s 176(1) of the Constitution because that section did not authorise Parliament to delegate the power to extend to the President. Instead, it required Parliament itself 'must take the legally significant step of extending the term of active service of a judge of this Court'.[20] It concluded:[21]

'It is so that s 176(1) of the Constitution creates an exception to the requirement that a term of a Constitutional Court judge is fixed. That authority, however, vests in Parliament and nowhere else. It is notable that s 176(1) does not merely bestow a legislative power, but by doing so also marks out Parliament's significant role in the separation of powers and protection of judicial independence.

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[17] Para 90.
[18] Para 91.
[19] *Justice Alliance of South Africa v President of the Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).
[20] Para 57.
[21] Para 67.

The nature of this power cannot be overlooked, and the Constitution's delegation to Parliament must be restrictively construed to realise that protection.'

[54] The cases we have discussed flatly refute the central premise of the HSF's argument – that not only the involvement of the executive but also that of the legislature interferes with the independence of an organisation such as IPID. Indeed, these cases identify the involvement and oversight of the legislature as an important element of the protection of the functional and structural independence of independent statutory bodies. The legislature, in other words, is a bulwark against the erosion of their independence.

[55] This conclusion means that the foundation of the HSF's interpretation of s 6(3) is untenable, namely that because the PCP having the power to renew undermines IPID's independence, it is necessary to interpret s 6(3) in a different way that is purportedly constitutionally compatible. Despite that, we shall deal briefly with the competing interpretations of the section.

[56] Section 6 deals with the method of appointing the executive director of IPID, the incumbent's term of office and its renewal, the temporary appointment of an acting executive director when the executive director is temporarily unable to fulfil his or her duties, the obligation to fill a vacancy expeditiously and the removal from office of the executive director.

[57] In the section as a whole, covering all of these aspects, only two role-players are mentioned. They are the Minister and the PCP. Both play a part in the appointment process in the sense that while the Minister nominates a candidate, the PCP either confirms or rejects the nomination. If the nomination is confirmed, the successful candidate is appointed. Section 6(3) is silent as to who has the power to renew the tenure of the executive director for a further term of five years. It is also silent as to the process that is to be followed.

[58] From these features, it appears to us that in relation to the renewal of the executive-director's term of office, the only bodies that were contemplated in the process were one or both of the Minister and the PCP. We are of the view that the PCP has the power to renew,

in the same way as it had the power to appoint. We are strengthened in our view by the analogous situation in *Masetlha v President of the Republic of South Africa and Another*[22] in which it was held that the power vested in the President to appoint a person to a position included and incidental power to remove that person from the position. The court held that this was, in 'the absence of constitutional or statutory provisions to the contrary', a 'sound principle of constitutional and statutory construction'.[23] We have already found that the Minister's role is a limited one: he or she may communicate his or her views to the PCP, as they would usually be relevant to its deliberations, and no empowerment is necessary for him or her to do so.

[59] By contrast, the HSF's interpretation, that the executive director has an option to renew finds no support in the text of the section. Indeed, when the scheme of s 6 is viewed holistically, it jars. There is, as we have pointed out, no need for this type of interpretation in order to save s 6(3) from constitutional invalidity because the PCP's powers are not in conflict with IPID's independence. But even if that was the case, the HSF's interpretation would nonetheless be untenable. There are limits to reading a statute down in order to save it from invalidity: it is, the Constitutional Court said in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[24] 'limited to what the text is reasonably capable of meaning'. The HSF's interpretation of the section fails this test. Furthermore, the proffered interpretation is not only illogical but could have disastrous results. Why, one could rightly enquire, if it lies in the hands of an incumbent to decide whether to remain in the position, is provision made for possible renewal or extension? The answer to the question of why there is a renewal process is for the PCP to assess whether it is in the interests of the country to have the incumbent continue in the post, or to decide whether he or she is indeed the best person for the position at that moment in time, taking

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[22] *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).
[23] Para 168.
[24] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) 1 (CC); 2000 (1) BCLR 39 (CC) para 24. See too *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) paras 23-24.

into account a track-record and the views of all interested parties. The suggested interpretation by the HSF might have the result that someone who had failed miserably at performing the tasks of an executive director is the determinative voice in deciding his or her continued tenure. That would be an absurd result.

[60] One final point bears mention. It is clear from the above that the order made by Hughes J was in accordance with a proper interpretation of s 6(3) of the Act and that, as a result, the HSF's appeal must fail. Even if it had succeeded, however, it would not have been entitled to the relief it sought in para 2.2 of the draft order attached to its notice of appeal, namely an order 'declaring that Mr McBride's tenure as the Executive Director of IPID is renewed for a five-year period, from 1 March 2019 to 28 February 2024'. First, Mr McBride never purported to exercise an option to renew in terms of this purported power, as suggested by the HSF. Second, and no less importantly, there is presently someone else in that position. Mr McBride has taken up a new position which he is not willing to relinquish and the current executive director has not been joined as a party and has thus not been heard. The suggestion by the HSF makes an incumbent a judge in his or her own cause, which is as undemocratic as it can get.

Amici

[61] In *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others*[25] the Constitutional Court recognised the importance of the role played by amici. It said the following:[26]

'Thus the role of an *amicus* envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, rule 16A(2) describes an *amicus* as an "interested party in a *constitutional issue* raised in proceedings". Therefore, although friends of the court played a variety of roles at common law, the new Rule was specifically intended to facilitate the role of *amici* in promoting and protecting the public interest. In these cases *amici* play an important role first, by ensuring that courts consider a wide range of

[25] *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC).
[26] Para 26. Citations omitted.

options and are well informed: and second, by increasing access to the courts by creating space for interested non- parties to provide input on important public interest matters, particularly those relating to constitutional issues.'

[62] In *Children's Institute* the court held that it was permissible for an amicus to submit evidence for consideration by a court, where appropriate, in addition to making submissions to assist a court. [27] This will be permitted if it is in the interests of justice to do so.

[63] Our law reports abound with cases where courts have obtained assistance from amici. However, in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[28] the Constitutional Court was unsympathetic to the Democratic Alliance (the DA), a political party, in its attempt be admitted as an amicus. The court considered it inappropriate to permit the DA to advance a sectarian interest under the guise of being an amicus. In that case the court also held that the written submission that the DA had filed did not contain any new insight. It supported 'in great part' the attitude already displayed by one of the parties.[29]

[64] In *Komape and Others v Minister of Basic Education*[30] this court considered an application by a firm of attorneys to be admitted as an amicus, in terms of rule 16 of the rules of this court, on the basis that it wanted to be of assistance in developing the common law. In deciding against admitting the firm as an amicus, the court held that the firm was advancing a cause of its own, in that it had litigated in another matter on behalf of a client on a contingency basis and was claiming delictual damages in that matter, as was the appellant in the appeal before this court. It was therefore more a litigant than an amicus. This court concluded that, in its quest to be admitted as an amicus, the firm of attorneys was seeking unfairly to steal a march on the opposing litigant in the other case. The firm's financial interests in the outcome of the appeal could also not be discounted. A further factor,

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[27] Paras 29-39.
[28] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC).
[29] Paras 15 and 16.
[30] *Komape and Others v Minister of Basic Education* [2019] ZASCA 192; 2020 (2) SA 347 (SCA).

this court said, that militated against the firm's admission as an amicus was that it was not supporting the appellants in that case but was advancing a different cause of action that had not been pleaded and in respect of which no evidence had been led, and the issue which it sought to have addressed had not been explored in the court below.

[65] What can be distilled from what is set out above is that our courts consider it important to admit amici that will play their rightful role but also ensure that the participation of amici is kept within appropriate bounds.

[66] In the present case the HSF, in its presentation to the court below of the basis on which it sought to be admitted, as set out in para 20 above, took the view that the legislation in question was not specific about who the responsible authority was for taking the decision to re-appoint and that its proposal that it be left to the incumbent to decide was the only constitutionally viable interpretation. It did not have regard to the fundamental difficulties with that perspective as outlined above. There was no challenge to the constitutionality of the legislation, in the event it was only capable of being read to mean that the power to re-appoint lay with the PCP. The decisions of the Constitutional Court referred to earlier about parliamentary oversight might have proved to be an insurmountable stumbling block.

[67] The attempted broadening of the scope of the challenge before us as to the lack of guidelines in the processes of the PCP, which was not foreshadowed at all, either in the application for admission as an amicus and certainly not by any of the parties, is impermissible. There was no evidence on which such an adjudication could take place and there was no attempt by the HSF, in the court below, to adduce such evidence which would then, in turn, have given the opposing parties a right to challenge by way of evidence and submissions of their own. What an amicus should not be permitted to do is to make out an entirely new case on appeal without the necessary evidence and without regard to due process. As pointed out above, events have overtaken the agreement reached by the parties. The order sought by the amicus would have Mr McBride re-instated in a post he does not intend to return to. At least notionally, it would displace the present executive-director of IPID and at the very least would render his appointment questionable, without

him or her being heard. It is at this point that an amicus ceases to be an amicus and becomes a litigant. It is thus not unsurprising that Corruption Watch exited the scene after the settlement agreement between the primary disputants.

The order

[68] It will be clear from our reasoning that the appeal must fail. No costs order was made by the court below when it made the settlement an order. In dismissing the HSF's application for leave to appeal, however, the court below ordered it to pay costs. When granting leave to appeal, this court set aside that costs order. In its place it ordered that 'the costs of the application for leave to appeal in this court and the court a quo are costs in the appeal'. On the basis of the *Biowatch* principle,[31] no order of costs will be made in this appeal.

[69] The appeal is dismissed.

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M S NAVSA

ACTING DEPUTY PRESIDENT

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C PLASKET

JUDGE OF APPEAL

[31] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Appearances:

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For 3rd respondent:	T Ngcukaitobi SC, with him J Mitchell
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For 4th respondent:	T Ngcukaitobi SC, with him K Premhid
Instructed by:	State Attorney, Pretoria
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