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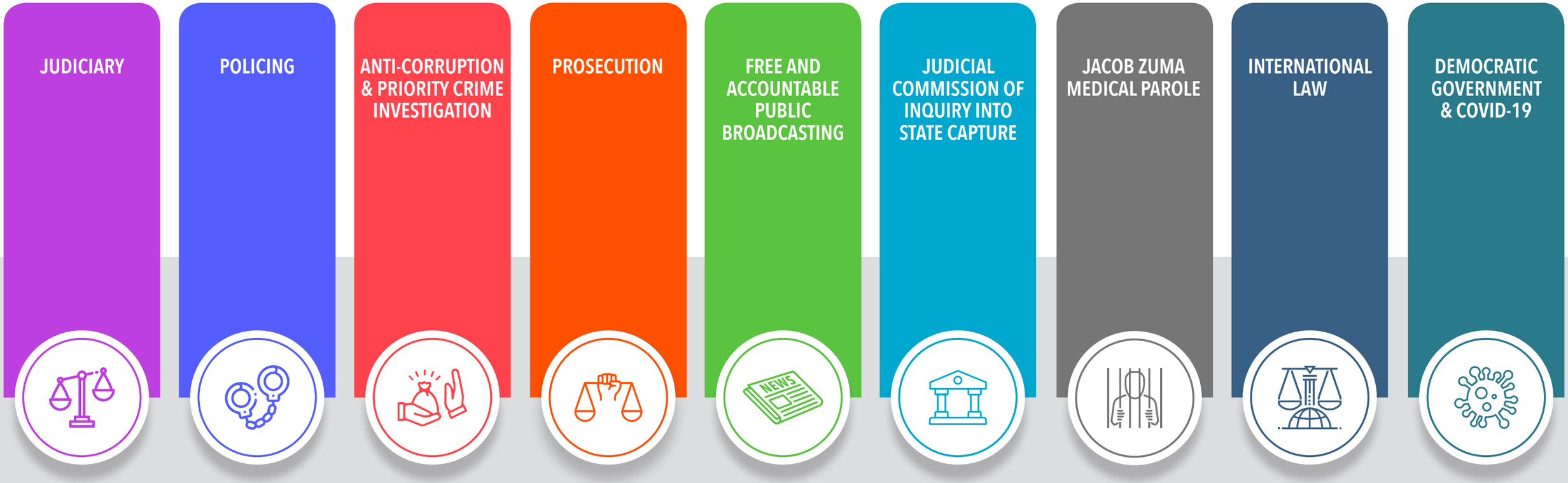

Compiled by: Christopher Fisher, with Cecelia Kok, Sophie Smit, Mihloti Basil Sherinda, Zeenat Emmamaly, Chelsea Ramsden, Francis Antonie and Anton van Dalsen

Judicial Service Commission

The Judicial Service Commission (JSC) was established in terms of section 178 of the South African Constitution and is regulated by the Judicial Service Commission Act 9 of 1994. The JSC plays a central advisory role in the selection of judges, as well as in the receipt and adjudication of complaints about judges.

The JSC is designed to play a crucial role in South Africa's constitutional democracy, through ensuring the quality and independence of its judiciary.

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Magistrates' Commission

The Magistrates' Commission (Commission) was created in terms of the Magistrates' Court Act 32 of 1994. The Commission plays a central role in the selection of magistrates (judicial officers of the lower courts of South Africa) as well as in the receipt and adjudication of complaints about magistrates.

The Commission is designed to play a crucial role in South Africa's judiciary, through ensuring the quality and independence of its magistracy.

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Judicial Service Commission

The Helen Suzman Foundation's litigation in respect of the JSC sought transparency in the process by which judges are selected. The catalyst for the litigation was a 2012 decision by the JSC to recommend certain candidates to be appointed as judges in the Western Cape Division of the High Court. The effect of the decision was to overlook certain well qualified candidates. This caused the HSF to launch a review of the 2012 decision.

However, the JSC was determined to keep secret its deliberations about the decision, effectively blocking the HSF's review. What ensued was a six-year long court battle, in which the HSF sought, successfully in the end, to compel the JSC to release its private deliberations. The HSF's successful litigation in this matter has laid the foundations for a transparent judicial selection process going forward.

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Magistrates' Commission

The HSF joined proceedings against the Commission as a 'friend of the court' (*amicus curiae*), when Mr Richard Lawrence approached the High Court to challenge the lawfulness of his being excluded from consideration as a permanent magistrate on the sole ground of his race. Mr Lawrence was successful before the High Court and again before the Supreme Court of Appeal, after the Commission appealed against the High Court's decision.

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JUDICIARY

05 SEP 2014

THE HIGH COURT CASE

Helen Suzman Foundation v Judicial Service Commission [2014] ZAWCHC 136

2 NOV 2016

THE SUPREME COURT OF APPEAL CASE

Helen Suzman Foundation v Judicial Service Commission [2016] ZASCA 161

24 APR 2018

THE CONSTITUTIONAL COURT CASE

Helen Suzman Foundation v Judicial Service Commission Foundation of South Africa as amicus curiae 2018 (7) BCLR 763 (CC)

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2014
5 Sep

Helen Suzman Foundation v Judicial Service Commission
[2014] ZAWCHC 136

Judgment Date: 5 September, 2014

In October 2012, the JSC decided to advise the President of South Africa to appoint certain candidates as judges in the Western Cape Division of the High Court. The JSC's advice had the effect of excluding certain well-qualified candidates from that office. This caused the HSF to launch a review of the JSC's decision on the grounds that it was irrational and unlawful. In order for a judicial review of this sort to be launched effectively and fairly, however, Rule 53 of the South African Uniform Rules of Court requires that the party making an application for judicial review has access to the full record of the impugned decision. The HSF believed that this should include the JSC's private deliberations, subject to a confidentiality regime that a court of law may deem necessary.

In August 2013, the JSC made available a record of its decision that did not include its private deliberations and later claimed blanket confidentiality thereover when the HSF objected.[1] The HSF then launched a separate interlocutory application in the Western Cape High Court, seeking to compel the JSC to release its private deliberations. The HSF argued that it was entitled to these deliberations in order to fairly and effectively launch its review and that to withhold the record of the deliberations would cause the JSC to act in an untransparent and unaccountable manner.

The High Court disagreed with the HSF on both counts.

The High Court held that the record delivered to the HSF complied with Rule 53 for two reasons. First, because the JSC's private deliberations did not fall within the scope of that rule in the first place. Second, because the record already delivered was considered sufficient. Further, the High Court held that the JSC's public interview process, coupled with its publicly available procedure and

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1. For the sake of completeness, the record did include: (a) the reasons for the decision by the JSC; (b) the transcripts of the JSC interviews; (c) each candidate's application for appointment; (d) comments on each candidate by various professional bodies and individuals; and (e) related research, submissions and correspondence.

set of criteria for the selection of judges, meant that the JSC did not act in an untransparent and unaccountable manner.

The HSF appealed the High Court's decision to the Supreme Court of Appeal.

The High Court judgment and court papers can be found **here**.

2016
2 Nov

Helen Suzman Foundation v Judicial Service Commission
[2016] ZASCA 161

Judgment Date: 2 November, 2016

On appeal to the SCA, the HSF pressed the argument that it placed before the High Court, namely that South African constitutional democracy, and its associated principles of transparency and accountability, implied that the JSC's private deliberations must be made available in the course of a judicial review. Further, the HSF argued that the JSC's private deliberations were essential to it being able to fairly and effectively review the JSC's decision in the first place, because they represented the most direct evidence of the JSC's reasoning process.

While the SCA recognised that there is no hard-and-fast rule that excluded private deliberations from being made available in the course of a judicial review, the SCA dismissed the HSF's appeal. The SCA gave a three-fold justification for this finding.

First, that the JSC had a legitimate interest in its deliberations remaining private, lest it shrink from engaging in the sort of frank and open debate that is required to properly assess candidates for judicial office. Second, that candidates for judicial office themselves have a reputational interest in not having the JSC's private opinions about them publicly aired to any degree. Third, that the JSC compared favourably with its international counterparts in terms of transparency and accountability, because it held its interviews in public, advertised its procedures and the criteria for appointment as a judge and recognised its duty to give reasons for its decisions, albeit summarised versions thereof.

The HSF then appealed the SCA's finding to the Constitutional Court.

The Supreme Court of Appeal judgment and court papers can be found **here**.

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2018
24 Apr

Helen Suzman Foundation v Judicial Service Commission Foundation of South Africa as amicus curiae 2018 (7) BCLR 763 (CC)

Judgment Date: 24 April, 2018

A majority of the Constitutional Court upheld the HSF's appeal against the SCA's finding. The majority found that the JSC's private deliberations indeed fell within the scope of Rule 53 and, thus, had to be disclosed in the course of reviewing a decision of the JSC. The Constitutional Court held that endorsing the contrary view would be to exempt the JSC from the foundational values of South African constitutional democracy, namely: transparency, accountability and responsiveness. Further, the Constitutional Court held that any legitimate confidentiality concerns held by the JSC or candidates for judicial office could be dealt with effectively by coupling the disclosure of the JSC's private deliberations with a strict confidentiality regime.

The Constitutional Court reasoned that the JSC's private deliberations were manifestly relevant to an application to review a decision of the JSC and to withhold them would constitute an unjustified limitation of the right to access courts, enshrined in section 34 of the Constitution. In this regard, the Constitutional Court pointed out that the JSC's advisory role in appointing judicial officers was a crucial constitutional function. As such, our rules governing judicial review should allow applicants seeking to review the JSC's decisions to formulate their case on the most complete record of relevant information possible.

In addressing the JSC's confidentiality concerns, the Constitutional Court departed from the SCA's reasoning in two key respects. First, it found that the SCA underestimated the JSC's members when it assumed that they would shrink from robust debate, if there were a risk that their deliberations could be disclosed subject to a confidentiality regime. Second, it found that the SCA underestimated the resilience of candidates for judicial office themselves, as they are in any event subject to a robust public interview process that poses no more reputational risk than private deliberations that are later disclosed.

The judgment and court papers can be found **here**.

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JUDICIARY

12 DEC 2019

THE HIGH COURT CASE

Lawrence v Magistrates' Commission and Others [2020] JOL 46442 (FB)

2 DEC 2021

THE SUPREME COURT OF APPEAL CASE

Magistrates Commission and Others v Lawrence [2021] ZASCA 165

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JUDICIARY

12 DEC 2019

Lawrence v Magistrates' Commission and Others
[2020] JOL 46442 (FB)

Judgment Date: 12 December, 2019

The Applicant in this case, Richard Lawrence, had been acting as a magistrate in Bloemfontein since 2 January 2015 and as Head of Office of the Petrusburg Magistrate Court since 1 October 2016. He had received accolades from more than one of his seniors in several progress reports and his acting contract had been extended several times on the basis of the recommendations of a senior magistrate and Acting Chief Magistrate.

During 2018 the Commission invited applications to fill several vacancies, which included six vacancies for magistrates in Bloemfontein and one vacancy for Head of Office for each of the towns of Petrusburg and Botshabelo. Lawrence applied for all of them and was not shortlisted for any. The record of the decision revealed that this was solely because Lawrence was a white male.

On 26 February 2019 Lawrence was informed that he was not shortlisted, because his appointment would not address the concern, housed in section 174(2) of the Constitution, that "the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed". No mention was made of section 174(1) of the Constitution, which states that "any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer".

Lawrence subsequently approached the High Court to declare the shortlisting proceedings unlawful and that they be set aside. The HSF joined proceedings as 'friend of the court' (*amicus curiae*). The main thrust of the HSF's argument was that both sections 174(1) and 174(2) of the Constitution must play a role in evaluating applications for judicial office. Therefore, the Commission completely fettered its discretion when it first imposed race and gender as a sole criterion, without adopting a holistic view of Lawrence's application.

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The ultimate finding by the High Court was that because the Commission's Appointment Committee did not consider Mr Lawrence at all, they placed the sole focus on his race. As a result, the High Court declared the shortlisting proceedings unlawful and unconstitutional and set them aside.

The Magistrates' Commission applied for, and was granted, leave to appeal to the Supreme Court of Appeal on 16 March 2020.

The judgment and court papers can be found **here**.

JUDICIARY

02 DEC 2021

Magistrates Commission and Others v Lawrence [2021] ZASCA 165

Judgment Date: 2 December, 2021

On appeal to the SCA, the HSF submitted that section 174(2) does not allow for a rigid exclusion of candidates for judicial appointment solely on racial grounds. In this regard, the HSF submitted that both sections 174(1) and 174(2) of the Constitution must play a role in evaluating applications for judicial office. It is in the interests of justice, and the independence of the judiciary, that all suitably qualified candidates must, at the very least, be considered for appointment to judicial office notwithstanding their race or gender.

The SCA confirmed the judgment of the High Court, finding that the targeted exclusion of white candidates meant that a blanket, inflexible approach was adopted that prioritised race to the exclusion of all others. It held that there should have been a consideration of all relevant criteria.

The High Court judgment and court papers can be found **here**.

POLICING

Independent Police Investigative Directorate (IPID)

The Independent Police Investigative Directorate (IPID) was created in terms of section 206(6) of the South African Constitution and is regulated by the Independent Police Investigative Directorate Act 1 of 2011. IPID is tasked with receiving and investigating complaints against members of the South African Police Service (SAPS).

IPID plays a crucial role in deterring, preventing and investigating unlawful activity perpetrated within the SAPS. It is, therefore, crucial that IPID be staffed by individuals of integrity and remain free from undue political interference.

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POLICING

The Helen Suzman Foundation's (HSF) participated litigation related to IPID, in order to ensure its independence from undue political interference. A direct threat to this independence came first in 2015, when the Minister of Police unilaterally suspended the then IPID Executive Director, Robert McBride. Another threat came in 2018, when the Minister of Police sought to unduly interfere with the renewal of McBride's term as IPID's executive Director. In both instances, the HSF participated in litigation to ensure and defend IPID's independence.

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POLICING

6 SEP
2016

THE HIGH COURT CASE

McBride v Minister of Police and Another; Helen Suzman Foundation as Amicus Curiae
CC 2016 (11) BCLR 1398

7 APR
2021

THE SUPREME COURT OF APPEAL CASE

Helen Suzman Foundation v McBride and Others
[2021] JOL 50046 (SCA)

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2016
6 Sep

McBride v Minister of Police and Another; Helen Suzman Foundation as Amicus Curiae 2016 (11) BCLR 1398 (CC)

Judgment Date: 6 September, 2016

This case took place against a backdrop of an attempt to remove from office the Head of the Directorate of Priority Crime Investigation (colloquially known as the "Hawks"), Anwa Dramat, and one of his Deputies, Major General Sibiya. Dramat and Sibiya were alleged to have been involved in the unlawful repatriation of four Zimbabwean nationals, who stood accused of crimes in Zimbabwe, between 2010 and 2011.

Given that the Hawks are a unit within the SAPS, IPID was tasked with investigating the accusations. It produced two conflicting reports. The first recommended that criminal charges be brought against Dramat and Sibiya. The second found that there was no evidence that could establish criminal liability, effectively removing any basis for removing Dramat and Sibiya. The Minister of Police at the time, Nkosinathi Nhleko, suspended IPID's Executive Director, Robert McBride, who had overseen the second report.

McBride responded by instituting an urgent application in the Pretoria High Court to restrain the Minister of Police from suspending him. In addition, McBride requested a declaration that various legislative provisions that guided the Minister's role in the suspension, discipline and removal of the Executive Director of IPID were unconstitutional.[1] McBride argued that these provisions did not afford IPID an adequate level of independence from political control. The High Court agreed with McBride and relied heavily on the HSF's successful intervention as a 'friend of the court' (*amicus curiae)* in a related case, *Glenister II*, for its finding.[2] The High Court held that the relevant legislative provisions effectively gave the Minister unilateral power and sole discretion to terminate the tenure of the Executive Head of IPID, resulting in a constitutionally impermissible lack of independence.

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1. The HSF did not participate in these proceedings.
2. The arguments placed before the Constitutional Court in this case can be perused further, under the entry "Anti-Corruption and Priority Crime Investigation."

As a result, the High Court declared the relevant legislative provisions unconstitutional, and declared the Minister's decision to suspend McBride unlawful.

In terms of section 167(5) of the South African Constitution, any declaration by a High Court that a legislative provision is unconstitutional must be confirmed by the Constitutional Court by way of an application by the successful party. McBride duly applied to the Constitutional Court for confirmation and the HSF joined as *amicus curiae* in order to make submissions that highlighted the importance of IPID's actual and perceived independence. The Constitutional Court agreed with the High Court's order that the relevant legislative provisions were unconstitutional and, like the High Court before it, relied heavily on the reasoning in *Glenister II*.

The Constitutional Court also agreed with the High Court's remedy and declared the Minister's decision to suspend McBride unlawful. Ultimately McBride was reinstated.

The judgment and court papers can be found **here**.

POLICING

2021
7 Apr

Helen Suzman Foundation v McBride and Others
[2021] JOL 50046 (SCA)

Judgment Date: 7 April, 2021

Following Robert McBride's reinstatement as the Executive Director of IPID in the wake of *McBride v Minister of Police and Another; Helen Suzman Foundation as Amicus Curiae* 2016 (11) BCLR 1398 (CC), he found himself in another battle with the Minister of Police over the renewal of his term. As the time for renewal approached, McBride wrote to the Minster, seeking clarity on whether he would have his term in office renewed. The Minister wrote back to McBride, stating that he had decided that McBride's term would not be renewed.

Faced with yet another interference in IPID's independence by the Minister, McBride approached the High Court to interdict the decision not to renew his term as Executive Director. McBride argued that the decision to renew the term of IPID's Executive Director was not the Minister's to make but rather that it lay with the Parliamentary Committee for Policing (PCP). The HSF joined the proceedings before the High Court as a 'friend of the court' (*amicus curiae*) in order to make submissions regarding an alternative interpretation of the legislative provisions governing the renewal of the IPID Executive Director's term of office. The HSF submitted that the only interpretation of the relevant provisions that could keep IPID from undue political influence was one on which the Executive Head of IPID could decide on his own renewal.

Just before the matter was to be heard before the High Court, McBride, the Minister and the PCP revealed a settlement agreement, which provided for McBride's term not being renewed – but at the instance of the PCP. The High Court ultimately made the settlement agreement an order of the court, without a ventilation of the HSF's interpretive argument. As a result, the HSF appealed to the Supreme Court of Appeal (SCA), which dismissed the HSF's interpretive argument. The SCA held that once it is clear that the decision to renew IPID's Executive Director's term of office lay with the PCP – and not the Minister – IPID was sufficiently protected from undue political influence.

The judgment and court papers can be found **here**.

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ANTI-CORRUPTION & PRIORITY CRIME INVESTIGATION

The Directorate for Priority Crime Investigation

The Directorate for Priority Crime Investigation (colloquially referred to as "the Hawks") was created in 2008 under the South African Police Services Act. The Hawks are tasked with preventing, combatting and investigating priority crimes, corruption and other serious offences.

The Hawks is a crucial institution in South Africa's crime fighting apparatus. The crimes which it investigates are often complex and require dedicated, highly skilled and independent institutional capacity. It is, therefore, crucial that the Hawks are staffed with persons of integrity and remain independent of undue political influence.

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ANTI-CORRUPTION & PRIORITY CRIME INVESTIGATION

The Helen Suzman Foundation's (HSF) interest in the Hawks began when they were called into life to replace the disbanded Directorate of Special Operations (colloquially referred to as "the Scorpions"). The Scorpions were a priority crime fighting unit, situated within the South African National Prosecuting Authority, that was renowned for its independence and effectiveness in dealing with priority crimes. The HSF's concern was that the newly formed Hawks would lack the independence and effectiveness of its predecessor.

After significant success in two separate cases dealing with the Hawks' independence, the HSF successfully pursued two further legal battles centered around the unlawful suspension and subsequent appointment of the Hawks' National Head.

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ANTI-CORRUPTION & PRIORITY CRIME INVESTIGATION

17 MAR 2011

THE 1ST CONSTITUTIONAL COURT CASE

Glenister v President of the RSA and Others; Helen Suzman Foundation as Amicus Curiae
2011 (7) BCLR (1)

13 DEC 2013

THE 1ST HIGH COURT CASE

Helen Suzman Foundation v President of the Republic of SA and others; In re: Glenister v President of the Republic of South Africa and Others
[2013] ZAWCHC

27 NOV 2014

THE 2ND CONSTITUTIONAL COURT CASE

Glenister v President of the Republic of South Africa and Others
2015 (1) BCLR 1 (CC)

JAN/FEB 2015

THE 2ND HIGH COURT CASE

Helen Suzman Foundation v Minister of Police and Others
(2015) ZAGPPHC
CASE NO: 1054/2015

17 MAR 2017

THE 3RD HIGH COURT CASE

HSF and another v minister of police and others [2017] 3 ALL SA 253 (GP) 17 MARCH 2017

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2011
17 Mar

Glenister v President of the RSA and Others; Helen Suzman Foundation as Amicus Curiae 2011 (7) BCLR (1)

Judgment Date: 17 March, 2011

In 2001, South Africa created the Scorpions, a specialised unit within the National Prosecuting Authority (NPA). The Scorpions were dedicated to investigating organised crime and assisting its prosecution. It later developed into a highly effective corruption-fighting force in South Africa. As a result, the Scorpions drew the unwanted attention of political actors. In 2008, legislation was passed to disband the Scorpions and create the Hawks, as a specialised unit within the South African Police Services (SAPS), not the NPA. The relocation was not benign, as the legislation established the Hawks to be significantly more beholden to political actors.

The legislation that disbanded the Scorpions and established the Hawks was initially challenged by South African businessman, Hugh Glenister, in the Western Cape High Court (High Court).[1] He challenged the legislation on the grounds that the formation of the Hawks, within the SAPS as opposed to the NPA, did not serve any rational governmental purpose, that it undermined the independence of the NPA and that it resulted in the state failing to uphold a litany of its constitutional obligations. Mr. Glenister failed in the High Court and appealed to the Constitutional Court.

There, the HSF joined as a 'friend of the court' (*amicus curiae*) and made a distinct two-fold argument against the legislation that established the Hawks. First, that the South African Bill of Rights, interpreted in line with South Africa's binding international law obligations, required the state to establish a sufficiently independent corruption-fighting institution – whether it was located within the NPA or the SAPS. Second, that the legislation which created the Hawks fell short of this obligation.

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1. This was the second time that Mr. Glenister had tried to challenge the South African Government's attempt to disband the Scorpions and establish the Hawks. His first attempt failed, because the legislation at issue had not yet been properly passed by Parliament, making his challenge premature. The HSF did not participate in these initial proceedings. That judgment was reported as: *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19 and is available **here.**

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A majority of the Constitutional Court accepted the HSF's reasoning over that of Mr Glenister's.

The majority of the Constitutional Court held that the state's duty contained in section 7(2) of the South African Constitution (Constitution) to "respect, protect, promote and fulfil the rights in the Bill of Rights" implied that reasonable steps had to be taken to combat corruption, given its manifestly deleterious effect on the state's ability to realise the overall promise of the Bill of Rights. The Constitutional Court agreed with the HSF that since section 39(1)(b) of the Constitution mandates our courts to "consider international law" when interpreting the Bill of Rights, South Africa's binding international law commitment to establishing an independent corruption-fighting institution could not be ignored. This commitment was expressed in various instruments of international law that the South African Parliament had ratified – and this meant that establishing a sufficiently independent anti-corruption unit was a constitutional imperative.

In assessing whether the legislation that created the Hawks met this constitutional imperative, the majority of the Constitutional Court found three key defects. First, the legislation gave the National Head of the Hawks the same precarious level of job security as any ordinary member of the SAPS, effectively making him or her beholden to political actors that oversee the SAPS. Second, political actors could unduly influence the Hawks via a Ministerial Committee that could determine the Hawk's crime-fighting agenda and exercise significant control over its day-to-day management. Third, Parliament was given no substantial role in overseeing the Hawks, essentially making the Ministerial Committee the key mechanism of the Hawks' oversight.

As a result, the Constitutional Court declared the legislation that created the Hawks unconstitutional and gave Parliament eighteen months to rectify its defects.

The judgment and court papers can be found **here**.

2013
13 Dec

Helen Suzman Foundation v President of the Republic of South Africa and others; In re: Glenister v President of the Republic of South Africa and Others [2013] ZAWCHC

Judgment Date: 13 December, 2013

As a result of the Constitutional Court's finding in *Glenister v President of the RSA and Others; Helen Suzman Foundation as Amicus Curiae* 2011 (7) BCLR (1) (*Glenister II*),[2] the South African Parliament set about amending the legislation that disbanded the Scorpions and established the Hawks.

The HSF challenged the amended legislation in the Western Cape High Court (High Court), because it failed to make the Hawks independent to a degree that would comply with the state's constitutional obligations as set out in *Glenister II*.

The HSF was partially successful in the High Court with regard to legislative provisions that impermissibly allowed undue political influence to affect the appointment, suspension and extending the tenure of the National Head of the Hawks, as well as the formulation of the Hawks' crime fighting agenda.

In terms of section 167(5) of the South African Constitution, any declaration by a High Court that a legislative provision is unconstitutional must be confirmed by the Constitutional Court by way of an application by the successful party. Alongside its confirmation application, the HSF appealed against the High Court's refusal to declare unconstitutional legislative provisions that gave the Minister of Police extensive influence in determining the conditions of employment at the Hawks, as well as to determine the Hawks' ability to co-ordinate its activities with those of other government departments.

The outcome of the appeal and the confirmation application to the Constitutional Court constitute the final legal outcome of the HSF's challenge to the legislation establishing the Hawks. It is discussed under its own heading in the next entry to this timeline.

The High Court judgment and court papers can be found **here**.

2. The case is called *Glenister II*, because it was the second time that Mr. Glenister had tried to challenge the South African Government's attempt to disband the Scorpions and establish the Hawks. His first attempt failed, because the legislation at issue had not yet been properly passed by Parliament, making his challenge premature. That judgment was reported as: *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19 and is available **here**.

ANTI-CORRUPTION & PRIORITY CRIME INVESTIGATION

2014
27 Nov

Helen Suzman Foundation v President of the Republic of South Africa and others; Glenister v President of the Republic of South Africa and Others
2015 (1) BCLR 1 (CC)

Judgment Date: 27 November, 2014

Following the Western Cape High Court's finding in *Helen Suzman Foundation v President of the Republic of South Africa and others; In re: Glenister v President of the Republic of South Africa and Others* [2013] ZAWCHC, the HSF brought the requisite confirmation application to the Constitutional Court. At the same time, the HSF appealed against the High Court's decision not to declare invalid certain provisions in the legislation that established the Hawks. The appeal was dismissed but the High Court's orders of invalidity were partially confirmed in three respects.

First, the Constitutional Court agreed with the HSF that the legislation at issue gave the Minister of Police unfettered power to renew the tenure of the National Head of the Hawks in certain circumstances. This opened the possibility that the National Head could tailor his job performance to the political demands of the Minister of Police and rendered the relevant provisions unconstitutional.

Second, the Constitutional Court agreed with the HSF that the legislation at issue impermissibly allowed the Minister of Police untrammelled power to remove the National Head of the Hawks, without any meaningful check by Parliament.

Third, the Constitutional Court accepted the HSF's concerns regarding the Hawks ability to determine its crime-fighting agenda independently of political actors and in a manner that was clear and ascertainable from the legislation that governed the Hawks. In this regard, the Constitutional Court made two key findings. First, it found that the legislation at issue unduly inserted political actors (such as the Minister of Police or the National Commissioner of Police) into the determination of the types of offences that the Hawks could pursue. Second, it struck down provisions of the legislation that lacked clarity as to categories of crime that the Hawks were empowered to investigate.

The result of this line of cases was that the Hawks were left fundamentally more independent.

The judgment and court papers can be found **here**.

HOME TIMELINE

2015 23 Jan

2015 6 Feb

Helen Suzman Foundation v Minister of Police and Others (2015) ZAGPPHC Case No: 1054/2015.

1st Judgment Date: 23 January, 2015 | **2nd Judgment Date:** 6 February, 2015

Just a matter of weeks after the Constitutional Court's ruling in *Helen Suzman Foundation v President of the Republic of South Africa and others; Glenister v President of the Republic of South Africa and Others* 2015 (1) BCLR 1 (CC) (*Glenister III*), the then Minister of Police, Nkosinathi Nhleko, suspended the incumbent National Head of the Hawks, Anwa Dramat and replaced him with General Berning Ntlemeza.

The HSF applied to the Gauteng High Court in order to secure an order declaring that Dramat's suspension was unlawful and, subsequently, that the appointment of General Ntlemeza was unlawful. The HSF pointed out that Dramat had been suspended in terms of legislative provisions that were expressly struck down as unconstitutional in *Glenister III*. The High Court accepted the HSF's argument and, in a judgment delivered on 23 January 2015, declared that Dramat's suspension was unlawful and, as a result, so was the appointment of General Ntlemeza.

Immediately thereafter, Nhleko and Ntlemeza applied to the High Court for leave to appeal against the 23 January 2015 judgment. The HSF opposed the application and made its own counterapplication, which sought to ensure that the 23 January 2015 order remained in full effect while the appeal process played out. This relief was central to defending the HSF's success in the initial application, because the general legal rule is that a court order does not take effect until the appeals process is finalised. This opens the potential to abuse the appeals process in order to avoid the effect of the initial order.

The HSF was ultimately successful before the High Court. In a judgment handed down on 6 February 2015, the High Court found in favour of the HSF in two respects. First, it refused leave to appeal. Second, because this did not prevent Nhleko and Ntlemeza from applying to higher courts directly for an appeal, it ordered that its order which aside the suspension of Dramat and the appointment of Ntlemeza would remain operational until future appeals were finalised.

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Despite the series of court judgments in his favour, Dramat decided to resign from his position as National Head of the Hawks. This opened the way for Nhleko to appoint Ntlemeza as National Head of the Hawks on 10 September 2015, unburdened by having to first suspend the incumbent.

The judgments and court papers can be found **here**.

2017 17 Mar | 2017 10 May | 2017 9 Jun

HSF and another v minister of Police and others [2017] 3 all SA 253 (GP) 17 March 2017

1st Judgment Date: 17 March, 2017 | **2nd Judgment:** 10 May, 2017 | **3rd Judgment:** 9 June, 2017

In March 2017, the HSF, along with Freedom Under Law (FUL), challenged Nhleko's decision to appoint Ntlemeza as National Head of the Hawks in the Pretoria High Court. The HSF and FUL contended that the appointment was unlawful, irrational and would undermine the Hawks' integrity and independence.

The principal ground of review was that Nhleko, who was aware of, but had not taken into account the fact that Ntlemeza's integrity was called into question in a 2015 court judgment, that was handed down against Ntlemeza.[3] That case involved Ntlemeza's decision to suspend a provincial head of the Hawks. In finding against Ntlemeza, the judge in that matter stated that he had acted in bad faith and lied under oath.

The High Court held in favour of HSF and FUL in a judgment handed down on 17 March 2017 (First High Court Judgment). It reasoned that the legislative provisions governing the appointment of the National Head of the Hawks contemplated a person who was fit, proper, conscientious and displayed integrity. The High Court found that Ntlemeza fell short of this standard and, subsequently, set his appointment as National Head of the Hawks aside.

Subsequently, Ntlemeza applied to the High Court for leave to appeal against the First High Court Judgment. The HSF and FUL opposed the application and, as was done in the litigation involving Dramat's suspension, counter-applied for an order that kept the initial order in effect even while Ntlemeza pursued his appeal. In a judgment handed down on 10 May 2017, the High Court found in favour of the HSF and FUL. The High Court denied Ntlemeza leave to appeal and ordered that the order secured in the First High Court Judgment stay in place until the appeal process was exhausted. An appeal of the High Court's finding in this regard to the Supreme Court of Appeal was dismissed on 9 June 2017. In addition, the SCA ordered that Ntlemeza pay the legal costs of his opponents in his personal capacity.

The judgments and court papers can be found **here**.

3. The judgment is reported as *Sibiya v Minister of Police and Others* (5203/2015) [2015] ZAGPPHC 135 (20 February 2015) and is available **here**.

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PROSECUTION

National Prosecuting Authority

Section 179 of the South African Constitution establishes a National Prosecuting Authority (NPA) and gives it the power to initiate criminal proceedings on behalf of the state.

As with any prosecuting authority, the NPA plays a crucial role in the delivery of criminal justice in South Africa. It is crucial that it is staffed by persons of integrity and that it remains independent from undue political influence.

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PROSECUTION

In May 2015, the National Director of Public Prosecutions (NDPP) at the time, Mr Mxolisi Nxasana, vacated his position in exchange for a multimillion Rand settlement agreement. The NDPP, as head of the NPA, holds the power to determine prosecutorial policy in South Africa.

The litigation, in which the Helen Suzman Foundation participated as a 'friend of the court (*amicus curiae*), that followed the settlement agreement sought two purposes. First, to challenge the settlement agreement on the grounds that it was a subversion of the lawful procedures governing an NDPP's vacation of office. Second, to challenge the constitutionality of the statutory provisions that made the NDPP's job security dependent on the discretion of the President, whether by way of unilateral suspension or unilateral renewal of tenure.

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PROSECUTION

13 AUG
2018

THE CONSTITUTIONAL COURT

Corruption Watch NPC and others v President of the Republic of South Africa and others 2018 (10) BCLR 1179 (CC)

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PROSECUTION

2018
13 Aug

Corruption Watch NPC and others v President of the Republic of South Africa and others 2018 (10) BCLR 1179 (CC)

Date of Judgment: 13 August, 2018

This case took place against the backdrop of nearly a decade of turmoil at South Africa's National Prosecuting Authority (NPA), during which two Presidents, Jacob Zuma and Thabo Mbeki, sought to influence the direction of the NPA through undue interference in the appointment of its head. This case was precipitated by a particular chapter in this saga, in which former South African President, Jacob Zuma, tried to remove from office Mxolisi Nxasana, the then National Director of Public Prosecutions (NDPP).

Mr Zuma initially tried to suspend Nxasana, pending a commission of inquiry into his fitness to hold office. Following Nxasana's approach to the High Court to challenge his suspension, Mr Zuma changed his strategy and instead tried to coax Nxasana to leave office 'voluntarily'. This ultimately ended in Nxasana accepting an offer of over R17 million to leave office and Mr Zuma replacing him with Shaun Abrahams.

High Court litigation ensued in which various civil society organisations challenged the settlement agreement, as well as sections 12(4) and (6) of the National Prosecuting Authority Act (NPA Act) as unconstitutional. It was argued that these provisions, respectively, allowed the President to renew the tenure of the NDPP in certain circumstances and to summarily suspend the NDPP without pay.

The High Court held that the settlement agreement was unlawful, and sections 12(4) and (6) of the NPA Act were unconstitutional, because they threatened the NPA's independence. In terms of section 167(5) of the South African Constitution, any declaration by a High Court that a legislative provision is unconstitutional must be confirmed by the Constitutional Court, by way of an application by the successful party. The HSF joined the confirmation proceedings as a friend of the court (*amicus curiae*).

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The Constitutional Court found that the exorbitant value of the settlement agreement was a direct threat to the NPA's independence. While the NPA Act made provision for the voluntary exit of an NDPP, it set a significantly lower limit on any financial benefit emanating from an NDPP's voluntary exit. This left the Constitutional Court with the impression that Mr Zuma was attempting to 'buy' Nxasana out of his job and, thereby, to unduly exert Presidential interference in the voluntary removal of the NDPP. Accordingly, the Constitutional Court upheld the High Court's finding that the settlement agreement was unlawful. As a result, Nxasana's removal, and Abrahams' subsequent appointment, were set aside and Mr Zuma was given 90 days to fill the position via a lawful process.

The Constitutional Court further confirmed the High Court's finding that sections 12(4) and (6) of the NPA Act were unconstitutional, because they undermined the independence of the NPA. In this regard, the Constitutional Court relied heavily on the HSF's submissions in its successful application in a related case, *Glenister III*.[1]

The judgment and court papers can be found **here**.

1. The case can be perused in more detail as an entry to the "Anti-Corruption and Priority Crime Investigation" section of this document.

FREE AND ACCOUNTABLE PUBLIC BROADCASTING

SABC

In this matter, the Helen Suzman Foundation sought urgent relief interdicting the implementation of the South African Broadcasting Commission's (SABC) policy and practice not to cover violent and other protests, as well as relief preventing the SABC from adopting or implementing any censorship policy which would be contrary to the mandate of the public broadcaster.

The SABC's case collapsed, and an interim interdict was granted by the High Court, effectively ending the SABC's efforts to censor news coverage of violent and other protests.

The High Court's order and court papers can be found **here**.

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JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE

Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (also known as the 'Zondo Commission', named after the Deputy Chief Justice chairing it) was established to uncover and investigate serious abuses of power as well as corruption in the public sector, with a particular focus on Jacob Zuma's presidency.

Mr Zuma's Presidency saw staggering levels of corruption and a concomitant hollowing out of state institutions to protect a corrupt political elite. This required unearthing and accountability.

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JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE

The Helen Suzman Foundation (HSF) became involved in litigation surrounding the Commission when Jacob Zuma refused to comply with summones instructing him to appear as a witness before the Commission. When the Commission itself sought to obtain an order from the Constitutional Court compelling Mr Zuma to comply with the summones, the HSF joined the court case as a 'friend of the court' (*amicus curiae*).

Despite securing an order from the Constitutional Court compelling Mr Zuma to appear before the Commission, Mr Zuma refused to do so. Approaching the Constitutional Court for the second time, the Commission sought an order of contempt of court and the HSF, once again, joined as an *amicus curiae*. The Constitutional Court held that Mr Zuma was in contempt of court and due to the severe and unprecedented nature of his contempt, sentenced him to 15 months imprisonment.

This finding set in motion two further unprecedented court battles. The first was an application by Mr Zuma to the Constitutional Court to rescind its judgment which sentenced him to imprisonment on the basis that he was not afforded a fair trial. The second was an application to the Pietermaritzburg High Court – which had geographical jurisdiction over Mr Zuma's residence and place of intended imprisonment – to interdict the Constitutional Court's order of imprisonment, pending the outcome of the rescission application.

The HSF was cited as a respondent in both applications and opposed them. Following a swift victory in respect of the interdict application, the parties to the rescission application were requested by the Constitutional Court to make submissions on whether Mr Zuma's claim that he was not afforded a fair trial had any basis in South Africa's international law obligations. Ultimately, the Commission and the HSF successfully opposed the High Court Interdict and the rescission application, resulting in Mr Zuma being kept in prison.

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JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE

THE 1ST CONSTITUTIONAL COURT CASE

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma (CCT 295/20) [2021] ZACC 2

THE 2ND CONSTITUTIONAL COURT CASE

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT 52/21) [2021] ZACC 18

THE HIGH COURT CASE

Zuma v Minister of Police and Others (4686/2021P) [2021] ZAKZPHC 40 (9 July 2021)

THE 3RD CONSTITUTIONAL COURT CASE

Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28

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JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE

2021
28 Jan

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma (CCT 295/20) [2021] ZACC 2

Date of Judgment: 28 January, 2021

Mr. Zuma initially appeared before the Commission on 15 July 2019, in order to answer various allegations of corruption that were levelled against him by several of the Commission's previous witnesses. After two days of testimony, Mr. Zuma decided that he would no longer participate in the Commission's proceedings. Nevertheless, the Commission requested that Mr. Zuma appear before it again later that year. Following Mr Zuma's failure to co-operate, the Commission, on 20 October 2020, issued summons for Mr. Zuma to appear before it from 16 to 20 November 2021.

Mr Zuma attended the Commission's proceedings on 16 November 2020, where, instead of providing testimony, he made an application for the recusal of the Chairperson of the Commission, Deputy Chief Justice, Raymond Zondo. The application was dismissed on 19 November 2020, prompting Mr Zuma to "excuse himself" from the Commission's proceedings.

Faced with Mr. Zuma's resolve to disobey the October 2020 summons, the Commission applied, on an urgent basis, to the Constitutional Court to compel Mr Zuma to appear before it. The HSF joined the Commission as a 'friend of the court' (*amicus curiae*) in order to make submissions about the value of Mr. Zuma's testimony to the South African public, which had the right to know the full extent of Mr. Zuma's complicity and participation in corrupt activity during his presidency. Mr Zuma refused to take part in the proceedings.

In a unanimous judgment, the Constitutional Court found that section 3 of the Commission Act empowered the Commission to summon witnesses to appear before it and that a failure to comply with a summons would amount to a direct breach of the rule of law. As a result, the Constitutional Court directed Mr. Zuma to appear and testify at the Commission.

The judgment and court papers can be found **here**.

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2021 April

JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE

2021
29 Jun

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT 52/21) [2021] ZACC 18

Date of Judgment: 29 June, 2021

When Mr Zuma defied the order of the Constitutional Court in, *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (CCT 295/20) [2021] ZACC 2 (*Zuma I*) and failed to present himself at the Commission to give testimony, the Commission once against approached the Constitutional Court on an urgent basis – this time to declare that Mr Zuma was in contempt of the court order issued in *Zuma I* and to seek his imprisonment therefore. The HSF followed up its work in *Zuma I* and once again joined as *amicus curiae*, in order to make submissions on the appropriate sanction for Mr Zuma's contempt. In this regard, the HSF submitted that Mr Zuma's sanction should contain a mandatory jail sentence, with a portion thereof being avoidable, if he chose to testify before the Commission. The Constitutional Court found that the HSF's submissions regarding sanction were "relevant and of assistance".

Once again, Mr Zuma chose not to participate in the proceedings. However, in the midst of its post-hearing deliberations, the Constitutional Court broke from tradition and procedure and invited Mr Zuma to make representations on what he thought would be an appropriate sanction, in the event that he was found guilty. In response, Mr Zuma did not file an affidavit but instead addressed a 21-page letter to the Chief Justice, in which he made inflammatory statements intended to undermine the Constitutional Court, portray himself as a victim of the law and evoke public sympathy.

The Constitutional Court unanimously found that Mr Zuma was in contempt of the order handed down in *Zuma I*. The Constitutional Court split on the issue of sanction, however. In determining the appropriate sanction, a majority of the Constitutional Court took into account Mr Zuma's steadfast resistance to participate in the proceedings of the Commission and the Constitutional Court itself. In this regard, the Constitutional Court found that any further attempt to compel Mr Zuma to testify before the Commission would be fruitless. An aggravating factor in determining Mr Zuma's sanction was his uniquely powerful position as a former President, which made all the more potent his contempt of the Constitutional Court order and his inflammatory comments against the Constitutional Court itself.

The Constitutional Court ultimately sentenced Mr. Zuma to 15 months in prison.

The judgment and court papers can be found **here**.

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2021 April

JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE

2021
9 Jul

Zuma v Minister of Police and Others
(4686/2021P) [2021] ZAKZPHC 40 (9 July 2021)

Date of Judgment: 9 July, 2021

Facing imprisonment as a result of the Constitutional Court's judgment in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28 (*Zuma II*), Mr Zuma made an application to the Constitutional Court to 'rescind' that judgment. Pending the outcome of that application, Mr Zuma applied to the Pietermaritzburg High Court, which had geographical jurisdiction over his place of residence and his intended place of imprisonment, in order to interdict the Constitutional Court's order in *Zuma II*. The effect of this interdict would have been to keep Mr Zuma out of jail while the Constitutional Court deliberated on whether it should rescind the *Zuma II* order.

The HSF was cited as a respondent and opposed the relief sought by Mr Zuma.

The Pietermaritzburg High Court swiftly dismissed the application, branding it as an act of "judicial adventurism". The High Court grounded its decision on the basic constitutional principle that the hierarchy of courts should be respected, lest we invite chaos in the judicial system by allowing litigants to enlist lower courts to frustrate orders from higher ones with which they disagree.

The judgment and court papers can be found **here**.

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2021 April

1. This application is discussed in more detail under its own heading in the next entry to this timeline.

JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE

2021
17 Sep

Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28

Date of Judgment: 17 September, 2021

The first time that Mr Zuma made an effort to participate in the proceedings initiated against him by the Commission was an application to the Constitutional Court. In this application, Mr Zuma asked the Constitutional Court to 'rescind' the order which found him guilty of contempt of court and sentenced him to 15 months imprisonment. In South African law, the rescission procedure allows for a judgment, which would ordinarily be final, to be undone on very narrow grounds. Usually, a judgment is rescinded because the court or the parties made a patent factual error or because a party to the proceedings was not notified thereof.

The HSF was cited as a respondent in Mr Zuma's application and opposed it. In the midst of the Constitutional Court's post-hearing deliberations, it issued directions to all the parties asking them to make submissions on the international law relevant to Mr Zuma's fair trial rights. The HSF duly complied and submitted that South Africa's international law obligations had not been violated by the Constitutional Court's decision to imprison Mr Zuma for contempt of court in *Zuma II*.

A majority of the Constitutional Court found that the strict test for rescission was not met by Mr Zuma's application. The majority found that all the factual errors alleged by Mr. Zuma were substantially dealt with in the Constitutional Court's prior judgments regarding Mr Zuma's failure to cooperate with the Commission. Further, the majority found that Mr Zuma could not exploit his lack of presence before the Constitutional Court in *Zuma II* as a ground for recission, because he was duly notified of these proceedings and consciously chose not to be a part thereof.

Relying in particular on the HSF's submissions regarding Mr Zuma's rights to a fair trial under international law, the majority of the Constitutional Court found that the order of imprisonment, handed down in *Zuma II*, did not violate any of South Africa's international law obligations.

The judgment and court papers can be found **here**.

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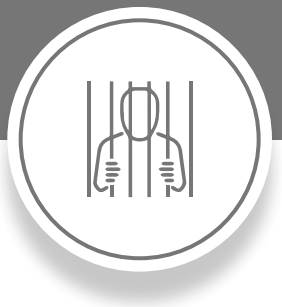
JACOB ZUMA MEDICAL PAROLE



In terms of the Correctional Services Act 11 of 1998, prisoners may receive medical parole, under certain strict conditions. The effect of being placed on medical parole is that the offender serves out their sentence outside of prison. It is, therefore, crucial for the rule of law that this statutory mechanism is not abused.

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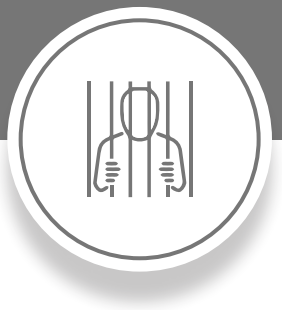
JACOB ZUMA MEDICAL PAROLE



Following a short stint in prison, due to his conviction for contempt of court by the Constitutional Court, former South African President, Jacob Zuma, was placed on medical parole by the National Commissioner of Correctional Services, Arthur Fraser. The HSF took the position that the National Commissioner unlawfully overruled the recommendation of an independently constituted Medical Parole Advisory Board. Accordingly, the HSF challenged Commissioner Fraser's decision in the High Court.

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JACOB ZUMA MEDICAL PAROLE

15 DEC
2021

THE HIGH COURT

The Helen Suzman Foundation v National Commissioner of Correctional Services and Others
Case No: 2021/46468

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JACOB ZUMA MEDICAL PAROLE

2021
15 Dec

The Helen Suzman Foundation v National Commissioner of Correctional Services and Others
Case No: 2021/46468

Date of Judgment: 15 December, 2021

The HSF sought to review the decision to place Mr Zuma on medical parole, made by the then National Commissioner of Correctional Services Arthur Fraser on two grounds. First, that the Commissioner was acting outside of his legal powers when he overruled the recommendation of an independently constituted independent Medical Parole Advisory Board (MPAB), which found that Mr Zuma was not eligible for medical parole. Second, that if the Commissioner had this power, he had exercised it irrationally by not giving any reason to depart from the MPAB's recommendation. In either event, the HSF argued that the Commissioner's decision should be set aside and that Mr Zuma should be returned to a correctional facility.

Because Mr Zuma had avoided several months of imprisonment due to the Commissioner's decision, the HSF argued that the High Court should order that his time spent on medical parole, effectively as a free person, not count towards carrying out his original sentence.

The High Court granted the HSF all the relief it sought.

The High Court found that the Commissioner does not have the power to overrule a recommendation of the MPAB, when that recommendation finds that an offender's medical condition does not warrant medical parole. This ensures that the medical parole system is not abused to subvert the rule of law. In addition, the High Court agreed with the HSF that the period during which Mr Zuma had been released on medical parole should not count towards carrying out his original sentence.

The High Court judgment and court papers can be found **here**.

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INTERNATIONAL LAW

The International Criminal Court and Omar Al Bashir

The International Criminal Court (ICC) was established by the Rome Statute in 2002. The ICC tries individuals who are alleged to have committed the most serious crimes that exist, namely: crimes against humanity, war crimes, genocide and the crime of aggression. It is therefore crucial that signatories to the Rome Statute comply with its obligations and cooperate in enabling the ICC to perform its functions.

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Extradition and Manuel Chang

Extradition is the handing over of an accused person from one state to another, where the latter has jurisdiction over that person and intends to pursue a prosecution. As such, extradition is designed to ensure criminal prosecutions are not nullified by the movement of an accused to other countries.

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INTERNATIONAL LAW

The International Criminal Court and Omar Al Bashir

In 2009 and 2010, President of Sudan, Omar Al Bashir became the subject of two warrants of arrest issued by the ICC. He was charged with crimes against humanity, war crimes and genocide. In 2015, Al Bashir attended an African Union Summit in South Africa. Instead of complying with its legal obligation to arrest him - which was confirmed in urgent High Court litigation at the time - the South African government allowed Al Bashir safe passage in and out of the country.

The South African government later appealed against the High Court judgment to the Supreme Court of Appeal, where the HSF joined proceedings as a 'friend of the court' (*amicus curiae*). Ultimately, the SCA dismissed the South African government's appeal, reaffirming that its failure to arrest Al Bashir is unlawful.

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INTERNATIONAL LAW

15 MAR 2016

THE SUPREME COURT OF APPEAL CASE

Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae) [2016] 2 All SA 365 (SCA)

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INTERNATIONAL LAW

2016
15 Mar

Minister of Justice and Constitutional Development and others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae)
[2016] 2 All SA 365 (SCA).

Date of Judgment: 15 March, 2016

In June 2015, the President of Sudan, Omar Hassan Ahmad Al Bashir, arrived in South Africa to attend the 25th Assembly of the African Union (AU). President Al Bashir was accused of committing international crimes, and the International Criminal Court (ICC) had issued two warrants for his arrest. These warrants were forwarded to parties to the Rome Statute, including South Africa, with a request that it arrests and detains President Al Bashir and surrender him to the ICC. South Africa had the opportunity to arrest Al Bashir when he travelled to South Africa to attend and African Union Summit in 2015.

The South African government refused to do so, arguing that Al Bashir had immunity in terms of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA). The South African Litigation Centre (SALC) brought an urgent application on 14 June 2015 in the Pretoria High Court to compel the government to arrest Al Bashir and surrender him to the ICC. SALC argued that the obligation to arrest Al Bashir arose from the Rome Statute and the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). The government argued that South Africa had entered into an agreement with the Commission of the AU (the Hosting Agreement), under which it had agreed to afford immunity to certain parties. In line with the DIPA, the Minister of International Relations and Cooperation recognised the Hosting Agreement in the government Gazette.

The High Court found that the immunity provisions of the Hosting Agreement did not cover heads of state or representatives of states, but only the AU itself and other organisations. The Court ruled that the government's failure to arrest Al Bashir was unconstitutional and that it was compelled to arrest and detain him pending his surrender to the ICC. The government told the Court that Al Bashir had left the country earlier that day.

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INTERNATIONAL LAW

In an appeal to the Supreme Court of Appeal (SCA), the government argued that a head of state enjoys immunity under customary international law and the DIPA, notwithstanding the Implementation Agreement. SALC argued that the provisions of the Implementation Act plainly precluded anyone arrested in terms of an ICC warrant from raising immunity as a ground for resisting their arrest and surrender.

The HSF was admitted as *amicus curiae* in the SCA. HSF emphasised the role of the Constitution, and argued that DIPA and customary international law must be read in light of South Africa's constitutional obligations. The Court praised the HSF for submissions that "were of great value in dealing with [the] case".

The Court ultimately held that while DIPA governs the issue of immunity for heads of state, the Implementation Act excludes such immunity in relation to international crimes. As such, the government had an obligation to arrest, detain and surrender President Al Bashir to the ICC under the Implementation Act.

The judgment and court papers can be found **here**.

INTERNATIONAL LAW

Extradition and Manuel Chang

Manuel Chang is a former Finance Minister of Mozambique and a former Mozambican member of Parliament. During his time in office, he is alleged to have been involved in fraud relating to loans secured from foreign financiers to various Mozambican companies. Mr Chang faces charges of fraud and corruption in both the United States of America (USA) and Mozambique.

While *en route* to Dubai in December 2018, Mr Chang was arrested in South Africa in terms of an extradition treaty between South Africa and the USA. A legal dispute ensued, centered around the question of whether South Africa should extradite Chang to the USA or to Mozambique. The South African Minister of Justice and Correctional Services at the time chose to extradite Mr Chang to Mozambique, without considering whether Mr Chang would enjoy immunity against prosecution in Mozambique. The HSF joined a collective of Mozambican civil society organizations in High Court litigation which successfully set aside this decision as unlawful.

However, in August 2021, a new Minister also made a decision to extradite Mr Chang to Mozambique. The HSF joined the same Mozambican civil society collective to oppose the South African government's decision, as a result of a continued lack of clarity regarding Mr Chang's immunity and the likelihood of a prosecution in Mozambique. This time around, the High Court ordered that Mr Chang be extradited to face prosecution in the USA and not be sent back to Mozambique.

As matters stand, the Mozambican government intends to appeal the above-mentioned court judgment.

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INTERNATIONAL LAW

11 NOV 2019

THE 1ST HIGH COURT CASE

Chang v Minister of Justice and Correctional Services (Forum de Monitoria Do Orcamento and another as Intervening Parties and Helen Suzman Foundation as amicus curiae) and a related matter [2020] JOL 46552 (GJ)

7 DEC 2021

THE 2ND HIGH COURT CASE

Chang v Minister of Justice and Correctional Services (Forum de Monitoria Do Orcamento and another as Intervening Parties and Helen Suzman Foundation as amicus curiae) and a related matter [2020] JOL 46552 (GJ)

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INTERNATIONAL LAW

2019
11 Nov

Chang v Minister of Justice and Correctional Services (Forum de Monitoria Do Orcamento and another as Intervening Parties and Helen Suzman Foundation as amicus curiae) and a related matter [2020] JOL 46552 (GJ)

Date of Judgment: 11 November, 2019

Manuel Chang was Mozambique's Minister of Finance between 2005 and 2015 – thereafter, he became a member of Mozambique's National Parliament. Mr Chang is alleged to have taken part in schemes of securities fraud, which involved securing large loans from foreign banks, companies, and persons to companies under the control of the Mozambican government. The loans were meant to fund maritime projects that would benefit the Mozambican people but, it is alleged, the funds were instead diverted to government officials in Mozambique. The amounts involved are said to be in excess of US$2 billion.

While travelling via South Africa to Dubai on 29 December 2018, the USA requested that South Africa arrest Chang in terms of an extradition treaty between the two nations. On 27 December 2018 the Pretoria Magistrate's Court authorised Chang's arrest in terms of South Africa's Extradition Act and, after hearing Chang's case, ordered his detention pending the Minister of Justice and Correctional Service's decision to extradite him. What made matters complicated for the Minister was that in the meantime, Mozambique had issued its own request for Chang's extradition.

The Minister then had to decide to where South Africa would extradite Chang. To aid his decision, the Minster enlisted the help of the International Relations Department (Department), which subsequently liaised with Mozambique's Attorney General regarding the possibility of Chang enjoying immunity from prosecution in Mozambique. The Attorney General incorrectly assured the Department that Chang no longer enjoyed immunity in Mozambique. So, when the Minister made his decision to extradite Chang to Mozambique on 21 May 2019, he did so without applying his mind to the fact that Mr Chang may well not face prosecution in Mozambique.

A collection of Mozambican NGOs applied to the Gauteng High Court to challenge the lawfulness of the Minister's decision and the HSF joined proceedings as a 'friend of the court' (*amicus curiae*).

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INTERNATIONAL LAW

The High Court found that Chang still enjoyed immunity from prosecution. This would have made his extradition there a breach of South Africa's international law obligations in terms of the SADC Protocol on Extradition. The Protocol prohibits extradition to countries where the person who is the subject of the extradition request would enjoy immunity from prosecution.

As a result, the High Court set aside the Minister's decision and remitted the decision to the new Minister of Justice and Correctional Services, Ronald Lamola for reconsideration.

The judgment and court papers can be found **here**.

INTERNATIONAL LAW

2020
7 Dec

Chang v Minister of Justice and Correctional Services (Forum de Monitoria Do Orcamento and another as Intervening Parties and Helen Suzman Foundation as amicus curiae) and a related matter [2020] JOL 46552 (GJ)

Date of Judgment: 7 December, 2021

After the High Court's decision in *Chang v Minister of Justice and Correctional Services (Forum de Monitoria Do Orcamento and another as Intervening Parties and Helen Suzman Foundation as amicus curiae*) and a related matter [2020] JOL 46552 (GJ) (*Chang I*), the new Minister of Justice and Correctional Services had an opportunity to decide whether to extradite Chang to the USA or to Mozambique. This time, the Minister was not ignorant of the possibility that Mr Chang could be immune from prosecution in Mozambique. The Minister initially decided to extradite Chang to the USA but then changed his mind and decided, like his predecessor, to extradite Chang to Mozambique.

The same collective of Mozambican civil society organisations, once again, challenged the lawfulness of the Minster's decision to extradite Chang to Mozambique. The HSF was cited as a respondent to this application and filed submissions urging the court to set aside the Minister's decision.

The High Court found that the Minister's decision was irrational, because, *inter alia*, he did not take into account that it was at best uncertain whether Chang enjoyed immunity from prosecution in Mozambique, nor did the Minister consider that Chang was a flight risk or that Mozambique was unlikely to be effectively prosecute him. In contrast to *Chang I*, the High Court ordered that Chang be extradited to the USA. In this regard the High Court held that remitting the decision to the Minister would serve no purpose, as the facts revealed that extradition to the USA was the only rational option available to the Minister on the facts before him.

The judgment and court papers can be found **here**.

HOME TIMELINE

DEMOCRATIC GOVERNMENT & COVID-19

The South African Government's response to the Covid-19 pandemic was carried out in terms of the Disaster Management Act (DMA). Once a 'disaster' is declared in terms of the DMA, the executive branch of government takes over all aspects of its management. In effect, therefore, the DMA seals off managing the Covid-19 pandemic from ordinary deliberative democratic law-making processes.

This shift away from Parliamentary involvement in managing the Covid-19 pandemic precipitated the HSF's approach to the Gauteng High Court to compel the government to chart a different course.

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THE HIGH COURT CASE

Helen Suzman Foundation v Speaker of the National Assembly and Others (32858/2020) [2020] ZAGPPHC 574

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DEMOCRATIC GOVERNMENT & COVID-19

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Helen Suzman Foundation v Speaker of the National Assembly and Others (32858/2020) [2020] ZAGPPHC 574

1st High Court Judgment Date: 7 October, 2020 | **2nd High Court Judgment Date:** 4 December, 2020

Before the Gauteng High Court, the HSF sought to challenge the South African Government's approach to managing the Covid-19 pandemic. The HSF argued that the Disaster Management Act (DMA) could not be interupted to permanently exclude Parliamentary involvement in the fight against Covid-19. In this regard, the HSF argued that Parliament was in dereliction of its constitutional duties for not having prepared or passed legislation that would deal specifically with the Covid-19 pandemic. The HSF did not argue that the DMA or its implementation offended any constitutional rights.

In this way, the HSF's case raised two narrow questions:

1. Did the facts and context created by the onset of Covid-19 create a duty to legislate over and above what had already been achieved through the DMA?
2. Was the DMA promulgated as a short-term measure to deal with Covid-19 or was it intended as an all-encompassing and comprehensive long-term response to Covid-19 and its consequences?

The High Court found that while there may well be circumstances where a court could order legislation to be drafted, this was not one of them. In this regard, the High Court found the DMA itself was a suitable pre-emptive response to a disaster like the Covid-19 pandemic and in the absence of a direct constitutional challenge to its content or effect, it would have to suffice. Moreover, the High Court found that the text and structure of the DMA revealed that it was not intended to be a short-term mechanism in the management of disasters like Covid-19.

The HSF then applied to the High Court for leave to appeal, which was denied in a judgment handed down on 4 December 2020. The HSF then applied directly to the Supreme Court of Appeal (SCA) for leave to appeal and was denied access. The HSF has petitioned the SCA in respect of an adverse costs order and that is currently under review.

The judgments and court papers can be found **here**.