IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: **09/2014**

In the matter between:

HUGH GLENISTER	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF POLICE	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

1.

The First Respondent opposes the Appeal and Orders sought by Mr Glenister (hereafter glenister to distinguish between this Appellant/Applicant and references to the decision of this Court in **GLENISTER**) for the reasons as set out and argued in the HSF matter before this Court. That argument is repeated herein by incorporation as opposed to verbatim repetition. This argument thus simply addresses issues peculiar to the glenister case made.

2.

The First Respondent as set out in the Answering Affidavit, supported and sought the strike out order granted in the Court *a quo*.

3.

That order was fully justified. glenister advanced a vitriolic, defamatory and vexatious personal attack on the ANC Government of the day and the President.

4.

The **GLENISTER** challenge invokes many paragraphs and 100's of pages to tarnishing the present Government and numerous individuals in it as corrupt. This is wholly irrelevant as already stated and simply defamatory.

5.

The President was labelled a corrupt crook and the ANC Government was slated as extremely corrupt. The allegations of corruption and criminality were denied by the First Respondent.

6.

It is not clear what glenister considered the appropriate response of the ANC Government and the Presidency was to be in answer to the wide range general accusations of corruption. There was no need to vex the Respondents with such scurrilous accusations which could not feasibly advance the application.

7.

The **"justification invoked"** for the vexatious attacks on persons

and Government was that these **"facts"** demonstrate the great need for almost absolute independence of the DPCI in the South African State.

8.

This approach is at odds with the approach to invalidity by the Courts. In **NEW NATIONAL PARTY OF SOUTH AFRICA v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 1999 (3) SA 191 (CC)** it was held:

> **"[22] … This Court has adopted an objective approach to the issue of the constitutionality of statutory provisions. A pre-existing law becomes invalid to the extent of its inconsistency with the Constitution the moment the Constitution comes into force. It is irrelevant that this Court may declare it to be inconsistent only several years later. Similarly, a statutory provision which is passed after the Constitution comes into operation is invalid to**

the extent of its inconsistency with the Constitution the moment the provision is enacted. This is so regardless of the fact that its invalidity is only attacked, or the concrete circumstances that form the basis of the attack only become apparent, long after its enactment. Consistent with this objective approach to statutory invalidity, the circumstances which become apparent at the time when the validity of the provision is considered by a Court are not necessarily irrelevant to the question of its consequential invalidity. <u>However, a statute cannot have limping validity, valid one day, invalid the next, depending upon changing circumstances</u>." …

"(Nevertheless, the implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later,

its implementation would infringe a constitutional right. In assessing the validity of such a complaint, it becomes necessary to determine whether the proximate cause of the infringement of the right is the statutory provision itself, or whether the infringement of the right has been precipitated by some other cause, such as the failure of a governmental agency to fulfil its responsibilities. If it is established that the proximate cause of the infringement, in the light of the circumstances, lies in the statutory provision under consideration, that provision infringes the right. This is not a departure from the objective approach to unconstitutionality. It is merely a recognition of the fact that a constitutional defect in a statutory provision is not always readily apparent at the time of its enactment, but may only emerge later when a concrete case presents itself for adjudication.)".

> **"[24] … Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of Courts in a democratic society."**

(our underlining e.g. if the DA was the ruling party, was Chapter 6A constitutional?)

9.

It was made clear that at the hearing that these paragraphs should be struck out– many are defamatory and so constitute prejudice but they are in any event irrelevant and fall squarely within the **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (2) SA 277 (SCA)** decision. The individual paragraphs were identified, in answer, and complained about and strike out was asked as indeed was generally stated in the papers **"… An application to strike out these allegations will be made at the hearing of this application."**

10.

The absence of such material in the **SUZMAN** application which raises in essence the same core legal challenge, demonstrates the irrelevancy (and also co-lateral nature) of the impugned paragraphs and materials.

11.

Any public perception test is in any event based on the judgment of a postulated reasonable and informed member of the public who also recognises that policy decisions and accountability go hand in hand with some control.

12.

The danger of public perception comes when persons take this literally by trying to present it not as a touchstone, but as testimonies of individuals (none who have even been asked if they are well-informed) as public perception. That inevitably leads in this case to the answer that the members of the public will give their answer at the ballot box and that the opinions of individual put forward are irrelevant.

13.

The exercise the CC did in **GLENISTER** to establish public perception avoids these conundrums. The comparison between the DSO and the DPCI was done in detailed fashion by the Second Respondent in an analysis to show overall the now DPCI ahead on adequate independence.

14.

The glenister application is wedded to the notion that the DPCI must be outside the police service. This argument is no longer open to it given **GLENISTER**. Moreover, the insistence that the Executive must have no control over the DPCI, is based on incorrect literalism.

15.

The application was misconceived and vexatious. The glenister application is to be dismissed in both Courts and the strike out order, including the costs order, upheld.

KJ KEMP SC
T MASUKU
Chambers, Durban and Cape Town
13th April 2014.