IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23199/16

19/10/2016

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW	Second Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

18/04/16
DATE

SIGNATURE

MINISTER OF POLICE	First Respondent
MTHANDAZO BERNING NTLEMEZA	Second Respondent
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Respondent
CABINET OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

JUDGMENT

Tuchten J:

1 The applicants are organisations which strive to promote constitutional democracy, respect for human rights and the rule of law. The second

respondent is the National Head of the third respondent (the DPCI), a division within the SA Police Service which is known as the Hawks.

2 The DPCI was established by s 17C of the South African Police Service Act, 68 of 1995 (the SAPS Act). Section 17C is part of Chapter 6A of the SAPS Act, which was inserted by amendment into the SAPS Act.[1]

3 Section 17B states that in relation to the DPCI the following should be recognised and taken into account:

> (a) The need to establish a Directorate in the Service to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption.
> (b) The need to ensure that the Directorate-
> (i) implements, where appropriate, a multi-disciplinary approach and an integrated methodology involving the co-operation of all relevant Government departments and institutions;
> (ii) has the necessary independence to perform its functions;
> (iii) is equipped with the appropriate human and financial resources to perform its functions;
> (iv) is staffed through the transfer, appointment, or secondment of personnel whose integrity is beyond reproach.

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1 By s 3 of Act 57 of 2008

4 Section 17C(2) provides for the appointment of a National Head of the DPCI, a Deputy National Head at national level, Provincial Heads and other officers. Section 17C(1) provides in terms that the DPCI must function through offices at national level and in each province. This application concerns the appointment of the second respondent as National Head. Section 17CA provides for how the National Head must be appointed and the characteristics he or she must have in order to be entrusted with the responsibilities of this office:

> (1) The Minister, with the concurrence of Cabinet, shall appoint a person who is-
> (a) a South African citizen; and
> (b) a fit and proper person,
> with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate for a non-renewable fixed term of not shorter than seven years and not exceeding 10 years.
> (2) The period referred to in subsection (1) is to be determined at the time of appointment.
> (3) The Minister shall report to Parliament on the appointment of the National Head of the Directorate within 14 days of the appointment if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

5 The Minister referred to in s 17CA is the Minister of Police, the first respondent. It is common cause that the Minister appointed the second respondent as the National Head of the NCI on 10 September 2015.

6 The case for the applicants is that in appointing the second respondent, the Minister abused his discretion and failed to take into account relevant factors. In addition, the applicants have forthrightly alleged that the second respondent is a person of bad character who could, as such and because of the scheme of the Act which requires that the officers within the DPCI be persons of irreproachable integrity,[2] not competently be appointed to his office.

7 The functions of the DPCI are set out in s 17D. In quoting these provisions I identify by strikeout in the text matter in s 17D(1) found by the Constitutional Court to be inconsistent with the Constitution and invalid:[3]

> (1) The functions of the Directorate are to prevent, combat and investigate-
>
> (a) national priority offences, which in the opinion of the National Head of the Directorate need to be

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2 Section 17B(b)(iv) read with, in the case of the National Head, s 17CA(1).

3 See *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 2 SA 1 CC para 112.5.

addressed by the Directorate, ~~subject to any policy guidelines issued by the Minister and approved by Parliament~~;

(aA) ~~selected offences not limited to~~ offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004); and

(b) ~~any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament.~~

8 The creation of the DPCI and the interventions of the Constitutional Court in the legislative terrain preeminently reserved for Parliament must be seen against the backdrop of the rampant corruption and abuse of state resources prevalent in our country.[4] The National Head has a most important function. As the Constitutional Court has said in relation to the selection of this officer:[5]

> The overarching requirement for suitability is 'fit and proper' which, broadly speaking, means that the candidate must have the capacity to do the job well and the character to match the importance of the office. Experience, integrity and conscientiousness are all intended to help determine a possible appointee's suitability 'to be entrusted with the

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4 *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 2 SA 1 CC paras 1-2

5 *Helen Suzman Foundation v President of the Republic of South Africa and Others*, *supra*, para 63

> responsibilities of the office concerned'. Similarly, laziness, dishonesty and general disorderliness must of necessity disqualify a candidate.

9 The first applicant wanted to know on what grounds the Minister had selected the second respondent for appointment as National Head. By letter dated 2 November 2015, it wrote to the Minister asking, amongst other things, for full written reasons why the second respondent was so appointed and for evidence that the statutory requirements had been fulfilled. Correspondence ensued. The Minister responded substantively to the requests in the letter of 2 November 2015 in a letter dated 2 March 2016. The 2 March 2016 letter sets out the full written reasons for the appointment and records that the documents considered by the Minister (and the Cabinet) in making the appointment were the *curriculum vitae* of the second respondent and a document containing the recommendation to Cabinet. Neither of these documents was provided to the first applicant at that stage. The second respondent however put up his *curriculum vitae* in his answering papers.

10 The text of the 2 March 2016 letter reads as follows:

> Please note that [the second respondent] was appointed as the head of the DPCI effective from 10 September 2015 after the post was advertised and he was interviewed along with

four other candidates for the position. The appointment was made in terms of section 17C(a)(i) of the South African Police Services Act, 1995. The committee that interviewed [the second respondent] unanimously agreed that he was fit and proper person to be entrusted with the responsibilities of the Head of DPCI.

The following credentials count in [the second respondent's] stead:

- he qualifies for the position of the Head of the DPCI. He is in possession of BA Police Science and B Juris degrees,
- he has more than thirty years' experience in the police service in various capacities,
- During the interviews, he displayed strength against the required competency profile and also in comparison with other candidates who were interviewed,
- He also demonstrated an in depth knowledge of the work of the Hawks and a high level of proficiency to function at the level of the Head: DPCI,
- He is in possession of a top secret clearance certificate valid until 2019,
- Personnel suitability was also checked and answers are reflected in bold:
    - criminal record: **None**
    - pending disciplinary cases: **None**
    - financial/asset record checks: **Yes**
    - Citizen verification: **Yes**
    - Qualification/Study verification (SAQA): **Confirmed**

The appointment of [the second respondent] as the Head of the DPCI was approved by the Cabinet on 09 September 2015. The document containing a cabinet decision in this

> regard is marked 'top secret' and therefore cannot be provided as requested.
> Also take note that I could not find any report pertaining to [the second respondent] that was produced by the Independent Police Investigation Directorate.
> You also requested documents and information that was considered in making the appointment. This will include the Curriculum Vitae (CV) of [the second respondent]. Please note that the CV of [the second respondent] contain his personal information that I am prohibited the in terms of section 34(1) of the Promotion of Access to Information Act, 2000 from disclosing without his consent. In this regard I do not have consent to disclose any personal information relating to [the second respondent].

11 By notice of motion dated 16 March 2016, the applicants applied for relief arising from the appointment of the second respondent. The applicants seek in the normal course as Part B of the relief to review and set aside the Minister's decision to appoint the second respondent as the National Head of the DPCI. This application is pending. By Part A of the relief sought, the applicants apply urgently to interdict the second respondent, pending the final determination of the Part B relief, from exercising any power or discharging any function or duty as head of the DPCI. The Part A relief is before me for decision. The Minister and the second respondent were separately represented. The fourth respondent abides.

12 The factors influencing the grant or refusal of an interim interdict pending a review in the constitutional era were set out by my brother Fabricius J in *Afrisake NPC and Others v City of Tshwane and Others*, a judgment delivered in this Division on 14 March 2014 under case no 74192/2014. As I cannot materially improve upon the exposition of Fabricius J, I shall quote the contents of paragraphs 8-10 of the judgment:[6]

> These requirements, which are often referred to as being "trite", conveniently appear in the Law of South Africa, Second Edition, Vol 11 at 411, the author being the respected former Judge of Appeal, LTC Harms. They are also dealt with, and their history, in the Law and Practice of Interdicts, CB Prest SC, Juta and Company 1996. As I have said, these requirements are often regarded as being "trite", but a careful reading of the Case Law will lead one to the conclusion that they are often misunderstood, and, as in the case before me, not applied to the facts correctly. I am not dealing with the requirements for a final interdict. One of the most important considerations is that an interim interdict must be concerned with the future only. It is not meant to affect decisions already made.
>
> See: *National Treasury vs Opposition to Urban Tolling Alliance ...*[7]
>
> I say that this is of the utmost importance because it is interrelated to the second requirement, and it is in this

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6 Paragraph numbering omitted.

7 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 6 SA 223 CC para 50

context in particular where the misapprehension occurs as to what must actually be shown. The requisites for the right to claim an interim interdict are:

a) A prima facie right, though open to some doubt;

b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

c) That the balance of convenience favours the granting of an interim interdict; and

d) That the applicant has no other satisfactory remedy.

None of these requisites must be judged in isolation.

See: *Olympic Passenger Service (Pty) Ltd vs Ramlagan* 1957 2 SA 382 D at 383.

These requisites have their origin, so it is often said, in *Setlogelo vs Setlogelo* 1914 AD 221 at 227. It is however clear from that judgment that the appeal before the Court concerned the granting of a final interdict, where the requirements are different. It was in the context of whether or not an interim interdict could be obtained even though a clear right was not shown, that Innes JA dealt with the need to show irreparable harm as set out by *Van der Linden, Institutes*, (3, 1, 4, 7). Van der Linden mentioned this only in the case of where the right relied upon was not clear, but was only *prima facie* established, if open to some doubt. In that instance the question would be whether the continuance of the thing against which an interdict is sought, would cause irreparable injury to the applicant. The better course would be, so it was said, to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party. The whole topic was again debated by *Clayden J in Webster vs Mitchell* 1948 1 SA 1186 W at 1189. The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient, but the weighing-up of the probabilities of

conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent, should then be considered, and if they throw serious doubt on the applicant's case, the latter cannot succeed. In *Webster vs Mitchell supra* the test was actually whether the applicant could obtain final relief on those facts. The mentioned qualification was introduced by *Gool vs Minister of Justice* 1955 2 SA 682 C at 687 to 688. The Full Bench of the Cape Provincial Division agreed with the relevant analysis of the requirements in *Webster vs Mitchell supra*, subject to the qualification that the Court must decide, having applied the proper approach to the facts that I have mentioned, whether the applicant should (not could) obtain final relief at the trial on those facts. I may add at this stage, because I will return to that topic hereafter, that it was also held in that decision (at 689) that where an interdict was sought against the exercising of statutory powers, it will only be exercised in exceptional circumstances, and when a strong case is made out for relief. The mentioned qualification to the *Setlogelo*-test, if I can call it that, as subsequently adapted by *Webster vs Mitchell*, was held to be "a handy and ready guide to the bench and practitioners alike in the grants of interdicts in busy magistrates' courts and high courts." The qualification in *Gool* was given approval, and it was also said that the *Setlogelo*-test had now to be applied cognisant of the normative scheme and democratic principles that underpin

our Constitution.[8] This means in effect that when a Court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. For instance, if the right asserted in the claim for an interim interdict is sourced from the Constitution it would be redundant to inquire whether that right exists. As another example, the principle of the separation of powers must be applied in appropriate circumstances.

See: *National Treasury vs Opposition to Urban Tolling Alliance* supra at 236 par. 44.

I have said that the mentioned requisites are not to be judged in isolation and that they interact. It is no doubt that for this reason Moseneke DCJ in the *National Treasury* decision *supra* held at 237 par 50 that "under the Setlogelo-test the *prima facie* right a claimant must establish is not merely a right to approach a Court [in] order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicant must demonstrate a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions does not require any preservation *pendente lite*." The second requisite of irreparable harm, must be looked at objectively, and the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm; actual harm need not be established upon a balance of probabilities. This requisite in turn is closely related to the question of the balance of convenience. This is the third requisite and it must be shown that the balance of

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8 Fabricius J was quoting from and referring to *National Treasury and Others v Opposition to Urban Tolling Alliance and Others, supra*, para 45

convenience favours the grant of the order. In this context the Court must way the prejudice the applicant will suffer if the interim interdict is not granted, against the prejudice the respondent will suffer if it is.

See: *Harms supra* par 406 and *Prest supra* at 73, where the learned author said, in my view quite correctly, that a consideration of the balance of convenience is often the decisive factor in an application for an interim interdict. He states that even where all the requirements for a temporary interdict appear to be present, it remains a discretionary remedy and the exercise of the discretion ordinarily turns on a balance of convenience. I agree with that approach and the view of Harms, JA in this context (at par 406), as well as the dictum in *Olympic Passenger Service (Pty) Ltd supra* at 383.

The fourth requisite for the granting of an interim interdict is the absence of another adequate remedy. This element is also a factor in the exercise of the Court's general discretion to grant or refuse an interim interdict. Before turning to the relevant facts and submissions made by the parties, it is said (see *Harms supra* par. 408) that the Court always has a wide discretion to refuse an interim interdict even if the requisites have been established. This means that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision, and not that the Court has a free and unfettered discretion. The discretion is a judicial one, which must be exercised according to law and upon established facts. I therefore do not agree with [counsel] that I have a so called "overriding" discretion.

See: *Knox D'Arcy Ltd vs Jamieson* 1996 4 SA 348 A at 361 to 362 and *Hix Networking Technologies CC vs System Publishers (Pty) Ltd* 1997 1 SA 391 A at 401. The exercise of the discretion must therefore be related to the requisites for the interim order sought, and not to any unrelated features.

13 I would add that while the right to review a decision made in the exercise of public power does not require an interdict for its protection, I do not think that the strength of the case ultimately to be made on review is irrelevant to an application for an interdict pending the review. If the applicant disclosed no prospects of success on review, then a court would not grant an interim interdict pending a review which was doomed to fail. But on the authority of *National Treasury* para 50, the existence of prospects of success on review is while in my view necessary, not sufficient. An applicant in these circumstances must show a right other than the right to review which requires protection *now*.

14 What are the rights which the applicants seek to protect? The rights in question, according to the applicants' founding affidavit are the right to an independent and functioning criminal justice system, the right to have a National Head appointed who is fit for office and the right to have the decision appointing the National Head made in accordance with the Constitution and s 17CA of the SAPS Act.

15 Although the grounds for the Part B relief are wide ranging, the applicants' case for the violation of these rights relied upon at this stage is rather limited. The applicants submit that the Minister in considering whether to appoint the second respondent and the

Cabinet in delivering its concurrence with the Minister's decision to appoint failed to have regard to findings by a judge of this Division in two considered judgments in a case heard in this Division in 2015, both critical of the character of the second respondent.

16 I think it is as well to get two preliminary matters out of the way. The respondents submit that the case is not urgent or rather that the urgency is self-created. They argue that the applicants were aware of the appointment shortly after it was made and impermissibly delayed until March 2016 to bring their application. The short answer to this contention is that it would have been irresponsibly precipitate, and possibly even premature, to bring these proceedings before the Minister had been given a fair opportunity to provide reasons for the decision. The matter is of great public importance and concerns a high functionary in a specialised crime fighting unit within the SA Police Service. The case for urgency must be considered primarily on the applicant's case.[9] The second respondent as head of the DPCI makes important decisions very day with significant implications for the liberty of persons and the conduct of investigations. Under s 17D(10)(a), it is in the discretion of the National Head of the DPCI to decide which "national priority offences" should be addressed by the DPCI and, by implication therefore, which such alleged offences should not so be

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9 *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) 586

addressed.[10] It is self-evident that the person exercising these powers must be a person of integrity appointed as such pursuant to a process which complies with the law. There is a second basis on which the respondents say the matter is not urgent: they submit that the applicants have shown no irreparable harm. I prefer in the exercise of my discretion to deal with this second submission when I consider the merits of the application.

17 For these reasons I hold that the matter is urgent within the meaning of rule 6(12(b) and direct that the matter be enrolled and heard before me as an urgent application.

18 The second such preliminary matter arises from the submission that the applicant's case is in substance for the suspension of the second respondent pending the determination of the Part B relief, that the power to suspend is vested in the Minister and not the court and that the court should therefore not trespass on the terrain of the executive. I wholeheartedly agree that the court should not trespass on the terrain of the executive. But I think that this submission rests on a misconception. The case for the applicants is not that the second respondent be suspended pending proceedings to have him removed

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10 "National priority offences", as defined in s 17A, means organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof.

from office. It is that the second respondent was never lawfully appointed in the first place and should be interdicted pending the determination of that issue from performing functions which, because he was not validly appointed, he was never empowered to perform. Although the consequences for the second respondent may be similar or even the same in both situations, in law they are of different characters. Interim relief in the second situation is classically within the province of the courts.[11]

19 The way is now cleared for a consideration of the facts. This will require analysis of the two judgments which I mentioned earlier (*Sibiya*) together with a judgment in another case decided in the Durban High Court (*Booysen*), the response of the second respondent to the criticisms of him made in those judgments and the responses of the Minister to what was put before him.

20 These judgments all arise from urgent applications brought in response to disciplinary proceedings initiated by the second respondent against high ranking officers within his own unit, the DPCI. The first set relates to the suspension by the second respondent of General Sibiya as a provincial head of the DPCI pursuant to a notice of indefinite suspension served on Sibiya on 20 January 2015 and the

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11 *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others* 1986 2 SA 663 A

concomitant appointment of an acting provincial head to perform Sibiya's functions. The reason for the suspension of Sibiya was said in the notice of suspension by the second respondent to have been related to certain alleged conduct by Sibiya on about 5 November 2010, namely the alleged unlawful rendition of certain foreign nationals to Zimbabwe.

21 Sibiya applied urgently to this court to set aside his suspension and the appointment of the acting provincial head made to fill the gap caused by his suspension. The application came before my brother Matojane J. In a judgment handed down on 20 February 2005, the learned judge found that no basis for a precautionary suspension such as that in question had been disclosed on the papers and that the second respondent had not even explained what role in the alleged rendition he sought to ascribe to Sibiya. Matojane J found that no power to suspend and no grounds for suspension had been established. The consequent order was that the suspension and the appointment of the acting provincial head were set aside with costs against the present second respondent in his official capacity.

22 In paragraph 31 of this judgment, Matojane J held as follows:

> In my view, there exists no basis in law or fact for [the present second respondent] to take the drastic measure of placing [Sibiya] on precautionary suspension. I agree with [Sibiya] that the decision by [the second respondent] was taken in bad faith and for reasons other than those given. It is arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it is unlawful as it violates [Sibiya's] constitutional right to an administrative action that is lawful, reasonable and procedurally fair. [my emphasis]

23 Sibiya claimed in his founding papers that the second respondent had acted against him out of a desire to punish Sibiya for having investigated the conduct of one Lt General Mdluli and having him charged with murder. But there is no finding in the judgment that this allegation was found to be established.

24 The second respondent applied for leave to appeal. Sibiya counter-applied for an order that the main judgment operate and be executed until the final determination of all present or future appeals. Unfortunately the matter then got out of hand. The second respondent formed the view, entirely erroneously, that Matojane J had privately engaged with the lawyers for Sibiya in order to determine a date for the hearing of the applications. He observed in one of his affidavits relating to the application to bring the main judgment into force pending appeal that it was disturbing that a judge would do such a thing. Indeed a private conversation between a judge and one of the

sides in contested litigation might be disturbing, depending on the facts and the context, but the real point is that Matojane J did not privately engage with the lawyers for Sibiya, there was objectively no basis to think that he had done so and the observation was accordingly not called for. In fact the arrangements were made by the judge's registrar.

25 The allegations made against Matojane J distressed the learned judge. On 14 April 2015, the learned judge delivered a judgment on the applications respectively for leave to appeal and to bring the main judgment into force pending the appeal. He pointed out in the judgment the serious consequences that such unfounded allegations had for the proper administration of justice. He found that a ground of appeal had been advanced opportunistically because the second respondent attacked the finding on question on the ground that the court had made the finding in the absence of certain relevant documents when the second respondent was responsible for withholding those documents from the court. The learned judge observed that the second respondent had failed to take the court into his confidence and misled the court by not mentioning the fact that there had been conflicting material on the strength of which he should have assessed the case against Sibiya. The learned judge held:[12]

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12 Typed p8 of the judgment

> In my view, the conduct of the [second respondent] shows that he is biassed and dishonest. To further show that the [second respondent] is dishonest and lack integrity and honour, he made false statements under oath ... .

26 Matojane J continued to find that the second respondent had fabricated evidence in his affidavit resisting the application to put the main judgment into force pending appeal. The basis for the fabrication was said to be that while the second respondent said under oath that one of the persons rendered to Zimbabwe died under mysterious circumstances, the death certificate of the deceased person showed that he died of natural causes. The judge proceeded:

> Under the circumstances and having regard to the vindictive and injudicious conduct of the [second respondent] I am unable to find that there is a reasonable prospect of success on appeal on this ground.

27 It is difficult to understand how the conduct of the second respondent in relation to the application to put the main judgment into force pending appeal could have bearing on the ground of appeal in question. Be that as it may, Matojane J then refused leave to appeal and upheld the application to bring the main judgment into force pending appeal.

28 The second respondent then petitioned the Supreme Court of Appeal for the requisite leave. In the second respondent's affidavits in support of his petition, the second respondent made an allegation that was incorrect. Sibiya made a point of the incorrect allegation. The second respondent corrected the mistake and explained how he came to make it. He said he had corrected a draft given to him by his attorney and signed the fair copy when it was returned to him, not noticing that the attorney had failed to include the correction. Counsel for the applicants did not make anything before me of this aspect.

29 On 26 May 2015, the SCA dismissed the petition with costs on the grounds that there was no reasonable prospect of success in an appeal and there was no other compelling reason why an appeal should be heard.

30 General Booysen was appointed provincial head of the DPCI with effect from 1 March 2010. By notice dated 14 September 2015, the second respondent suspended Booysen from duty with immediate effect. By notice of motion dated 17 September 2015, Booysen brought an urgent application in the Durban High Court to set aside the suspension notice. The second respondent opposed the application. The Minister, who was cited as an interested party, elected to abide and played no part in the proceedings.

31 The attack on the suspension notice was brought on the grounds that the decision to suspend him had been taken *mala fide* and for some ulterior purpose and was not one which the second respondent could reasonably have made if he had actually considered the relevant facts, including representations made by Booysen prior to his suspension. The matter came before Van Zyl J.

32 There is a potentially worrying context to the way the case was argued. Apparently Booysen's founding affidavit was replete with allegations of ulterior motive, bad faith and the like and, according to counsel for the second respondent, who had appeared for him in the Booysen case, Van Zyl J asked counsel for Booysen how the learned judge could be expected to decide these disputes of fact in an urgent application. To this, according to counsel for the second respondent, senior counsel for Booysen had responded on the record that he would only argue that the decision had been unlawful.

33 The second respondent raised this issue in an affidavit he made in support of an application to the SCA for leave to appeal (the petition). A copy of the papers in the petition was handed to me without objection. I was told that the petition, while fully pleaded out was, when the hearing before me adjourned, still pending before the SCA. However, subsequently I was sent an electronic copy of the order of

the SCA on the petition which shows that on 4 April 2016 the application for leave itself was referred for oral argument. The point for present purposes is made out in the founding and answering affidavits in the petition. The second respondent said:[13]

> ... [Van Zyl J] asked counsel for [Booysen] ... whether Booysen was persisting with the allegations of ulterior motive, bad faith and the like and ... Booysen['s] counsel confirmed that he was not persisting with that cause of action but will argue the unlawfulness of the suspension.

34 Booysen's response[14] was

> ... I admit the contents of paragraph 34 and confirm that my counsel conceded that the case based on a vendetta against me could not be decided by the court in view of the dispute of fact on the papers.

35 But, Booysen went on in his affidavit to say[15], the allegation of ulterior motive remained alive. I shall say more on this topic later.

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13 Para 34 of the founding affidavit

14 Para 12(a) of the answering affidavit

15 Paragraph 12(b) of the answering affidavit

36 The suspension notice stated that there were "serious allegations" against and "possible disciplinary charges" being preferred against Booysen and went on to say that the second respondent had considered representations submitted by Booysen and was of the view that there was a basis for placing Booysen on "precautionary suspension", pending finalisation of the contemplated investigation.

37 Booysen's attack on the suspension notice was that the second respondent would only have been entitled to place him on precautionary suspension if the second respondent had reason to believe both that Booysen had engaged in serious misconduct and also that there was some objectively justifiable reason to deny Booysen access to the workplace while the investigation was in progress. Booysen submitted that there was no reason to believe that any misconduct had been committed at all, let alone by Booysen. On the postulated ground that there was no reason to believe that Such misconduct had been committed, Booysen submitted that the second respondent had been actuated by an ulterior motive in suspending him.

38 The alleged misconduct on the strength of which the second respondent suspended Booysen was that Booysen had during October 2008 made a fraudulent misrepresentation which had

induced the payment of a monetary reward to himself. Van Zyl J found that the document upon which the second respondent relied for drawing the conclusion that Booysen had recommended himself for the reward showed that Booysen had not recommended himself for the award and that the recommendation had been made by his then superior officer, Assistant Commissioner Brown. The learned judge also found that all the evidence supported this conclusion.

39 It seems that the second respondent also relied upon the fact that while the award related to police action in response to the killing of one of their number, Superintendent Choncho, on 27 August 2008, the docket numbers cited in relation to the reward referred not to the killing of Supt Choncho but to other police actions. But the evidence before Van Zyl J (thus the learned judge) demonstrated that the recording of the wrong docket number was merely of a topographical nature and had not demonstrated any fraud at all. Furthermore, on the evidence of the second respondent himself, Brown had been approached by the officer investigating the alleged fraud and had provided a statement supporting Booysen's version.

40 The case for the second respondent in response to the allegation that he was actuated by an ulterior motive was that there was no basis for the allegation and was simply conjecture. All he wanted to achieve

(thus the second respondent) was a thorough investigation into the serious and *prima facie* allegations of misconduct against Booysen.

41 The learned judge analysed the evidence and concluded that there was insufficient factual basis for drawing the conclusion that the recommendation was misleading and that even if it were, there was not a shred of evidence that Booysen himself had been involved in formulating its content and that the second respondent's conclusion in that regard was at best entirely speculative.

42 Van Zyl J dealt with the submission that the second respondent had been actuated by ulterior motive. The learned judge found that there was a strong suggestion of an ongoing move to unseat Booysen but that there was insufficient evidence before him to enable the court to draw firm conclusions and proceeded:[16]

> What is however noteworthy is that the [second] respondent had embarked, for reasons unknown, upon a course of conduct as against [Booysen] which was unsustainable upon the evidence at his disposal. When [Booysen] responded with detailed and motivated submissions to the notice of intention to suspend him, the [second] respondent effectively ignored these and proceeded with the suspension in any event. When [Booysen] instituted the present application to

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16 Para 64 of the judgment

> set aside the suspension, the [second] respondent doggedly opposed the relief sought.

43 In my view, the *Booysen* judgment concludes that the second respondent was guilty of a stubborn (dogged) persistence in a course of action which was in no way justified. But why the second respondent behaved in this manner was left undecided. The learned judge was asked to award costs *de bonis propriis* against the second respondent. In declining to grant such an order, the judge expressed himself as follows, after referring to SCA authority on the point in relation to officials who behave in a high-handed manner by seeking to frustrate the enforcement by courts of litigants' constitutional rights and the powers of courts to hold such officials personally liable for costs:[17]

> The [second] respondent ... may well give serious consideration to the *caveat* thus expressed by the supreme court of appeal. However, I am not persuaded that, for present purposes, an order for costs *de bonis* propriis against the [second] respondent personally would be justified. The conduct of the [second] respondent nevertheless deserves censure and as a mark of the court's disapproval, I consider that costs on the scale between attorney and client would be justified.

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17 Para 71 of the judgment

44 Van Zyl J then proceeded to order the second respondent, in his nominal capacity as national head of the DPCI to pay Booysen's costs as between attorney and client.

45 The Minister does not dispute that he knew about the judgments in *Sibiya*. The second respondent's evidence is that when he applied for the position as National Head, he disclosed in the documents supporting his application the fact of the judgments and sought to justify his conduct in a memorandum signed by the second respondent on 1 July 2015. This memorandum and the other documents submitted by the second respondent were considered by a panel set up by the Minister to advise him on the question. There were several other applicants for the position.

46 In the memorandum (under the heading "BRIEF MEMORANDUM"), the second respondent said the following:[18]

> I raise an issue which I believe I should bring to the attention of the panel, because the requirement for the appointment of the National Head of the DPCI among others is that the incumbent must be a fit and proper person. I am currently acting in the position of National Head of DPCI since December 2014.

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18 Paragraph numbering omitted

During January 2015 I initiated a process to suspend Major General Sibiya; the Provincial Head of DPCI. He challenged his suspension in the North Gauteng High Court successfully. I applied for leave to appeal and General Sibiya applied to have an order of execution of the judgment pending appeal. The lawyers of Sibiya set the execution application down without prior arrangement with my attorneys and they addressed a letter to my lawyers that they have arranged the date with Judge Matojane. My lawyers addressed a letter to Sibiya's lawyers objecting to Sibiya's ;lawyers conduct. In an affidavit opposing the execution application, I raised the same issue and I attached the letter from my attorneys.

To my surprise, when Judge Matojane delivered his judgment on the leave to appeal and the execution application, he attacked me saying that I have accused him of colluding with Sibiya's attorneys and that I am dishonest and cannot be trusted. All these allegations are unfounded and baseless. Judge Matojane did not even give me an opportunity to deal with the accusations nor did he give my legal representatives an opportunity to address him on the accusations. Judge Matojane made certain factual findings that Sibiya was innocent or that he had been exonerated by IPID from the Zimbabwean rendition when he was not called upon to decide the merits. It was on that basis that he said I am dishonest and I did not inform the Court about the report which exonerated Sibiya.

I have since been vindicated because, the Minister appointed Werksmans attorneys to investigate the conflicting reports. Werksmans concluded that there is only one legitimate IPID report of January 2014. Werksmans also concluded that Sibiya and Lt General Dramat and others should be criminally charged and that disciplinary proceedings should be brought against them. Werksmans also found that Mr Robert McBride

> tempered with the report in order to protect Dramat and Sibiya.
> Sibiya has since gone through the disciplinary enquiry and he is awaiting the outcome from the chairperson. The above mentioned developments are a vindication to me and have shown that I had no personal vendetta against Sibiya that I was doing my work as I am required to do in terms of the SAPS Act.
> During the disciplinary enquiry of Sibiya, I am told by my legal team that Sibiya did not make any single allegation against me in his evidence, and he never suggested to witnesses that I was acting with ulterior motive in disciplining him.
> I can confirm to the panel that I am a fit and proper person to be appointed to the position of National head of the DPCI. The judgment of Matojane, and my affidavit are available upon request should the panel wish to peruse them. The transcript of the disciplinary enquiry of Sibiya is not yet finalised and it will be made available should the panel wish to have it.

47 According to the Minister, the panel unanimously recommended the second respondent for the post, The Minister says that he approved

> ... [the second respondent's] appointment after being satisfied about his fitness to hold office, his explanation thereof, his qualifications and experience that he was the best candidate for the job.

48 I mentioned in paragraph 9 above that the Minister said in the 2 March 2016 letter that he considered in making the appointment the *curriculum vitae* of the second respondent and a document containing the recommendation to Cabinet. The Minister thus had no regard to the brief memorandum of the second respondent or the Sibiya judgments.

49 But even if the Minister had read these documents, that would in my view probably not have been enough. It seems likely that the Minister indeed brushed aside the *Sibiya* judgments as irrelevant or inconsequential. The Minister explained in his answering affidavit why he held this view:[19]

> This entire application is premised upon the remarks made in the Sibiya judgment. These remarks are the basis upon which the applicants contend that the second respondent is not a fit and proper person to hold the office of National Head DPCI.
> According to the applicants, the remarks in the Sibiya judgment serve as a bar in the appointment of the second respondent. The applicants persist with this contention despite the fact that there has been no allegations pertaining to the second respondent not being a fit and proper person to hold the office of National Head DPCI. The second respondent as stated above, has not been provided any

19 Paragraph 63. Subparagraph numbers omitted.

> opportunity to deal with the aspect of his unfitness to hold office as such allegations do not exist.
> Besides, the case of Sibiya did not deal with the issues pertaining to the fitness and propriety of the second respondent to hold office of National Head of DPCI. Consequently, it would be irrational of me to take a decision on a matter which has not been properly ventilated. I cannot rely on remarks made in the course of judgment in the exercise of my discretion.
> ... [S]ection 17CA sets out the process for the appointment of the National Head of the DPCI and this has been complied with. Accordingly, section 17DA deals with his removal from office including his suspension.
> In the event of any allegations of unfitness or impropriety of any person appointed to the position of National Head DPCI, then such allegations would be dealt with in terms of the process as envisaged in terms of section 17DA of SAPS Act. The grounds included therein include amongst others the incumbent to the position being no longer a fit and proper person to hold that office. I know of no allegations against the second respondent pertaining to his unfitness to hold office.

50 I have decided only to make provisional findings in this case. My reasons are, firstly, that these are proceedings for interim relief brought as a matter of urgency and the parties have not had the full opportunity of getting legal advice and submitting evidence against a consideration of the full record as contemplated in rule 53; and, secondly, because final findings made by me may inappropriately intrude into the terrain of the court which will hear the review in due course.

51 Section 17CA(1) broadly requires two things: firstly that the Minister has followed a proper process in evaluating whether to make an appointment. All public power must be exercised rationally and for a proper purpose. So if the decision maker acted capriciously or for a wrong motive or did not properly apply his mind to the question, eg ignored relevant considerations, then in principle the manner in which the decision was arrived at would be inconsistent with the Constitution and therefore invalid. Then, secondly, the section requires that the person who is appointed be *in fact* (ie not merely in the opinion, reasonable or otherwise, of the decision maker) a fit and proper person with due regard to his or her experience, conscientiousness and integrity to be entrusted with the responsibilities of the office.

52 At this level of the enquiry, all that is in issue before me is the process aspect.[20] I think that on the papers as they stand, the applicants have demonstrated strong prospects of success on the merits of the review. Where as here the character of a candidate for appointment to a position is relevant to the decision, a decision maker such as the

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20 This aspect gave rise to some confusion during oral argument. Counsel for the applicants at one stage told me that her case was limited to this process aspect. It is so restricted in relation to the evaluation of the prospects of success in the review, which I have said I need to consider in relation to interim relief. But the applicants' case was not so limited in relation to the consideration of irreparable harm. Any prejudice to the respondents from counsel's incorrect articulation of the applicants' case was cured when I gave counsel for the respondents further opportunities to address me.

Minister is not free to brush aside a considered opinion of a superior court which bears upon that very point. This observation arises not from judicial vanity but from the provisions of the Constitution. The core business of courts is to decide disputes which can be resolved by the application of law.[21] In coming to such decisions, courts in this country and elsewhere have pronounced where they consider it appropriate on the credibility and character of, amongst others, the litigants and witnesses before them. The judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.[22] Organs of state including the Minister must through legislative and other measures assist and protect the courts to ensure, amongst other things the effectiveness of the courts. All spheres of government, which include the courts and members of the executive, must respect the functions of other spheres and assist and support each other.[23]

53 *Democratic Alliance v President of the Republic of South Africa and Others*[24] was a case in which considerations similar to the present case arose. The issue was whether the President's decision to

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21 Section 34 of the Bill of Rights

22 Sections 165(1) and (2) of the Constitution

23 Sections 41(1)(e) and 41(1)(h)(ii) of the Constitution

24 2013 1 SA 248 CC

appoint a Mr Simelane to the office of Director of Public Prosecutions should stand. Mr Simelane had given evidence before a commission which made findings critical of him and bearing upon his character. The President did not take those findings into account. The Constitutional Court found that the evidence was highly relevant to Mr Simelane's credibility, honesty, integrity and conscientiousness and that ignoring it rendered the ultimate decision irrational.

54 This is not to say that the decision maker is bound to agree with the tribunal or court which made the adverse finding. But in principle, a decision maker who is aware of such an adverse finding is obliged to take it seriously and consider the grounds on which the finding was made as part of the decision making process. I need not consider whether any finding of any tribunal or any court would trigger this obligation. Nor need I consider what the position would be if a relevant finding existed but was not known to the decision maker at the time the decision was made. But in the light of what I have said above, it is in my judgment a necessary step in the decision making process that where a decision maker knows that a judge of the High Court has during the course of a reasoned judgment (as opposed, eg, to remarks made during the course of the proceedings or during argument) pronounced adversely on the integrity of a candidate for a position in which integrity is a prerequisite, the decision maker must

investigate the circumstances under which the pronouncement was made sufficiently to enable the decision maker to assess whether the candidate is a person with the integrity to discharge the responsibilities of the position. The more important the position, ie the more public power that the position will vest in the candidate, the more stringently must the decision maker scrutinise the conduct of the candidate which led to the adverse finding.

55 This is not, however, on the papers presently before me a case in which I need to examine the scrutiny of the decision maker to establish whether or not adequate scrutiny was given. By taking the incorrect view that the findings of Matojane J were irrelevant to the decision at hand, the Minister probably disabled himself from making a rational decision.

56 Finally on this aspect, I would add that the facts that the proceedings before Matojane J were not directed at the question whether the second respondent was fit to be the National Head of the DPCI or that the question of the second respondent's fitness was not "fully ventilated" in those proceedings are of no significance in the present context. I have said that the Minister was not entitled to ignore the finding of the court. A decision maker confronted with such an adverse finding must himself ventilate the question, if ventilation is necessary.

By this I mean that the decision maker must himself go sufficiently into the facts underlying the finding to enable the decision maker to make an informed and rational evaluation of the force of the criticism and the weight it should bear in the decision making process.

57 I turn to the requirement that the applicants must establish irreparable harm, which seems to be at the heart of the matter.

58 I have shown in paragraph 12 above that the question at this level is whether a reasonable person, confronted by the facts, would apprehend the probability of harm and that actual harm need not be established upon a balance of probabilities. The primary submission of counsel for the applicants was that the harm in circumstances such as the present is the possibility that the second respondent's appointment might in the review be found not to have been made in accordance with the Constitution and thus be invalid. In such circumstances, so runs the argument, there is a risk that every decision made by the second respondent will turn out to have been made by someone who did not have the power to make those decisions, in which case the decisions themselves would not have been made in accordance with the Constitution and therefore invalid.

59 I think that this argument overlooks the powers of the reviewing court to make orders which are just and equitable. It is in my view not a given that because a reviewing court holds the appointment of the office bearer was not made in accordance with the Constitution, it follows that the reviewing court is bound to hold that all decisions made by the office bearer invalid or to be set aside. Indeed, it is similarly not a given that if the reviewing court finds that the second respondent was in fact not validly appointed, the appointment should be set aside or, if it is set aside, the second respondent might not validly be appointed by the Minister on a reconsideration. Just such a situation arose in *Democratic Alliance v President of the Republic of South Africa and Others*.[25] In that case, the Constitutional Court ordered that decisions made by Mr Simelane while he purported to hold his office were not invalid merely because of the invalidity of his appointment, which meant that all decisions made by him remained challengeable on any ground other than the circumstance that his appointment was invalid.

60 Not every exercise of public power affected by a defect such as that under discussion will inevitably be set aside. In some cases, the persons affected by a decision will be content with it. In others, the challenge mounted in particular circumstances will be collateral, in

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25 Paras 90-93

which case a challenge will only be successful if it is the right remedy, sought by the right person in the right proceedings.[26] In yet other cases, the reviewing court will exercise its just and equitable remedy powers against setting the decision aside.

61 The second ground relied upon by counsel for the applicants in relation to irreparable harm is that the second respondent has been held by the courts, so runs the argument, to be a person of bad character.

62 As I have said above in a different context, findings in considered judgments of the High Courts must be taken seriously. Counsel suggested that I should go further and treat the judgments in *Sibiya* and *Booysen* on the footing that they constituted binding authority. I do not think that this can be correct. It is my duty to evaluate whether or not irreparable harm has been shown. A factual finding in another court is part of the material upon which I should make this evaluation but I do not think that it would be right for me to abdicate, as it were, this duty to another judge. My further difficulty with this submission is that I have to judge the second respondent's character solely on findings made in motion proceedings. In the evaluation of the character of the officer in *Democratic Alliance v President of the*

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26 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 SCA para 35

Republic of South Africa and Others, the Constitutional Court had the benefit of a thorough cross-examination of the officer in the proceedings in which the findings adverse to him were made. In the present case, I do not even have the records of the cases so that I can decide whether I agree with the evaluations.

63 In my view, the judgment in *Booysen* does not find that the second respondent lacks integrity. He was found to be stubborn and inflexibly determined not to depart from a course of action on which he had resolved. I think that in relation to the findings of Van Zyl J, the second respondent might with justice qualify as one of the vexatious litigants contemplated in *In re Alluvial Creek Ltd* 1929 CPD 532 at 535:

> Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.

64 In both *Sibiya* and *Booysen*, the court was asked to draw inferences which translated to lack of integrity. In both cases, the ground advanced was that the second respondent had taken disciplinary proceedings against a highly placed officer in the DPCI for an improper purpose. In both courts, the underlying logic of the submission of improper purpose was that the absence of an explanation for what appeared on the face of it to be a thoroughly ungrounded disciplinary proceeding justified the conclusion that the proceeding had been actuated by a motive which showed lack of integrity. In *Booysen*, the court was not prepared to go that far on the material before it; in *Sibiya*, the court was indeed prepared to draw that inference.

65 It is trite that motion proceedings are not generally the best procedural vehicles to resolve this kind of dispute. I do not think I would be justified on a conspectus of all the facts in concluding in these urgent motion proceedings that the court in *Sibiya* was right when it drew the inference of lack of integrity and the court in *Booysen* was wrong when it declined to do so.

66 I do not think that in *Sibiya*, in relation to the application for leave to appeal and to put the order into operation pending the appeal, i would have judged the second respondent as severely as did Matojane J. I

think one must make some allowance for an aggrieved litigant. In addition, the preposterous conclusion to which the second respondent came regarding the probity of the learned judge was probably fuelled by absurd legal advice. The second respondent, and probably one or more of his lawyers, jumped to a wholly unjustified conclusion. But that, as I see it, does not necessarily, or even probably, prove lack of integrity.

67 There were other allegations in the applicants' papers designed to demonstrate that the second respondent lacked integrity. As, properly so, no reliance was placed on them, I have not dealt with them at all. I would only express the hope that when and if this dispute goes further, the applicants will either back up their assertions with fact or withdraw them from the record of contention.

68 This is not a case in which the applicants can point to a particular decision likely to be made by the second respondent in the period from now until the review is decided in which any character flaws manifested by the second respondent are likely to have an impact on the decision. The high point of the applicants' case at this level, made out in the papers before me, is that the second respondent has a propensity for taking disciplinary proceedings against his highly placed

fellow officers without justification. There is no suggestion that any further such proceedings are contemplated.

69 I am therefore not persuaded that the evidence before me constitutes a compelling, exceptionally clear case for an interdict *pendente lite* preventing the second respondent from performing his statutory duties. Absent such a compelling, exceptionally clear case, I must give effect to the appointment of the second respondent to his office which constitutes valid law unless and until the appointment is set aside.[27] Moreover, I do not think that the harm postulated by counsel for the applicants is irreparable. Nothing prevents an attack on an individual decision in due course with, if considered appropriate, a request that the operation of the impugned decision be suspended pending a review or other relief sought in the normal course.

70 There remains the question of costs. Counsel for the Minister did not ask for costs if the case went his way because of the *Biowatch* principle. Counsel for the second respondent, prompted by remarks which I made during argument, asked for costs if their clients were successful. I think that the dispute between the applicants and the second respondent ultimately arose because of an alleged failure by the Minister to perform his constitutional and statutory responsibilities.

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27 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*, *supra*, para 71

In these circumstances I think that no adverse costs order should be made.

71 I accordingly make the following order:

The application for relief *pendente lite* is dismissed.

There will be no order as to costs.

NB Tuchten
Judge of the High Court
18 April 2016

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