IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.

In the matter between –

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

FOUNDING AFFIDAVIT

I, the undersigned

HUGH GLENISTER

do hereby make oath and state that:

1. I am an adult businessman currently residing at 18 Kitui Street, Sunninghill, and I am the Applicant herein.

2. The facts herein contained are, save as where the contrary appears from the context, within my personal knowledge, and to the best of my belief, both true and correct, and I can and do swear positively thereto.

3. Where I make legal submissions, I rely on advice that I have received from my legal representatives.

4. Where appropriate, I shall refer to the confirmatory affidavits of persons who can positively swear to the facts I have described that do not fall within my personal knowledge which have been filed of record in the Court a quo.

5. Some journalists furnished affidavits of a confirmatory nature in the Court a quo, while others refused on the grounds of professional privilege.

THE PARTIES

6. As aforesaid, I am the Applicant herein.

7. The First Respondent is The President of The Republic of South Africa. The First Respondent's office is located at the Union Buildings, Government Avenue, Pretoria. The First Respondent is cited herein in his capacity as "Head of the Cabinet" (within the meaning of Section 91(1) of the

Constitution), and by virtue of the fact that the executive authority of the Republic is vested in him in terms of Section 85(1) of the Constitution. Section 85(2)(d) of the Constitution provides that the First Respondent exercises executive authority, together with other members of the cabinet, by inter alia, "preparing and initiating legislation", and ultimately assenting thereto in terms of Section 84(2)(a).

8. The Second Respondent is The Minister of Safety and Security, acting in his official capacity. The Second Respondent's office is located at the Department of Safety and Security, 7th Floor, 231 Pretorius Street, Pretoria. The Second Respondent is cited herein by virtue of the fact that he administers some of the legislative amendments that have resulted in the disestablishment of the Directorate of Special Operations (hereinafter referred to as "the DSO").

9. The Third Respondent is The Minister of Justice and Constitutional Development, acting in his official capacity. The Third Respondent's office is located at The Department of Justice and Constitutional Development at Momentum Building, 329 Pretorius Street, Cnr Prinsloo Street, Pretoria, The Third Respondent is cited by virtue of the fact that he is the Cabinet Minister responsible for the administration of The National Prosecuting Authority Act No.32 of 1998 hereinafter referred to as "the NPA Act"), Moreover, it is apparent that the Third Respondent is responsible for administering some of

the legislative amendments that have resulted in the disestablishment of the DSO.

10. The Fourth Respondent is The National Director of Public Prosecutions, acting in his official capacity (the citation of the Fourth Respondent has been amended since the launching of my application in the Western Cape High Court in as much as at the time of the launching of such application, no permanent appointment had been made, although an acting appointment had been made. Subsequent to the launching of my application First Respondent formally appointed a new National Director of Public Prosecutions.). The Fourth Respondent's office is located at The National Prosecuting Authority, VTM Building, 123 Westlake Avenue, Cnr Hartley Avenue, Weavind Park, Silverton, Pretoria. The Fourth Respondent is the head of the prosecuting authority in terms of section 179(1)(a) of the Constitution. The Fourth Respondent is cited herein by virtue of the fact that the DSO was established in his office by virtue of Section 7(1) (a) of the NPA Act. No relief is sought against the Fourth Respondent, save for a Costs Order in the event that the Fourth Respondent were to oppose the relief sought herein.

11. The Fifth Respondent is The Government of the Republic of South Africa, care of The State Attorney, 10th Floor, North State Building, 95 Market Street, Johannesburg.

12. I respectfully point out that the Head of the DSO is no longer cited as a party to these proceedings in that the coming into effect of the National Prosecuting Authority Amendment Act 56 of 2008 and The South African Police Service Act 57 of 2008 has resulted in there no longer being a Head of the DSO as the DSO itself was disestablished in terms of the aforegoing legislation.

RELIEF SOUGHT

13. Since its establishment approximately 10 years ago, the DSO has proved to be the most successful crime fighting institution in the Republic of South Africa. Notwithstanding the success of the DSO, the Cabinet announced in February 2008, that it intended to initiate legislation that would have the effect of disestablishing the DSO. This represented an abrupt about turn in respect of previous Government policy. The only plausible and reasonable explanation for this about turn is that the African National Congress (hereinafter referred to as "the ANC") resolved at its national conference in December 2007 that the DSO should be "… dissolved as a matter of urgency …" in order to protect various ANC members from current and future investigations by the DSO. I respectfully submit that the Cabinet's decision to initiate legislation, and the subsequent parliamentary process, and the First Respondent's decision to assent to the legislation

disestablishing the DSO, violates a range of constitutional obligations, and is invalid.

14. The DSO, as aforesaid, came into existence on 12 January 2001. It was established in the Office of The National Director of Public Prosecutions by means of Section 7(1)(a) of the NPA Act. In the approximately 10 years since its establishment, the DSO has proved to be extremely effective in the fight against crime. As indicated in my papers filed in the Court a quo, the DSO has been significantly more effective than the South African Police Services (hereinafter referred to as "SAPS') in the combating of crime.

15. Notwithstanding the success of the DSO, the cabinet announced in February 2008 that it intended to initiate legislation that would have the effect of disestablishing the DSO. As stated herein above, this represents an abrupt about turn in respect of previous government policy, with the only plausible and reasonable explanation for this about turn being that the ANC resolved at its national conference in December 2007 that the DSO should be "… dissolved as a matter of urgency …" In other words, the cabinet initiated

> legislation that would disestablish the DSO in order to implement a resolution adopted at the ANC's national conference in 2007, being a conference attended by approximately 4000 delegates. That resolution, as illustrated by my papers filed in the Court a quo, was passed because the DSO had been *too effective* when it came to investigating various high profile members of

the ANC (including several past and current sitting members of Parliament and the current President, Mr Jacob Zuma), which leads me to the conclusion that the resolution was apparently passed in order to protect various ANC members from current and future investigations by the DSO.

16. I respectfully submit that the cabinet's decision to initiate such legislation, and the subsequent passing of such legislation by Parliament, and the assenting thereto by the First Respondent disestablishing the DSO violates a range of constitutional obligations and is invalid. In this regard, I respectfully refer this Honourable Court to my affidavit filed in the Court a quo.

17. The relief that I seek is a declarator to the effect that the legislation disestablishing the DSO and creating the Directorate of Priority Crime Investigation (hereinafter referred to as "the DPCI") is unconstitutional and invalid.

HISTORY OF THE LITIGATION

18. On or about 18 March 2008, I launched an urgent application in the North Gauteng High Court in which I sought an Order, inter alia, interdicting and restraining the President, and the members of his cabinet from initiating legislation aimed at the disestablishment of the DSO.

19. Such application came before the North Gauteng High Court on 20 and 21 May 2008, at which occasion the above Honourable Court struck the matter from the Roll on the basis that the North Gauteng Court did not have the necessary jurisdiction to grant the relief that I sought.

20. Subsequent thereto, I approached the above Honourable Court under Case No. CCT41/08, and made application for leave to appeal against the whole of the judgment of the North Gauteng High Court.

21. The aforesaid matter was argued before the above Honourable Court on or about 20 August 2008. Judgment was reserved and ultimately handed down on 22 October 2008, in which judgment the above Honourable Court found that because the relevant legislation had not yet been passed by Parliament, this Honourable Court, due to considerations of deference, could not interfere in the legislative process at that stage, and dismissed my Application.

22. Subsequent thereto, the legislation was passed by Parliament on or about 23 October 2008 and, assented to by the First Respondent on 27 January 2009, with the effective date thereof being 1 July 2009.

23. My application in the Western Cape High Court was launched on 17 April 2009, and was ultimately argued on 2 and 3 June 2010. The said Court dismissed my application on 18 June 2009 but without furnishing its reasons for its order.

24. The reasons for the dismissal of such application were delivered on 26 February 2010 (more than 8 months later). A copy of such reasons is annexed hereto marked "**HG1**".

25. Having regard to these reasons, it is apparent that the Western Cape High Court dismissed my application primarily on the basis of its finding that it was precluded from making decisions relating to the invalidity I contend for based upon the non-fulfillment of constitutional obligations in terms of the provisions of section 167(4)(e) of the Constitution.

26. In the circumstances, and having regard to the Court a quo's findings, it is apparent that I have no alternative but to approach the above Honourable Court for the relief that I seek, it being the only Court in this country which has the necessary jurisdiction to hear my matter if the Court a quo was correct in declining jurisdiction and, if not, by way of seeking leave to appeal.

27. In addition hereto, and as is apparent from the judgment, I also attacked the validity of the legislation on the basis of its lack of rationality and legitimate government purpose. The Court a quo, in its reasons, made no finding regarding the rationality of the disestablishment of the DSO but did find (in paragraph 13 on page 10) that the establishing of the DPCI "is a legitimate governmental purpose and the means by

which it is sought to be achieved appear to be rational". As appears more fully hereunder, I respectfully challenge this finding.

SUBMISSIONS

28. As regards the rationality of the Acts under attack in the Court a quo, I am advised and verily believe that the two Acts constitute laws inconsistent with the requirements of our Constitution and are therefore invalid and unlawful. This contention is based upon the following considerations:

28.1 The Constitution requires that the National Director of Public Prosecutions is the functionary responsible for the determination of prosecution policy;

28.2 The decision to disband the DSO is a matter of prosecution policy;

28.3 That decision, it is common cause, did not bear the imprimatur of the then acting National Director of Public Prosecutions;

28.4 It follows that the entire scheme of both Acts, involving as it does the disbandment of the DSO and its substitution with the DPCI, is constitutionally invalid and accordingly not in accordance with the principle of legality and the rule of law.

29. When coming to the conclusion that the establishment of the DPCI is a legitimate governmental purpose, I respectfully submit that the Court a quo erred by failing to deal in any shape or form in its judgment with the irrational decision to disband the DSO, but for which it would not have been necessary to establish the DPCI. In this regard I respectfully refer to the factual details in the affidavits I have filed a quo and to the contentions in the heads of argument there filed on my behalf.

30. As regards the decision of the Court a quo to decline to exercise jurisdiction in respect of those issues which it characterised as failures by Parliament and the President to fulfill constitutional obligations, it is respectfully submitted that the only substantive relief sought a quo was a declaration of invalidity in respect of the two Acts under attack and that accordingly the Court a quo, in the exercise of its jurisdiction, was at large to make an order invalidating the two Acts upon the grounds put up on my behalf in the Court a quo, subject to confirmation of the order of invalidity by this Honourable Court as contemplated in section 167(5) of the Constitution.

31. I do not, in this affidavit, propose to reiterate the grounds set out in my founding and supporting affidavits, and, instead, my heads of argument and heads of argument in reply, which were filed a quo, are annexed hereto marked "**HG2**" and "**HG3**" respectively.

32. I respectfully incorporate herein by reference all of the material placed on record on my behalf in the Court a quo. The record of such proceedings will be lodged with the Registrar in support of this application.

33. In terms of rule 18.2c I respectfully contend that this matter can be dealt with by this Honourable Court without the hearing of oral evidence. In terms of rule 19.3d, I record that I do not intend to apply for leave to appeal to any other court.

THE INTERESTS OF JUSTICE

34. In dismissing the application in the Court a quo, the Court a quo (at page 11, paragraph 15) expressed the view that I had raised a matter of some importance and for that reason, whilst dismissing the application, had granted no order as to costs.

35. Having regard to the issues raised by me, and the consequences thereof for the future conduct of not only the President, but also the various members of the cabinet, with regards to initiating legislation and the ultimate assenting thereto, the issues raised herein impact directly on the general public and, indeed, the country's entire legislative process.

36. In addition thereto, I respectfully submit that I have raised important issues with regards to the conduct of Parliament and, in particular, public participation in the parliamentary process. As submitted in the Court a quo, I respectfully contend that the

parliamentary process was a sham and a window dressing exercise. It is respectfully submitted that the parliamentary process provided for in terms of the Constitution is an important process and should not be manipulated in the fashion, I submit, that Parliament did in the process of passing the aforementioned legislation. In other words, the parliamentary process is required to be a meaningful process and not merely the case of paying lip service to the Constitution and window dressing such participation process in order to appear to comply with the Constitution.

37. In the circumstances, the Constitutional issues raised are issues of pressing significance and thus constitute issues on which a ruling by this Honourable Court is not merely desirable, but of self-evident importance.

38. This matter involves, as aforesaid, the conduct of the Cabinet, the President, and Parliament itself, and the finding of this Honourable Court in relation hereto will have far reaching consequences and, indeed, impact on the general public.

CONDONATION

39. I am advised that in terms of rule 19 of the rules of the above Honourable Court, I was afforded a period of 15 Court days within which to launch this Application. This Application has not been launched within such period.

40. I respectfully advise this Honourable Court that this application has not been launched within the aforesaid period not as a result of any willful disregard thereof by me or my legal representatives, but as a result of various circumstances which have resulted in the late filing of this application.

41. In this regard, I respectfully advise this Honourable Court as follows:-

41.1 As stated hereinabove, the application in the Court a quo was argued on 2 and 3 June 2009, whilst the reasons for the dismissal of the application were only delivered on 26 February 2010, more than 8 months after the dismissal of the application;

41.2 I am advised that I could not launch this Application prior to the reasons for the dismissal of my application being delivered;

41.3 In the light of the lengthy delay between the dismissal of the application in the Court a quo, and the delivery of the reasons for such dismissal, it was necessary for my legal representatives, prior to advising me as to whether or not I had grounds to approach this Honourable Court for Leave to Appeal, to consider the judgment and to reacquaint themselves with the record in the Court a quo. I respectfully point out to this Honourable Court that the record in the Court a quo runs to some 3000 pages. The exercise of

reacquainting themselves with the papers by my legal representatives was a time consuming the exercise;

41.4 In addition thereto, I am, as is stated hereinabove, a businessman. My business interests range worldwide and I have, during the period from the beginning of March 2010 to the end of April 2010, been required to conduct several business trips, which resulted in me being out of the country for periods of up to a week at a time. The aforegoing, so I respectfully submit, has naturally created delays in my legal representatives being able to consult with me and furnish me with advice with regards to the appeal process;

41.5 I respectfully point out to this Honourable Court that my two counsel herein practise in Cape Town, whilst my attorney practises in Johannesburg, which has further created logistical problems with regards to consulting on this matter.

42 In the circumstances, I respectfully submit that this application, more particularly in the light of the lengthy delay between the dismissing of my application and the delivering of the reasons therefore, has been brought as early as reasonably possible in the circumstances and without undue delay.

43 I respectfully submit that any prejudice that the Respondents may contend for as a result of my failure to comply with the rules of the above Honourable Court is negligible, if not non-existent. However, it is respectfully submitted that the prejudice that not only I would suffer but, indeed, all the citizens of the Republic of South Africa, will suffer should this Honourable Court decline to hear my application (ie: dismiss my application for condonation) far outweighs any prejudice that the Respondents may suffer, if any.

44 In addition, I respectfully submit that, regard being had to the issues raised in the Court a quo, it is in the interests of justice that this Honourable Court grant condonation and hear my application. Further, I respectfully submit, regard being had to what is stated hereinabove, that there exists reasonable prospects that this Honourable Court shall grant the relief that I seek in this Application.

CONCLUSION

45 It is submitted that the issues raised in the Court a quo are matters of public importance in respect of which it is essential to obtain certainty with regard to not only the conduct of the President and the members of his cabinet, but also of the members of Parliament and, indeed, the public participation process in parliamentary proceedings as provided for in the Constitution.

WHEREFORE I PRAY that it may please the above Honourable Court to grant an Order as prayed for in terms of the notice of application to which this affidavit is annexed.

HUGH GLENISTER

I hereby certify that the deponent has acknowledge that he/she knows and understands the contents of this Affidavit which was signed and sworn to before me at …… on this ……. day of …….. 2010 and that the provisions of the regulations contained in the Government Notice No. R1258 dated 21 July 1972, as amended, Government Notice No. R4648 dated 19 August 1977 (as amended) and Government Notice No,. R774 dated 23 April 1982 have been complied with.

COMMISSIONER OF OATHS