IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.:
6588/15

In the matter between:

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Applicant for Admission as Amicus Curiae
and	
THE MINISTER OF POLICE	First Respondent
THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	Second Respondent
In re:	
ROBERT MCBRIDE	Applicant
and	
THE MINISTER OF POLICE	First Respondent
THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	Second Respondent

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WRITTEN SUBMISSIONS

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INTRODUCTION

1. The Council for the Advancement of the South African Constitution ("**CASAC**") seeks admission as an *amicus curiae* in order advance legal argument on foreign law relating to Independent Civilian Oversight Bodies ("**ICOBs**") and to adduce evidence on the nature of the Independent Police Investigate Directorate ("**IPID**") and the importance of independence to its legitimacy and functioning.

2. CASAC sought consent from the parties, which consent was granted by the applicant but not by the Minister of Police ("**the Minister**"), and has filed an application to be admitted as an *amicus curiae* in terms of rule 16A(5) of the Uniform Rules of Court.

3. In addition to the application to be admitted as an *amicus curiae,* CASAC has also applied to be permitted to adduce evidence, and to this end has filed the expert affidavit of Mr Robert David Bruce ("**Bruce**"). It is on this expert evidence, and the publicly available sources referred to by Mr Bruce, that CASAC's submissions largely rest.

4. For the reasons set out in more detail below, CASAC submits that it has an interest in this matter, and that the evidence and submissions introduced by CASAC will be of assistance in the determination of the main application.

5. The focus of CASAC's submissions is to highlight the importance of independence to ensure the legitimacy and effectiveness of oversight bodies such as IPID, which in turn plays a critical role in ensuring the legitimacy and effectiveness of the police. It is certainly not the intention to repeat what has been

said in Mr Bruce's affidavit; rather, the purpose of CASAC seeking to file written submissions is two-fold:

5.1. To highlight to the Court some of the key findings and conclusions made by Mr Bruce; and

5.2. To draw to the Court's attention the position in certain foreign jurisdictions that are relevant to the present matter.

6. This is dealt with in turn below. Before addressing the substantive matters, these submissions deal with why CASAC should be admitted as an *amicus curiae* and should be permitted to adduce evidence.

CASAC'S ADMISSION AS AN AMICUS CURIAE

7. In *Hoffman v South African Airways*, the Constitutional Court explained the role of an *amicus curiae* in the following terms:[1]

> "*An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court*

[1] 2001 (1) SA 1 (CC) ("***Hoffman***") at para 63.

because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position."

8. As mentioned above, in the present matter, the purpose of CASAC's application to be admitted as an *amicus curiae* is two-fold:

   8.1. First, in order to adduce the expert evidence of Mr Bruce and the underlying publicly-available documents on which he relies; and

   8.2. Second, to advance legal argument regarding the meaning of adequate independence of oversight bodies such as IPID with a focus on the foreign law position in comparative jurisdictions.

9. It is by now trite that in order for a party to be admitted as an *amicus curiae*, the following requirements must be met:

   9.1. It must have an interest in the proceedings;

   9.2. The submissions to be advanced must be relevant to the proceedings; and

   9.3. It must raise new contentions that may be useful to the court.[2]

10. It is submitted that CASAC meets all three requirements.

(i) CASAC has an interest in the proceedings

11. CASAC's interest in the matter has been set out in detail in the founding affidavit in CASAC's application for admission as an *amicus curiae*.[3] As set out therein,

[2] *In re certain amicus applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 715 (CC) ("***Certain amicus applications***") at para 3; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 9.

CASAC is a non-governmental organisation whose principles are based on the core values of the Constitution, including the rule of law, public accountability and open governance. The subject-area of the present matter falls squarely within CASAC's focus areas and the work in which it has been involved. CASAC therefore has both an interest in, and expertise on, the issues to be determined by this Honourable Court.

(ii) The submissions advanced by CASAC are relevant to the proceedings

12. There can be no dispute with regard to the relevance of CASAC's submissions to the present proceedings. Both the legal argument and the evidence sought to be adduced deal directly with the core issues to be determined in the main application.

(iii) CASAC's submissions are novel and useful

13. Neither CASAC's interest in the matter nor the relevance of its arguments are brought into question by the Minister of Police. Rather, the Minister of Police opposes CASAC's application to be admitted as an *amicus curiae* on the basis that CASAC does not raise novel submissions, and that it wishes to bolster a partisan interest.[4] CASAC submits that this opposition falls to be dismissed.

14. Cognisant of the role of an *amicus curiae*, CASAC has been cautious not to repeat the submissions made by the other parties. CASAC's submissions are twofold:

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[3] Albertyn Founding Affidavit, paras 8-14, pp 7-9.

[4] Thema Answering Affidavit, para 15, p 250.

14.1. First, it makes submissions on foreign law only to the extent that it is not covered by the applicant or other parties.[5] This much is apparent from the arguments set out below. Hence, these submissions are novel and are intended to assist the Court.

14.2. Second, CASAC makes factual submissions in the form of an expert affidavit by Mr Bruce. Mr Bruce explains the nature of ICOBs (such as IPID); the context in which IPID operates; its relationship with the public and the police; and the factors that impact its legitimacy and effectiveness. The analysis provided by Mr Bruce is a novel contribution to this debate. Moreover, this analysis is important because it clarifies the factual context in which the debate occurs and informs the definition of "adequate independence" in the law.

15. Furthermore, it is absurd to suggest that the application of an *amicus curiae* must fail because its submissions may be perceived as being more favourable to one party than another. To preclude an *amicus curiae* from admission on this basis would have both a chilling and stunting effect on the important role that *amici curiae* play in court proceedings. To the contrary, as was stated by the Constitutional Court in *Hoffman*, an *amicus curiae* "*chooses the side it wishes to join unless requested by the Court to urge a particular position*".[6] Hence, the Minister's complaint in this respect cannot justify the dismissal of CASAC's application.

[5] CASAC's position on this point has been clarified in correspondence, the founding affidavit and the replying affidavit. Albertyn Founding Affidavit, paras 29-32, pp 14-15; Albertyn Replying Affidavit, para 23, pp 306-307.

[6] *Hoffman* at para 63.

16. Accordingly, CASAC submits that it meets the requirements to be admitted as an *amicus curiae,* and seeks to be so admitted.

CASAC'S APPLICATION TO ADDUCE EVIDENCE

17. In addition to its application to be admitted as an *amicus curiae,* CASAC seeks leave to adduce the expert evidence of Mr Bruce together with the publicly-available statistical information underlying Mr Bruce's evidence.

18. Only the Minister opposes CASAC's application to adduce evidence. However, the Minister does not provide reasons for his opposition.[7]

19. As is set out in CASAC's founding affidavit, it is well-established in our law that *amici curiae* are permitted to adduce evidence. [8] As was stated by the Constitutional Court in the *Certain Amicus Applications* case, "*[t]he role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn*".[9]

20. Although rule 16A of the Uniform Rules of Court does not expressly provide for an *amicus curiae* to adduce evidence (thus differing, for instance, from the rules of the Constitutional Court), the position was settled by the Constitutional Court in *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others*, wherein it was stated that:[10]

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[7] Thema Answering Affidavit, para 17, p 250, in which it is simply stated that "*[t]he Minister also opposes the introduction of the affidavit by Mr Bruce*" without providing any reasons for this opposition.

[8] Albertyn Founding Affidavit, paras 41-46, pp17-19.

[9] *Certain amicus applications* at para 5. Emphasis added.

[10] 2013 (2) SA 620 (CC) at para 17 ("**Children's Institute**").

"*Properly interpreted, Rule 16A is in my view permissive and allows for an amicus to adduce evidence. Both a textual and purposive interpretation of the Rule supports this conclusion. In any event, even if Rule 16A does not provide for evidence to be adduced by an amicus, section 173 of the Constitution gives courts the inherent power to regulate their own process and this includes the ability to allow amici to adduce evidence if the interests of justice so demand.*"

21. The Constitutional Court went on to hold that the term "*submissions*" contained in rule 16A ought to be interpreted "*to include written or oral argument, or evidence*",[11] and that properly construed, the phrase "*terms and conditions as it may determine*" in rule 16A(8) empowers a high court to admit any submissions by an *amicus curiae* and to determine, guided by what is in the interests of justice, the nature and extent of the argument and evidence sought to be led.[12]

22. In relation to a determination of whether to permit an *amicus curiae* to adduce evidence, albeit specifically in the context of the Constitutional Court, the following factors have been identified as being relevant:

    (i) The delay caused by giving the other parties an opportunity to respond to the new evidence;

    (ii) The Constitutional Court's reluctance to deal with evidential material without having the benefit of the views of another court;

    (iii) The cogency of the evidence; and

[11] *Children's Institute* at para 22 (emphasis added).

[12] *Children's Institute* at para 23.

(iv) The importance of the evidence to the matters which the court has to decide.[13]

23. These are considered in turn below.

23.1. Firstly, in the present matter, the evidence adduced by CASAC has not caused any delay in relation to the hearing date of the application. The time period for the filing of CASAC's application and evidence was agreed to by all the parties and included in the directions of the Deputy Judge President Ledwaba well in advance of the hearing date. Any delay that has subsequently been caused has been solely attributable to the Minister's extensive and repeated failure to file his answering affidavit timeously.[14] Even this delay, however, has not prejudiced the hearing date in this matter, and the Minister has had an opportunity to answer the evidence that has been adduced by CASAC.

23.2. Secondly, the second factor identified is not a concern that arises in the present matter. While the Constitutional Court may have reservations about accepting evidence adduced by an *amicus curiae* without having the benefit of a lower court's decision – which, in any event, has not necessarily been a bar to the Constitutional Court permitting an *amicus curiae* to adduce evidence – this factor weighs heavily in favour of this Honourable Court admitting the evidence sought to be adduced by CASAC. As the court *a quo*, it is submitted that this Honourable Court is indeed better placed to evaluate the evidence and make findings in

[13] G Budlender 'Amicus curiae' in S Woolman & M Bishop (eds) *Constitutional law of South Africa 2nd ed* (2014) at ch8-p12.

[14] Albertyn Replying Affidavit, paras 10-20, pp 303-306.

relation thereto, and would further alleviate the concerns of any apex court of having to sit as the final arbiter on evidence not previously subject to judicial scrutiny.

23.3. Thirdly, CASAC submits that the evidence is manifestly cogent. Mr Bruce has established himself as an expert in the field of policing, and the expert opinion that he offers is underpinned by reputable statistical information. The Minister has not contested this information. Mr Bruce's evidence and analysis is clearly and extensively supported by his years of expertise and corroborating data.

23.4. Lastly, it is submitted that the expert evidence sought to be adduced by CASAC is directly relevant to the issues under consideration by this Honourable Court. The expert evidence in question provides valuable information about the nature and role of IPID, and the importance of independence to its legitimacy and effectiveness in investigating corruption and the excessive use of force by the police. This information will inform the meaning of 'adequate independence' in relation to IPID. The impugned provisions of the Independent Police Investigative Directorate Act [15] will, in turn, be measured against the standard of 'adequate independence' to determine their constitutional validity.

23.5. The Constitutional Court has adopted this approach in the past. In *Teddy Bear Clinic*, [16] the Court considered the expert evidence of a clinical psychologist and a child psychiatrist to inform its evaluation of the

[15] Act 1 of 2011 ("**the IPID Act**").

[16] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) ("***Teddy Bear Clinic***").

challenges to sections 15 and 16 of the Sexual Offences Act.[17] The expert report was compiled to provide information about the sexual development of children and the potential impact of sections 15 and 16 of the Sexual Offences Act in this regard. [18]

23.6. Mr Bruce's evidence would perform the same kind of function as the expert evidence in *Teddy Bear Clinic*. The evidence will provide information that allows the Court to assess the impact of the impugned provisions as they currently stand and to determine the constitutionality of such provisions.

23.7. Hence, it is submitted that this evidence will undoubtedly assist this Honourable Court in the determination of this matter.

24. In light of the above, CASAC seeks to be permitted to adduce the evidence contained in the affidavit of Mr Bruce.

CASAC'S FACTUAL SUBMISSIONS

(i) IPID's investigative mandate

25. Section 28(1)(g) of the IPID Act provides that IPID must investigate —

> "*corruption matters within the police initiated by the Executive Director on his or her own, or after he receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be*". (Own emphasis.)

[17] *Teddy Bear Clinic* at para 48.
[18] *Teddy Bear Clinic* at para 43.

26. In addition, section 28(2) states that:

> "*The Directorate may investigate matters relating to systemic corruption involving the police.*"

27. As one of the categories of offences that IPID is required to investigate, "*corruption matters*" are no less important than any of the other categories that the IPID Act prioritises. There is no basis for downplaying the importance of IPID's corruption mandate. Nor is there any basis for arguing (as Dr Dintwe does) that IPID should be afforded a lesser degree of independence than that of the Directorate for Priority Crime Investigation ("**DPCI**") on the ground that its investigations into "corruption matters" are not an important part of its mandate.

28. In terms of the domestic and international law cited by the applicant and the Helen Suzman Foundation, institutions or agencies that are tasked with the investigation of corruption must be independent. I refer the Court to those parties' papers and do not repeat their submissions here.

29. In addition to corruption, IPID is required *inter alia* to investigate allegations of torture and assault. Section 28(1)(f) of the IPID Act provides that IPID must investigate —

> "*any complaint of torture or assault against a police officer in the execution of his or her duties*".

30. According to the data published by the Independent Complaints Directorate ("**ICD**") and IPID, from 2007-08 onwards the ICD/IPID have recorded over 1 000

complaints of alleged torture, assault GBH and attempted murder by police.[19] Mr Bruce explains that the large number of complaints received by IPID involving allegations of excessive force by police can reasonably be taken as an indication that excessive force is a substantial problem.[20]

31. South Africa is a party to the Convention Against Torture ("**CAT**"). Article 12 of the CAT provides that:

> "*[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*"

32. As indicated above, the IPID receives a significant number of cases each year alleging torture by the police. IPID must enjoy adequate independence in order for South Africa to fulfil its obligation under the article 12 of the CAT to ensure that an impartial investigation into the allegations is conducted.

33. Accordingly, the requirements set out in *Glenister v President of the Republic of South Africa*[21] ("***Glenister II***") are applicable to IPID.

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[19] The data published by ICD and IPID record the following number of complaints for 2011-2014:

Torture: 2011/12 – 80 complaints; 2012/13 – 50 complaints; 2013/14 –78 complaints.

Assault GBH and attempted murder: 2011/12 – 1145 complaints; 2012/13 – 1775 complaints; 2013/14 – 1076 complaints.

Bruce Affidavit, para 22.2, pp 185-186.

[20] Bruce Affidavit, para 16, p 180.

[21] 2011 (3) SA 347 (CC).

(ii) The importance of actual and perceived independence to IPID's ability to investigate cases of corruption and the excessive use of force by the police (including torture)

34. Adequate independence is necessary to ensure the legitimacy and effective operation of oversight bodies such as IPID. [22] This, in turn, allows IPID to effectively fulfil its mandate to investigate incidents of corruption and the excessive use of force by police officers. We expand upon this argument below.

35. With regard to legitimacy, independence (or perceived independence) is necessary to create public trust in IPID. The reason is that, if a person believes IPID to be independent, she will be more likely to believe that her case will be dealt with impartially.[23]

36. This is to be expected, given that there is a tendency for members of the public to suspect that investigations carried out by police agencies into their own members are not necessarily carried out vigorously or impartially.[24] This suspicion is not without basis. Mr Bruce notes that there is in fact considerable evidence that many internal investigations are not carried out properly. ICOBs (like IPID) therefore aid in creating greater public confidence that investigations against police are carried out properly.[25]

37. If IPID enjoys public trust and confidence, it will be better able to perform its functions effectively. The reason is that public confidence in the independence of IPID encourages members of the public (and police officers) who have complaints

[22] Bruce Affidavit, para 6, pp 173-174.

[23] Bruce Affidavit, para 36.1, p 198.

[24] Bruce Affidavit, para 35, p 198.

[25] Bruce Affidavit, para 35, p 198.

against police members to report their cases to IPID.[26] Public trust in IPID also supports greater trust in the outcome of its investigations.

38. Independence also enhances IPID's legitimacy in the eyes of the police. This is significant because the creation of ICOBs (such as IPID) often provokes hostility and distrust from police personnel.[27] ICOBs typically have to work to establish trust from the police themselves. The ICOB's ability to do its work effectively is partly reliant on its ability to present itself to police as acting independently and impartially.

39. To be effective, it must therefore not just be independent of the police, but be independent in the sense of being 'neutral' and trusted by police to deal with cases in an impartial manner.[28] The ability of IPID officers to project IPID as a neutral agency that is purely committed to establishing the truth and not biased towards either party is an important part of their repertoire of strategies.[29] This allows them to avoid being identified as 'out to get' the police, and enables them to secure greater cooperation and assistance from the police.

40. IPID relies extensively on such cooperation and assistance. There are a number of examples of how cooperation from the police is crucial to IPID's ability to conduct an investigation:

    40.1. In any investigation into an allegation against a police officer, some or all of the witnesses are likely to be other police.[30]

[26] Bruce Affidavit, para 22.3, p 187.

[27] Bruce Affidavit, para 36.5, pp 199.

[28] Bruce Affidavit, para 36.5, p 199-200.

[29] Bruce Affidavit, para 36.5, p 199-200.

[30] Bruce Affidavit, para 69, p 219.

40.2. The IPID investigator may require the assistance of superiors or others in the police department to obtain access to documentary records (such as custody registers or data from vehicle tracking systems) in order to evaluate the credibility of the complaint or of the police officer's account of the incident.[31]

40.3. The ability of the IPID personnel to do their work can be undermined by police using strategies such as deliberate delays, failing to return telephone calls, or claims that documents have been lost.[32]

40.4. ICOBs are typically dependent to some degree on police resources and personnel to carry out certain specialist functions. For instance, ICOBs frequently do not have their own capability for carrying out ballistic tests. In addition, IPID (and its predecessor, the ICD) uses the services of experts from the South African Police Service ("**SAPS**") Local Criminal Records Centre ("**LCRC**") at crime scenes where people have been shot by police. This includes the use of general crime scene experts, who collect evidence at crime scenes and document the layout of the scene, such as the location of bodies, by means of photographs and sketches, and ballistics experts.[33]

40.5. The support that ICOBs depend on the police for is not only technical support. Due to the fact that police personnel far outnumber those for

[31] Bruce Affidavit, para 69, p 219.

[32] Bruce Affidavit, para 70, p 219.

[33] Bruce Affidavit, para 72, pp 220-221.

ICOBs, they also rely on police support for guarding crime scenes even after ICOB investigators reach the scene.[34]

41. In sum, if IPID is independent it will enjoy greater legitimacy and trust from both the public and the police. This legitimacy, in turn, enables IPID to carry out its investigative mandate more effectively.

42. Notably, legitimacy relies on actual and/or perceived independence. If the public and the police believe that the Executive Director is subject to political interference and operates in pursuance of a political agenda, IPID will lose its legitimacy. If this occurs, IPID will forfeit the efficiency benefits that come along with legitimacy and will be far less effective in investigating corruption and the police's excessive use of force (including torture).

(iii) The importance of independence to protect against active political interference

43. In *Glenister II*, the Constitutional Court recognised that it is necessary for specialised anti-corruption agencies to enjoy sufficient independence to prevent undue political interference. This requires the "*de-politicisation of anti-corruption institutions*".[35]

44. CASAC submits that IPID should enjoy the same degree of independence as that afforded to specialised anti-corruption agencies such as the DPCI. The reason is that the DPCI and IPID are similar in important respects -

    44.1. The DPCI's need for independence partly relates to the fact that its investigations may target the political elite and powerful 'politically

[34] Bruce Affidavit, para 74, pp 221-222.

[35] *Glenister II* at para 121.

connected' individuals.

44.2. In the same way, IPID investigations may focus on senior officials who are powerful and 'politically connected'.

45. For instance, Jackie Selebi (the former National Commissioner of the SAPS) was the subject of an investigation conducted by the ICD. Although the ICD's investigation did not confirm the validity of the allegations against Mr Selebi, he was later found guilty of corruption. Bheki Cele, also a former National Commissioner of the SAPS, was similarly accused of corruption and misconduct (although no criminal charges have been laid against him). Both Mr Selebi and Mr Cele have been prominent members of the ruling party. Where senior, politically connected SAPS officials are accused of misconduct, there may be efforts to protect them from investigation or prosecution.[36]

46. This problem is exacerbated by the fact that the Chief of Police typically enjoys greater formal and informal power than the ICOB Executive Director, and also typically has greater access to the Minister of Police. The reason for this is as follows:

46.1. Due to the importance of the police organisation in the overall process of governing the country, there is often a very close relationship between the senior political official responsible for police (the Police Minister) and the Police Chief or Commissioner. While this relationship is supposed to be governed by certain principles regarding the respective powers of these

[36] Bruce Affidavit, para 61, pp 215-216.

two officials, in practise it does not always work this way.[37]

46.2. It is widely recognised internationally that there is a risk of improper influence on the Police Commissioner by the Police Minister. There are examples of this risk materialising both domestically and abroad.

46.2.1. In 2011, a police commissioner in Victoria, Australia, resigned after it was found that he had "*released misleading crime statistics which were favourable to the government immediately before an election*".[38]

46.2.2. Most recently this risk has been highlighted in the report of the Marikana Commission of Inquiry ("**Commission**") which found that the Minister of Police may have influenced the decision to launch the police operation on 16th August 2012 at Marikana.[39] The Commission includes a recommendation that–

> "*[w]hile it is recognised and accepted that in large and special operations there is a role for consultation with the Executive, in particular the Minister of Police, the Commission recommends that the Executive should only give policy guidance and not make any operational decisions and that such guidance should be*

[37] Bruce Affidavit, para 62, pp 216-217.

[38] Phillip Stenning, 'Governance of the Police: Independence, Accountability and Interference' Ray Whitrod Memorial Lecture 2011 at p 3.

[39] Report of the Marikana Commission of Inquiry, para 74, p 452.

appropriately and securely recorded."[40]

47. The nature of the relationship between the Police Commissioner and the Minister does not mean that only the Police Commissioner might do 'favours' for the Minister. Rather, the Police Commissioner often has a lot of influence with the Minister. In such circumstances, the Police Commissioner may attempt to use his access to the Minister to secure the support of the Minister in exerting pressure on the ICOB executive director.

48. In the circumstances, it is necessary to ensure that the Executive Director is clothed with adequate independence to avoid 'political interference' from the Police Minister.

(iv) Protection from regulatory capture

49. There is a final factor that may discourage IPID from carrying out investigations into corruption and excessive use of force in a thorough, vigorous and impartial manner. This is the risk of regulatory capture. Regulatory capture occurs when the IPID officials' reliance and connections with the police mean that they tend to view cases from a perspective that rationalises and excuses breaches of standards by the police.[41] The reasons why IPID officials may become reliant on the police are described above.

50. In order for ICOBs like IPID to resist regulatory capture, it is necessary for a 'mind-set' and attitude of independence to continuously be encouraged, nurtured and supported within the organisation.[42] In the circumstances of regulatory

[40] Id at para D.1, p 551.

[41] Bruce Affidavit at para 82.2, p 229.

[42] Bruce Affidavit at para 83, p 229.

capture, the IPID personnel's ability to maintain their independence is constrained. As such, they need a robust source of support in order to assert their independence. That support must come from the Executive Director. Only an Executive Director who is confident in his or her own independence will be able to provide this kind of support to the personnel. The independence of the Executive Director is therefore foundational to the overall independence of IPID.[43]

Dr Dintwe's affidavit

51. The Minister has filed an affidavit by Dr Dintwe Setlhomamaru Isaac Dintwe ("**Dr Dintwe**") in response to Mr Bruce's affidavit. CASAC has submitted a further affidavit by Mr Bruce in order to clarify the issues raised in Dr Dintwe's affidavit and to draw the Court's attention to contradictions between Dr Dintwe's stated position and the evidence on which he relies.

52. In brief, Mr Bruce's further affidavit clarifies the following issues:

    52.1. Dr Dintwe has asserted that because the IPID Act remedied insufficiencies in the legislation governing the ICD, it will only be legally offensive if it "*totally disables*" the IPID's ability to perform its legal duties.[44]

    52.2. Dr Dintwe's argument is based on the false assumption that the IPID has greater structural and operational independence than the erstwhile ICD. However, Mr Bruce compellingly argues that the ICD and IPID are the

[43] Bruce Affidavit at para 85, p 230.

[44] Dintwe Affidavit, para 74, p 282.

same institution, subject to the fact that the IPID's mandate is different and its powers have been expanded to a limited degree.

52.3. Further, Dr Dintwe's argument that IPID can be clearly distinguished from an anti-corruption agency ("**ACA**") and has a limited need for independence is manifestly unfounded. As is explained above, the IPID is a distinctive type of ICOB in that it is an investigative agency with a mandate that includes the investigation of allegations of unlawful violence against police and of police corruption. The IPID is therefore an independent investigative body that has a hybrid investigative mandate that overlaps with that of the DPCI. [45] Alongside the DPCI, it is an important part of the architecture of law enforcement and accountability in South Africa.

CASAC'S LEGAL SUBMISSIONS – FOREIGN LAW

53. CASAC submits that the provisions of the IPID Act fail to adequately provide for or protect the independence of the Executive Director of IPID. In terms of the IPID Act, the Minister may unilaterally suspend or remove the Director on the basis of one of three broad grounds – (i) misconduct; (ii) ill health or (iii) an inability to perform the duties of that office effectively. These provisions render the Executive Director vulnerable to political interference by the Minister. In order to ensure that the Executive Director is adequately independent, it is necessary that there be parliamentary oversight for the removal or suspension of the Executive Director.

[45] David Bruce Further Affidavit, para 23, p 339.

54. This position is borne out by comparative foreign law. A number of countries have enacted statutes that create independent police oversight bodies and that require parliamentary oversight for the removal or suspension of the person(s) that direct or govern the body. CASAC focuses its submissions on the examples of Kenya and Scotland.

i) Kenya

55. In 2011, Kenya implemented the Independent Policing Oversight Authority Act No. 35 of 2011 to create a body by the same name ("**the IPOA**"). The IPOA is mandated by its Act to "*hold the police accountable to the public in the performance of their functions*" and to "*ensure independent oversight of the handling of complaints by the Service.*" [46] Rather than being headed by an executive director, the Act stipulates that the IPOA shall be governed by an independent Board of Authority. The chairperson of the Board must be a person who is qualified for appointment as a judge of the High Court of Kenya. [47] The remaining members of the Board are required to hold qualifications in various fields. No person may become a member of the Board if they are a police officer or have served as a police officer in the last five years or holds office in a political party.[48]

56. The process and grounds for the removal of a person from the Board are described in section 14 of the Act. Section 14 provides:

[46] Independent Policing Oversight Authority Act No. 35 of 2011, section 5.

[47] Independent Policing Oversight Authority Act No. 35 of 2011, section 9.

[48] Independent Policing Oversight Authority Act No. 35 of 2011, section 10(2).

"*Removal of a member of the Board*

(1) The chairperson or a member of the Board may be removed from office only for—

(a) serious violation of the Constitution or any other law;

(b) gross misconduct, whether in the performance of their functions or otherwise;

(c) physical or mental incapacity to perform the functions of office;

(d) incompetence; or

(e) bankruptcy.

(2) A person desiring the removal of the chairperson or a member on any ground specified in subsection (1) may present a petition to the Public Service

Commission setting out the alleged facts constituting that ground.

(3) The Public Service Commission shall consider the petition and, if at least two-thirds of the members present and voting agree that it discloses a ground for removal under subsection (1), the Commission shall recommend the removal from office of the chairperson or member, as the case may be, to the National Assembly.

(4) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground for removal under subsection (1), shall forward the petition to the President.

(5) On receiving a petition under subsection (3), the President—

(a) shall appoint a tribunal in accordance with subsection (6) to hear and determine the petition; and

(b) may suspend the chairperson or member as the case may be, pending the outcome of the petition.

(6) The tribunal referred to in subsection (5) shall consist of—

(a) a person who holds or has held office as a judge of a superior court,

who shall be the chairperson;

(b) at least two persons who are qualified to be appointed as judges of

the High Court; and

(c) one other member who is qualified to assess the facts in respect of

the particular ground for removal.

(7) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within seven days.

(8) A person suspended under this section shall be entitled to continue to receive one-half of the remuneration and benefits of the office while suspended."

57. The process set out in the Act requires oversight by the Kenyan National Assembly before a member of the Board can be suspended or removed. Although the President has final say on the matter, he cannot suspend a Board member or consider the application for removal until Parliament has indicated that it is satisfied that one or more of the grounds for removal exist.

ii) Scotland

58. The institution of the Police Complaints Commissioner for Scotland ("**PCCS**") was created by section 33 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 ("**the PCCS Act**").

59. The grounds for removal of office for the Police Complaints Commissioner for Scotland are listed in sub-paragraphs 3(4) and (5) of Schedule 4 to the PCCS Act. These provisions provide:

"*3(4) The Scottish Ministers may remove a person from the office of Commissioner if satisfied that any of the grounds mentioned in sub-paragraph (5) is the case.*

3(5) Those grounds are –

(a) The person has failed without reasonable excuse to carry out the functions of the office for a continuous period of three months;

(b) the person falls within one or more of the sub-sub paragraphs of paragraph 2(1) [This is the list of limitations on appointment (a person is disqualified from holding the office of PCCS is they are in elected office or are a member of a police force or policing-oriented body);

(c) The person has, since appointment, been convicted of a criminal offence;

(d) The person's estate has been sequestrated or the person has been adjudged bankrupt, made an arrangement with creditors or has granted a trust deed for creditors or a composition contract;

(e) The person is subject of a disqualification order under the Company Directors Disqualification Act 1986 (c. 46) or under Part 2 of the Companies (Northern Ireland) Order 1989 (S.I. 1989/2404 (N.I. 18));

(f) The person has acted improperly in relation to the person's duties;

(g) the person is otherwise unable or unfit to perform the person's duties."

60. It is clear from the above provisions that the Scottish PCCS may not be removed unilaterally by the Minister or the Cabinet Secretary that is responsible for police. Rather, the PCCS can only be removed by the decision of the Scottish Ministers as a whole.

COSTS

61. It is not conventional for an *amicus curiae* to be awarded costs in an application. However, in *Jeebhai and Others v Minister of Home Affairs and Another*,[49] the Supreme Court of Appeal held that an *amicus curiae* may be awarded the costs of their admission application in the event of unreasonable opposition to their admission.

62. We submit that in the circumstances of this case, such an order is warranted. The Minister's opposition to CASAC's *amicus* application is unfounded, unreasonable and unnecessary. The concerns of the Minister could have been addressed without the need for CASAC to make application for admission as an *amicus curiae.* The Minister has therefore caused unnecessary expenditure on his part and on the part of CASAC.

[49] *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) at paras 52 and 55(3).

CONCLUSION

63. The IPID is an independent investigative body with a hybrid investigative mandate which overlaps with that of other investigative bodies like the DPCI. Its independence allows it to function effectively and without political interference, thereby enabling it to fulfil its mandate to investigate police corruption. As such, it should enjoy the same protections to its independence as are afforded to the DPCI.

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24 August 2015