



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 255/15

In the matter between:

ROBERT McBRIDE

Applicant

and

MINISTER OF POLICE

First Respondent

**MINISTER FOR PUBLIC SERVICE AND
ADMINISTRATION**

Second Respondent

and

HELEN SUZMAN FOUNDATION

Amicus Curiae

Neutral citation: *McBride v Minister of Police and Another* [2016] ZACC 30

Coram: Mogoeng CJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J.

Judgments: Bosielo AJ (unanimous)

Heard on: 17 May 2016

Decided on: 6 September 2016

Summary: Confirmation proceedings — independence of police complaints body — section 206(6) of the Constitution — decision by Minister to suspend and institute disciplinary proceedings against Executive Director of the Independent Police Investigative Directorate invalid and set aside

Declaration of invalidity — section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 — sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994 — regulation 13 of the IPID Regulations

ORDER

On application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria:

1. It is declared that the following provisions are invalid to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate—
 - 1.1. section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011;
 - 1.2. sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994;
 - 1.3. regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 of Government Gazette 35018 of 10 February 2012), (IPID Regulations).
2. Parliament is directed to cure the defects in the legislation within 24 months from the date of this order.
3. Pending the correction of the defect(s):
 - 3.1. Section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 is to be read as providing as follows:

“Subsections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 apply to the suspension and removal of the Executive Director of IPID, with changes as may be required by the context.”

- 3.2. Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994 and regulation 13 of the IPID Regulations are declared inconsistent with section 206(6) of the Constitution and shall not apply to the Executive Director of the Independent Police Investigative Directorate.
4. It is declared that the decision of the Minister of Police to suspend Mr Robert McBride from his position as Executive Director of the Independent Police Investigative Directorate is invalid and is set aside.
5. The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.
6. It is declared that the decision of the Minister of Police to institute the disciplinary inquiry against Mr Robert McBride, which was to commence on 21 May 2015, is invalid and is set aside.
7. The Minister of Police is directed to pay the costs of Mr Robert McBride, including the costs of two counsel.

JUDGMENT

BOSIELO AJ (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):

Introduction

[1] On 4 December 2015, acting in terms of section 172(1)(a) of the Constitution,¹ the High Court of South Africa, Gauteng Division, Pretoria (High Court) declared several sections of the Independent Police Investigative Directorate Act (IPID Act)² inconsistent with the Constitution and invalid. These were section 6(3)(a) and 6(6) of the IPID Act; sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act;³ and regulation 13 of the IPID Regulations for the Operation of the Independent Investigative Directorate (IPID Regulations),⁴ which were found to be inconsistent with section 206(6) of the Constitution and thus invalid, to the extent that they purport to authorise the Minister of Police to suspend, take disciplinary steps pursuant to the suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate (IPID).⁵

[2] For this declaration of invalidity to have legal force, it must be confirmed by this Court in terms of section 172(2)(a) of the Constitution.⁶ Hence the application to this Court.

[3] The applicant is Mr Robert McBride, the Executive Director of IPID since 3 March 2014. He has been on precautionary suspension since 24 March 2015 –

¹ Section 172(1), in relevant part, provides:

“When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”

² 1 of 2011.

³ Proclamation 103 of 1994.

⁴ Independent Police Investigative Directorate Act, 2011 Regulations for the Operation of the Independent Police Investigative Directorate, GN 98, GG 35018, 10 February 2012.

⁵ *McBride v Minister of Police and Another* [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP) (High Court judgment).

⁶ Section 172(2)(a) reads:

“The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

pending a disciplinary inquiry to be initiated against him by the Minister of Police. The first and second respondents are the Minister of Police and the Minister of Public Service and Administration respectively. Only the Minister of Police (Minister) participated in the proceedings before us. The Helen Suzman Foundation (HSF), a non-governmental organisation whose main objective is to defend the values that underpin our constitutional democracy and to promote respect for human rights and the rule of law, was admitted as *amicus curiae* (friend of the court) and presented oral submissions before us.

[4] Section 206(6) of the Constitution provides for the establishment of an independent police complaints body by national legislation.⁷ Pursuant to this section, Parliament established IPID. Its primary duty is to investigate any alleged misconduct or offence committed by a member of the police service. IPID's independence is further bolstered by section 4 of the IPID Act which provides that the Directorate functions independently from the South African Police Service (SAPS).⁸

[5] However, this must be contrasted with section 206(1) of the Constitution, which provides for a member of the Cabinet to be responsible for policing and the determination of national policing policy.⁹ Allied to this is section 6(3)¹⁰ of the IPID

⁷ Section 206(6) of the Constitution reads:

“On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.”

⁸ Section 4 of the IPID Act reads:

“(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.”

⁹ Section 206(1) of the Constitution provides:

“A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial government and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.”

¹⁰ Section 6(3) provides:

“In the event of an appointment being confirmed—

Act which makes IPID's Executive Director subject to the laws governing the public service as well as section 6(6)¹¹ which authorises the Minister to remove the Executive Director from office on specified grounds. But this section is silent on oversight of the Minister's action by Parliament.

[6] Mr McBride's primary submission is that the cumulative effect of these pieces of legislation is that IPID does not have sufficient safeguards to ensure that its Executive Director and IPID, as an institution, are able to act with sufficient independence. The gravamen of this submission is that these provisions are inimical to any notion of the independence of the Executive Director as demanded by both the Constitution and the IPID Act.

[7] Although the Minister opposed the application in the High Court, before us he made qualified, albeit far-reaching, concessions. The Minister accepted that the impugned provisions do not provide adequate protection of the independence of IPID. As a result, he supported the confirmation of invalidity as per paragraph 1 of the order of the High Court. But he opposed confirmation of paragraphs 3, 4, 5 and 6 of the High Court's order. These, in part, sought to read section 17DA(3) to 17DA(7) of the South African Police Service Act¹² (SAPS Act) into section 6(6) of the IPID Act –

-
- (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."

¹¹ Section 6(6) reads:

"The Minister may, remove the Executive Director from office on account of—

- (a) misconduct;
- (b) ill health; or
- (c) inability to perform the duties of that office effectively."

¹² 68 of 1995. Section 17DA reads, in relevant part:

"(3)

- (a) The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.

pending the expiry of 12 months or correction of the defect(s) by the Legislature, whichever should occur first. The other part of the opposed order has the effect of insulating the Executive Director from the application of sections 16A(1),¹³ 16B,¹⁴

-
- (b) The adoption by the National Assembly of a resolution calling for that person's removal from office.
 - (4) A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with a supporting vote of at least two-thirds of the members of the National Assembly.
 - (5) The Minister—
 - (a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and
 - (b) shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.
 - (6) The Minister may allow the National Head of the Directorate, at his or her request, to vacate his or her office—
 - (a) on account of continued ill-health; or
 - (b) for any other reason which the Minister deems sufficient.
 - (7) The request in terms of subsection (6) shall be addressed to the Minister at least six calendar months prior to the date on which the National Head of the Directorate wishes to vacate his or her office, unless the Minister grants a shorter period in a specific case.”

¹³ Section 16A(1) reads:

“An executive authority shall—

- (a) immediately take appropriate disciplinary steps against a head of department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;
- (b) immediately report to the Minister the particulars of such non-compliance; and
- (c) as soon as possible report to the Minister the particulars of the disciplinary steps taken.”

¹⁴ Section 16B reads:

“Discipline

- (1) Subject to subsection (2), when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction:
 - (a) In the case of a head of department, the relevant executive authority; and
 - (b) in the case of any other employee, the relevant head of department.
- (2) Where an employee may lodge an internal appeal provided for in a collective agreement or in a determination in terms of section 3(5), a sanction referred to in subsection (1) may only be given effect to—
 - (a) if an internal appeal is lodged, after the appeal authority has confirmed the sanction pronounced by the chairperson of a disciplinary hearing; or
 - (b) if no internal appeal is lodged, after the expiry of the period within which the appeal must have been lodged.

17(1)¹⁵ and 17(2)¹⁶ of the Public Service Act. The Minister also opposed the setting aside of the decision to suspend Mr McBride from his position as Executive Director of IPID, and institute disciplinary proceedings against him. It is to be noted that the High Court suspended the effect of these two orders, pending parliamentary intervention.

-
- (3) The Minister shall by regulation make provision for—
- (a) a power for chairpersons of disciplinary hearings to summon employees and other persons as witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and other objects; and
 - (b) travel, subsistence and other costs and other fees for witnesses at disciplinary hearings.
- (4) If an employee of a department (in this subsection referred to as ‘the new department’), is alleged to have committed misconduct in a department by whom he or she was employed previously (in paragraph (b) referred to as ‘the former department’), the head of the new department—
- (a) may institute or continue disciplinary steps against that employee; and
 - (b) shall institute or continue such steps if so requested—
 - (i) by the former executive authority if the relevant employee is a head of department; or
 - (ii) by the head of the former department, in the case of any other employee.
- (5) In order to give effect to subsection (4), the two relevant departments shall co-operate, which may include exchanging documents and furnishing such written and oral evidence as may be necessary.
- (6) If notice of a disciplinary hearing was given to an employee, the relevant executive authority shall not agree to a period of notice of resignation which is shorter than the prescribed period of notice of resignation applicable to that employee.”

¹⁵ Section 17(1) reads:

“(a) Subject to paragraph (b), the power to dismiss an employee shall vest in the relevant executive authority and shall be exercised in accordance with the Labour Relations Act.

(b) The power to dismiss an employee on account of misconduct in terms of subsection (2)(d) shall be exercised as provided for in section 16B(1).”

¹⁶ Section 17(2) reads:

“An employee of a department, other than a member of the services, an educator or a member of the Intelligence Services, may be dismissed on account of—

- (a) incapacity due to ill health or injury;
- (b) operational requirements of the department as provided for in the Labour Relations Act;
- (c) incapacity due to poor work performance; or
- (d) misconduct.”

[8] Central to this application is the crisp question: whether, in the light of the applicable statutory framework, IPID enjoys adequate structural and operational independence, as envisaged by section 206(6) of the Constitution, to ensure that it is effectively insulated from undue political interference.

Background

[9] At the time when Mr McBride took office on 3 March 2014, there was a political storm brewing over the alleged unlawful rendition of four Zimbabwean nationals in November 2010 and January 2011. Lieutenant-General Anwa Dramat (General Dramat), then the head of the Directorate for Priority Crime Investigation (DPCI) and Major General Sibiya (General Sibiya), then the provincial head of, Gauteng, were allegedly implicated in these unlawful renditions.

[10] IPID initiated an investigation into this matter overseen by Advocate Mosing (Mr Mosing), of the National Prosecuting Authority (NPA), assisted by Mr Innocent Khuba (Mr Khuba), the Provincial Head: IPID, Limpopo. On 22 January 2014, IPID issued its first report (January report) which concluded that General Dramat and General Sibiya were involved in the illegal renditions of the Zimbabweans. It recommended that criminal charges be brought against them.

[11] Mr Khuba explained in his affidavit that because he regarded the January report as provisional, he continued with his investigations. His investigations gave birth to a second report, dated 18 March 2014 (March report), which was signed by Mr Khuba; Mr Matthews Sesoko, Chief Director: IPID Investigation and Information Management (Mr Sesoko); and Mr McBride. Contrary to the first report, the second report concluded that there was no evidence implicating General Dramat and General Sibiya in the illegal renditions of the Zimbabweans. As a result it recommended that no criminal charges be brought against them. This report was submitted to the National Director of Public Prosecutions (NDPP) for a decision on possible prosecution on 13 April 2015.

[12] Faced with the glaring discrepancies in the two reports, the Minister suspected serious tampering. As a result, he commissioned Werksmans Attorneys (Werksmans) to investigate the two reports. Relying on the January report and the investigation by Werksmans, the Minister invoked his powers in terms of section 6(6) of the IPID Act, the Public Service Act and Chapter 7 of the Senior Management Services Handbook (SMS Handbook), and placed Mr McBride on precautionary suspension on 24 March 2015. Acting on the strength of section 6(6)(a) of the IPID Act read with the provisions governing disciplinary proceedings under the Public Service Act and the IPID Regulations, the Minister served Mr McBride with a notice to attend a disciplinary enquiry.

In the High Court

[13] The Minister's actions stung Mr McBride into a defensive mode. Mr McBride instituted an urgent application before the High Court, firstly for an interim interdict to restrain the Minister from suspending him, and secondly, for an order declaring section 6(3)(a) and 6(6) of the IPID Act, regulation 13 of the IPID Regulations, sections 16A(1), 16B, 17(1) and (2) of the Public Service Act (only insofar as they apply to the Executive Director of IPID), paragraphs 2.5, 2.6, 2.7(1) – (5) of Chapter 7 and paragraphs 18-19 of Chapter 8 of the SMS Handbook (impugned provisions) constitutionally invalid and setting them aside. In addition, Mr McBride sought an order to review and set aside the decision by the Minister to suspend him as the Executive Director of IPID and to institute disciplinary proceedings against him.

[14] Relying on section 206(1) of the Constitution, the Minister opposed this application. He asserted that this section gives him the power to oversee the police as the Cabinet member responsible for policing. The disciplinary proceedings he had instituted against Mr McBride were therefore lawful as they are authorised by section 206(1). He contended further that sections 6(3)(a) and 6(6) of the IPID Act authorised him to invoke the laws governing the public service to remove the Executive Director of IPID from office. He also relied on sections 16A(1), 16B, 17(1)

and 17(2) of the Public Service Act, which authorise him to take appropriate disciplinary proceedings against Mr McBride as head of IPID.

[15] The High Court found that the independence of IPID is expressly guaranteed and protected under section 206(6) of the Constitution, which is “significant and decisive”.¹⁷ Furthermore, the High Court reasoned that, given that IPID performs overlapping anti-corruption functions with the DPCI, it must be afforded at least the equivalent protections that the Constitution requires for the DPCI.¹⁸ In *Glenister II*,¹⁹ this Court found that the independence of the DPCI was an implicit constitutional requirement, flowing from section 7(2) of the Constitution and the threat to South Africa posed by endemic corruption. The High Court found that inasmuch as the DPCI is independent despite there being no express constitutional entrenchment of its independence, by parity of reasoning “the effect of the constitutional entrenchment of the independence of IPID is that the *operational and structural independence of IPID must be at least as strongly protected as that of the DPCI*”.²⁰

[16] The High Court went further to hold that IPID’s constitutionally guaranteed independence requires more stringent protection. This is because, unlike the DPCI which is situated within SAPS, IPID is institutionally and functionally independent from SAPS.²¹ Another reason presented by the High Court as to why the principles pronounced in *Glenister II* extend to IPID is that, having found that the DPCI requires adequate independence from Executive interference in that case, it would be subversive of IPID not to afford it the same level of independence as the DPCI. As IPID has oversight and accountability responsibilities over the DPCI, affording the DPCI adequate independence without doing the same for IPID appears to be self-

¹⁷ High Court judgment above n 5 at paras 15-6.

¹⁸ Id at para 20.

¹⁹ *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*).

²⁰ High Court judgment above n 5 at para 17.

²¹ Id at para 21.

defeating. In this regard, the High Court held that IPID's oversight role over the DPCI would be compromised and might create room for political interference to seep through and render the DPCI's independence nugatory.²²

[17] Crucially, the High Court held that section 6(3)(a) and 6(6) of the IPID Act, sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act and regulation 13 of the IPID Regulations are inconsistent with section 206(6) of the Constitution. This was based on the fact that the impugned sections do not provide for parliamentary oversight in relation to the suspension, discipline or removal of the Executive Director and that they afford the Minister unilateral powers and the sole discretion to terminate the Executive Director's tenure. Furthermore, the Minister is entitled to discipline the Executive Director on the same basis as any head of department in the public service, without any special oversight or protection. The High Court found that this amounts to inadequate security of tenure for a national head of an independent body investigating police misconduct, including corruption.²³ Hence it declared the impugned sections inconsistent with section 206(6) of the Constitution and invalid. However the declaration of invalidity was suspended for 12 months to allow Parliament to remedy the defects.

[18] As an interim measure, the High Court read section 17DA of the SAPS Act into section 6(6) of the IPID Act, with the other impugned provisions being read as having no application to the Executive Director of IPID. The decisions to suspend and institute a disciplinary inquiry against Mr McBride were set aside – with the order setting aside the Minister's decision to suspend Mr McBride being itself suspended for 30 days to allow the National Assembly and the Minister to exercise their powers in terms of section 17DA (as it was read into section 6(6) of the IPID Act), should they so choose. All of these orders were referred to this Court for confirmation.²⁴

²² Id at para 24.

²³ Id at para 46.

²⁴ The full order of the High Court was as follows:

The issues

[19] The issues are as follows:

-
1. It is declared that the following provisions are unconstitutional and unlawful to the extent that they purport to authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or to remove from office the Executive Director of the Independent Police Investigative Directorate:
 - 1.1 Sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act, No. 1 of 2011;
 - 1.2 Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, 1994; and
 - 1.3 Regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GNR 98 of Government Gazette 35018 of 10 February 2012) (“IPID Regulations”).
 2. The declaration of invalidity in paragraph 1 is suspended for a period of 12 months from the date of the order to enable Parliament to correct the constitutional defect(s).
 3. Pending the correction of the defect(s), or the expiry of the 12-month period, whichever occurs first:
 - 3.1 Section 6(6) of the Independent Police Investigative Directorate Act, No. 1 of 2011 is to be read as providing as follows:

“Sub-sections 17DA(3) to 17DA(7) of the SAPS Act apply to the suspension and removal of the Executive Director of IPID, with such changes as may be required by the context”; and
 - 3.2 Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, 1994 and regulation 13 of the IPID Regulations, shall be read as having no application to the Executive Director of the Independent Police Investigative Directorate.
 4. It is declared that the decision of the Minister of Police to suspend the Applicant from his position as Executive Director of the Independent Police Investigative Directorate is unlawful and invalid and the decision is set aside.
 5. It is declared that the decision of the Minister of Police to institute the disciplinary inquiry against the Applicant, which was to commence on 21 May 2015, is unlawful and invalid and the decision is set aside.
 6. The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.
 7. All of the above orders are referred to the Constitutional Court for confirmation and shall have no force unless and until confirmed by the Constitutional Court.
 8. The First Respondent is directed to pay the costs of the Applicant, including the costs of two counsel.
 9. The First Respondent is ordered to pay the costs of the Helen Suzman Foundation, including the costs of two counsel.
 10. The First Respondent is ordered to pay the costs of the Council for the Advancement of the South African Constitution.

- a) Should the declaration of constitutional invalidity of the impugned sections be confirmed?
- b) Should the decision by the Minister to suspend Mr McBride and institute the disciplinary proceedings, taken in terms of the laws governing the Public Service, be allowed to stand and continue?
- c) Is the order granted by the High Court a just and equitable remedy as contemplated by section 172(1)(b) of the Constitution?
- d) Costs.

Should invalidity be confirmed?

[20] I pause to observe that a day before the hearing, the Minister filed a draft order with the Registrar of this Court. This draft order was foreshadowed in his written submissions. It reads thus:

- “1. The orders of constitutional invalidity granted by the High Court of South Africa (Gauteng Division, Pretoria) in respect of sections 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 (‘IPID Act’), and Regulation 13 of the Regulations for the Operation of the Independent Police Investigative Directorate GN R 98 GG No 35018 (10 February 2012) (‘IPID Regulations’) are confirmed;
2. The orders of invalidity in paragraph 1 above are suspended for a period of 18 months to enable Parliament to cure the constitutional defect;
3. Pending the enactment of legislation by Parliament, or the expiry of the 18 month period in paragraph 2 above:
 - 3.1 Section 6(6) of the IPID Act is to be read as providing as follows:

‘Sub-sections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 to apply to the suspension and removal of the Executive Director of the Independent Police Investigative Directorate, with such changes as may be required by the context’; and

- 3.2 regulation 13 of the IPID Regulations, shall be read as having no application to the Executive Director of the Independent Police Investigative Directorate;
4. It is declared that the decisions to suspend, and institute disciplinary proceedings against the Applicant are invalid;
 5. The decisions in paragraph 4 above are not set aside;
 6. It is declared that, in terms of paragraph 3.1. above, and section 17DA(3) of the SAPS Act as applied to the Executive Director of IPID, the relevant Portfolio Committee of the National Assembly is deemed to be seized with the disciplinary proceedings already instituted against the Applicant;
 7. The First Respondent is directed to pay the costs of the Applicant in the High Court, including those occasioned by the employment of two counsel; and
 8. There is no order as to the costs of the confirmation proceedings before this Court.”

[21] It is clear from the draft order that the Minister made a qualified concession. But he supports the confirmation of the declaration of invalidity in respect of the orders in paragraphs 1 to 4 only. However, he resists the setting aside of his decision to suspend Mr McBride from his position as the Executive Director of IPID as well as to institute disciplinary proceedings against him. Despite conceding their invalidity, he nonetheless urged us to endorse the disciplinary proceedings already underway and for them to be deemed to be undertaken by the relevant Portfolio Committee of the National Assembly.

[22] As appears from the Minister’s draft order, the Minister supports confirmation by this Court of the declaration of invalidity in respect of section 6(3)(a) and 6(6) of the IPID Act and regulation 13 of the IPID Regulations. Although the Minister supports the declaration of invalidity in respect of his decision to suspend and institute disciplinary proceedings against Mr McBride, he requests that the decision not be set aside but that the relevant Portfolio Committee of the National Assembly be deemed

to be seized with the disciplinary proceedings already underway. But the Minister requests that the disciplinary proceedings against Mr McBride be allowed to proceed to finality – thus validating the proceedings the Minister concedes are invalid.

[23] As already stated, section 172(1)(a) of the Constitution provides that when a court decides a constitutional issue within its powers, it must declare any law or conduct inconsistent with the Constitution invalid to the extent of such inconsistency. This section is couched in peremptory terms. It is therefore a constitutional imperative. This Court has a duty to satisfy itself that the declaration of invalidity of the various impugned sections was properly made.²⁵ It also has to satisfy itself whether the impugned sections are inimical to the independence of IPID. This requires this Court to examine each of the impugned provisions to determine whether they are congruent with, or subversive of, IPID's independence as demanded by section 206(6) of the Constitution.

[24] IPID is an independent police complaints body established in terms of section 206(6) of the Constitution. Section 4(1) of the IPID Act requires it to function independently of SAPS. This is to ensure that IPID is able to investigate cases or complaints against the police without any fear, favour or prejudice or undue external influence. Section 4(2) of the IPID Act requires that each organ of state assist the Directorate to maintain its impartiality and to perform its functions effectively. Importantly, section 2 of the IPID Act requires IPID to play an oversight role over SAPS and Municipal Police Services. Given the nature, scope and importance of the role played by police in preventing, combating and investigating crime, IPID's oversight role is of cardinal importance. This is aimed at ensuring accountability and

²⁵ *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at paras 66-7. Notably, in *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68, this Court held:

“Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.”

transparency by SAPS and Municipal Police Services in accordance with the principles of the Constitution.²⁶

[25] IPID is headed by an Executive Director who is nominated by the Minister in terms of section 6(1) of the IPID Act. This nomination must be either confirmed or rejected by the Parliamentary Committee within a period of 30 parliamentary working days.

[26] The Executive Director's responsibilities are set out in section 7 of the IPID Act. They include: providing strategic leadership to the Directorate;²⁷ appointing provincial heads of each province;²⁸ appointing such staff as may be necessary to enable the Directorate to perform its functions in terms of the Act;²⁹ giving guidelines concerning the investigation and management of cases by officials within the respective provincial offices, the administration of national and provincial offices and, the training of staff at national and provincial levels;³⁰ referring criminal cases revealed as a result of an investigation to the NPA for criminal prosecution and notifying the Minister of such referral;³¹ ensuring that complaints regarding disciplinary matters are referred to the National Commissioner and where appropriate, the Provincial Commissioner;³² once a month submitting a summary of disciplinary matters to the Minister and providing the Secretary with a copy thereof;³³ and keeping proper records of all financial transactions, assets and liabilities of the Directorate,

²⁶ One of the objects of the IPID Act is set out in section 2(g) as follows:

“to enhance accountability and transparency by the South African Police Service and Municipal Police Services in accordance with the principles of the Constitution.”

²⁷ Section 7(11).

²⁸ Section 7(2).

²⁹ Section 7(3)(a).

³⁰ Section 7(3)(e)(i)-(iii).

³¹ Section 7(4). In terms of section 7(5), the NPA must notify the Executive Director of its intention to prosecute, whereafter the Executive Director must notify the Minister thereof and provide a copy to the Secretary.

³² Section 7(6).

³³ Section 7(7).

ensuring that the Directorate's financial affairs comply with the Public Finance Management Act³⁴ and, preparing an annual report in the manner contemplated in section 32.³⁵ The Executive Director is also the accounting officer of the Directorate. Evidently, his duties are extensive and wide.

[27] This must be seen against section 7(7) of the IPID Act which requires the Executive Director to submit a summary of disciplinary matters to the Minister. In addition, section 32 requires the Executive Director to prepare and submit an annual report in the form prescribed by the Minister within five months of the end of the financial year to the Minister. Evidently, this is intended to ensure that the Executive Director accounts to the Minister about the activities within IPID. This is probably because the Minister, as the political head of the police, bears political responsibility for the police.

[28] But does this on its own undermine IPID's independence to a point where it offends section 206(6) of the Constitution? No. The fact that IPID is required by both the Constitution and the IPID Act to be independent does not mean that it cannot be held accountable. Like all other organs of state, IPID must be accountable for its actions. To be insulated from undue political interference or control does not mean that IPID should be insulated from political accountability. Accountability is one of the important values enshrined in our Constitution – a basic tenet for good governance. Hence the requirement that it must submit reports about its activities to the Minister who in turn will place them before Parliament. This Court explained this apparent conundrum in *Glenister II* as follows:

“The second general point we make is that adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible. And it would be averse to our uniquely South African constitutional structure. What is required is not insulation from political accountability, but only

³⁴ 1 of 1999.

³⁵ Section 7(1)(a)-(c).

insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit.”³⁶

[29] Section 6(3)(a) of the IPID Act makes the Executive Director subject to the laws governing the public service. In terms of the Public Service Act, section 16A(1)(a) authorises the executive authority to take appropriate disciplinary steps against the head of the department and to report such non-compliance to the Minister. Section 16B in turn authorises the institution of disciplinary proceedings against such a head, whilst section 17(1) vests the power to dismiss in the relevant executive authority. Is this statutory regime compatible with the independence of IPID and its Executive Director as envisaged by section 206(6) of the Constitution? I think not.

[30] It is axiomatic that public servants are government employees. They are beholden to government. They operate under government instructions and control. The authority to discipline and dismiss them vests in the relevant executive authority. This does not require parliamentary oversight. To subject the Executive Director of IPID to the same regime is to undermine or subvert his independence. It is not congruent with the Constitution.

[31] What then does the independence of IPID mean? Does it mean complete or sufficient independence? Admittedly, it is difficult to attempt to define the precise contours of a concept as elastic as this. It requires a careful examination of a wide range of facts to determine this question. Amongst these are the method of appointment, the method of reporting, disciplinary proceedings and method of removal of the Executive Director from office, and security of tenure. However, this Court has had occasion to deal with the independence of a similar institution in *Helen Suzman Foundation*³⁷ and *Glenister II*. Although the two cases deal with the

³⁶ *Glenister II* above n 19 at para 216.

³⁷ *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) (*Helen Suzman Foundation*).

independence of the DPCI, whose mandate is different to that of IPID, they offer useful guidelines in giving substance to IPID’s constitutionally guaranteed independence – they offer bright lights for us as we traverse this new area.

[32] Grappling with the principle of the independence of the DPCI as a corruption-fighting body, Ngcobo CJ observed as follows in *Glenister II*, with the agreement of the majority:

“The question, therefore, is not whether the DPCI is fully independent, but whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it ‘discharges its responsibilities effectively’, as required by the Constitution.”³⁸

[33] The Chief Justice also states:

“Ultimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence.”³⁹

[34] To address this vexed issue, the High Court sought guidance from a number of international instruments.⁴⁰ These included: the United Nations Convention against Corruption;⁴¹ the Council of Europe’s Commissioner for Human Rights’ Opinion on the Independent and Effective Determination of Complaints Against the Police;⁴² and

³⁸ *Glenister II* above n 19 at para 125.

³⁹ *Id* at para 121. See also High Court judgment above n 5 at para 28.

⁴⁰ High Court judgment above n 5 at para 36.

⁴¹ It calls for independent bodies or persons (specialised in combating corruption through law enforcement) that can “carry out their functions effectively and without any undue influence” (article 36). For this, the independent body should have complete discretion in the performance or exercise of its functions and not be subject to the direction or control of a minister or any other party. In principle, it should give an account after its work has been performed when it reports to parliament (rather than the executive).

⁴² The Council of Europe’s Commissioner for Human Rights’ *Opinion on the Independent and Effective Determination of Complaints Against the Police* (2009), similarly found that:

“An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as a fundamental protection against

the AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa.⁴³

[35] That Court had recourse to a report by the Organisation for Economic Co-operation and Development titled: *Specialised Anti-corruption Institutions: Review of Models*,⁴⁴ which was cited with approval by this Court in *Glenister II*.⁴⁵ The report proffers the following definition of independence:

“Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference.”⁴⁶

[36] *Glenister II* expressly stated that this definition was not part of international law, but accepted that it serves as a useful interpretive tool against which IPID’s independence may be measured. I have found the criteria adumbrated in this definition to be both useful and illuminating in trying to define and delineate the contours of independence as it pertains to the independence of IPID.

ill-treatment and misconduct. An independent police complaints body . . . should form a pivotal part of such a system.”

⁴³ The AU Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, 2006, calls upon State Parties “to establish independent civilian policing oversight mechanism[s]”. In relevant part, the AU Resolution reads:

“[A]ccountability and the oversight mechanisms for policing forms the core of democratic governance and is crucial to enhancing the rule of law and assisting in restoring public confidence in police.”

⁴⁴ Available at: <http://www.oecd.org/dataoecd/7/4/39971975.pdf>, accessed on 6 June 2016.

⁴⁵ *Glenister II* above n 19 at para 187.

⁴⁶ Id at paras 119 and 188.

[37] In *Glenister II*, the majority held that a corruption-fighting entity will have the requisite independence if it can be established that the “reasonably informed and reasonable member of the public will have confidence in an entity’s autonomy-protecting features”.⁴⁷ Factors that might be considered in assessing the independence of an institution include security of tenure and remuneration, and the mechanisms in place for accountability and oversight.⁴⁸ Since IPID is entrusted with wide-reaching police oversight powers, the same considerations, at the very least, should be factored in when assessing its independence. In contradistinction to the DPCI, the threshold for satisfying independence in respect of IPID is arguably more stringent given that the Constitution expressly demands its independence.

[38] On the other hand, section 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.

[39] To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service – to the extent that they empower the Minister to unilaterally interfere with the Executive Director’s tenure –

⁴⁷ *Glenister II* above n 19 at para 207.

⁴⁸ *Id* at para 210.

is subversive of IPID's institutional and functional independence, as it turns the Executive Director into a public servant subject to the political control of the Minister.

[40] Without adequate independence, it would be easy for the Minister to usurp the power of the Executive Director under the guise of exercising political accountability or oversight over IPID in terms of section 206(1) of the Constitution. In this case, acting unilaterally, the Minister invoked the provisions of section 16A(1) of the Public Service Act, placed Mr McBride on suspension and instituted disciplinary proceedings against him. Undoubtedly, such conduct has the potential to expose IPID to constitutionally impermissible executive or political control. That action is not consonant with the notion of the operational autonomy of IPID as an institution. Put plainly it is inconsistent with section 206(6) of the Constitution. It follows that it is invalid and must be set aside.

[41] All this should be seen against the extensive powers IPID has to investigate the police. Section 28 of the IPID Act authorises the Directorate to investigate a whole variety of matters involving the police and complaints of assault, torture, rape, discharge of firearms, death while in police custody and as a result of police action. Section 28(1)(g) authorises the Directorate to investigate corruption within the police, whilst section 28(2) empowers the Directorate to investigate systemic corruption within the police force. There have in recent years been alleged instances of police brutality and killings perpetrated against civilians. Undoubtedly, these are very serious matters which affect the public. Naturally, the public has a direct interest in seeing these matters being vigorously pursued and properly investigated. IPID is given this responsibility. It is cast in the role of a watchdog over the police. It is therefore necessary to its credibility and the public confidence that it be not only independent but that it must also be seen to be independent to undertake this daunting task without any interference, actual or perceived, by the Minister.

[42] A question might be asked whether the statutory framework created by the impugned sections conduce to engendering public confidence in the independence of

IPID. This Court dealt with this issue of public confidence in *Glenister II*,⁴⁹ and reiterated it in *Helen Suzman Foundation*, where it stated:

“This Court has indicated that ‘the appearance or perception of independence plays an important role’ in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity’s autonomy-protecting features is important to determining whether it has the requisite degree of independence.”⁵⁰

[43] To my mind, the cumulative effect of the impugned sections has the potential to diminish the confidence the public should have in IPID. As the amicus curiae emphasised in its submissions, both the independence and the *appearance* of an independent IPID are central to this matter. The manner in which the Minister dealt with Mr McBride demonstrates, without doubt, how invasive the Minister’s powers are. What exacerbates the situation is that he acted unilaterally. This destroys the very confidence which the public should have that IPID will be able, without undue political interference, to investigate complaints against the police fearlessly and without favour or bias. IPID must therefore not only be independent, but must be seen to be so. Without enjoying the confidence of the public, IPID will not be able to function efficiently as the public might be disinclined or reluctant to report their cases to it.

[44] Based on the above exposition, I conclude that the impugned sections do not pass constitutional muster. It follows that the order of constitutional invalidity by the High Court must be confirmed.

⁴⁹ *Glenister II* above n 19 at para 207.

⁵⁰ *Helen Suzman Foundation* above n 37 at para 31.

What is a just and equitable remedy?

[45] As I indicated earlier, the Minister conceded that the decisions to suspend and institute disciplinary proceedings against Mr McBride are invalid. However, he pleaded that they should not be set aside but rather be allowed to continue to finality as if they were undertaken by the relevant Portfolio Committee of the National Assembly. The main submission is that the Minister took this decision in good faith as, when he took it, he considered it to be constitutional as the relevant section had not been declared unconstitutional. Furthermore, it was submitted that to set it aside would be disruptive. It would thus not be a just and equitable remedy as the disciplinary proceedings against Mr McBride had already commenced and were partly heard before an independent chairperson. The Minister submitted that setting aside these proceedings would permit Mr McBride to continue working as the Executive Director notwithstanding the fact that there is a prima facie case of gross misconduct against him.

[46] On the contrary, Mr McBride argued that the decisions by the Minister must be set aside. In the main, he contended that it would infringe the rule of law for this Court to preserve the Minister's actions which have been proved to be unconstitutional. In other words it would be untenable, if not invidious, for this Court to countenance an act which has been declared unconstitutional. In essence, he submits that no court can make an unlawful act lawful.

[47] As a counter, the Minister argued that this Court has in the past endorsed the principle that administrative decisions taken under a valid law that is subsequently declared unconstitutional are not automatically invalid but rather "[t]he rule of law requires their preservation". Three decisions of this Court were cited in support of this claim: *Van Rooyen*,⁵¹ *Democratic Alliance*⁵² and *Kruger*.⁵³

⁵¹ *Van Rooyen and Others v the State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*).

⁵² *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (*Democratic Alliance*).

[48] I will briefly deal with the three cases to demonstrate that the reliance on them was misguided.

[49] In *Cross-Border Road Transport Agency*, this Court held that the legal consequence which ordinarily flows from a declaration of constitutional invalidity is that the impugned law is invalid from the date of its promulgation.⁵⁴ This is the so-called default position. In other words, the order of invalidity will have immediate retrospective effect unless the order is varied by an order of court. This can be done for a variety of reasons provided it is just and equitable.

[50] In *Van Rooyen*, it is true that, although several provisions of the Magistrates' Courts Act were declared to be invalid, the decisions taken under them were preserved.⁵⁵ This is because the interests of justice demanded this, as it would have caused chaos if all previous magistrates' courts' decisions were overturned. No comparable interests of justice considerations exist in the present case.

[51] Similarly, in *Democratic Alliance*, the invalid decisions by Mr Simelane were preserved as it would have brought about confusion and disorder if all the decisions taken by Mr Simelane were set aside as nullities. Yacoob ADCJ therefore rightly preserved these decisions.⁵⁶

[52] The Minister incorrectly contends that *Kruger* supports the proposition that “an act done pursuant to invalid statutory provisions must nonetheless remain valid in the interests of certainty and to avoid disruption”. But the case supports no such general

⁵³ *Kruger v President of Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (*Kruger*).

⁵⁴ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) at para 20.

⁵⁵ *Van Rooyen* above n 51 at para 260.

⁵⁶ *Democratic Alliance* above n 52 at para 93.

proposition. In *Kruger*, the Court preserved the conduct of the Road Accident Fund that had relied on invalid proclamations. This was to avoid disruption and disorder. There must be an interests of justice consideration that overrides the presumption of objective constitutional invalidity.⁵⁷

[53] It is worth noting that Mr McBride is not opposed to his suspension followed by disciplinary proceedings. Furthermore, he has declared his willingness to participate in any process provided it is constitutionally compliant.

[54] In an attempt to obviate the disruption which the Minister feared might ensue if his decisions to suspend and discipline Mr McBride are set aside, the High Court made an order that the declaration of invalidity of the Minister's decision to suspend and institute disciplinary proceedings against Mr McBride be suspended for 30 days in order for the National Assembly and the Minister, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 of its order. Mr McBride is amenable to this. I find this to be just and equitable for both parties. It affords the Minister the opportunity, if he so wishes, to restart the process but on a proper basis. At the same time it ensures that Mr McBride's suspension is reasonable as he is still protected by the constitutionally protected presumption of innocence in his favour.

[55] I thus confirm the High Court's reading-in of the relevant provisions of the SAPS Act to operate on an interim basis. Furthermore, I regard a notional severance of the relevant provisions of the Public Service Act and the IPID regulations to be fair and equitable. This is intended to secure the independence of the IPID on an interim basis, until Parliament remedies the defects identified. During this time, the impugned provisions of the IPID Act, the Public Service Act and the IPID Regulations – to the extent that they allow the Minister to suspend, remove or institute disciplinary proceedings against the Executive Director – will remain inoperative.

⁵⁷ *Kruger* above n 53 at paras 69-70.

[56] The High Court gave adequate consideration to what a just and equitable remedy should be as required by section 172 of the Constitution. Its conclusion was well-reasoned and fully supported by the facts of the case. Accordingly, I confirm the orders of the High Court.

Costs

[57] The general principle is that costs must follow the result. In other words a successful party must be awarded costs. At the hearing, the Minister submitted that, because he made some legal concessions, no costs order should be made in this Court. But he still opposed the matter until late in the proceedings. The Minister's draft order was served and filed at the proverbial eleventh hour, after the parties had already finalised their preparation and incurred high costs. I am therefore of the view that there is no reason to depart from the general rule, costs must follow the result.

[58] In the result, the following order is made:

1. It is declared that the following provisions are invalid to the extent that they authorise the Minister of Police to suspend, take any disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate—
 - 1.1. section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act 1 of 2011;
 - 1.2. sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994;
 - 1.3. regulation 13 of the IPID Regulations for the Operation of the Independent Police Investigative Directorate (GN R98 of Government Gazette 35018 of 10 February 2012), (IPID Regulations).

2. Parliament is directed to cure the defects in the legislation within 24 months from the date of this order.
3. Pending the correction of the defect(s):
 - 3.1. Section 6(6) of the Independent Police Investigative Directorate Act 1 of 2011 is to be read as providing as follows:

“Subsections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 apply to the suspension and removal of the Executive Director of IPID, with changes as may be required by the context.”
 - 3.2. Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994 and regulation 13 of the IPID Regulations are declared inconsistent with section 206(6) of the Constitution and shall not apply to the Executive Director of the Independent Police Investigative Directorate.
4. It is declared that the decision of the Minister of Police to suspend Mr Robert McBride from his position as Executive Director of the Independent Police Investigative Directorate is invalid and is set aside.
5. The order in paragraph 4 is suspended for 30 days in order for the National Assembly and the Minister of Police, if they so choose, to exercise their powers in terms of the provisions referred to in paragraph 3.1 above.
6. It is declared that the decision of the Minister of Police to institute the disciplinary inquiry against Mr Robert McBride, which was to commence on 21 May 2015, is invalid and is set aside.
7. The Minister of Police is directed to pay the costs of Mr Robert McBride, including the costs of two counsel.

For the Applicant:

S Budlender and J Bleazard instructed
by Adams & Adams Attorneys

For the First Respondent:

W Mokhari SC, T Ngcukaitobi,
F Hobden and J Raizon instructed by
Hogan Lovells (South Africa)
incorporated as Routledge Modise
Incorporated

For the Amicus Curiae:

C Steinberg instructed by Webber
Wentzel Attorneys