

## Chapter 23B

# Security Services

**Stu Woolman** \*

23B.1 Introduction

23B.2 Historical Background: Transformation and the Development of the Post-Apartheid Security Services

23B.3 The South African Police Service

- (a) Composition, structure and mandate
- (b) Control and management
- (c) The SAPS and fundamental rights
  - (i) Use of force by the police
    - (aa) Govender and Walters
    - (bb) Changes to CPA s 49 in light of *Walters*
    - (cc) Shoot to Kill? Proposed Amendments Designed to Undermine Constitutionally Mandated Changes to CPA s 49
  - (ii) Human rights violations by the police
  - (iii) Duty to protect the public
    - (aa) Carmichele and K
    - (bb) *F*: The rollback of *Carmichele* and *K*?
    - (cc) Novel uses of cost orders as constitutional remedies
- (d) Limitations on the rights of SAPS members
- (e) Accountability and Oversight
  - (i) Executive and parliamentary oversight
  - (ii) Independent Complaints Directorate
  - (iii) Community Policing Forums
  - (iv) Police malfeasance, incompetence and corruption
    - (aa) The Auditor-General's Report on Police Service Delivery (2009)
    - (bb) Public Protector's Report (2011): *Against the Rules*
    - (cc) Special Investigative Unit 2011 Preliminary Reports

#### 23B.4 The South African National Defence Force

- (a) Composition, structure and functions
- (b) Civil military relations
- (c) Military discipline
- (d) Limitations on the rights of SANDF members

#### 23B.5 South African Intelligence Services

- (a) Composition, structure and functions
- (b) Control, oversight and accountability
  - (i) Parliamentary oversight
  - (ii) Inspector-General
  - (iii) The National Intelligence Co-ordinating Committee
  - (iv) Executive control and oversight
- (c) Rights issues facing the intelligence agencies
  - (i) Interception of private communications
  - (ii) Compliance with the principle of open justice
    - (aa) MISS and the missing Open Democracy Bill
    - (bb) *Independent Newspapers* and the principle of open justice
  - (iii) The Protection of Information Bill: A necessary evil with potential constitutional infringements

#### 23B.6 Other Role Players in the Security Sector

- (a) The Directorate for Special Operations ('DSO' or 'Scorpions')
- (b) Directorate of Priority Crimes Investigation ('DPCI' or 'Hawks')
  - (i) Powers and functions of the DPCI
  - (ii) *Glenister I*: Not ripe enough
  - (iii) Between *Glenister I* and *Glenister II*: Legality, rationality review and an anti-domination doctrine
  - (iv) *Glenister II*: Rights, duties, international law, reasonableness review and a principle of anti-corruption
- (c) Electronic Communications (Pty) Ltd ('Comsec')
- (d) National Communications Centre ('NCC')
- (e) Office for Interception Centres ('OIC')

\* I would like to express my gratitude to Kim Robinson and Okyerebea Ampofo-Anti for their significant contributions to the first iteration of this chapter. Juha Tuovinen's research assistance proved invaluable for this second iteration of the chapter. I save my profoundest thanks for Michael Bishop and Jason Brickhill. Both understand that the vocation of editing requires time-consuming, substantive engagement with a text, that the true calling of editing demands that they ensure that every line scans, that their efforts may cause their authors some consternation and that their hard work will ultimately disappear into the author's final text. The quality of their work is on display throughout this chapter. All errors, however, remain my responsibility alone.

---

RS3, 05-11, ch23B-p1

## 23B.1 Introduction

South Africa has, over the past seventeen years, transformed itself from a racist, fascist state ruled by a white minority into a non-racial constitutional democracy whose twin grundnorms are respect for human dignity and for the rule of law. Nowhere have these changes had a more profound effect in South African society than on our security services: the police, the military and the intelligence agencies.<sup>1</sup>

From Hobbes onward, the western philosophical tradition has engaged in an ongoing conversation regarding the need to trade off liberty against security, and security against liberty. However, as Jeremy Waldron has noted:

Trading off liberty against security has a treacherous logic. It beckons us in with easy cases — the trivial amount of freedom restricted when we are made to take our shoes off at the security checkpoint when we board an airplane is the price of an assurance that we will not be blown up by any imitators of Richard Reid. But it is also a logic that has been used to justify spying without a warrant, mass detentions, incarceration without trial, and abusive interrogation. In each case, we are told, some safeguards must be given up in the interests of security.<sup>2</sup>

---

RS3, 05-11, ch23B-p2

And yet, physical security, is undoubtedly a prerequisite for the meaningful exercise of democracy and human rights in today's South Africa. In speaking both to the ugliness of our past, and the present's current dangers, former President Mbeki stated that:

We cannot erase that which is ugly and repulsive and claim the happiness that comes with freedom if communities live in fear; closeted behind walls and barbed wire, ever

---

1 Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC') s 1 provides: '[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.' The composition of the security services is dealt with in FC s 199(1). Whether South Africa is best described as a multi-party democracy or a one-party dominant democracy is a question taken up by Sujit Choudhry in "'He had a mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

Choudhry's views shape, in part, this chapter's analysis of the relationship between the political branches of our constitutional democracy, the judiciary and our security services. See also H Klug 'Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision-making' (2010) 3 *Constitutional Court Review* 1. For the ur-text with respect to institutional analysis of the Constitutional Court, see T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa (2008) 7 *I-CON* 106. See also See T Roux *The Politics of Principle: The First South African Constitutional Court 1995-2005* (forthcoming 2012).

anxious in their houses, on the streets and on our roads, unable freely to enjoy our public spaces.<sup>3</sup>

The Final Constitution gives additional voice, in manifold ways, to this most basic desire to live in a secure, yet free, environment. FC s 198(a) provides: 'National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.' FC s 12(1) reads, in relevant part: 'Everyone has the right to freedom and security of the person, which includes the right ... to be free from all forms of violence from either public or private sources.' FC s 200(2) states: 'The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people.' FC s 205(3) declares: 'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.' Finally, the same agencies that denied us our fundamental rights under apartheid are under a general obligation — found in FC s 7 — to respect, protect, promote and fulfil our fundamental rights.<sup>4</sup>

With respect to the security services, the drafters of the Final Constitution were actually more ambitious than even FC s 7 suggests. The Final Constitution imposes positive obligations on members of the security services to entrench the normative underpinnings of our basic law. Under FC s 199(5), '[t]he security services must act, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'<sup>5</sup>

An exemplary Constitution, a robust Bill of Rights, model pieces of legislation, and oversight mechanisms constitute only the beginning of South Africa's formal efforts to strike the right balance between liberty and security. The proof is, however, in the pudding. Have the policies and the practices of our security services met the demands of the Final Constitution<sup>6</sup> and the statutes that govern their daily

---

2 J Waldron 'Is this Torture Necessary?' (2007) 54(16) *The New York Review of Books* 40. See also D Cole & J Lobel *Less Free, Less Safe: Why America is Losing the War on Terror* (2007); I Loader & N Walker *Civilizing Security* (2007); L Lazarus *Security and Human Rights* (2007); R Posner *Not a Suicide Pact: The Constitution in a Time of National Emergency (Inalienable Rights)* (2006); C Sunstein *The Laws of Fear: Beyond the Precautionary Principle* (2005); R Posner *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (2005); J Waldron 'Safety and Security' (2006) 85 *Nebraska Law Review* 454; N Fritz 'States of Emergency' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61. If our Constitutional Court's vaunted jurisprudence on the right and the value of human dignity is to retain its currency, it must be able provide a bulwark against the dehumanisation associated with the security state. See S Woolman 'Dignity' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

3 T Mbeki 'State of the Nation Address' (9 February 2007) available at <http://www.polity.org.za> (accessed on 5 November 2007).

4 FC s 7(2) states: 'The State must respect, protect, promote and fulfil the rights in the Bill of Rights.'

5 FC s 199(5).

6 FC ss 198-210.

operations?<sup>7</sup> According to the first iteration of this chapter, penned in 2007, the interim reviews were 'decidedly mixed'. Four years on, and new reviews are in. They are largely negative.

In 2007, I suspected that the Directorate for Special Operations, 'the Scorpions', might well be 'victims of their own success.' And indeed, this highly successful police unit, embedded in the National Prosecuting Authority, was disbanded in 2009. Both its independence and its achievements in rooting out corruption in our one party dominant state made its continued existence politically undesirable. A pale facsimile, the Directorate of Priority Crimes Investigations, or 'the Hawks', supplanted the Scorpions. In observing the Machiavellian maxim, 'keep your friends close and your enemies closer,' the government — fearful of further revelations — placed the Hawks under the watchful eye of one of our most corrupt and inept government agencies: the police.

If virtue and justice have a place in our government today, then recent reports by the Public Protector, the Auditor-General and the Special Investigating Unit ('SIU') on rampant police corruption demonstrate that some members of government are watching the watchers. Indeed, the corruption is so deep and so widespread that the SIU initially stated that it only had the capacity to investigate the top 20 worst cases.

The Constitutional Court has also been quite alive to the damage that a non-independent (and palpably corrupt) police force can inflict on a constitutional democracy committed to the rule of law. In *Glenister II*, the Constitutional Court found the disbandment of the Scorpions unconstitutional.<sup>8</sup> In a somewhat convoluted judgment, the Court held that FC s 7(2), when read with various substantive provisions in the Bill of Rights, South Africa's obligations under international law, and the constitutional obligation of the police, required the creation and the maintenance of an independent investigatory unit that operates free of fear, favour or prejudice.<sup>9</sup> While the government has agreed to abide by the order, precisely how it will do so over the next eighteen months is a matter of conjecture. One can be forgiven for forecasting the inevitable arrival of a *Glenister III* on the Constitutional Court's docket in two year's time.

A final area about which this chapter expressed some concern turns on the Executive's involvement in and control over the Intelligence Services. In a well-functioning constitutional democracy, intelligence services provide relatively unbiased information about potential threats to the commonweal. The danger, of course, exists that the government of the day will manipulate and coerce intelligence

7 See, eg, J Rauch 'The South African Police and the Truth Commission' (2005) 36(2) *South African Review of Sociology* 224, available at [http://www.kas.de/db\\_files/dokumente/7\\_dokument\\_dok\\_pdf\\_4865\\_2.pdf](http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4865_2.pdf) (accessed 28 October 2007)(Suggests that, despite substantial efforts to effect the transformation and the reformation of a brutal culture, the SAPS has some distance to go.)

8 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6.

9 As I discuss later, *Glenister II* tracks my (pre-*Glenister I* and *II*) circa 2007 claim that the police, and the security forces generally, are subject to FC s 7(2)'s obligation to respect, protect, promote, and fulfil our fundamental rights and FC s 199(5)'s duty to 'teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'

into the service of political ends both domestic and foreign. (In this regard, South Africa's intelligence services have suffered no worse a fate than the intelligence services of the United States or the United Kingdom in having their offices and the proper scope of their activities subverted by the office of the President or Prime Minister.) The Constitutional Court's response has been rather muted, given the complexity of the cases

---

RS3, 05-11, ch23B-p4

that have come before it. However, in *Independent Newspapers*,<sup>10</sup> the Court extended the principle of open justice first articulated in *Shinga* and *SABC*. This principle should allow citizens greater access to the information used (and sometimes abused) by our intelligence services and the Executive in the context of judicial proceedings. In developing this principle of open justice, the Court has revealed a willingness to subject the national security claims of, and the classification of documents by, the Executive to judicial scrutiny. What remains to be seen is whether this principle of open justice will be robust enough to counter the deleterious conduct of a government whose actions occasionally leave the impression that it believes itself to be above the law and unaccountable to the people of South Africa. What the courts are certain to entertain in this domain in the not too distant future are challenges based upon provisions similar to those that underpin the principle of open justice principle when the controversial Protection of Information Bill<sup>11</sup> currently tabled in Parliament finally becomes law.<sup>12</sup>

The remainder of this chapter provides a brief history of South Africa's post-apartheid security services. It then sets out the powers and the functions of the security services as adumbrated in the Final Constitution and more fully elaborated in enabling legislation. In each functional area, the courts have been deeply engaged with both the constitutional and the statutory constraints placed upon our security forces. They have, in addition to what I have sketched out above, generated a substantial body of jurisprudence about how we should watch the watchers.

## 23B.2 Historical background: transformation and the development of the post-apartheid security services

Prior to 1994, the South African security state suppressed political protest and denied basic liberties to the majority of its citizens through a network of highly repressive security legislation and a security service committed to legal forms of law

---

10 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa & Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6.

11 B 6-2010.

12 As Jason Brickhill notes, much of the public criticism of the POI Bill is overwrought and levelled by persons and organizations unfamiliar with the text of the Bill. South Africa needs new legislation. As matters stand, the antiquated, apartheid-era 1984 POI Act applies. The irony of the criticism levelled against the current POI Bill is that its delay has already led to the replacement of a functional initial draft (prepared during Ronnie Kasrils' tenure) by a somewhat problematic piece of proposed legislation. So while provisions that create criminal offences for the possession of classified information need to be eliminated and loose definitions need to be tightened, the Bill needs to be passed. (E-mail Correspondence with Jason Brickhill, 5-6 May 2011.) The promulgated Act's constitutional infirmities, if any are left, can then be properly assessed in a court of law.

enforcement and extra-legal forms of oppression, abuse and humiliation. The enforcement of apartheid's grossly inhumane system of pass laws, separate amenities arrangements and separate development programmes demanded close co-operation — and constant vigilance — by the armed forces, the police, and the intelligence agencies. Prior to the transition to a democratic South Africa, the security services were 'the face of apartheid': they were brutal, sadistic, corrupt and merciless.

---

RS3, 05-11, ch23B-p5

After 1978, upon PW Botha's assumption of the Presidency, the National Party employed all the means at its disposal to destroy the liberation movements and the putative 'total onslaught' of foreign and domestic communists. The 'total strategy' deployed to contain this Orwellian threat was a co-ordinated approach that drew upon the collective expertise of the entire security establishment. A complex network of security committees known as the National Security Management System ('NSMS'), with about 500 regional, district and local branches, was established to complement the already existing State Security Council ('SSC'). The SSC consisted of the heads of the military, police, intelligence agencies, certain cabinet ministers and the President. The SSC, guided by the NSMS, was responsible for all security related policy and strategic decisions. In this virtually totalitarian security climate, all government policies were seen as potential security issues and could be subjected to scrutiny and to control by the SSC. The various components of the security establishment, namely the police, security agencies and the military, played an increasingly pivotal and pernicious role in policy formulation.<sup>13</sup> And when the security establishment was not meddling in the law-making functions of the state, it busied itself with operations carried out beyond the reach of the law.

The South African Police ('SAP') as they were then known, were trained and equipped for confrontational and militaristic policing. The emphasis of policing, particularly in 'non-white' residential areas, was not crime prevention, but rather the enforcement of the plethora of discriminatory legislation that underpinned the apartheid state.<sup>14</sup> They turned arbitrary detention, torture and the excessive use of force in effecting arrests and quelling demonstrations into the norm for 'law enforcement'.<sup>15</sup> Three quarters of police stations in the country were located in 'white' areas. Townships and other 'non-white' residential areas possessed little or no community orientated police presence.<sup>16</sup> The role of the police in 'non-white' residential areas was to conduct raids and to control political unrest.

Racial discrimination was perpetuated within the ranks of the police force. Although, by the early 1990s, sixty per cent of policemen were black, the officer corps remained ninety per cent white. Women of all races were also heavily under-

---

13 J Kuzwayo 'Developing Mechanisms for Civilian Oversight over the Armed Forces' (1998) 7 *African Security Review* 55-56.

14 M Shaw *Crime and Policing in Post-Apartheid South Africa: Transforming Under Fire* (2002) 10-13.

15 G Cawthra *Policing South Africa: The South African Police and the Transition from Apartheid* (1993) 113-117.

16 Shaw (supra) at 11-12.

represented: and those women who were recruited were consigned to administrative positions or relegated to handling female accused and witnesses.<sup>17</sup>

Police accountability to the general public, particularly the black majority, was virtually non-existent. The generally accepted culture of bigotry and brutality, together with the absence of an independent body for oversight of police activities, cultivated an environment where police officers abused the rights of citizens with impunity. In the limited instances where allegations of violations were investigated, the investigation occurred through commissions of enquiry. These commissions, staffed primarily by the police, seldom handed down findings that resulted in disciplinary

---

RS3, 05-11, ch23B-p6

action against the accused.<sup>18</sup> Inquests into the deaths of political activists in custody, presided over by Magistrates, invariably led to the exculpation of police and other members of the security services — even in the face of overwhelming evidence of torture, assault and murder.<sup>19</sup>

The South African Defence Force ('SADF') had a similar image to that of the police. It worked closely with the SAP and was deployed extensively to control unrest in the townships. It was also involved in warfare in other southern African nations: the so-called 'front line states' that provided military bases for the training of the armies of the liberation movements. Elements within the SADF such as the Civil Co-operation Bureau and the notorious 32 Battalion engaged in illegal activities such as assassinations and chemical and biological warfare.<sup>20</sup> The SADF did not have many black members and was composed primarily of white male conscripts.<sup>21</sup>

---

17 Cawthra (supra) at 78-81.

18 Cawthra (supra) at 174-175. See also N Haysom 'Policing the Police: A Comparative Survey of Police Control Mechanisms in the United States, South Africa and the United Kingdom' (1989) *Acta Juridica* 144-151.

19 G Bizos *No One to Blame: In Pursuit of Justice in South Africa* (1998).

20 Cawthra (supra) at 173. See also G Cawthra & R Luckham *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies* (2003) 34.

21 Transformation has to be understood in terms of the transition from, and the change of priorities of, the apartheid state to the democratic state. See L Heinecken 'South Africa's Armed Forces in Transition: Adapting to the New Strategic and Political Environment' (2005) 36(1) *Society in Transition* 74 ('The defence budget, which in 1989 increased to 4,3 % of the Gross Domestic Product (GDP) of which most went on internal deployment alongside the police, plummeted to a mere 1,6 % of the GDP in years to come.') See J Cilliers 'From a "Siege Mindset" to a Popular Force: The Evolution of the South African National Defence Force' (1998) 38(3) *Africa Quarterly* 27, 35-36. Heinecken further writes:

[The transition] meant not only realigning its forces to the new security environment, but reintegration into the political world and in particular African society, as well as a new political dispensation. This affected virtually every facet of the SANDF's being and sparked a process of radical transformation unsurpassed in the history of South Africa. The transformation process covered four main areas: transformation of civil-military relations; organisational restructuring; normative and cultural transformation; and constitutional and legal transformation. Clearly these issues are not mutually exclusive, as the entire process of transformation hinges on the imperatives spelt out in the Constitution of the Republic of South Africa, 1996.

The intelligence agencies consisted of the SAP Security Branch, the Directorate of Military Intelligence and the Bureau of State Security (later the National Intelligence Service).<sup>22</sup> Like the SADF, the intelligence community worked closely with the SAP. Indeed, most National Police Commissioners were appointed from the SAP Security Branch.<sup>23</sup> As with the SADF and the SAP, the intelligence agencies were virtually unaccountable — to anyone.<sup>24</sup> The covert activities of the intelligence agencies — and the desire of politicians to be able to deny culpability for untoward actions — actually served as justification for this absence of accountability.

---

RS3, 05-11, ch23B-p7

The future of the security services under the new democratic order featured prominently in the various talks that led to South Africa's democratic transition.<sup>25</sup> In 1991, a National Peace Accord was signed by the various parties involved in the negotiations to create a framework for greater police accountability. Although discussions between the military wings of the liberation movements and the SADF took place during this period, these talks were largely informal. In 1993, a Transitional Executive Council, established to govern the country in the period leading up to the 1994 elections, set up the Joint Military Co-ordinating Committee. This committee, which consisted of the heads of the military forces in the homelands, the SADF and the armies of the liberation movements, began the process of integrating and restructuring the SADF.<sup>26</sup>

The Multi-Party Negotiating Forum crafted an Interim Constitution<sup>27</sup> and 34 Constitutional Principles that would guide a representative Constitutional Assembly's drafting of the Final Constitution.<sup>28</sup> Constitutional Principle XXXI dealt directly with the security services and provided that 'every member of the security forces (police, military, and intelligence), and the security forces as a whole, shall be required to

---

Heinecken (supra) at 79 citing Department of Defence *White Paper on Defence and Defence Review* (1998) 74–76. Despite these pressures, the soldiers who make up the SANDF were (as of 2005) 64 per cent black and 29 per cent white. Department of Defence *Personnel Statistics* (15 February 2005). The critical structural problem remains in the middle ranks – major to colonel: whites still occupy more than half of those positions. Heinecken (supra) at 79.

22 K O'Brien 'Controlling the Hydra: A Historical Analysis of South African Intelligence Accountability' in H Born, L Johnson & I Leigh (eds) *Who's Watching the Spies? Establishing Intelligence Service Accountability* (2005) 200.

23 Shaw (supra) at 11–12.

24 O'Brien (supra) at 200.

25 Cawthra (supra) at 165–172.

26 Cawthra & Luckham (supra) at 36–37.

27 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

28 See IC Schedule 4.

perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.<sup>29</sup>

During the certification process for the Final Constitution, neither Constitutional Principle XXXI nor the security forces themselves occasioned much controversy. However, in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*,<sup>30</sup> the original draft of the Final Constitution was found not to comply with the Constitutional Principles because it conferred insufficient powers on the provinces with respect to, among other things, the police.<sup>31</sup> The Constitutional Assembly thereafter submitted an amended text that was certified by the Constitutional Court.<sup>32</sup>

The Final Constitution wrought a radical reformation of the security services. Under the Final Constitution, the security services are: subject to the rule of law,<sup>33</sup> accountable to Parliament and the national executive,<sup>34</sup> precluded from partisan

---

RS3, 05-11, ch23B-p8

conduct in the performance of their duties,<sup>35</sup> subject to parliamentary oversight,<sup>36</sup> subject to civilian authority,<sup>37</sup> prohibited from carrying out illegal orders,<sup>38</sup> and enjoined to protect and to promote fundamental rights.<sup>39</sup>

---

29 See IC Schedule 4.

30 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*').

31 Ibid at paras 395–401. For a brief discussion on this particular ground for refusal to certify, see C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) § 20.4.

32 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24.

33 FC s 198(c) states: 'National security must be pursued in compliance with the law, including international law.'

34 FC s 198(d) states: 'National security is subject to the authority of Parliament and the national executive.'

35 FC s 199(7) states: 'Neither the security services, nor any of their members, may, in the performance of their functions (a) prejudice a political party interest that is legitimate in terms of the Constitution; or (b) further, in a partisan manner, any interest of a political party.'

36 FC s 199(8) states: '[T]o give effect to the principles of transparency and accountability, multi-party parliamentary committees have oversight of all security services.'

37 FC s 204 and FC s 205 require civilian secretariats for defence and police to be established pursuant to national legislation. However, no such constitutional requirement exists for the intelligence agencies. Rather, in terms of the Intelligence Services Control Act 40 of 1994, an Inspector-General must be appointed for each intelligence service. The absence of such a constitutional provision may reflect the desire of the drafters to make the activities of the intelligence services less likely to be subject to judicial oversight and constitutional review.

The Final Constitution has brought about other significant changes in the structure of the security services. We now have a single defence force and a single police service.<sup>40</sup> Any intelligence service other than that of the police and the military must be established by the President under the terms of the Final Constitution.<sup>41</sup> Any military force in the country other than the South African National Defence Force ('SANDF') is unlawful.<sup>42</sup> Armed organisations or services other than the SAPS, the SANDF, and constitutionally authorised intelligence agencies must be created in a manner consistent with national legislation.<sup>43</sup>

In a clear departure from apartheid South Africa, the Final Constitution explicitly places political responsibility for the security services under civilian authority.<sup>44</sup> Likewise, the Final Constitution mandates civilian secretariats for both the military<sup>45</sup> and police.<sup>46</sup> Civilian monitoring of the intelligence agencies occurs through inspector generals appointed in terms of national legislation.<sup>47</sup> The operational command of the police and the military is no longer subject to political control.<sup>48</sup>

Perhaps the most significant paradigm shift with respect to South Africa's security forces is evinced in FC s 198(a): 'National Security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.' This paradigm shift, to which the Final Constitution aspires, is further reflected in a series of

---

38 See FC s 199(6).

39 See FC s 7(2) and FC s 199(5).

40 See FC s 199(1).

41 See FC s 199(1).

42 See FC s 199(2).

43 See FC s 199(3).

44 See FC ss 201, 206, and 209.

45 See FC s 204; Defence Act 44 of 1957 s 7A.

46 See FC s 208; South African Police Service Act 68 of 1995 ss 2-4

47 See FC s 210.

48 See FC s 202 and FC s 207.

white papers on safety and security, defence and intelligence.<sup>49</sup> The extent to which the aspirations of both the Final Constitution and the white papers have been met is another matter. The amalgamation of apartheid security services with the security and defence forces of the homelands and liberation movements, skills shortages, redistribution of resources, high crime levels and overcoming the culture of impunity entrenched under apartheid, have all proved to be significant barriers to the transformation of the security services.

## 23B.3 The South African police service

### (a) Composition, structure and mandate

The SAPS emerged from the amalgamation of the 10 police agencies of the former 'independent homelands' of Transkei, Bophutatswana, Venda and Ciskei, the former 'self-governing homelands' of KwaZulu, Lebowa, QwaQwa, KwaNdebele, KaNgwane and Gazankulu and the South African Police. In 1990, South Africa had 140,000 police officers, of which 112,000 were members of the South African Police.<sup>50</sup> The new SAPS therefore consisted mainly of police officers who had operated under the apartheid regime. The functions, powers and training of these police officers prior to 1994, as discussed above, constituted a major hurdle to establishing a new police service that was suitable for the needs of the new democratic nation. In 2002, the SAPS launched a new recruitment drive that increased the numbers of police officers substantially, decreased the numbers of previous SAP and homeland police officers, and thereby substantially altered the composition of the service.<sup>51</sup>

As a result of its history, the primary challenge facing the newly created SAPS was securing its legitimacy. The SAPS initially met this challenge in three symbolic ways. First, the South African Police became the South African Police Service.

---

49 Accordingly, the first White Paper considered the following objectives and the need for enabling legislation in order to realise their varied ends:

The overarching challenge of transforming defence policy and the armed forces in the context of the Constitution, national security policy, the RDP, and international law on armed conflict. Civil-military relations, with reference to the constitutional provisions on defence; transparency and freedom of information; defence intelligence; the structure of the Department of Defence (DOD); military professionalism; civic education; the responsibilities of government towards the SANDF; and the rights and duties of military personnel. The external and internal strategic environment and the importance of promoting regional security. The primary and secondary functions of the SANDF. Human resource issues, including integration; the maintenance of an all-volunteer force; the Part-Time Force; rationalisation and demobilisation; equal opportunity, affirmative action, non-discrimination and gender relations; and defence labour relations. Budgetary considerations. Arms control and the defence industry. Land and environmental issues.

Department of Defence Defence in a Democracy: White Paper on National Defence for the Republic of South Africa (May 1996) 4-5.

50 See J Rauch 'The South African Police and the Truth Commission' (2005) 36(2) *South African Review of Sociology* 224, available at [http://www.kas.de/db\\_files/dokumente/7\\_dokument\\_dok\\_pdf\\_4865\\_2.pdf](http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4865_2.pdf) (accessed on 28 October 2007).

51 See G Newham 'Strengthening Democratic Policing in South Africa through Internal Systems for Officer Control' (2005) 36(2) *South African Review of Sociology* 160, available at <http://www.csvr.org.za/docs/policing/strengthening.pdf> (accessed on 9 March 2009).

Second, military ranks were eliminated and replaced with new designations.<sup>52</sup> Finally, the menacing Ministry of Law and Order became the Ministry of Safety and Security. Recently, however, some of these symbolic reforms were reversed. The Ministry was renamed 'the Ministry of Police' and military ranks were reintroduced for the SAPS leadership — the National Commissioner now goes by the honorific 'General'.

The police are constitutionally mandated to prevent, to combat and to investigate crime, to maintain public order, to protect and to secure the inhabitants of South Africa and their property and to uphold and enforce the law.<sup>53</sup> The powers and the functions of the police are determined by constitutionally-mandated national legislation: the South African Police Service Act ('SAPS Act').<sup>54</sup>

In terms of FC s 205(1), the SAPS must be 'structured to function at national, provincial and, where appropriate, local spheres of government.' The SAPS does not have separate branches within each province. Provincial priorities are integrated into the SAPS through the control and the management of the SAPS at provincial level. Up until 2006, each province was also divided into 'areas'. Each area consisted of about 26 police stations. However, pursuant to a restructuring process undertaken in 2006, 'areas' have now been replaced with smaller units of approximately six police stations.<sup>55</sup>

FC s 206(7) provides for legislation to govern the establishment of municipal policing. Initially, the SAPS Act did not provide for the establishment of municipal police services ('MPS').<sup>56</sup> However, a 1998 amendment to the SAPS Act introduced this possibility.<sup>57</sup> In terms of s 64(1) of the SAPS Act, a municipality can now establish a municipal police service on application to the relevant MEC in the province concerned. Subsequent to the local government elections of 2000, most of the large municipal councils have created an MPS. An MPS must be funded by municipalities, must comply with national policing standards and may not derogate from the powers

---

52 Under the new democratic order, 'general' became 'commissioner'; 'brigadier' became 'director' and 'colonel' became 'senior superintendent.' See J Rauch 'Police Reform and South Africa's Transition' *Centre for the Study of Violence and Reconciliation Working Paper 6*, available at <http://www.csvr.org.za/docs/policing/policebeformandsouth.pdf> (accessed on 9 March 2009).

53 See FC s 205(3).

54 Act 68 of 1995. FC s 205(2).

55 Rauch 'Police Reform and South Africa's Transition' (supra) at 1. The restructuring process was motivated by a need to increase efficiency within the SAPS by removing excessive layers of authority which served as an impediment to service delivery. *Ibid.*

56 Shaw notes that the Final Constitution's provision with regard to municipal policing was inserted at the behest of the Democratic Party. He contends that the reason for the African National Congress ('ANC') government's initial reluctance to allow for the establishment of municipal policing was the fear that municipal police would be used by local government structures for political purposes. Shaw (supra) at 123.

57 South African Police Service Amendment Act 83 of 1998.

and duties of police officers conferred by national legislation.<sup>58</sup> Municipal councils are obliged by the Act to establish civilian oversight mechanisms.<sup>59</sup> MPS do not have the same range of powers as the SAPS

and are limited to traffic policing, the enforcement of municipal by-laws and the prevention of crime.<sup>60</sup>

### **(b) Control and management**

Political power over the police vests in the national Minister of Police. The Minister determines national policing policy subsequent to consultation with provincial governments.<sup>61</sup> At provincial level, a member of each provincial government, an MEC, has political responsibility for the police in that province.<sup>62</sup> Co-ordination of the police service and cooperation among the spheres of government is facilitated through a committee comprised of the Minister of Police and the provincial MEC for police.<sup>63</sup> Although FC Schedule 4 lists policing as a concurrent national and provincial competence, the actual concurrency of this authority is limited by the terms of FC Chapter 11. Under FC Chapter 11, the national government retains significant authority over the provinces. For the most part, provincial power has been limited to oversight functions. Beyond this role, the provinces exercise primarily those powers assigned to them in national legislation or by national policing policy.<sup>64</sup>

The National Commissioner, who is appointed by the President, exercises operational and managerial control over the police service at the national level.<sup>65</sup> This power must be exercised in a manner consistent with national policing policy and the directions of the Minister of Police.<sup>66</sup> The removal of a National Commissioner is not

---

58 SAPS Act ss 64(2)(b) and 64(6).

59 SAPS Act s 64(2)(d). In terms of SAPS Act s 64J Municipal Councils are also required to appoint a special committee of the council to maintain oversight of the MPS.

60 SAPS Act 64E. MPS are not empowered to investigate crime, merely to prevent it. SAPS Act s 64H requires that suspects arrested by a municipal police officer must be handed over to the SAPS as soon as possible.

61 See FC s 206(1).

62 See FC s 206(4).

63 See FC s 206(8).

64 See FC s 206(3) and 206(4).

65 See FC s 207(1). See also IC s 218. In terms of FC Schedule 6 item 24(1), certain provisions of the Interim Constitution remain in force: IC ss 218 and 219. These sections set out the responsibilities of the National Commissioner and Provincial Commissioners.

66 See FC s 207(2).

mentioned in the Final Constitution. However, in terms of s 8 of the SAPS Act, a National Commissioner can be removed if he has lost the confidence of Cabinet.

Provincial commissioners have operational and management control in their respective provinces, subject to the authority of the National Commissioner.<sup>67</sup> Provincial commissioners are required to report annually to the provincial legislature and to provide a report to the National Commissioner.<sup>68</sup> The provincial MEC responsible for policing has one power that the Minister of Police does not. Where the provincial MEC has lost confidence in the Provincial Commissioner, the MEC may initiate proceedings for the removal of, or disciplinary action against,

---

RS3, 05-11, ch23B-p12

the Provincial Commissioner.<sup>69</sup> With respect to the National Commissioner, that power rests with Cabinet as a whole.

### **(c) The SAPS and fundamental rights**

#### **(i) Use of force by the police**

Some theorists like to speak of the state retaining a monopoly over the use of force and violence in order to safeguard the physical wellbeing of its citizens. It follows, on this line of thinking, that in order to maintain 'control' and to minimize conflict, citizens may only legitimately use physical force in a limited number of circumstances. The police, on the other hand, are specifically empowered to use force, and even lethal force, where necessary, in order to protect the public.

This discretion to use lethal force creates the potential for abuse. The legislature and the courts face a difficult task in granting the appropriate degree of authority to, and imposing the requisite degree of constraint upon, the police when they use force in life-threatening or otherwise dangerous circumstances. Since 1977, the use of force by the police (or any other person authorised to make an arrest) in effecting arrests of suspected criminals has been governed by s 49 of the Criminal Procedure Act<sup>70</sup> ('CPA'). Prior to its amendment in 2003, CPA s 49 stated that:

---

67 FC s 207(4). See also IC s 219.

68 See FC s 207(5).

69 See FC s 207(6) and SAPS Act s 8(2). Section 8(2) of the SAPS Act requires the Executive Council of a province that has lost confidence in a Provincial Commissioner to notify the Minister of Safety and Security who, if he deems it 'necessary and appropriate', will in turn notify the National Commissioner. A board of inquiry is then established by the National Commissioner to look into the matter. The procedure appears to conflict with FC s 207(6), which expressly confers the power to institute proceedings for the 'removal or transfer of, or disciplinary proceedings against' a Provincial Commissioner on the provincial executive. Although this power is required to be exercised 'in accordance with national legislation', the reference to national legislation should be interpreted as a reference to procedural rules to be established in national legislation. The procedure in s 8(2) of the SAPS Act goes even further and subordinates the decision of the provincial executive council to that of the Minister of Safety and Security. It confers on the Minister the discretion not to take further steps against the provincial commissioner concerned unless he deems it to be 'necessary and appropriate'.

70 Act 51 of 1977.

(1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person—

- (a) resists the attempt and cannot be arrested without the use of force; or
- (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.<sup>71</sup>

---

RS3, 05-11, ch23B-p113

CPA s 49 — as articulated above — confers a fairly broad degree of discretion on police officers to use force, and if necessary lethal force, as a means to effect an arrest. This degree of discretion has attracted judicial scrutiny for quite some time.

In *Matlou v Makhubedu*, decided some 30 years ago, the Appellate Division (now the Supreme Court of Appeal) held that CPA s 49 demanded that the force used be proportionate to the crime that the suspect had allegedly committed.<sup>72</sup> Despite this holding, the police could still justify the use of lethal force in circumstances where — though the crime was serious — the suspect did not pose a mortal danger to any person and was merely resisting arrest. Even after the advent of the Final Constitution, the statutory framework only changed after judicial intervention by the Supreme Court of Appeal and the Constitutional Court.<sup>73</sup>

### **(aa) Govender and Walters**

CPA s 49 was first subject to constitutional challenge in *Govender v Minister of Safety and Security*.<sup>74</sup> The case turned on the shooting of an unarmed 17-year-old boy by the SAPS. The boy, who was involved in the theft of a motor vehicle, was shot by the police whilst trying to evade arrest. In an attempt to prevent his escape, the police

---

71 Schedule 1 includes serious offences such as murder and rape but also non-violent offences such as fraud, forgery, receiving stolen goods and theft.

72 1978 (1) SA 946, 957 (A).

73 In 1997 the SAPS issued a Special Service Order in terms of which police officers were instructed to limit their use of lethal force to a specific list of serious offences that were set out in the Order and that were more limited than those listed in Schedule 1 of the CPA. The Order was made in an attempt to bring s 49(2) in line with the provisions of the Final Constitution. Although it was a step in the right direction, the Order did not override s 49(2) and police officers could not be convicted of murder if they could show that they had acted within the bounds of s 49(2). In 1998 Parliament adopted a new constitutionally compliant version of s 49 through the Judicial Matters Second Amendment Act 122 of 1998. The Act provided that the President would fix the date on which the Act would enter into force. However, due to persistent objections from the Ministry of Safety and Security and the SAPS, who insisted that the new provisions were unworkable and impractical, the Act remained dormant until 2003. D Bruce 'Killing and the Constitution - Arrest and the Use of Lethal Force' (2003) 19 *SAJHR* 430.

74 2001 (4) 273 (SCA), 2001 (11) BCLR 1197 (SCA) ('*Govender*').

officer pursuing the boy attempted to shoot him in the legs. Instead, the officer shot him in the back, rendering him permanently disabled. The initial delictual action for damages by the boy's father was dismissed in the Durban High Court on the basis that the action taken by the police officer was reasonably necessary to prevent the boy's escape and was therefore permitted under CPA s 49(1).<sup>75</sup>

The appellant did not directly challenge the constitutionality of CPA s 49(1). He argued instead that the statute needed to be interpreted in accordance with FC s 39(2) and the values that animated the rights to life, to dignity, to physical integrity, to the presumption of innocence and to equality before the law.<sup>76</sup> The Minister contended that CPA s 49(1) provided a legitimate justification for the

---

RS3, 05-11, ch23B-p14

police officer's actions and that the officer's conduct, properly understood, had not been wrongful.

The Supreme Court of Appeal found for the appellant. The court correctly pointed out that the state possessed both a legitimate interest in apprehending criminals, and a duty to protect its citizens (even those citizens attempting to escape arrest.)<sup>77</sup> It held that the words 'reasonably necessary' in s 49(1) should be read to require proportionality both with respect to the offence and the force used, and with respect to the force used and the threat that the suspect posed to the police officer and to the general public.<sup>78</sup>

In *Ex parte Minister of Safety and Security: In re S v Walters*, the Constitutional Court considered the constitutionality of CPA s 49(1) and CPA s 49(2).<sup>79</sup> In the underlying matter, a father and a son had fatally shot a burglar who had broken into their bakery. It was argued, in their defence, that the homicide was justified by CPA s 49(2). The High Court had declared both CPA s 49(1) and CPA s 49(2) unconstitutional on the grounds that they were inconsistent with the rights to life (FC s 11) and to dignity (FC s 10). The High Court then referred the decision to the Constitutional Court for confirmation.<sup>80</sup>

---

75 *Govender v Minister of Safety and Security* 2000 (1) SA 959 (D), 1999 (5) BCLR 580 (D).

76 FC s 39(2) states that 'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum, must promote the spirit purport and objects of the Bill of Rights.'

77 *Govender* (supra) at paras 12-13.

78 *Ibid* at para 21.

79 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (7) BCLR 663 (CC), [2002] ZACC 6 ('*Walters*')

80 *S v Walters & Another* 2001 (2) SACR 471 (Tk), 2001 (10) BCLR 1088 (Tk).

The Constitutional Court identified the rights to life, dignity and bodily integrity (FC s 12) as the principal rights limited by the use of lethal force under CPA s 49(2).<sup>81</sup> The *Walters* Court wrote:

[T]he right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights would for its justification demand a very compelling public interest.<sup>82</sup>

As to whether the limitation of rights by CPA s 49 was constitutionally justifiable, the *Walters* Court first held that the Supreme Court of Appeal's reading down of CPA s 49(1) in *Govender* avoided the need for a finding of invalidity. It declined to confirm that part of the High Court's judgment.<sup>83</sup> With regard to CPA s 49(2), however, the *Walters* Court found that restricting the use of deadly force to Schedule 1 offences failed to introduce an appropriate test for proportionality. Schedule 1 offences ranged from violent crimes such as murder and robbery to non-violent crimes such as fraud and forgery.<sup>84</sup> The *Walters* Court also emphasised that the purpose of arrest is to bring a suspected criminal before a court: that purpose would be frustrated if the suspect were to be killed. While the *Walters* Court recognised the high levels of crime in our society, it found that this troublesome fact did not justify the use of lethal force in all the circumstances contemplated by

---

RS3, 05-11, ch23B-p15

CPA s 49(2) and Schedule 1.<sup>85</sup> The Court stated that lethal force can only be used when the police officer has reasonable grounds to believe that the suspect poses an immediate threat of serious bodily harm to themselves or to another person, or that the person has committed a crime involving the infliction of serious bodily harm.<sup>86</sup> The *Walters* Court concluded that CPA s 49(2) was not a justifiable limitation of the rights to life, dignity and bodily integrity and confirmed that part of the High Court's order striking down the section.

### **(bb) Changes to CPA s 49 in light of *Walters***

According to the order, the state was obliged to pass an amendment to CPA s 49 in line with the holding in *Walters*. The new s 49, promulgated in 2003, states that:

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the

---

81 *Walters* (supra) at paras 5-7 and 29-30.

82 *Ibid* at para 25.

83 *Ibid* at para 39.

84 *Ibid* at para 41.

85 *Walters* (supra) at paras 43-50.

86 *Ibid* at para 52.

arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—

- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

*Govender, Walters*, and the new text of CPA s 49(2) generate the following principles with regard to the use of force by police officers when effecting an arrest:

- (i) Police officers should avoid using force when arresting a suspect unless such force is necessary to overcome the suspect's resistance.
- (ii) If force is necessary, then only the minimum force necessary to overcome the suspect's resistance should be used.
- (iii) Lethal force may only be used if the suspect poses a danger to the police officer or to members of the public, or if the suspect is suspected of having committed a crime involving the infliction of serious bodily harm. The second justification for the use of lethal force turns on the assumption that if the suspect has (allegedly) committed a violent crime, he poses a danger to the public which justifies the use of force to prevent him or her from committing another violent crime.

---

RS3, 05-11, ch23B-p16

### **(cc) Shoot to kill? Proposed amendments designed to undermine constitutionally mandated changes to CPA s 49**

At the time of writing, May 2011, the National Assembly has tabled a further amendment to CPA s 49.<sup>87</sup> The amendment was introduced to Parliament shortly after controversial statements made by National Commissioner Bheki Cele about the SAPS' new 'shoot to kill' policy for suspected criminals.<sup>88</sup> Such a policy would be manifestly unconstitutional. Members of the public have expressed concern that the amendments reflect the 'shoot to kill' policy by granting greater leeway for the state's use of lethal force.

A close examination of the text — not to mention statements of the National Commissioner and the Minister<sup>89</sup> — lends credence to these fears. While the preamble to the Bill claims that the amendments are designed to bring the law into line with *Walters* (a dubious proposition given that the 2003 amendments have already done

---

87 Criminal Procedure Amendment GG 33526 of 5 October 2010.

88 See, eg, SAPA 'Cele Tells Police to Use Deadly Force' *Business Day* (7 December 2009), available at <http://www.businessday.co.za/articles/Content.aspx?id=88947> (accessed on 5 May 2011).

so), the new wording of CPA s 49 certainly broadens the scope for lawfully injuring or killing a person in the course of arrest in a manner not contemplated by the *Walters* Court. The Bill's amended text reads as follows (the text to be removed is placed in square brackets):

Use of force in effecting arrest

49. (1) For the purposes of this section

- (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; [and]
- (b) 'suspect' means any person in respect of whom an arrestor has [or had] a reasonable suspicion that such person is committing or has committed an offence; and
- (c) 'deadly force' means force that is intended or likely to cause death or serious bodily harm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force [that is intended or is likely to cause death or grievous bodily harm to a suspect,] only if he or she believes on reasonable grounds—

- (a) that the force is [immediately] necessary for the purposes of protecting the arrestor [or any person lawfully assisting the arrestor] or any other person from imminent or future death or [grievous] serious bodily harm; or
- (b) [that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or] that the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened

---

RS3, 05-11, ch23B-p17

infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.

- [(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.]

The amendments constitute a blatant roll-back of the 2003 amendments that gave effect to *Walters*. First, the force employed is no longer 'immediately' necessary. The new amendments would not limit deadly force to instances in which a serious crime has occurred and the police responded 'immediately' in an attempt to apprehend and to arrest the suspected criminal. Deadly force could be used — it would appear — during routine investigations or during attempts to arrest a person that are not subject to the same degree of uncertainty associated with the arrest of a person who has just committed a crime and apparently used deadly force. Second, the potential

---

89 See, eg, W Hartley 'Give Police More Firepower, Cele Tells MPs' *Business Day* (6 August 2009), available at <http://www.businessday.co.za/articles/Content.aspx?id=77850> (accessed on 5 May 2011); E Ferreira 'Cele Calls for Greater Power for Cops' *Mail & Guardian* (5 August 2009), available at <http://mg.co.za/article/2009-08-05-cele-calls-for-greater-powers-cops> (accessed on 5 May 2011).

danger to the arrestor or to a third party need only be serious harm — not grievous bodily harm as currently contemplated. Again, this alteration suggests that the arrestor or a third party need not themselves be in mortal danger. Third, the proposed amendment no longer requires that 'substantial risk [exists] that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed.' The existing text contemplates an armed suspect who might turn on police and other standers-by shortly after commission of a crime or a person known to be so dangerous that no chances can be taken when attempting to effect his or her arrest. The current provision draws a clear nexus between the force employed and the circumstances of employment of that force and the immediate danger posed by the suspect. The proposed amendment eliminates the carefully considered justification for the use of deadly force: namely that, in the heat of the moment, a clearly dangerous person poses a genuine risk to the lives of law enforcement officials. The proposed amendment intimates that a mere physical tussle between law enforcement officials and a suspect that occurs long after the crime could justify the use of deadly force.

However, the most obvious departure from the views of the *Walters* Court and the existing provisions is reflected in the excision of the following words: 'that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.' Once again, the *Walters* Court's carefully calibrated balance between the use of deadly force by police and the use of deadly force by a suspect in flight is entirely ignored. Recall that in *Walters*,<sup>90</sup> Kriegler J reasoned that an arrest was never an end in itself, but merely one means of ensuring that a suspect appeared in court. As a result, force could only be justified when an arrest was necessary to achieve that goal. If an arrest is necessary,

---

RS3, 05-11, ch23B-p18

then the force employed must be the minimum necessary to effect the arrest,<sup>91</sup> and must be proportionate with respect to the offence committed or the continued threat of violence.<sup>92</sup> The proposed amendments appear to ignore the actual goal of arrest, the notion of minimum force necessary to secure arrest and the belief that the use of

---

90 *Ex Parte Minister of Safety and Security & Others: In re Ex Parte Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), [2002] ZACC 6. For a more detailed account of the constitutional dimensions of arrest, see F Snyckers & J le Roux 'Criminal Procedure' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51. See also I Currie & J De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 309; M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

91 *Walters* (supra) at para 54 ('Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.')

92 *Ibid* ('In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.') See also *Govender* (supra) at paras 19-20 (Court interprets statute to only allow use of force when there are reasonable grounds to believe that the suspected offence involved the infliction or threat of serious bodily harm or where the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public.)

deadly force could only be justified when death or grievous harm to the police or the public was imminent.

## (ii) Human rights violations by the police

Despite the tremendous strides made in reforming a police service modelled in many respects upon Nazi Germany's SS, problems inevitably remain in a police force still in transition. The police are faced with enormously high levels of crime, placed in regular mortal danger and are invariably tempted by the power of their position. They engage in rent-seeking behaviour, bribery and more damaging forms of corruption. In 1999, Hamber suggested that the culture and practices of policing in South Africa had changed little after 1994 and the revelations of the TRC:

The TRC has been relatively successful at uncovering the truth about atrocities of the past through its trade of truth for justice. However the exact impact of amnesty ... on ongoing

---

RS3, 05-11, ch23B-p19

levels of impunity is not yet fully understood ... perpetrators have not been punished for gross violations of human rights . . . As a result, a subtle, but stubbornly residual air of impunity still lingers in South African society and in its police service.<sup>93</sup>

A more sanguine view is offered by Bruce:

[The] moral climate in South Africa [has changed] from one where police abuse went primarily unsanctioned to one where the potential for that sanction is far greater. The TRC existed at a particular watershed moment, a moment where it was important to demarcate what had happened in the past, from what was to come. Insofar as the new society is willing to, and has the means to, sanction police abuses, the TRC is an

---

The requirement of proportionality echoes the sentiments of Justice White in *Tennessee v Garner* 471 US 1 (1985) 11-12 ('It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorises the use of deadly force against such fleeing suspects. It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.')

The High Court has twice considered whether allowing the police to order the surgical removal of a bullet from a suspect's leg amounted to a violation of FC s 12(1)(c). See *Minister of Safety and Security & Another v Xaba* 2003 (2) SA 703, 708H (N)(Finding a violation); *S v Gaqa* 2002 (1) SACR 654, 658H (C) (Finding no violation).

The dual duties of the police become particularly complicated when two opposing protesting groups resort to violence. The European Court of Human Rights held that the police have a duty to interfere, with force if necessary, to prevent the two private groups from causing further violence. See *Plattform Ärzte für das Leben v Austria* (1991) 13 EHRR 204; S Woolman 'Freedom of Assembly' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

93 B Hamber 'The Past Imperfect: Exploring Northern Ireland, South Africa and Guatemala' in B Hamber (ed) *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition* (2002) 6.

important part of what makes such sanction legitimate. The question now is whether South African society has the means and the will to impose such sanction for abuses by the police.<sup>94</sup>

As we shall see below, the South African courts have been quite aggressive in altering the landscape for liability for police brutality. Whether the revolution wrought by the Constitutional Court and the Supreme Court of Appeal translates into a more profound change in behaviour remains to be seen. As things stand, the police still fail to handle suspects properly;<sup>95</sup> they impair the ability of protestors to assemble peaceably;<sup>96</sup> they remain responsible for a large number of deaths in police custody;<sup>97</sup> and are viewed by the public as failing to combat crime effectively.<sup>98</sup> Of particular concern is the maltreatment of foreigners: little

---

RS3, 05-11, ch23B-p20

exists by way of legal control for officers who engage foreigners, whether the foreigners are in South Africa legally or not.<sup>99</sup>

Over the last several years, 2007 through 2011, the police have either exacerbated township violence through their palpable absence during service delivery protests (qua xenophobia) or poured fire on the flames by firing live ammunition into angry crowds.<sup>100</sup> The deaths of hundreds, the rapes of innumerable women, and the displacement of well over a 100,000 denizens (both foreign and South African) during township unrest from 2007 through 2010 at the hands of other South Africans,<sup>101</sup> as well as the police slaying of Andries Tatane in 2011 during

---

RS3, 05-11, ch23B-p20

a demonstration in Ficksburg, bespeak a culture of incompetence and impunity within the police force.<sup>102</sup>

### (iii) Duty to protect the public

- 94 D Bruce 'Police Brutality in South Africa' in N Mwanajiti, P Mhlanga, M Sifuniso, Y Nachali-Kambikambi, M Muuba & M Mwananyanda (eds) *Police Brutality in Southern Africa: A Human Rights Perspective* (2002).
- 95 See Human Rights Watch *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (1998).
- 96 See M Memeza 'A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993: A Local Government & Civil Society Perspective' (July 2006); S Woolman 'Freedom of Assembly' in S Woolman M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43; S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garvis v SATAWU (Minister for Safety & Security, Third Party)* (2010) 6 SA 280 (WCC) (2011) 27 SAJHR — (forthcoming)('My Tea Party').
- 97 Amnesty International *Report 2007: South Africa* (2007) available at [www.thereport.amnesty.org/eng/Regions/Africa/South-Africa](http://www.thereport.amnesty.org/eng/Regions/Africa/South-Africa) (accessed on 9 November 2007).
- 98 M Harris & S Radaelli 'Paralysed By Fear: Perceptions of Crime and Violence in South Africa' (2007) available at <http://www.markinor.co.za> (accessed on 6 November 2007)(Despite the fact that official crime statistics have fallen, '[c]urrently only one third of the adult South African population (33%) believes that government is handling the issue of fighting crime well. South Africans of all population groups view government's ability to fight crime considerably more negatively since the last poll in November last year. Only one in every 10 from minority groups (whites, coloureds and Indians) believes that government is doing very or fairly well in handling crime.')

The duty of the police to ensure that members of society are able to fully enjoy their right to be free from violence goes beyond mere apprehension of suspects after crimes have been committed. In certain instances, it gives rise to positive obligations to take reasonable steps to secure the safety of the public. Furthermore, as guardians of the safety of the public, and in terms of the recently revised law of delict, police officers have a duty of care with respect to delicts committed by themselves whilst acting in their official capacity. When the police commit a delict under colour of law, members of the public are entitled to seek redress from their employer, the Minister of Police.

- 
- 99 B Harris 'A Foreign Experience: Violence, Crime and Xenophobia during South Africa's Transition' (2001) 5 *Violence and Transition Series* 51, available at <http://www.csvr.org.za/wits/papers/papvtp5.htm> (accessed on 9 March 2009) ('The law thus allows for the apprehension of suspected undocumented foreigners. If a foreigner cannot "satisfy" the officer of his/her legal status, then the officer may apprehend him/her. In this way, the law gives strong powers of apprehension to police officers. These powers rest on subjective terms such as "reasonable grounds" and "satisfy such officer". Consequently, there is scope for abuse within the law. For example, a personal vendetta or extortion-scheme may lie behind the "reasonable grounds" on which a person is apprehended. Alongside the legal potential for abuse, it seems that arresting officers do not always work within the confines of the law. The HRC found that "there was a substantial failure of enforcing officers to comply with even [the law's] minimal requirements". For example, it is not a legal condition that individuals carry proof of identification and the "official policy adopted by the SAPS is that individuals should be accompanied to retrieve their ID if an officer suspects that they are illegally in the country but they allege they do have valid documents". However, in practice, it appears that apprehending officers seldom do this. Suspects are rarely given the opportunity to collect any valid documents that they might have. Rather, they are apprehended immediately. This practice has been criticised as a new form of apartheid because it effectively forces foreigners to carry documented proof of their legal status, in much the same way as black South Africans were obliged to carry pass books to prove their status during the apartheid era. Even if suspects are able to identify themselves, this is no guarantee that they will not be arrested. HRW and HRC report that documents are regularly destroyed by enforcing officers.') See also Human Rights Commission *Report on the Arrest and Detention of Persons in terms of the Aliens Control Act* (1999).
- 100 See L Landau 'Loving the Alien?: Citizenship, Law, and the Future in South Africa's Demonic Society' (2010) 109 *African Affairs* 213; JP Misago with L Landau & T Monson *Towards Tolerance, Law and Dignity: Addressing Violence against Foreign Nationals in South Africa* (2009) available at [http://www.migration.org.za/sites/default/files/reports/2009/Addressing\\_Violence\\_against\\_Foreign\\_Nationals\\_IOM.pdf](http://www.migration.org.za/sites/default/files/reports/2009/Addressing_Violence_against_Foreign_Nationals_IOM.pdf) (accessed on 5 May 2011); S Woolman 'Is Xenophobia the Right Legal Term of Art? A Freudian and Kleinian Response to Loren Landau on Township Violence in South Africa' (2011) 23 *Stellenbosch Law Review* (forthcoming).
- 101 See Landau 'Loving the Alien?' (supra) at 1-2 citing T Polzer & V Igglesdon 'Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned following Attacks on Foreign Nationals in May 2008' *Forced Migration Studies Programme Report* (2009) ('On 11 May 2008, residents of Alexandra township turned on their neighbours. The conflict soon spread across Gauteng Province to informal settlements and townships around the country. During two terrible weeks, citizens murdered more than 100 people, raped dozens, wounded close to 700, and displaced over a hundred thousand.')
- 102 'Andries Tatane Killed by South African Police: 13 April 2011' available at [www.youtube.com](http://www.youtube.com) (accessed on 5 May 2011) (Video leaves no doubt as to the circumstances of Tatane's murder by the police.) As to government complicity, violent service delivery protests have become a regular occurrence in South Africa since 2007. Under such circumstances, national government policy ought to be inclined towards the most limited use of force necessary to protect protestors, onlookers and public and private property. Tatane's death suggests that police General Cele's unofficial 'Shoot to Kill' policy has permeated normal police activities. The use of rubber bullets at a distance of roughly a metre constitutes the use of lethal force where lethal force is clearly neither required nor lawful.

### (aa) Carmichele and K

*Carmichele v Minister of Safety and Security*<sup>103</sup> and *K v Minister of Safety and Security*<sup>104</sup> illustrate the Constitutional Court's commitment to stamping out the culture of impunity that still exists within the police force. Both cases concerned brutal and violent attacks on women that turned on police negligence or complicity. A third case, *Minister of Safety v Luiters*, further clarified the extent to which the Minister of Police can be held vicariously liable for the delicts committed by police officers.<sup>105</sup>

In *Carmichele v Minister of Safety and Security*, the perpetrator had previously been convicted of house breaking and indecent assault. At the time of the attack, he was facing charges of rape and had been released on bail upon the recommendation of the investigating officer. Despite a number of requests that the perpetrator be kept in custody, subsequent complaints about his suspicious behaviour, as

---

RS3, 05-11, ch23B-p22

well as evidence that he suffered from psychological problems, neither the police nor the prosecutor opposed his continued release on bail. The perpetrator then committed a brutal and life-threatening assault on Ms Carmichele. Ms Carmichele brought a delictual action against the Minister of Safety and Security based on the failure of the police and prosecutor to oppose bail. She argued that the police and the prosecuting authority had a duty to ensure that she enjoyed her constitutional rights to dignity, freedom and security of the person, privacy and freedom of movement.

Her action failed in both the High Court and the Supreme Court of Appeal. The Constitutional Court in *Carmichele* recognised Ms Carmichele's claim and effectively ordered the High Court to extend the existing duty of care owed by the police and the state prosecutor so that the duty would now, and in the future, cover the kinds of harms suffered by Ms Carmichele. In reaching its conclusions, the Constitutional Court quoted approvingly the following statement by the European Court of Human Rights in *Osman v United Kingdom*:

It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law

---

(Indeed, police policy proscribes the use of rubber bullets at distances of less than 20 metres.) As to the general, inappropriate response of the state (and the courts) to demonstrations, protests, assemblies and gatherings, see Woolman 'My Tea Party' (supra). That General Cele remained in office despite Tatane's death, the Public Protector's finding of an illegitimate R500 million building lease in Pretoria (with which General Cele 'appears' to have been involved) and the SIU's finding of rampant corruption in the tender for the construction of more than 30 police stations around the country supports charges of complicity in such behaviour by the national government. According to Transparency International, South Africa ranks 54th out of 178 nations on its corruption perception index. Transparency International *Corruption Perceptions Index 2010* (2011) available at [www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results) (accessed on 5 May 2011).

103 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC), [2001] ZACC 22 ('Carmichele').

104 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), [2005] ZACC 8 ('K').

105 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC), [2006] ZACC 21 ('Luiters'). See also *Minister of Safety & Security v Luiters* 2006 (4) SA 160 (SCA).

provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that art 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.<sup>106</sup>

The Court was unequivocal in linking a woman's physical safety with a woman's rights to dignity and to freedom and security. It wrote:

In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence... . Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.<sup>107</sup>

The *Carmichele* Court held that the rights to dignity and to freedom and security of the person impose affirmative duties on the police to prevent violations of physical integrity. The prosecuting authorities also have an affirmative duty to disclose to the courts information pertinent to the decision of whether to grant bail. Further, these rights mandated that the duty of care imposed on the state in delictual actions be expanded to ensure that the state did not allow known violent offenders to jeopardise the rights of its citizens. The Court stated that the possible 'chilling effect' that the imposition of such liability might have on the ability of the police and the prosecutors to perform their functions is minimised by the requirements of proportionality, foreseeability and proximity.<sup>108</sup> One might ask, however, why the imposition of liability for omissions would have such an effect? If police officers and their superiors knew that they would be held liable

---

RS3, 05-11, ch23B-p23

for omissions, then one would expect them to be more, not less, vigilant in the discharge of their duties and the protection of ordinary citizens.

In employing FC s 39(2), the Court stated that the common law in this matter had to be developed but declined to do so itself.<sup>109</sup> Instead, it referred the matter back to the High Court for final determination.

In *K*, three uniformed police officers raped the applicant in the back seat of a police vehicle after offering to provide her with a safe ride home. After the High Court and Supreme Court of Appeal rejected her suit, the Constitutional Court found the state vicariously liable under the common law of delict. The *K* Court provided three primary grounds for this conclusion. First, the Court held that the police have a duty under the Final Constitution to protect South Africans and to prevent crime.<sup>110</sup> Second, the rights

---

106 *Carmichele* (supra) at para 45 quoting *Osman v United Kingdom* [1998] EHRR 101.

107 *Ibid* at para 62.

108 *Ibid* at para 49.

109 *Carmichele* (supra) at paras 34-6.

110 *K* (supra) at para 51.

to security of the person, dignity, privacy and substantive equality are 'of profound constitutional importance' and require that the ordinary common law or statutory law give them full force and effect.<sup>111</sup> To give the rights full force and effect, the Final Constitution required that the common law be developed in a manner consistent with Chapter 2's rights and freedoms and their underlying values.<sup>112</sup>

The *K* Court stated that the new test for vicarious liability has two stages. The first stage determines whether the employee was carrying out his duties or whether he was simply pursuing his own ends. This stage turns on a purely factual determination. The second stage is an enquiry into whether, notwithstanding that the employee may have been pursuing his own ends, the employer should still be held liable because there exists a sufficiently tight nexus between the business of the employer and the conduct of the employee. It is at this second stage that policy considerations play a role and constitutional values are taken into consideration.<sup>113</sup>

In order to determine whether the Minister was vicariously liable, the Court considered the fact that Ms K reasonably relied on an offer of assistance from the uniformed officers, assistance that they are under a duty to provide, and which Ms K would not have sought but for the trust that she placed in these police officers. The Court emphasised that such trust in the police is essential if the police are to fulfil their obligations to protect the public. The rape occurred in the context of the police acting under colour of law and was, in fact, facilitated by their position of authority. The *K* Court wrote:

[T]he opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that that mandate is successfully fulfilled. When the policemen — on duty and in uniform — raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed

---

RS3, 05-11, ch23B-p24

by the policemen and the purposes of their employer. The close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.<sup>114</sup>

The Court then held that the rights to dignity, freedom and security of the person required that the interpretation of vicarious liability be broadened to ensure that the state was responsible for the conduct of police officers acting under the colour of law.

In *Luiters*, the Court clarified the extent to which the Minister is to be held vicariously liable for the delicts committed by police officers. Mr Luiters had been shot and permanently paralysed by a police constable, Lionel Siljeur, who had gone on a

---

111 Ibid at para 18.

112 Ibid at para 15.

113 Ibid at para 32.

114 *K* (supra) at para 57.

shooting spree during which he injured a number of innocent civilians. While Siljeur was, at the time of the shooting, officially off-duty, the High Court and the Supreme Court of Appeal found that he had subjectively placed himself on-duty in order to arrest certain individuals who had allegedly robbed him.<sup>115</sup> The courts arrived at this conclusion on the strength of testimony from a Mr Davidse who, together with a companion, arrived on the scene soon after the shootings began. Siljeur approached their vehicle and informed them that he was looking for robbers. He did not identify himself as a police officer, and he was not in uniform. However, Mr Davidse's companion noted that the fire arm Siljeur was carrying was of the type usually issued to police officers. Based on this information they concluded that he was a police officer looking for robbers. Siljeur later opened fire on the two men when they attempted to assist Mr Luiters. After the shootings, Siljeur fled the scene.

The Constitutional Court accepted the Supreme Court of Appeal's factual finding that Siljeur had placed himself on duty. The Minister contended that a different test than the one developed in *K* was needed for such situations involving off-duty officers. The Minister argued that when an off-duty officer places himself or herself on duty, the enquiry ought to be whether their conduct (though subjectively intended to be within the scope of their employment) was so far removed from the purpose for which they were employed that the Minister could not be held liable. In the Ministers view, because the police exercised a different level of control over on-duty and off-duty officers, different standards for vicarious liability ought to be set.<sup>116</sup>

The *Luiters* Court rejected the Minister's proposed alteration of the test for vicarious liability, and held that the level of control that an employer has over the employee is already a relevant factor to be considered in the second leg of the test.<sup>117</sup> It also rejected the Minister's suggestion that the standard of care be based on the impunity with which the police officer had acted: 'What it would mean is that the more improper the conduct of the police officer, the less likely the Minister will be held liable. This result is not one that accords with a Constitution that seeks to render the exercise of public power accountable.'<sup>118</sup>

---

RS3, 05-11, ch23B-p25

The legal conclusions of the Constitutional Court are sound. However, the factual findings of the lower courts appear somewhat misguided. The High Court and the Supreme Court of Appeal in *Luiters* were content to conclude that Siljeur had placed himself on duty simply on the basis of his statement that he was 'looking for robbers' and that he possessed a firearm issued by the police. In so doing, the High Court and the Supreme Court of Appeal conflate the two-stage vicarious liability analysis developed in *K*. When employing the two-stage test set out in *K*, courts should be careful not to confuse the factual enquiry contained in the first leg of the test, ie, whether the police officer was on a frolic of his own, with the policy considerations in

---

115 Police officers are authorised to place themselves on duty when the need arises.

116 *Luiters* (supra) at paras 20-21.

117 Ibid at para 32.

118 Ibid at paras 34.

the second leg of the test, ie, whether the Minister should be held liable for the police officer's actions.

After the decisions in *Carmichele* and *K*, it is clear that the duty of the police to ensure the safety of the public entails a positive duty to take action to prevent possible crimes. The decisions in *K* and *Luiters* indicate that the duty imposed upon the police to protect the public is abrogated when police officers violate the rights of citizens through the commission of crimes themselves. Expanding the scope of vicarious liability for the Minister takes into consideration the considerable power and trust placed in the hands of the police and the concomitant potential for abuse that such power creates. However, protecting the public from unruly police officers should not, and will not, translate into liability for the Minister in all cases where crimes are committed by police officers.

### **(bb) F: The rollback of *Carmichele* and *K*?**

Several cases handed down in 2011 engage *two* critical developments, noted above, in the law of delict as it relates to the police and their (notional) employers.

First, *Carmichele* and *K* made it patently clear that the constitutional rights to dignity and to freedom and security of the person impose affirmative duties on the police to prevent violations of physical integrity and ensure that a police officer's constitutional obligations do not necessarily end when he or she clocks out. These principles may seem quite abstract. Not so. They are decidedly well-grounded in the real world of South Africa — a country with one of the world's highest levels of sexual assault and rape (not currently in a war zone.) The *Carmichele* Court's words, in this regard, are worth rehearsing: 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.'<sup>119</sup> Second, *Carmichele* and *K* may, at the same time, have led to some conceptual confusion regarding the difference between personal delictual liability and vicarious delictual liability for police officers who have breached their constitutional duties.

In *Minister of Safety and Security v F*, the Supreme Court of Appeal was seized with a case that engaged both developments.<sup>120</sup> In short, a 13-year-old girl was raped by a police detective (who had mendaciously described himself as a private detective, but whose police radio and cases files led the girl to conclude

---

RS3, 05-11, ch23B-p26

correctly that he was a police officer.) As in *K*, the police officer's status led the girl to accept the offer of a lift home. (It is worth noting that despite her fear of this officer — she had previously leapt from the car — the girl's predicament (out on the road in the dead of night) and the notion that our police remain our thin blue line between order and chaos — led her to accept a second invitation of a ride home.) The critical difference between *F* and *K* for three judges on the Supreme Court of Appeal panel was that the police officer in *F* was not officially on duty, but was only 'on call'. This status meant that the officer had an obligation to make himself available for duty should his services be deemed necessary. That he may have been neither fish nor

---

119 *Carmichele* (supra) at para 62.

120 *The Minister of Safety and Security v F* [2011] ZASCA 3 (Supreme Court of Appeal, 22 February 2011)('F').

fowl did not, however, influence the girl's decision. Indeed, that the police force allowed him to use an official car while 'on call' did — both courts accepted — (ultimately) convince the girl that a lift from a police officer was a reasonably safe bet.

In a judgment that challenges, fascinates and disturbs, Nugent JA found that the Constitutional Court in *Carmichele, K and Luiters* (and other courts that had followed its lead) had collapsed the distinction between direct liability and vicarious liability with respect to the delictual actions of police officers. In his view, the Supreme Court of Appeal decisions<sup>121</sup> spawned by *Carmichele K and Luiters — Minister of Safety and Security v Van Duivenboden*,<sup>122</sup> *Van Eeden v Minister of Safety and Security*,<sup>123</sup> and *Minister of*

---

RS3, 05-11, ch23B-p27

*Safety and Security v Hamilton*<sup>124</sup> — should best be understood as instances of *direct* liability, not *vicarious* liability. Following his own *novel* finding in constitutional law, Nugent J held that the defendant — the Minister of Safety and Security — could not be held vicariously liable for the actions of a policeman (on standby duty) who had raped a minor.

While Nugent JA may have, bravely, chosen this case to draw attention to what he, two other judges on the panel and a brace of academics<sup>125</sup> perceive to be a problem in this relatively new, constitutionally driven development of the law of delict, his

---

121 The change in this constitutionally driven domain of delict has been dramatic. *Van Duivenboden, Hamilton, Van Eden* - noted above and below — speak to the extent to which the Supreme Court of Appeal has followed Carmichele's break with tradition.

122 2002 (6) SA 431 (SCA), [2002] 3 All SA 741 (SCA)(Nugent J) at para 22 ('Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of the person are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them . . . We are not concerned in this case with the duties of the police generally in the investigation of crime . . . In this case we are concerned only with whether police officers who, in the exercise of duties on behalf of the State, are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring . . . There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence') Although the facts in F and *Van Duivenboden* differ, the most palpable difference appears to be in Nugent J's approach to vicarious liability.

123 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA) at paras 17-18 (Our Courts have in a number of recent decisions recognised that the entrenchment of the right to be free from violence in s 12(1)(c), read with s 205(3), would, in appropriate circumstances, be strongly indicative of a legal duty resting on the police to act positively to prevent violent crime. In *Van Duivenboden* this Court held that certain police officers who were in possession of information that reflected adversely upon the fitness of a person to possess firearms owed a legal duty to members of the public to take reasonable steps to act on that information in order to prevent harm. In the majority judgment Nugent JA, after referring to the entrenchment of the rights to equality, personal freedom and privacy, to the State's positive duty under s 7 to act in protection of these rights and to the principle of public accountability, went on to say: "However where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of I accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm."

judgment suffers from three relatively apparent weaknesses. First, to (ostensibly) set an established body of constitutional law right, one could have legitimately expected the judge to offer a substantially longer and more nuanced expatiation of the legal issues in play, especially given the Constitutional Court's extended exploration over several cases of the constitutional rights at stake. Second, as the minority judgment of two members of the SCA panel makes clear: the evidence adduced by the lower court (not the evidence as re-read by Nugent JA, despite his denial of such a re-reading) reflects the actions of a police officer on standby duty, whose identity as a police officer became known to the rape victim during the course of the evening of the untoward events, and who gained the trust, subsequently abused, of the victim through the very nature of his office. Third, Nugent J seems tone deaf to the particular constitutional implications of the matter. The Constitutional Court made it patently clear that police officers have positive duties to uphold the Constitution and the Bill of Rights, and that the Minister has a constitutional obligation to 'teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'<sup>126</sup> Moreover, Nugent JA seems unmoved (though not entirely oblivious) to the implications of *K* and *F* and *Carmichele*: that we have a largely male police force that acts with

---

RS3, 05-11, ch23B-p28

impunity and, as the case law he reviews suggests, seems pathologically bent on continuing to commit sexually violent acts against women.

Other readers may find the judgment thorough and persuasive on one of the legal points at issue: that the Constitutional Court, and subsequent Supreme Court of Appeal decisions, have collapsed the distinction between direct liability and vicarious liability in these matters. Nugent JA clearly wishes to return to the halcyon days in which the terms of vicarious liability were clear and unambiguous:

---

124 2004 (2) SA 216 (SCA), [2003] 4 All SA 117 (SCA) at paras 35 ('[T]he individual's right to life, bodily integrity and security of the person must be balanced against policy considerations such as the efficient functioning of the police, the availability of resources and the undoubted public importance of the effective control of firearms. To my mind, in the present case, as in *Van Duivenboden*, it can be stated that one is not dealing with a situation involving "particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence". Here too, there "is no effective way to hold the State to account ... other than by way of an action for damages". Moreover, the spectre of the opening of the "floodgates of litigation" and the resultant "chilling effect" of potential limitless liability on the efficient and proper performance by the police of their primary functions — relied on very heavily by the appellant as a ground for denying the existence of a legal duty on the relevant police members in the circumstances of the present case — is no A more convincing here than it was in either *Van Duivenboden* or *Van Eeden*. In the words of Vivier ADP in the latter case: '[O]ur Courts do not confine liability for an omission to certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be held unlawful or not. In deciding that question the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.' (footnotes omitted).)

125 See S Wagener '*K v Minister of Safety and Security and the Increasingly Blurred Line between Personal and Vicarious Liability*' (2008) 125 *SALJ* 673; A Fagan '*Reconsidering Carmichele*' (2008) 125 *SALJ* 659; F du Bois '*State Liability in South Africa: A Constitutional Remix*' (2010) 25 *Tulane European & Civil Law Forum* 139. Whatever reservations one may have about Nugent JA's judgment, he draws down on a compelling body of academic literature.

126 FC s 199(5).

While 'risk creation' might indeed be capable of giving rise to liability on the part of the employer, ... the true basis for liability in [vicarious liability] cases is the failure of the employer, acting through the instrument of the employee, to fulfil the duty that is cast upon the employer to avoid harm occurring through the risk that has been created. For on the traditional approach vicarious liability arises from the existence of the relationship alone and not from any failure of duty by the employer.<sup>127</sup>

And it may well be possible that the Constitutional Court could have given clearer direction on the law in this domain. But to leave matters there would be to miss two critical aspects of the Court's jurisprudence on delicts involving sexual assault and the police. First, the Court has been quite cognizant of its specialized jurisdiction and its (consciously) limited role in the development of the common law. It thus left much of the development of the common law in this domain to lower courts. Second, irrespective of whether South Africa's pre-constitutional law of delict had clearly distinguished between direct liability and vicariously liability, the Constitutional Court has made it palpably clear that it will not tolerate a police force that abuses its powers, especially when those powers are used to sexually abuse women. Nugent JA's opinion would have been decidedly more compelling if it had taken to heart the central learning of *Carmichele* and *K*: the objective, normative value system established by the Final Constitution clearly sets its face against systemic, degrading violence against women and that the police have an essential role to play in ridding South African society of one of its most frightful and demeaning features. Seventeen years into our constitutional experiment, and the police appear no closer to accepting direct or vicarious responsibility for this inhumane state of affairs. By engaging in a rather formalistic attempt to narrow the grounds for a finding of vicarious liability, Nugent JA misses the rot at the heart of South African society and the Constitutional Court's attempt to place responsibility for rectifying that wrong where it belongs: with a government and a police force (Ministers of Safety and Security and police detectives alike) charged with vouchsafing our security of the person. In Nugent JA's own words on vicarious liability, the Constitutional Court can be read as finding that persistent neglect by the Minister and the Commissioner has created an ongoing 'material risk' of sexual assault by police officers in the line of duty and on the margins of that line of duty.

A final perplexing feature of Nugent JA's judgment flows from his apparent desire to cabin most delictual claims against the police within the framework of direct liability. Direct liability claims are certainly appropriate for individual police officers. Elements of wrongfulness and fault are more readily established. Nugent JA does

---

RS3, 05-11, ch23B-p29

not say, however, how such elements of a delictual action would be established with respect to a Minister of Safety and Security or a Police Commissioner. One might be forgiven for thinking that Nugent JA had a responsibility to delineate the contours of his preferred understanding of delictual actions flowing from crimes committed by police officers — on and off duty. Instead, he concludes that since no claim of direct liability was brought by the plaintiff/respondent against the Minister of Safety and Security, the Supreme Court of Appeal was not obliged to develop the law in this area.

Three things are certain. The Constitutional Court will be obliged to take the measure of Nugent JA's claim that the two forms of delictual action must be clearly

---

127 F (supra) at para 34.

distinguished and that direct liability is the preferred form in police driven delictual matters. The Court will have to assess whether its current doctrine of vicarious liability retains its merit as it stands, whether it needs to be tweaked or, as Nugent JA has it, whether it should be largely discarded. The Court will have to decide whether it wishes to reverse the Supreme Court of Appeal on its errant re-reading of the facts or on its refusal to follow Constitutional Court precedent.<sup>128</sup>

### **(cc) Novel uses of cost orders as constitutional remedies**

Two recent judgments in the North Gauteng High Court demonstrate that other judges are alive to the creative doctrines and remedies available to courts committed to rooting out the rampant ruthlessness reflected in the ranks of our police force. In *Coetzee v National Commissioner of Police & Minister of Safety and Security*,<sup>129</sup> Du Plessis AJ found that the unlawful arrest and illegal detention of a person not suspected of any crime (initially) constituted a clear violation of the Constitution that warranted unusual measures by way of remedy and costs. The case is not entirely straightforward. Although he had committed no crime and was not suspected of committing a crime, Coetzee refused to pull his car over at a roadblock and subsequently skipped a red light. (Coetzee justified his action on the grounds that such roadblocks, constructed late at night, had been used by criminals passing themselves off as police officers. He claimed that he feared for the safety of his family.) As a result of his actions at the roadblock and redlight, the SAPS and Metro police officers forced his car off the road and arrested him. Following his arrest, he found himself unable to secure the police bail normally granted in such circumstances. An urgent rule nisi order had to be issued by a judge in order to secure his release. In coming to his conclusion about the parties responsible for this injustice, and their respective degree of liability, Du Plessis AJ writes as follows:

The Constitution places a very high premium on the right to human dignity and freedom. It is essential that the courts should protect these rights in the most effective way possible. The level of crime in South Africa should not justify a departure from the democratic and constitutional principles enshrined in our Constitution, safeguarding the population from any excess use of power and deprivation of freedom by government institutions and authorities. The spirit of the Constitution, the recognition of basic human rights, and the right to freedom in particular, enshrined in the Constitution should not be compromised in any way whatsoever

---

RS3, 05-11, ch23B-p30

through the actions of government officials. The courts should therefore jealously guard these rights and act decisively upon the infringement thereof. Furthermore it is important that those who act with impunity, and who think that they can do as they please, simply because they have the force of the whole law enforcing system behind them, should be brought to book and restrained. The whole wrath of the legal system, the rule of law, the courts and the public should be brought upon such officials. It does not appear from the huge amount of damages claims instituted against the second respondent, the Minister of Safety and Security, that a damages claim constitutes a deterrent of any nature whatsoever in respect of unlawful behaviour on the part of the security forces. In fact, the only party being prejudiced as a result of damages claims based on unlawful arrest and detention, is the taxpayer, and therefore the public, who also bears the brunt normally of unlawful actions by the police services. It is in fact those who expect that the

---

128 At the time of writing, the Constitutional Court has set *F* down for hearing (31 May 2011).

129 *Coetzee v National Commissioner of Police & Others* 2011 (2) SA 227 (GNP) ('Coetzee').

hard fought and precious rights to freedom, dignity and not to be detained unnecessarily, should be upheld and enforced, who eventually have to pay for the breach of these rights, by state officials mostly acting with impunity. It is ironic further, that those who sometimes are subjected themselves to such unlawful breach of the aforesaid rights, form part of the taxpayers who have to pay in the form of damages for such breaches. In my view other possibilities should be considered to deter police services and metro police services from breaching the enshrined rights held dear by everybody in this country. The public must be protected. Therefore, if a preferable method of an accused's attendance is through a summons, that procedure should be employed. In this regard the risk of the suspect absconder or committing further crime should be considered. An arrest without any rational reasonable basis therefore should not occur indiscriminately. It does not matter how severe the alleged criminal offence may be. The person to be arrested is still an innocent person whose right to freedom, dignity and right to fair treatment should be upheld. I therefore come to the conclusion that the arrest in this matter was unlawful. His detention in the holding cells at the Pretoria West police station was therefore also unlawful. As I have mentioned above, those responsible for consideration of granting the applicant bail refused to do so. It follows that the applicant was held unlawfully and detained unlawfully at the Pretoria West police station.<sup>130</sup>

However, in a striking departure from form, the Judge does not dig into the deep pockets of the state and thus the taxpayer, in awarding costs. Instead, using constitutional powers granted him under FC s 38 and FC s 173, he writes:

I have no hesitation to come to the conclusion that appropriate relief in this matter, with reference to the costs of the application, that should never have been brought and that should never have been necessary, is that those responsible therefor, and who were derelict in their duties, and who did not act in accordance with their constitutional obligations, should carry the costs of the application. Furthermore there is no reason why the taxpayer should carry the costs of the actions of these officials. Senior Superintendent Moodley and his assistant, Superintendent Klopper who were on duty at the Pretoria West Police Station that day and evening, should not have allowed the arrest, and should have acted in such a fashion that the infringement of the rights of the applicant had not occurred. The Metro policemen responsible for the arrest, namely Constable Frans Moosa Sivayi had acted completely outside his authority and acted unlawfully by arresting the applicant. Constable Mandla Steven Ntsweni who is the deponent to the opposing affidavit filed, and who tried to justify the actions of the respondents, and who acted together with Constable Sivayi is

---

RS3, 05-11, ch23B-p31

similarly responsible. The original complaints commander and the commander who took over from him namely Captain Nhlazo and thereafter Inspector Duledu, similarly did not act in accordance with their duties, namely to consider bail and to consider the position and rights of the applicant.<sup>131</sup>

The police officers themselves are held jointly and severally liable for the infringement of fundamental rights and costs incurred by the illegal arrest and the subsequent litigation.<sup>132</sup> The Police Commissioner and the Minister remain on the hook only to the extent that the officers found culpable cannot cover the costs incurred by the applicant and by the two respondents in litigating the matter before

---

130 Coetzee (supra) at paras 43 - 51.

131 Coetzee (supra) at para 107.

132 Ibid at para 107.

the High Court.<sup>133</sup> Although there is nothing new about an order of costs *de bonis propriis*, the use of the award in the context constitutes a novel constitutional remedy for a constitutional breach. At the same time the remedy remains true to the spirit of *Fose* and declines to make the taxpayer liable for the unconstitutional acts of public employees.

The facts, the holding and the order in *Prinsloo v Nasionale Vervolgingsgesag En Andere* track *Coetzee* extremely closely.<sup>134</sup> Once again, an ordinary citizen was deemed to be detained without trial in terms FC s 12 because the responsible police officers failed to bring the accused to court before the expiration of 48 hours (as required by the Criminal Procedure Act). Such mindless and arbitrary deprivations of freedom could not be tolerated and warranted a penalty designed to ensure that future failures of a similar ilk would not occur again. Thus, as in *Coetzee*, the *Prinsloo* court held that costs for litigation can be imposed upon those members of the South African Police Service who have acted, as in the extant matter, *mala fide*, intentionally, unreasonably and improperly, and thus entirely beyond the scope of their powers.

#### **(d) Limitations on the rights of SAPS members**

The SAPS Act contains a number of limitations on the rights of police officers.

SAPS Act s 41(1) prohibits police officers from striking or inducing or conspiring with other officers to strike. The section empowers the National Commissioner, or the Provincial Commissioner, to issue an ultimatum to an officer to desist from engaging in such behaviour. Should the officer fail to stop, she may be dismissed without a hearing.<sup>135</sup> The procedural safeguards provided by the section

---

RS3, 05-11, ch23B-p32

are quite limited. The officer must be informed in writing of the reasons for the discharge. After such reasons are provided, the officer is afforded the opportunity to make written representations to the Minister for reinstatement.<sup>136</sup> The Constitutional Court's conclusions in *SANDU CC I* and *SANDU CC II* suggest that SAPS Act s 41 should pass constitutional muster. Not even POPCRU contests the proposition that members that provide 'essential services' can be prohibited from striking.<sup>137</sup>

The rights of police officers to demonstrate, to assemble and to form unions are entirely different matter. While *SANDU CC I* and *SANDU CC II* are concerned with the

---

133 *Ibid.*

134 2011 (2) SA 214 (GNP).

135 SAPS s 41(2) and 41(3).

136 SAPS s 41(3).

137 See *South African Police Services v Police and Prison Civil Rights Union & Another* [2010] 12 BLLR 1263 (LAC), [2010] ZALAC 17 (Currently on appeal, in 2011, in the Constitutional Court.) See also S Woolman 'Freedom of Association' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

rights of members of the SANDF, they offer a glimpse on what the Court will and will not tolerate with regard to members of the SAPS.

In *South African National Defence Union v Minister of Defence ('SANDU CC I')* the Constitutional Court held that a provision of the Defence Act prohibiting members of the armed forces from participating in public protest action and from joining trade unions violated the members' right to freedom of expression and their right 'to form and join a trade union'.<sup>138</sup> Implicit in the majority's decision — and explicit in Justice Sachs' concurrence — was a finding that SANDU members' freedom of association had been infringed. The question for the Court was whether these infringements were justifiable. With respect to the soldiers' right to freedom of expression, the Court found the provisions' limitations a grave incursion into the soldiers' expressive rights and patently unjustifiable. With respect to the soldiers' 'right to form and join a trade union', the Court rejected the Minister's contention that an infringement of the right was justified by the constitutional imperative to structure and to manage the SANDF as a 'disciplined military force'.<sup>139</sup> As the Act stood, it was a constitutionally unjustifiable limitation. However, while deciding that the requirement of strict discipline would not necessarily be undermined by permitting SANDF members to join a trade union, the *SANDU CC I* Court did note that the structure of a trade union might well differ in a military environment and that appropriate legislation might justifiably limit the scope of a soldier's trade union rights.

In *South African National Defence Union v Minister of Defence & Others ('SANDU CC II')*,<sup>140</sup> the Constitutional Court consolidated several separate High Court and

---

RS3, 05-11, ch23B-p33

Supreme Court of Appeal cases<sup>141</sup> in which SANDU had challenged the constitutionality of a constellation of subsequent regulations. The *SANDU CC II* Court rejected virtually all of SANDU's challenges to the regulations (most of which concerned rights regarding collective bargaining.) It did, however, uphold a limited right for SANDU members to assemble or to demonstrate (out of uniform) with regard to employment conditions in terms of regulation 8(b),<sup>142</sup> and rejected a claim by SANDF that 'the regulations do not impose an obligation upon it to exhaust the [collective bargaining] procedures set out in the regulations [because] the very purpose of the regulations is to prevent unilateral action by the SANDF in respect of

---

138 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC), [1999] ZACC 7 ('*SANDU CC II*').

139 See FC s 199 (7). It reads, in pertinent part: 'Neither the security forces, nor any of its members, may, in the performance of their functions - (a) prejudice a political party interest that is legitimate in terms of the Constitution; (b) further, in a partisan manner, any interest of a political party.'

140 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC), [2007] 9 BLLR 785 (CC), (2007) 28 *ILJ* 1909 (CC), [2007] ZACC 10 ('*SANDU CC II*').

141 See *South African National Defence Union v Minister of Defence & Others; Minister of Defence & Others v South African National Defence Union & Others* 2007 (1) SA 402 (SCA), 2007 (4) BCLR 398 (SCA); *Minister of Defence & Others v South African National Defence Union; Minister of Defence & Others v South African National Defence Union & Another* 2007 (1) SA 422 (SCA); *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T).

142 *SANDU CC II* (supra) at paras 81-82.

the areas of permissible bargaining until the procedures provided for in the regulations have been exhausted.<sup>143</sup>

The second noteworthy limitation concerns the political activities in which SAPS members may engage. In terms of SAPS Act s 46(1), members are prohibited from holding posts in, wearing the insignia or identifying mark of, or publicly displaying support for any political party, organisation, movement or body. SAPS Act s 46(2) qualifies the broad prohibition in SAPS Act s 46(1) by providing that SAPS Act s 46(1) does not prohibit membership of a political organisation, nor does it prohibit attendance at meetings of such an organisation. However, the officer may not attend in uniform.

In *Van Dyk v Minister van Veiligheid en Sekuriteit*, the High Court held that a police officer was legitimately terminated from his employment because he stood for election as a member of the Democratic Alliance.<sup>144</sup> The officer argued that because his position in the police force — that of a budget analyst — did not require him to engage the public directly, the officer's candidacy could not prejudice the administration of justice or give the appearance of such impropriety.<sup>145</sup> The High Court found that the purpose of the SAPS Act was to eliminate any perception on the part of the public that the administration and enforcement of the law advanced the fortunes of any political party or undermined the claims

---

RS3, 05-11, ch23B-p34

of members of other parties to justice.<sup>146</sup> The court found that the elimination of any taint of political party bias in the police force in order to instill greater public

---

143 Ibid at para 72.

144 Unreported, RPD case no 4268/2002 (29 April 2003) ('*Van Dyk*'). See further Woolman 'Freedom of Association' (supra).

145 While on the police force from 1995 to 1999, Van Dyk had represented the Freedom Front on the Greater Pretoria Metropolitan Council (GPMC). In 2000, Van Dyk switched to the Democratic Alliance and openly ran for a seat on the GPMC as a DA candidate. Van Dyk also argued that while s 46 of the SAPS Act and FC s 19(7), set identifiable limits on party political activity, those limits should be read, and if necessary modified, by the political rights found in the FC s 19. The court found that even if s 46(1) was deemed to have infringed FC s 19, the infringement was patently reasonable and justifiable under FC s 36.

146 Section 46 of the SAPS Act reads as follows:

(1) No member shall—

- (a) publicly display or express support for or associate himself or herself with a political party, organisation, movement or body;
- (b) hold any post or office in a political party, organisation, movement or body;
- (c) wear any insignia or identification mark in respect of any political party, organisation, movement or body; or
- (d) in any other manner further or prejudice party-political interests.

(2) Subsection (1) shall not be construed as prohibiting a member from—

- (a) joining a political party, organisation, movement or body of his or her choice;

confidence in government justified the limitation of the political and associational rights of the particular officer in question.<sup>147</sup> Such a finding is consistent with the needs of a nascent democracy committed to the principle that all are equal before the law and that all can be expected to be treated by the police without fear, favour or prejudice.<sup>148</sup>

A third limitation concerns the right of police officers to resign from the SAPS. SAPS Act s 49(1) states that once a state of emergency or state of national defence has been declared, no member can resign without the written permission of the National Commissioner. Further, in terms of SAPS Act s 49(2), during any period when it becomes necessary to maintain public order in the country, the National Commissioner may declare a 30 day period during which no police officer may resign without written permission. This limitation ensures that the SAPS properly performs its functions and that its ability to do so is not compromised by diminished numbers during a national emergency.

The rationale for this last limitation is consistent with the limits placed on the ability of SAPS members to strike: an issue engaged only glancingly above. As Carole Cooper notes:

The 1995 [Labour Relations Act 66 of 1995 (LRA)] ... limits the right to strike in essential services and minimum services. The ILO recognises that it might be necessary to prohibit strikes in essential services but that such services should be restrictively defined. Without a restrictive definition, the notion would lose all meaning. The ILO defines essential services as those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. It was not prepared to draw up a definitive list of which services could be determined as essential... . Critically, the ILO requires that where a strike is prohibited, there should be access to quick and impartial mediation

---

RS3, 05-11, ch23B-p35

and arbitration procedures for workers hit by the prohibition... . The 1995 LRA basically adopts the definitional approach to essential services. It defines as essential a service 'the interruption of which endangers the life, personal safety or health of the whole or any part of the population'.<sup>149</sup> It also specifically declares as essential the parliamentary service and the South African Police Service. The prohibition of strikes in essential services (including minimum services) provided for in the LRA should pass the

---

(b) attending a meeting of a political party, organisation, movement or body: Provided that no member shall attend such a meeting in uniform; or

(c) exercising his or her right to vote.

Section 46(1)(a) replaced s 35(1)(a) of the Police Act 7 of 1958. The Police Act stated that no member of the Police Force, while still a member of the Police Force, may engage in political activity, stand for election or participate in a municipal council.

147 See *Van Dyk* (supra) at 10 ('The need for a police force that is seen to be impartial speaks for itself.')

148 A number of eastern European nations have placed similar laws on the books in order to diminish the public's understandable reluctance to trust a security apparatus that had all too recently used all manner of surveillance and violation of bodily integrity to enforce the repressive policies of the state. Of course, as South Africa's history of overt politicisation of the security services recedes into the past, the rationale for barring party political activity will lose at least some of its force.

149 LRA s 213.

requirements of the limitations test in the Final Constitution, particularly as the prohibition is consonant with ILO requirements.<sup>150</sup> The Act's definition of an essential service replicates that of the ILO. Both provide for a prohibition on strikes only in very restricted circumstances. The specific inclusion of parliamentary and police services as essential services, thereby removing the right of employees in these services to strike, is also defensible in terms of the public importance of these functions, and is accepted by the ILO and is common elsewhere. The ILO states that the right to strike may be restricted or prohibited in the public service in so far as such a strike could cause 'serious hardship' to the 'national community' and provided that the limitations are accompanied by certain compensatory guarantees.<sup>151</sup>

Our labour courts have largely tracked Cooper's analysis. However, their judgments also reflect a number of subtle distinctions. *SA Police Services v POPCRU* turns on the reach of s 65(1)(d) of the LRA.<sup>152</sup> Section 65(1)(d) prohibits employees engaged in essential services from striking. The matter arose in 2007 when POPCRU called on its members in the SAPS to join a general strike. The Labour Court held that only those officers employed under the SAPS Act (actual police officers) were barred from striking. As a result, employees engaged by the SAPS in the service in terms of the Public Service Act retained the right to strike.<sup>153</sup> On appeal, the Labour Appeals Court ('LAC') largely upheld this finding. It noted that the term 'essential service' applies to particular functions performed by that employer: The functions assigned to SAPS by the Constitution are 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law'. These functions constitute the 'essential service' contemplated by s 71(1) of the LRA. The LAC held that, unless non-SAPS member are deemed members, non-members employed by the SAPS cannot perform police functions, and therefore do not form part of the police service. The LAC concluded that the SAPS' view that all its employees are prohibited from striking would constitute an unreasonable limitation on non-member employees' constitutional right to strike.

## **(e) Accountability and oversight**

### **(i) Executive and parliamentary oversight**

The executive exercises overall policy control over the SAPS at the national level through the Minister of Police and at the provincial level through an MEC with

---

RS3, 05-11, ch23B-p36

a comparable brief. The Final Constitution provides for the establishment of a national secretariat for the SAPS to 'function under' the responsible Minister. With respect to the provinces, s 2(1)(b) of the SAPS Act mandates the establishment of provincial

---

150 LRA s 65(1)(d)(i).

151 C Cooper 'Labour Relations' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) 53-54 – 53-55 citing ILO *Freedom of Association* (1996) 110 at para 533. See also C Cooper 'Strikes in Essential Services' (1994) 15(5) *ILJ* 903-29.

152 [2010] 12 BLLR 1263 (LAC).

153 *SAPS v POPCRU* (2007) 28 ILJ 2611 (LC).

secretariats for safety and security.<sup>154</sup> FC s 208 does not specify the functions that the national secretariat is meant to perform under the guidance of the Minister. However, s 3(1) of the SAPS Act states that these functions encompass advising the Minister on the exercise of his powers and performance of his functions, advising the Minister on constitutional matters, promoting accountability and transparency within the SAPS, monitoring the implementation of policy and directions issued by the Minister, conducting research into policing matters and evaluating the functioning of the SAPS. The secretariat is also given certain powers to facilitate the performance of its functions. It can obtain information and documents from the SAPS, enter buildings controlled by the SAPS and is entitled to receive 'all reasonable assistance' from SAPS members.<sup>155</sup>

The mandate of the secretariat, as articulated in the SAPS Act, ought to make it the backbone of executive oversight of the SAPS. Unfortunately, the national secretariat has been largely under-utilised. Pursuant to a policy decision taken in 1999 to decrease the size and the resources of the secretariat, it is no longer in a position to make a meaningful contribution to policy development and oversight.<sup>156</sup> Some commentators have noted that the sidelining of the secretariat reflects a shift in government policy away from building the accountability and the legitimacy of the SAPS to crime fighting.<sup>157</sup> Whatever the reasons may be, the weakening of the secretariat has left an undesirable lacuna in our system of policing.

At the provincial level, provincial executives have an additional oversight mechanism available to them. FC s 206(5)(a) permits provincial executives to establish commissions of inquiry into alleged inefficiencies in the SAPS within their province or breakdowns in the relationship between the SAPS and communities. FC s 206(5)(b) states that after conducting the inquiry the province 'must make recommendations to the Cabinet member responsible for policing'. FC s 206(5)(b) should not be read as a limitation of the ability of the province to take independent action to remedy problems that are identified through an inquiry. On the contrary, FC 206 makes it clear that the steps provided for in FC 206(5)(a) and (b) are carried out 'in order to perform the functions set out in subsection (3)'. Under FC 206(3) a province is entitled:

- (a) to monitor police conduct;
- (b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;
- (c) to promote good relations between the police and the community;

---

RS3, 05-11, ch23B-p37

---

154 In terms of s 3(5) of the SAPS Act, the functions and the powers of the provincial secretariats are the same as the functions and the powers of the national secretariat.

155 SAPS Act s 3(2).

156 See D Bruce, G Newham & T Masuko 'In the Service of People's Democracy: An Assessment of the South African Police Service' Centre for the Study of Violence and Reconciliation (2007) ('CSVR Study') available at <http://www.csvr.org.za/wits/papers/papsaps.htm>. See also M Shaw *Crime and Policing in Post-Apartheid South Africa: Transforming under Fire* (2002) 38-40.

157 Bruce et al 'CSVR Study' (supra) at 46.

- (d) to assess the effectiveness of visible policing; and
- (e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

The appropriate interpretation to be given to FC s 206(5)(b) is that once an inquiry initiated by the province has been completed, a report must be provided to the Minister. However, the province is also empowered to take whatever steps it deems necessary to remedy the problems in accordance with its entitlements under FC 206(3).

Parliamentary oversight of the SAPS is given effect through a Portfolio Committee on Safety and Security . In terms of FC s 205, provincial commissioners must present annual reports to the provincial legislature.<sup>158</sup> The effectiveness of the parliamentary portfolio committee in monitoring the SAPS has been limited. Portfolio committees tend to accept government policy and offer little critique.<sup>159</sup>

## **(ii) Independent Complaints Directorate**

The Independent Complaints Directorate ('ICD') is the statutory body that investigates complaints against the SAPS.<sup>160</sup> The ICD was established to satisfy the requirements of IC s 222. IC s 222 provided for the establishment of 'an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner.' The Final Constitution does not contain a provision comparable to IC s 222. However, FC s 206(6) indirectly requires the establishment of such a body by stating that 'on receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member.'

The ICD is headed by an Executive Director. The Executive Director is appointed for a renewable term of five years.<sup>161</sup> The staff of the ICD is appointed by the Executive Director in consultation with the Minister. The staff is subject to the same terms and conditions of employment as ordinary members of the public service.<sup>162</sup> Provincial Heads of the ICD are appointed by the Executive Director. However, this post is not specifically created in the SAPS Act. The ICD's funds come directly from Parliament and are allocated to it by the Minister of Finance through the national budget.

158 These reports must also be handed to the National Commissioner.

159 Bruce et al 'CSVR Study' (supra) at 46.

160 The ICD is created by Chapter 10 of the SAPS Act. For a critique of the structure and the powers of the ICD as conferred by the SAPS Act, as well as a comparison to practices in other jurisdictions, see B Manby 'The Independent Complaints Directorate: An Opportunity Wasted' (1996) 12 *SAJHR* 417. The ICD is not the only means by which police officers can be held accountable. The SAPS also conducts internal disciplinary enquiries. SAPS Act s 40.

161 In terms of s 51(1) of the SAPS Act, the Minister is responsible for nominating a candidate for the post of Executive Director. SAPS s 51(2) then provides that the nominee must be confirmed by the Parliamentary Portfolio Committee on Safety and Security before he or she can be appointed.

162 SAPS Act ss 52(1) and 52(2).

The investigative mandate of the ICD is primarily derived from s 53(2) of the SAPS Act:

In order to achieve its object, the directorate

- (a) may *mero motu* or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by a member, and may, where appropriate, refer such investigations to the Commissioner concerned;
- (b) shall *mero motu* or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and
- (c) may investigate any matter referred to the directorate by the Minister or the member of the Executive Council.

The ICD has also been granted the authority to exercise the same investigative powers over municipal police services.<sup>163</sup>

An important part of the ICD's mandate arises from s 18 of the Domestic Violence Act.<sup>164</sup> In terms of s 18, if a police officer fails to comply with any of the obligations imposed on her in terms of the Domestic Violence Act, then such failure must be treated as misconduct and referred for investigation by the ICD. (The failure to comply may also provide the grounds for delictual actions against the negligent police officer and the vicariously liable Minister.<sup>165</sup>) The Act also requires that disciplinary proceedings *must* be initiated against such a police officer unless the ICD directs otherwise. This process is overseen by Parliament. Parliament is meant to receive reports from the ICD every six months concerning investigations and recommendations made under s 18. The National Commissioner is also required to present reports to Parliament indicating the steps taken as a result of the recommendation made by the ICD.

The procedure established by s 18 of the Domestic Violence Act has the potential to be a very effective oversight mechanism. But it has not served that function in practice. In its 2005 report on the ICD, the Parliamentary Portfolio Committee on Safety and Security noted that the ICD had fallen behind in the provision of its reports on domestic violence and that the SAPS was not meeting s 18's reporting requirements.<sup>166</sup>

163 Regulations for Municipal Police Services Government Notice N R710 *Government Gazette* 20142 (11 June 1999).

164 Act 166 of 1998.

165 See *Minister of Safety and Security v Venter* [2011] ZASCA 42 (Delictual action against the police for failing to perform their duties under the DVA: currently on appeal to the Constitutional Court.)

166 *Report of the Portfolio Committee on Safety and Security on the Independent Complaints Directorate (ICD)* (17 August 2005) available at [www.pmg.org.za/docs/2005/comreports/050824pcsafetyreport.htm](http://www.pmg.org.za/docs/2005/comreports/050824pcsafetyreport.htm) (accessed on 18 September 2007).

To facilitate its investigations, personnel within the ICD can be designated to perform the functions and to exercise the powers of an ordinary SAPS member.<sup>167</sup> The ICD can, thereby, develop its own internal investigative unit. However, chronic shortages of resources and of staff have severely limited the investigative capacity of the ICD and resulted in a serious backlog of complaints. In addition,

---

RS3, 05-11, ch23B-p39

the ICD has complained of delays in ministerial approval of police powers for investigators: these delays have further hampered their investigative efforts.<sup>168</sup>

The Executive Director has the power to 'request and obtain' information from police officers, police commissioners and the National Director of Public Prosecutions and must receive the co-operation of any police officer.<sup>169</sup> These provisions are rather weak, as they do not specifically compel SAPS members to co-operate with investigations.<sup>170</sup> The ICD has, in the past, called for legislation granting it the specific power to access all documents held by the police. No such legislation is in the pipeline.<sup>171</sup> In addition, members of the SAPS are able to frustrate an ICD investigation, particularly investigations into deaths in police custody, by simply invoking their right to remain silent.<sup>172</sup>

Once an investigation has been completed, the ICD can make recommendations to the commissioner, the Minister, or the MEC concerned.<sup>173</sup> If the matter involves a potential criminal action, then the recommendations may be referred to the National Director of Public Prosecutions for further action.<sup>174</sup> The ICD has no power to compel the National Commissioner to initiate or to participate in disciplinary action. The lack of an effective enforcement mechanism for the recommendations of the ICD is a

---

167 Such a designation must be made by the Minister upon a request by the Executive Director. SAPS Act s 53(3)(a).

168 *ICD Strategic Plan 2006-2009* available at [http://www.icd.gov.za/documents/strategic\\_documents/2006-2009/StragicPlan2006\\_2009.pdf](http://www.icd.gov.za/documents/strategic_documents/2006-2009/StragicPlan2006_2009.pdf) (accessed on 18 September 2007).

169 SAPS Act ss 53(6)(b), 53(6)(d) and 53(6)(f).

170 The weakness of these provisions is especially evident when compared with the investigative powers granted to the Inspector General of Intelligence under s 7(8) of the Intelligence Services Oversight Act 40 of 1994. See § 23B.5(c)(ii) *infra*.

171 Independent Complaints Directorate *First Annual Report on the Activities of the Independent Complaints Directorate for the Financial Year Ending March 31, 1997* (1997).

172 See D Bruce, K Savage & J De Waal 'A Duty to Answer Questions? The Police, the Independent Complaints Directorate and the Right to Remain Silent' (2000) 16 *SAJHR* 71 (The authors argue in favour of the development of a duty to answer questions posed by the ICD during its investigations. The proposed duty would be made subject to the exclusion of incriminating testimony from any future criminal trial.)

173 SAPS Act ss 53(6)(i) and 53(6)(j).

174 SAPS Act s 53(6)(g).

serious shortcoming of the legislative framework. The implementation of the ICD's findings is effectively left within the discretion of the police commissioners, prosecutors and responsible ministers. The absence of enforcement mechanisms and remedial powers undermines the very purpose for creating an independent body to deal with police misconduct. In order to give its findings real bite, the ICD should be given genuine powers of intervention and control over disciplinary proceedings.<sup>175</sup>

A lack of public awareness is another matter of concern. In order for the ICD to adequately perform its various tasks, the public must be able to contact the ICD and be cognisant of the existence of a complaint mechanism. A further challenge to the effectiveness of the ICD has been the lack of an adequate number of satellite offices in the provinces and rural areas. The lack of sufficient local

---

RS3, 05-11, ch23B-p40

offices makes it substantially more difficult for members of the public to lodge complaints of abuse and misconduct.<sup>176</sup>

In recent years, the ICD has undertaken a number of initiatives designed to improve the performance of its mandate. In 2005, a Proactive Oversight Unit was established to conduct research into and analysis of trends in police conduct to make recommendations for policy changes where necessary. Importantly, an Integrity Strengthening Unit was also established in 2005 to oversee ethical conduct within the ranks of the ICD. In an effort to root out police corruption, an Anti-Corruption Command ('ACC') was set up in 2004. Given the scathing reports emanating from the Auditor General in 2009 and the Public Prosecutor in 2011, and the 2011 investigation of the Special Investigation Unit into rampant tender violations, neither the ICD nor the ACC would appear to have responded effectively. The ACC in particular has no presence in the provincial offices and suffers from an ongoing lack of capacity. The ACC has three offices: hardly sufficient to handle complaints emanating from the entire country.<sup>177</sup>

Aside from its external constraints, the ICD has experienced some internal management problems. These difficulties prompted the Portfolio Committee on Safety and Security to table a sharply critical report on the ICD to Parliament.<sup>178</sup> One of the problems identified was an over-centralisation of resources: 47 per cent of the ICD's budget went to national investigations whilst the remainder was distributed between the nine provinces. Over-centralisation of power at the national level has clearly hampered service delivery at provincial level. In terms of reporting, the Portfolio Committee noted inconsistencies in the quality of the reports as well as the information contained therein and specifically pointed out that the ICD appeared to

---

175 For a critique of the structure and powers of the ICD see B Manby 'The Independent Complaints Directorate: An Opportunity Wasted' (1996) 12 *SAJHR* 417.

176 Portfolio Committee on Safety and Security *Report on the Independent Complaints Directorate (ICD)* (17 August 2005).

177 Independent Complaints Directorate *Annual Report on the Activities of the Independent Complaints Directorate for 2005/2006* (2006) 44.

178 Portfolio Committee on Safety and Security *Report on the Independent Complaints Directorate* (2006). The Portfolio Committee required the ICD and the Ministry to report back to it within three months on the measures taken to remedy the problems that had been identified.

be presenting a rosy picture of its activities and was only willing to present certain information upon specific requests by the Portfolio Committee. These observations, particularly with regards to 'white-washed' reporting, are somewhat troubling.

Moreover, in recent years political support for the ICD appears to have waned. In 2006, the National Commissioner — himself the subject of corruption investigations — publicly expressed doubt about the necessity for the continued existence of the ICD.<sup>179</sup> These comments are more than unfortunate: They reflect the absence of an accountable and transparent police force whose clear mission is to protect the denizens of our fragile democracy.<sup>180</sup>

---

RS3, 05-11, ch23B-p41

### (iii) Community policing forums

Community policing forums were first established in the early 1990s during the transition.<sup>181</sup> The main purpose of establishing these forums was to boost the legitimacy of the police by providing communities with an opportunity to become involved in policing activities in their area. However, the forums are really not oversight or accountability mechanisms. They lack the authority to control the police or to take action against errant police officers. Since their establishment, the forums have served more as a consultative platform where police and communities are able to discuss their mutual concerns (and grievances). In some cases, however, the police and the communities have used the forums to develop joint strategies to take action against crime.

The forums have been formalised through the adoption of provisions within the SAPS Act that govern their establishment and composition.<sup>182</sup> The Act provides for the forums to exist on three levels: community, area and provincial.<sup>183</sup> The provincial forums are controlled by provincial commissioners, in consultation with the relevant MEC.<sup>184</sup> The forums are not democratically elected bodies. Rather, they consist of members of the public who volunteer their services.<sup>185</sup>

The forums have a mixed record of success. Police officers tend to see the forums as platforms for the community to criticise the police or view them as 'talk shops' that

---

179 Amnesty International *Report 2007* (2007) available at <http://web.amnesty.org/library> (accessed on 18 September 2007).

180 Ibid.

181 G Cawthra *Policing South Africa: The South African Police and the Transition from Apartheid* (1993) 165.

182 SAPS Act Chapter 6.

183 SAPS Act ss 19, 20, 21.

184 SAPS Act ss 19(1), 20(1), 21(1). The Minister of Safety and Security is, however, empowered by SAPS Act s 22(2) to make regulations to ensure the proper functioning of the forums.

185 SAPS Act ss 19(3), 20(3) and 21(3).

do not affect day-to-day policing. Another serious problem has been the forums' lack of representivity. Members of the public who become involved in the forums do so on a voluntary basis. Not surprisingly, wealthy sectors of the community or specific interest groups are sometimes overrepresented: the poor and marginalized are generally under-represented.<sup>186</sup>

There have been recent moves towards restructuring the forums to provide for greater community involvement in crime fighting.<sup>187</sup> Whilst the suggested changes may prove useful in enhancing democratic interaction between local government, the police and the communities they serve, broadening the spectrum of issues they engage may actually undermine the forum's focus on policing.

#### **(iv) Police malfeasance, incompetence and corruption**

Allegations of police corruption and claims of a systemic failure by the police to provide adequate protection to South Africa's denizens have attracted

---

RS3, 05-11, ch23B-p42

investigations and condemnation from two Chapter Nine Institutions and the Special Investigative Unit ('SIU'). The Auditor-General, the Public Protector and the SIU reports paint a bleak picture of malfeasance, incompetence and an absence of sufficient training throughout the ranks of those charged with securing our safety and security.

#### **(aa) The Auditor-General's report on police service delivery (2009)**

The Auditor-General's investigation took place during 2007 and 2008 and assessed the 'basic measures, processes or systems that should be in place at police stations and the police emergency phone line 10111'.<sup>188</sup> By 'basic measures', the Auditor-General's report means sector policing, vehicle management, training, community service centres, and the provision of bullet-proof vests. The report concluded that the existing practices in all of these areas fell short of the standards required by the Constitution. The short-falls ranged from the lack of an approved policy for sector policing to inadequate training and inadequate recording of cases of domestic violence. The Auditor-General found that many of these shortfalls are a result of inadequate training, a lack of funds, or both. The Auditor-General concluded that an underfunded, unskilled police force could not discharge its constitutional responsibility to protect the general population.

#### **(bb) Public Protector's Report (2011): Against the Rules**

---

186 See G Newham 'Strengthening Democratic Policing in South Africa through Internal Systems for Officer Control' (2005) 36(2) *South African Review of Sociology* 160, 173-4. See also J Rauch 'Police Reform and South Africa's Transition' *Centre for the Study of Violence and Reconciliation Working Paper* 6, available at <http://www.csvr.org.za/docs/policing/policebeformandsouth.pdf> (accessed on 9 March 2009) 61-62.

187 L Johns 'South Africa; New Future Mapped out for Community Police Forums' *AllAfrica.com* (9 September 2007) available at <http://allafrica.com/stories/200709100345.html> (accessed on 21 September 2007).

188 Auditor-General Report on a Performance Audit of Service Delivery at Police Stations and 10111 Call Centres at the South African Police Service 2007-2008 (March 2009) ('A-G's Report') 2, available at <http://www.agsa.co.za/audit-reports/SAR.aspx> (accessed on 10 April 2011).

In 2011, the Public Protector Thuli Madonsela released a damning report on irregularities related to the lease of two properties by the SAPS in Pretoria and Durban.<sup>189</sup> The report — *Against the Rules* — strongly suggests that the leases for the buildings were executed because of an untoward relationship between SAPS National Commissioner Bheki Cele and a private property owner. However, the Public Protector's findings of a potentially corrupt relationship are not nearly as important as her conclusions regarding the manifold constitutional breaches reflected in this 'property deal'.

With respect to the SAPS, the Public Protector identified the following constitutional and statutory improprieties:

1. 'Although the SAPS did not sign the lease agreement, its involvement in the procurement process was improper, as it proceeded beyond the demand management phase

---

RS3, 05-11, ch23B-p43

and it further failed to implement proper controls, as required by the PFMA and relevant procurement prescripts.<sup>190</sup>

2. 'The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.'<sup>191</sup>
3. 'The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require from an accounting officer to ensure that goods and services are procured in accordance with a system that fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.'<sup>192</sup>

Based upon these findings, the Public Protector recommended that the National Treasury determine whether there had been any fruitless or wasteful expenditure, that the Minister of Police should take action against the responsible official and that the SAPS should take steps to ensure that the same types of contraventions do not occur again.<sup>193</sup>

---

189 Public Protector *Against the Rules: Report of the Public Protector in terms of Section 182(1) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994 on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service relating to the Leasing of Office Accommodation in Pretoria* (2011) Report Number 33 of 2010/2011, available at [www.info.gov.za/view/DownloadFileAction?id=142293](http://www.info.gov.za/view/DownloadFileAction?id=142293) (accessed on 6 May 2011) ('*Against the Rules*').

190 T Madonsela *Address by the Public Protector, Adv Thuli Madonsela, During a media Briefing on the Release of the SAPS Lease Report* (22 February 2011) available at [http://www.pprotect.org/media\\_gallery/2011/23022011\\_sp.asp](http://www.pprotect.org/media_gallery/2011/23022011_sp.asp) (accessed on 6 May 2011).

191 *Ibid.*

192 *Ibid.*

193 *Ibid.*

## **(cc) Special Investigative Unit ('SIU'): 2011 preliminary reports**

After having assisted the Public Protector in the production of the report *Against the Rules*, the SIU announced its own preliminary findings regarding corruption in the SAPS. Willie Hofmeyr, head of the SIU, identified two primary areas of fraud and racketeering in an appearance before the National Assembly's Justice Committee:

First: 'A lot of the stations are being built on three quotes, not on a tender process. ... We have cases where the lowest quotations are not accepted, where the winning bid didn't submit a quote, possible cover quoting and BEE fronting.'<sup>194</sup>

Second: 'SAPS officials [seem to have] interest in the companies to whom work was given. In many cases the payments exceeded budgeted costs.'<sup>195</sup>

Hofmeyr finished his initial announcement of the preliminary findings by stating the fraud was so widespread that the SIU had decided to concentrate its energies on the 20 most egregious cases.

These findings may seem rather mild. However, given an environment of rather rampant corruption, and the involvement of such role players as General Cele

---

RS3, 05-11, ch23B-p44

(a close confidant of President Zuma), both the SIU and the Public Protector deserve credit for discharging their duties without fear, favour or prejudice.

## **23B.4 The South African National Defence Force**

### **(a) Composition, structure and functions**

The SANDF is comprised of a permanent force and a part-time reserve component.<sup>196</sup> The SANDF derives its primary authority from the Final Constitution. However, like the SAPS, it is governed by national legislation: the Defence Act.<sup>197</sup> The Final Constitution requires the SANDF to be set up and trained as a disciplined military force capable of carrying out its functions and of meeting international standards of competency.<sup>198</sup>

---

194 T Mokone 'More Dodgy Tenders Found: SIU Tells Parliament that It Uncovered Serious Irregularities in the Building of 33 Police Stations Which Cost the Country R330,000' *The Sunday Times* (30 March 2011) available at [www.timeslive.co.za/politics/article995872.ece/more-dodgy-tender-found](http://www.timeslive.co.za/politics/article995872.ece/more-dodgy-tender-found) (accessed on 6 May 2011); P Craven 'COSATU Welcomes SIU Fight against Corruption' *PoliticsWeb* (1 May 2011) available at [www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid](http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid) (accessed on 10 May 2011); E Ferreira 'SIU Uncovers Massive State Corruption, Says Hofmeyr' *Mail & Guardian* (31 March 2011) available at <http://mg.co.za/article/2011-03-31-siu-uncovers-massive-state-corruption-says-hofmeyr> (accessed on 6 May 2011).

195 Mokone (supra).

196 IC s 226(1). See s 11 of the Defence Act. The SANDF encompasses the South African Army, the South African Navy, the South African Air Force and the South African Military Health Service. See s 12 of the Defence Act.

197 Act 42 of 2002. See IC s 226(2) and 226(3). The 2002 Act replaces the Defence Act 44 of 1957.

198 See IC s 226(4) and 226(5) and FC s 200(1).

The SANDF was created by merging the SADF with the military forces of the homeland states, the ANC's armed wing, Umkhonto we Sizwe ('MK'), the armed wing of the PAC, the Azanian People's Liberation Army ('APLA'), and parts of the Inkatha Freedom Party's self-protection units.<sup>199</sup> The merger of the different armies, who had previously been enemies, as well as the implementation of affirmative action policies, created a significant amount of racial tension within the SANDF. That tension persists.<sup>200</sup> In addition, the merger vastly increased the size of the SANDF — far beyond what was necessary. One consequence of the transformation and downsizing process has been the loss of a large number of experienced SANDF members. Thus, despite its initial overcapacity, the SANDF currently struggles with a significant skills shortage.<sup>201</sup> During 2003, a new strategy, Human Resource Strategy 2010, was launched to eliminate human resource problems.<sup>202</sup> It is not yet clear what impact, if any, the strategy has had.

The primary function of the SANDF is to 'defend the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force'.<sup>203</sup> In terms of FC s 201(1)(a), the SANDF may also be employed in support of, or in co-operation with, the

---

RS3, 05-11, ch23B-p45

SAPS.<sup>204</sup> The Defence Act further increases the field of activity of the SANDF by authorising the Minister of Defence or the President to employ the SANDF to

- (a) preserve life, health or property in emergency or humanitarian relief operations;
- (b) ensure the provision of essential services;
- (c) support any department of state, including support for purposes of socio-economic upliftment; and

---

199 G Cawthra & R Luckham *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies* (2003) 41.

200 L Heinecken 'South Africa's Armed Forces in Transition: Adapting to the New Strategic and Political Environment' (2005) 36(1) *Society in Transition* 74, 81–85. In an effort to assist and equip SANDF members to cope with the transformed military environment, a Civic Education Task Group was set up to provide training on the Final Constitution, civil-military relations, civil rights, humanitarian law as well as cultural and gender sensitivity. Cawthra & Luckham (supra) at 43. The SANDF has also had to eliminate gender-based discrimination. Women now receive the same training and are eligible to occupy the same positions, including combat positions, as their male counterparts. As a result of these changes there are now women serving in the Army, Navy and Air Force. However, Heinecken notes that a lot more still needs to be done to change attitudes towards female officers in the SANDF. Heinecken (supra) at 85–86.

201 Heinecken (supra) at 81–85.

202 Ibid.

203 FC s 200(2).

204 The Minister of Defence must approve a code of conduct and operational procedures to be applied in every operation where the SANDF is employed to co-operate with the SAPS. Defence Act s 19(3) (c) (i).

(d) effect national border control.<sup>205</sup>

Any such employment must be reported to Parliament. Parliament retains the power to amend the terms of the employment or to cancel it altogether.<sup>206</sup>

Members of the SANDF have substantially the same powers and immunities as members of the SAPS.<sup>207</sup> However, they are specifically precluded from investigating crimes and are obliged to hand over any arrested persons or seized articles to the SAPS, or any other authorised person, as soon as possible.<sup>208</sup> In recent years, the SANDF has been employed primarily to assist the SAPS and national departments, to control national borders and to participate in peace-keeping missions in other African countries.<sup>209</sup>

## **(b) Civil military relations**

The Minister of Defence exercises overall political responsibility for the military through the Department of Defence.<sup>210</sup> However, only the President has the authority to employ the military to defend the country, to serve internationally, or to uphold law and order within the country in conjunction with the SAPS.<sup>211</sup> The President is required to inform Parliament 'promptly' when the SANDF is so employed and must provide reasons for and details about the employment.<sup>212</sup> Parliament has the authority to terminate any of these employments.<sup>213</sup>

---

RS3, 05-11, ch23B-p46

---

205 Defence Act s 18(1).

206 Defence Act s 18(5).

207 Defence Act ss 20(1), 20(2), 20(5), 20(6) and 20(7).

208 Defence Act ss 20(3) and 20(4). SANDF members who are involved in border patrolling are specifically authorised to arrest and to detain persons who are 'reasonably suspected' of being illegal immigrants and to request that such persons produce evidence that they are authorised to be in the country. Defence Act s 20(9)(a) and (b).

209 Heinecken (supra) at 76-77.

210 FC s 201(1).

211 FC s 201(2). In terms of FC s 203(1) the President also has the power to declare a state of national defence. When doing so he is required to inform Parliament of the reasons and to provide relevant details about deployment of the SANDF. In terms of FC s 203(2), if Parliament is out of session, then it must be summoned to an extraordinary session. Parliament must then approve the declaration or it lapses within seven days.

212 FC s 201(3). In addition to the requirement that the President must report any employment of the SANDF in conjunction with the SAPS to Parliament, s 19(2) of the Defence Act also requires the Minister of Defence to publish a notice to this effect in the *Government Gazette*.

213 IC s 228(5).

The President is also the Commander-in-Chief of the SANDF and appoints the Military Command of the SANDF.<sup>214</sup> The Military Command exercises operational control. However, command of the SANDF is subject to the direction of the Cabinet member responsible for defence under the authority of the President.<sup>215</sup> Unlike the Secretary of Defence, the Military Command does not have any financial responsibility and does not report to Parliament.

Further civilian control is provided by the Defence Secretariat. The secretariat serves as the administrative arm of the Department of Defence.<sup>216</sup> The Secretary of Defence, who must be a civilian, is appointed by the President. The Secretary is the head of the Defence Secretariat, and is the accounting officer for the SANDF under the Public Finance Management Act.<sup>217</sup> In addition, the Secretary serves in an advisory capacity, monitors implementation of defence policy, and possesses investigative powers.<sup>218</sup>

Although the establishment of civilian control over the military through the Department of Defence has been largely successful, problems with striking the right balance between oversight and cooperation persist. Few civilians possess the requisite levels of military expertise to meet the requirements of the job. Consequently, the personnel of the Department of Defence consists of a combination of civilians and SANDF members.<sup>219</sup>

Parliamentary oversight is conducted through a multiparty Joint Standing Committee on Defence ('JSCD'). This committee is empowered to investigate and to make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of the SANDF. The Minister for Defence is accountable to Parliament. Parliament also approves the annual budget for the SANDF.

A Military Ombudsman currently operates out of the Office of the Public Protector. The Ombudsman must address any matters related to military personnel that cannot be resolved through other existing mechanisms. According to Heinecken, the Ombudsman's placement outside defense structures 'has left a vacuum in terms of

---

214 FC s 202(1).

215 FC s 202(2).

216 FC s 204(1). Defence Act s 6 establishes the Defence Secretariat.

217 Defence Act ss 7(1) and 7(3) and 8(a).

218 These powers encompass the ability to order investigations by the Chief of the Defence Force or the Military Police. Defence Act s 8. The Military Police consists of SANDF members who perform a police function within the SANDF. Their primary duty is to prevent and to investigate crimes as well as to maintain law and order within the SANDF. They possess the same powers as the SAPS. See Defence Act ss 30-31.

219 Cawthra & Luckham (supra) at 40. See also Heinecken (supra) at 79.

reporting complaints and malpractice within the DOD.<sup>220</sup> That role has, instead, been assumed by the South African National Defence Union.<sup>221</sup>

### (c) Military discipline

In *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence*, the Constitutional Court ruled on two cases that raised related issues regarding military discipline.<sup>222</sup> *Potsane* was an appeal by the Minister of Defence ('the Minister') against a judgment declaring sections of the Military Discipline Supplementary Measures Act unconstitutional.<sup>223</sup> *Potsane* argued that provisions of the Act were inconsistent with FC s 179. Section 179 provides that '[t]here is a single national prosecuting authority' in South Africa headed by the National Director of Public Prosecutions ('NDPP'). The soldiers asserted that the prosecuting authority of the military courts infringes an exclusive power of the NDPP and was, therefore, unconstitutional. The exercise of such power by the military court was also alleged to be a violation of their right to equality under FC s 9.<sup>224</sup> The soldiers argued that the plain language of FC s 179 makes it clear that military courts could not retain any prosecutorial authority.

The Minister rejected the superficial reading offered by the soldiers and contended that historical context and contemporary reality were essential for a proper interpretation of FC s 179. The purpose of FC s 179 was not to preclude military courts

220 Heinecken (supra) at 79.

221 As Heinecken notes:

SANDU requested an investigation against the Officer Commanding of the South African Military Academy for unilaterally transferring several academic assistants back to their units, racism and mismanagement of the unit's affairs. The union used the media to bring these matters to the attention of the public and the Parliamentary Portfolio Committee on Defence and Minister of Defence.

Heinecken (supra) at 79. Other countries have a military ombudsman that operate within the defence forces. On the ombudsman in the Canadian armed forces, see 'National Defence and Canadian Forces Ombudsman' available at <http://www.ombudsman.dnd.ca/au-ns/faq/index-eng.asp> (accessed on 6 May 2011).

222 2002 (1) SA 1 (CC), 2001 (11) BCLR 1137 (CC), [2001] ZACC 12 ('*Potsane*').

223 Act 16 of 1999. The armed forces have also developed the following Code of Conduct (2000) for SANDF members: 'I pledge to serve and defend my country and its people in accordance with the Constitution and the law and with honour, dignity, courage and integrity. I serve in the SANDF with loyalty and pride, as a citizen and a volunteer. I respect the democratic political process and civil control of the SANDF. I will not advance or harm the interests of any political party or organisation. I accept personal responsibility for my actions. I will obey all lawful commands and respect all superiors. I will refuse to obey an obviously illegal order. I will carry out my mission with courage and assist my comrades-in-arms, even at the risk of my own life. I will treat all people fairly and respect their rights and dignity at all times, regardless of race, ethnicity, gender, culture, language or sexual orientation. I will respect and support subordinates and treat them fairly. I will not abuse my authority, position or public funds for personal gain, political motive or any other reason. I will report criminal activity, corruption and misconduct to the appropriate authority. I will strive to improve the capabilities of the SANDF by maintaining discipline, safeguarding property, developing skills and knowledge, and performing my duties diligently and professionally.'

224 *Potsane* (supra) at para 4.

from exercising prosecutorial power. The intent of FC s 179 was, rather, to consolidate the multiple prosecutorial offices established under apartheid into one national office in a unified South Africa.<sup>225</sup> The Minister then asserted that FC s 179 must be read in light of other constitutional mandates and the unique role of the military.<sup>226</sup> An efficient and effective system of military justice is a prerequisite for maintaining military discipline.<sup>227</sup> Thus, whereas the priority for a civilian prosecutor is to prosecute civil and criminal claims, military prosecutions are designed to maintain military discipline. The Minister concluded that inserting the NDPP into the military justice process would undermine military discipline.<sup>228</sup>

The *Potsane* Court found that FC s 179 did not render prosecutorial authority within military courts invalid. It agreed with the Minister and reasoned that such

---

RS3, 05-11, ch23B-p48

authority was indispensable for the objects of military justice.<sup>229</sup> In order to make sense of the word 'one' in FC s 179, it found that it referred solely to prosecutorial power with respect to civilian matters. FC s 179 did not go so far as to create an exclusive prosecuting authority that would apply in all contexts.<sup>230</sup> The Court concluded that if such a sweeping change had been intended, then it would have been made explicit in the text. (It noted that military prosecutions are not referred to in FC s 179.<sup>231</sup>) The Court recognised that the military constitutes a distinct subculture. The Court continued: 'Although the overarching power of the Final Constitution prevails, and although the Bill of Rights is not excluded, the relationship between the SANDF and its members has certain unique features.'<sup>232</sup> (The Court found it noteworthy that the soldiers could not find any precedent for the system of military prosecution by civil authorities that they sought.<sup>233</sup>)

The *Potsane* Court reached two discrete conclusions. First, it held that FC s 179 did not render the challenged sections of the Act unconstitutional. Second, it concluded that military prosecution did not violate the right to equality as it was 'rationally connected to the legitimate government purpose of establishing and maintaining a

---

225 Ibid at para 20.

226 Ibid at para 22.

227 Ibid at para 23.

228 Ibid at para 40.

229 *Potsane* (supra) at paras 24, 26.

230 Ibid at para 26.

231 Ibid at para 30.

232 Ibid at para 21.

233 Ibid at para 41.

disciplined military force with a viable military justice system' and did not discriminate on a prohibited ground.<sup>234</sup>

#### **(d) Limitations on the rights of SANDF members**

The Constitutional Court has recognised that members of the SANDF are generally entitled to the same constitutional solicitude that ordinary civilians receive. In *SANDU CC I*, the Court stated that '[m]embers of the Defence Force remain part of our society with obligations and rights of citizenship.'<sup>235</sup> And yet, the Court has simultaneously acknowledged that the Final Constitution demands that we differentiate between those in military uniform and those without.

The Defence Act contains a number of limitations on the rights of SANDF members:

- (i) members of the permanent force are precluded from holding office in any political party or political organisation or serving in any legislative body;<sup>236</sup>
- (ii) the rights of members to join or participate in the activities of trade unions and to demonstrate or picket can be subjected to limitations;<sup>237</sup>
- (iii) their private communications with people inside or outside of the SANDF may be subjected to screening 'to the extent necessary for military security and for safety of members of the Defence Force and employees'.<sup>238</sup>

---

RS3, 05-11, ch23B-p49

It is noteworthy, ironic, and perhaps symbolic of progress in South Africa, that the members of the armed forces, who were once centrally involved in resisting the transition to democracy, have been fairly active in asserting their rights under the Final Constitution. This activism has been particularly evident in the field of labour rights.

In 1994, the South African National Defence Union ('SANDU') was formed. The government vigorously opposed unionisation of the SANDF. However, through a series of constitutional challenges launched by SANDU, the courts have confirmed the right of SANDF members to form a trade union and to engage in collective bargaining.

In *SANDU CC I*, the Constitutional Court upheld the rights of members of the defence force to participate in public protest and to join trade unions.<sup>239</sup> The Transvaal

---

234 Ibid at para 44.

235 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) ('*SANDU CC I*') at para 12.

236 IC s 226(6). See also Defence Act s 50(8)(a).

237 Defence Act s 50(6) and (4).

238 Defence Act s 50(2)(b).

239 *South African National Defence Union v Minister of Defence* 1999 (4) 469 (CC), 1999 (6) BCLR 615 (CC), [1999] ZACC 7 ('*SANDU CC I*').

High Court had found s 126B of the Defence Act 44 of 1957 unconstitutional and invalid to the extent that it prohibited defence force members from participating in protest action and becoming members of trade unions. The Minister of Defence and the Chief of SANDF only challenged the lower court order with respect to the prohibition on trade union membership. However, the court was obliged to analyse the public protest issue so that it could confirm the lower court's order.

The impugned section regarding public protest is worth quoting in full. Section 126B of the Act provided that:

- (1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956). Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.
- (2) Without derogating from the provisions of sections 4(h) and 10 of the Military Discipline Code, a member of the South African Defence Force who is subject to the said Military Discipline Code, shall not strike or perform any act of public protest or participate in any strike or act of public protest or conspire with or incite or encourage, instigate or command any other person (whether or not such person is a member of the South African Defence Force or an officer or employee referred to in section 83A(2) serving in the South African Defence Force or a member of any auxiliary or nursing service established under this Act) to strike or to perform such an act or to participate in a strike or such an act.
- (3) A member of the South African Defence Force who contravenes subsection (1) or (2), shall be guilty of an offence.
- (4) For the purpose of subsection (2) 'act of public protest' means any act, conduct or behaviour which, without derogating from the generality of the foregoing, includes the holding or attendance of any meeting, assembly, rally, demonstration, procession, concourse or other gathering and which is calculated, destined or intended to influence, support, promote or oppose any proposed or actual policy, action, conduct or decision of the Government of the Republic of South Africa or another country or territory or any proposed or actual policy, action, conduct or decision of any public or parastatal authority of the Republic or another country or territory or to support,

---

RS3, 05-11, ch23B-p50

promote, further, oppose or publicise any real or supposed private or public interest, object, principle, cause, concern, demand or claim, grievance, objection or outrage or to indicate, demonstrate or display real or supposed private or public support for, opposition or objection to, dissatisfaction, sympathy, association or solidarity with, or concern or outrage regarding any such policy, action, conduct, decision, interest, object, principle, cause, concern, demand or claim, grievance, objection or outrage, or to do so in relation to any event or occurrence of national or public concern, importance or significance, or eliciting national or public concern or interest, in such manner as to attract or direct thereto, or be calculated, destined or intended to attract or direct thereto, the attention of (i) any such Government or authority; (ii) any other country, territory or international or multinational organization, association or body; or (iii) the public or any member or sector of the public, whether within or outside the Republic; 'strike' means any strike as defined in section 1 of the Labour Relations Act 1956.

The Constitutional Court in *SANDU CC I* provides a coherent account of the relationship between the general commitment to freedom of expression (and its concomitant commitment to content-neutrality) and the appropriate conditions under which the content of speech by members of the military may be restricted. *SANDU CC I* holds that the purpose of the mutually supporting expressive rights found in Chapter 2 — FC ss 15, 16, 17, 18, 19 — is to enable

groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.<sup>240</sup>

That said, the Final Constitution makes its plain that public servants, especially those in the security services, have obligations and duties that may legitimately restrict their expressive conduct. FC s 199(7) states:

Neither the security services, nor any of their members, may, in the performance of their functions — (a) prejudice a political party interest that is legitimate in terms of the Constitution; or (b) further, in a partisan manner, any interest of a political party.

The *SANDU CC I* Court concludes that FC s 199(7) stands for the proposition that 'members of the Defence Force may not, in the performance of their functions, act in a partisan political fashion.'<sup>241</sup> However, the prolix 255 word definition of 'act of public protest' found in s 126B covered conduct ranging from 'holding or attendance of a meeting which is calculated to support or oppose any policy or conduct of the government or of a foreign government' to any indication of 'private or public support or opposition regarding any policy, conduct or principle' or 'any event of national or public concern.' The long but still nonexhaustive definition of public protest could capture complaints made by a defence force member to her husband in relation to absolutely any 'event of national or public

---

RS3, 05-11, ch23B-p51

concern.' Such a complaint could never be accurately described as public protest or partisan political conduct. So while the *SANDU CC I* Court recognised the constitutional imperative of an impartial military, the Court found that these provisions were unnecessary to achieve that objective and unreasonably infringed the soldiers' fundamental rights.<sup>242</sup> As a result, the Constitutional Court held that the Defence Act's gloss on the term 'public protest' in s 126B(2) and the extension of its definition of 'act of public protest' in s 126B(4) were unconstitutional. It severed both subsections from the Act.

Regarding the outright ban on trade union membership, the respondents argued that it was reasonable and essential because of the constitutional mandate of a

---

240 *SANDU CC I* (supra) at para 8.

241 *Ibid* at para 11.

242 *SANDU CC I* (supra) at paras 11-13. The Court concluded that a well-tailored prohibition regarding the free expression rights of *uniformed* defence force members might be constitutionally acceptable under the limitations clause. *Ibid* at para 18.

'disciplined military'.<sup>243</sup> The respondents so argued despite the applicant's concession that such a right, with respect to the military, did not embrace the right to strike.<sup>244</sup> Pace *Potsane*, the Court was unpersuaded by the respondents' reasoning. The Court found that the term 'worker' in FC s 23 encompassed SANDF members and concluded that the relationship between the soldiers and the military was 'akin', although not identical, to a normal employment relationship that would entitle SANDF members to the protections of FC s 23.<sup>245</sup> O'Regan J then concluded that an outright ban on trade union membership could not be justified in terms of FC s 36.<sup>246</sup>

In *SANDU HC I*,<sup>247</sup> the High Court reviewed the constitutionality of a set of regulations promulgated in response to the decision of the Constitutional Court in *SANDU CC I*.<sup>248</sup> The High Court held that the regulations that specified conditions for peaceful demonstration, prohibited union affiliation or closed shop agreements, barred members from securing union-sponsored legal representation and allowed for withdrawal of union recognition without notice infringed SANDU's and SANDF members' constitutional rights to collective bargaining (FC s 23), assembly (FC s 17), and association (FC s 18).

The High Court, in *South African National Defence Union v Minister of Defence* ('*SANDU HC II*'), found several additional provisions of the Military Regulations<sup>249</sup>

---

RS3, 05-11, ch23B-p52

constitutionally infirm.<sup>250</sup> The *SANDU HC II* court held that regulation 37(1) and (2) contravened the right to engage in collective bargaining protected under FC s 23(2) (b). Under FC s 23(2)(b), 'every worker has the right to participate in the activities and programmes of a trade union.' The *SANDU HC II* court, per Smit J, also ruled that regulation 37 violated the right to engage in collective bargaining. Furthermore,

---

243 FC s 200(1) reads: 'The Defence Force must be structured and managed as a disciplined military force.'

244 *SANDU CC I* (supra) at para 33.

245 Ibid at paras 35-36.

246 The Court noted that the unique nature of the military might require certain constraints on a trade union and that such constraints might pass constitutional muster if they met the requirements of FC s 36. For more on *SANDU CC I*, see S Woolman 'Freedom of Assembly' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43; S Woolman 'Freedom of Association' in S Woolman, M Bishop, & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; M Chicktay 'Mission Impossible: Trade Union and Protest Action Rights in the Military: *South African National Defence Union v Minister of Defence*' (2000) 16 *SAJHR* 324.

247 2003 (9) BCLR 1055 (T).

248 *Government Gazette* No 998 (20 August 1999).

249 Amendment to the General Regulations for the South African National Defence Force and Reserve *Government Gazette* Vol 411 No. 20425 (1 September 1999).

250 Unreported, TPD case no 15790/2003 (14 July 2003).

regulation 13(a)'s total ban on military trade unions' affiliating or associating with any labour organisation, labour association, trade union or labour federation that is not recognised and registered infringed the right of a trade union to form and join a federation protected under FC s 23(4)(c). Again, the Minister of Defence invoked the constitutional imperative of a 'disciplined military'<sup>251</sup> to argue that the regulation's restrictions on association rights were proper. The Minister asserted that the proscriptions were justified in the interest of keeping the force politically independent.<sup>252</sup> The *SANDU HC II* court dismissed both arguments by the Minister and ordered the constitutionally repugnant provisions severed from the regulations.<sup>253</sup>

In yet another SANDU decision — *South African National Defence Union v Minister of Defence and Others* — ('*SANDU HC III*') — the High Court, per Van der Westhuizen J, was asked to determine whether the Final Constitution, and FC s 23(5), imposed any duty on the Minister and the Department of Defence to bargain

---

251 See FC s 200(1).

252 See FC s 199(7).

253 *SANDU HC II* (supra) at 41 - 42. Regulations 3(c), 8(b), 13(b), 19(b), 25, 27, 36, 37(1), 37(2), 41, 53 and 73 were declared unconstitutional in terms of FC ss 16(1), 17, 18, 23(1), 23(2)(b), 23(4)(c), 23(5), 27(b), 33(1), 34, 35(3). The High Court, as a remedy, either varied the regulations so that they would conform with constitutional dictates or severed them from the rest of the regulations. The order read, in pertinent part, as follows: 'It is declared that the first respondent is under a duty to negotiate with the first applicant within the Military Bargaining Council and otherwise on all matters of mutual interest (including the contents of, and amendments to, the General Regulations promulgated or to be promulgated in terms of the Defence Act) that might arise between the first respondent in his official capacity as the employer on the one hand, and the first applicant and/or its members on the other; The first respondent is directed with immediate effect to negotiate with the first applicant within the Military Bargaining Council and otherwise on all matters of mutual interest that might arise between the first respondent in his official capacity as the employer on the one hand, and the first applicant and/or its members on the other; Subsection 8(b) of the regulations is declared to be inconsistent with the Constitution and invalid, and such subsection is severed from the Regulations; Subsection 13(a) of the Regulations is declared to be inconsistent with the Constitution and invalid, and such subsection is severed from the Regulations; Section 19 of the regulations is declared to be inconsistent with the Constitution and invalid, and such section is severed from the regulations; The words 'but not to representation' in ss 25(a) of the regulations are declared to be inconsistent with the Constitution and invalid, and such words are severed from the regulations; The omission of the words 'and represent' after the word 'assist' in ss 25(a) of the regulations is declared to be inconsistent with the Constitution, and ss 25(a) of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent'; The omission of the words 'and represent' after the word 'assist' in ss 25(b) of the regulations is declared to be inconsistent with the Constitution, and ss 25(b) of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent'; The proviso to s 27 of the regulations is declared to be inconsistent with the Constitution and invalid, and it is severed from the Regulations; The omission of the words 'and represent' after the word 'assist' in ss 27(a) of the regulations is declared to be inconsistent with the Constitution, and ss 27(a) of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent'; The omission of the words 'and represent' after the word 'assist' in ss 27(b) of the regulations is declared to be inconsistent with the Constitution, and ss 27(b) of the regulations is to be read as though the following words appear therein after the word 'assist': 'and represent'; Section 37 of the regulations is declared to be inconsistent with the Constitution and invalid, and such section is severed from the regulations; The word 'certain' in s 3(c) of the regulations is declared to be inconsistent with the Constitution and invalid, and this word is severed from the regulations; Section 36 of the regulations is declared to be inconsistent with the Constitution and invalid to the extent that it purports to limit the right of military trade unions to engage in collective bargaining to the matters listed in ss (a)-(e); Section 73 of the regulations is declared to be inconsistent with the Constitution and invalid to the extent that it empowers the first respondent to appoint the members of the Military Arbitration Board.'

collectively with a military trade union.<sup>254</sup> The High Court held that although FC s 23(5) recognises the right to engage in collective bargaining, it does not impose a corresponding duty on any of the parties to do so. (Of course, the absence of a duty did not mean that that the employer could 'capriciously, at its mere whim or simply because of inconvenience or difficulty, decide not to negotiate.'<sup>255</sup>) What is, perhaps most striking about *SANDU HC III* is the tone. The High Court found that SANDU's behaviour was unacceptable and could seriously undermine the morale and the discipline within the SANDF. Moreover, the government — in this case, the Minister and the Department of Defense — were viewed as having acted reasonably in setting the preconditions for a new round of negotiations.<sup>256</sup>

The Supreme Court of Appeal, in *South African National Defence Union v Minister of Defence* ('*SANDU SCA I*') revisited the question of whether there is a legally enforceable duty on the SANDF to engage in collective bargaining with SANDU.<sup>257</sup> The Supreme Court of Appeal confirmed the reasoning of Van der Westhuizen J in *SANDU HC III* — and set aside the unreported decision of Bertelsmann J in *SANDU HC I*. In short, the Supreme Court of Appeal, per Conradie JA, held that:

[T]he Constitution, while recognising and protecting the central role of collective bargaining in our labour dispensation, does not impose on employers or employees a judicially enforceable duty to bargain. It does not contemplate that, where the right to strike is removed or restricted but is replaced by another adequate mechanism, a duty to bargain arises.<sup>258</sup>

The *SANDU SCA I* court went further and found that 'one cannot read an intention to impose judicially enforceable bargaining on the SANDF into the regulations.'<sup>259</sup>

In *Minister of Defence & Others v South African National Defence Union; Minister of Defence & Others v South African National Defence Union & Another* ('*SANDU SCA*

254 The applicant (SANDU) was a trade union which represented somewhere between 33 per cent (according to the applicant) and 28 per cent (according to the respondents) of the SANDF. The applicant was the only military union which, along with the Department of Defence (DOD), as employer, had been admitted to the Military Bargaining Council (MBC). It was the only union which, at that stage, satisfied the required threshold of 15 000 members. The negotiations in the MBC had met with very little progress. A series of threats and counter-threats followed. An ultimately calmer view of the need for continuing negotiations prevailed — but the nature and the conditions for negotiation were viewed differently by the two sides. Those differences led to litigation over the constitutional, the statutory and the regulatory issues raised in the instant matter.

255 *SANDU HC III* (supra) at 256–257.

256 Ibid at 261.

257 *South African National Defence Union v Minister of Defence & Others; Minister of Defence & Others v South African National Defence Union & Others* 2007 (1) SA 402 (SCA) ('*SANDU SCA I*').

258 Ibid at para 25.

259 Ibid at para 29.

II'), the Supreme Court of Appeal revisited many of the issues raised in *SANDU HC II*.<sup>260</sup> The *SANDU SCA II* court found that almost all of the regulations in the General Regulations for the South African National Defence Force and Reserve held to be invalid in *SANDU HC II* were, in fact, constitutionally permissible. The sole regulation held to be constitutionally invalid was regulation 19. As Nugent JA, for the *SANDU SCA II* court, wrote:

Regulation 19 is clear in its terms. The matters that it purports to exclude from collective bargaining (the negotiation of a 'closed shop or agency shop agreement') are undoubtedly legitimate labour issues ... Counsel for the SANDF sought to persuade us that the exclusion of these matters from permitted bargaining was justified in a military establishment, but was not able to articulate precisely why that was so. Whether a closed shop or agency agreement is antithetical to a military establishment seems to me to depend on the terms of the particular agreement, and in particular on the bargaining unit to which such an agreement applies. While it is not difficult to envisage a closed shop agreement that is incompatible with a military establishment, it is also not difficult to envisage such an agreement that is compatible with it. I can see no reason, in the circumstances, why a total prohibition on negotiating such an agreement is reasonable and justifiable, and in my view the regulation was correctly declared to be invalid.<sup>261</sup>

As noted above, the Constitutional Court, in *SANDU CC II*, consolidated all the various *SANDU* cases that had percolated up through the High Courts and the Supreme Court of Appeal. The *SANDU CC II* Court rejected virtually all of *SANDU*'s challenges to the regulations (most of which concerned rights regarding collective bargaining.) It did, however, uphold a limited right for *SANDU* members to assemble or demonstrate (out of uniform) with regard to employment conditions in terms of regulation 8(b),<sup>262</sup> and rejected a claim by SANDF that 'the regulations do not impose an obligation upon it to exhaust the [collective bargaining] procedures set out in the regulations [because] the very purpose of the regulations is to prevent unilateral action by the SANDF in respect of the areas of permissible bargaining until the procedures provided for in the regulations have been exhausted.'<sup>263</sup>

## 23B.5 South African Intelligence Services

### (a) Composition, structure and functions

The intelligence services consist of two civilian intelligence agencies, the National Intelligence Agency ('NIA') and the South African Secret Service ('SASS'), together with the military intelligence division of the SANDF and the Crime Intelligence Division ('CID') of the SAP. The military intelligence division of the SANDF and the CID are autonomous entities falling under the control and the direction of the Departments of Defence and of Police respectively, whilst the

---

260 2007 (1) SA 422 (SCA) ('*SANDU SCA II*').

261 *Ibid* at para 16.

262 *SANDU CC II* (*supra*) at paras 81-82.

263 *Ibid* at para 72.

NIA and SASS were specifically created under the Intelligence Services Act.<sup>264</sup> A National Intelligence Co-ordinating Committee ('Co-ordinating Committee') is responsible for co-ordinating intelligence emanating from these different agencies. As to the membership of the current intelligence services, it is composed primarily of former operatives from the National Intelligence Service of the apartheid regime, the Department of Intelligence and Security of the ANC, the Pan-Africanist Security Service of the PAC, and the intelligence forces of the Transkei, Bophuthatswana, Venda and Ciskei.<sup>265</sup>

The President has the sole authority to establish an intelligence service. However, he possesses no authority to establish an intelligence division within the military or the police.<sup>266</sup> In addition, the President is required to appoint the head of the NIA and the SASS.<sup>267</sup> The President may choose to exercise political responsibility for any intelligence services he establishes. Or he can appoint a member of Cabinet to exercise this function.<sup>268</sup> In practice, the President has appointed a Minister for Intelligence Services, recently renamed the 'Minister for State Security', who works together with a Cabinet Committee on Security and Intelligence Affairs.

The principal task of the NIA is to inform government of threats to domestic security.<sup>269</sup> The SASS is responsible for foreign intelligence, excluding foreign military intelligence, and conducts intelligence regarding external threats, opportunities and other issues with the aim of promoting the national and security interests of South Africa.<sup>270</sup> The CID is restricted to the gathering of intelligence on crime.<sup>271</sup> The military intelligence division of the SANDF is responsible for domestic and foreign military intelligence.<sup>272</sup>

---

264 Act 38 of 1994. This Act has since been repealed and replaced by the Intelligence Services Act 65 of 2002.

265 K O'Brien 'Controlling the Hydra: A Historical Analysis of South African Intelligence Accountability' in H Born, L Johnson & I Leigh (eds) *Who's Watching the Spies? Establishing Intelligence Service Accountability* (2005) 200, 207.

266 FC s 209(1).

267 FC s 209(2). The NIA and SASS are each headed by a Director General appointed by the President. See Intelligence Services Act ss 3(a) and (b).

268 FC s 209(2).

269 National Strategic Intelligence Act 39 of 1994 s 2(1). Counterintelligence broadly refers to 'the protection of the state and its secrets from other states and organizations.' S Boraz & T Bruneau 'Reforming Intelligence: Democracy and Effectiveness' (2006) 17 *Journal of Democracy* 28, 30. The National Strategic Intelligence Act defines counterintelligence as '... measures and activities conducted, instituted or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence and any classified information, to conduct security screening investigations and to counter subversion, treason, sabotage and terrorism aimed at or against personnel, strategic installations or resources of the Republic'.

270 National Strategic Intelligence Act s 2(2).

271 National Strategic Intelligence Act s (2).

The intelligence agencies serve a function quite distinct from that of the SAP and SANDF. Their work is often done surreptitiously, requires close communication with the national executive, and is highly specialised. Moreover, intelligence gathering is inherently political in nature: its ultimate aim is to guide the executive in constructing policy decisions on sensitive issues concerning security and relations with other sovereign nations. Consequently, the constitutional provisions governing political control over the intelligence services differ somewhat from the nature of the oversight of other security services. Thus, while the duties and the responsibilities of the police and the defence forces are expressly provided for in the Final Constitution, these details, with respect to the intelligence services, are enumerated in national legislation.<sup>273</sup> Whereas a secretariat exercises civilian oversight over other services, an Inspector-General of Intelligence ('IG') fulfils this role with respect to the intelligence services.<sup>274</sup> Furthermore, with the exception of the intelligence services for police and defence, the President may exercise direct political control over the intelligence services.<sup>275</sup>

### **(b) Control, oversight and accountability**

Oversight refers to the process of holding the intelligence services accountable to the public for their actions and is largely an *ex post facto* exercise. An oversight mechanism for the intelligence services can be considered effective if it 'has an independent status from the executive, investigative powers, access to classified documents, and a committee able to keep secrets and sufficient expertise.'<sup>276</sup> Control, on the other hand, refers to the 'day-to-day management' of the intelligence services.<sup>277</sup> Control of intelligence agencies commonly rests with the executive. However, as with all government entities, specific officials are charged with the direct day-to-day functioning of the agencies.

### **(i) Parliamentary oversight**

272 National Strategic Intelligence Act s 2(4). Domestic and foreign military intelligence are separately catered for and defined in the Act. Domestic military intelligence refers to intelligence required for the planning and conduct of military operations within the country to ensure the safety of South Africans. Foreign military intelligence refers to intelligence regarding the war potential and military establishments of foreign countries that can be used by South Africa to plan its military forces in times of peace and for the conduct of military operations in times of war. The conduct of domestic military intelligence is restricted and proper authority must be obtained before the intelligence division of the SANDF can conduct intelligence covertly to support police within South Africa. See National Strategic Intelligence Act s 2(4) read with s 3(2).

273 See FC s 210.

274 See FC s 210(b).

275 Compare FC s 201(1) and FC s 206(1), which require the appointment of Cabinet members to exercise political responsibility for the defence force and the police, with FC s 209(2), which grants the President the option of assuming direct political responsibility.

276 H Born & L Johnson 'Balancing Operational Efficiency and Democratic Legitimacy' in Born et al (supra) at 226.

277 Ibid at 236.

As with the SANDF and the SAPS, a parliamentary committee, known as the Joint Standing Committee on Intelligence ('JSCI'), is responsible for monitoring the intelligence services.<sup>278</sup> The JSCI is empowered to investigate the intelligence community's activities on its own accord or upon receipt of complaints from the public.<sup>279</sup> In

carrying out its task, the JSCI is permitted to hold hearings, to subpoena witnesses, and to receive any information that is necessary for the performance of its mandate.<sup>280</sup> The JSCI receives annual reports from the Inspector General of Intelligence and the various intelligence services.<sup>281</sup> The committee itself must report annually to Parliament on its activities and those of the intelligence services.<sup>282</sup>

## (ii) Inspector-General

The Final Constitution requires that civilian monitoring of the intelligence services take place in the form of an Inspector-General appointed by the President and approved by a resolution adopted by at least two-thirds of the National Assembly.<sup>283</sup> In terms of the Intelligence Services Oversight Act ('Oversight Act'), an IG must be nominated by the JSCI and approved by two thirds of the members of the National Assembly. Section 7(1) of the Oversight Act states that the President 'shall' appoint a person who has been duly nominated and approved by Parliament. The import of this wording is that the President has no discretion when it comes to the appointment of an IG. He or she must implement the decision taken by Parliament.

In light of these provisions, the procedure for removal of the IG seems anomalous. Section 7(4) of the Oversight Act empowers the President to remove the IG from office on the basis of '... misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence as prescribed.' No specific provision is made for the JSCI to be consulted with regard to the dismissal of the IG. However, s 7(5) of the Oversight Act states that '[i]f the Inspector-General is the subject of an investigation by the [JSCI] in terms of sub-s (4) he or she may be suspended by the President pending a decision in such investigation.' One might infer from s 7(5) that

---

278 Intelligence Services Oversight Act 40 of 1994 ('Oversight Act') s 2. The composition of the JSCI is determined by the proportional representation of the political parties in Parliament. Oversight Act s 2(2)(a). The deliberations of the JSCI are not open to the public.

279 Complaints from the public can be referred to the head of an intelligence service or the IG for investigation. Oversight Act s 3(f). If the JSCI is of the opinion that a matter relates to the protection of constitutional rights, it may also refer the matter to the Human Rights Commission. Oversight Act s 3(g).

280 See Oversight Act ss 3(j), 4(1) and 4(3). The intelligence services may withhold information concerning the identities of intelligence operatives as well as the identities of sources of intelligence under certain circumstances. Oversight Act s 4(2).

281 Oversight Act ss 7(6) and 7(11)(d).

282 Oversight Act s 6(1).

283 See FC s 210(b).

the JSCI is empowered to undertake an investigation to establish whether the conduct of the IG satisfies any of the grounds for dismissal under s 7(4).

Although the Oversight Act may contemplate two discrete mechanisms for removal, the better reading of the aforementioned section requires that s 7(4) and s 7(5) be read together. Such a reading would permit the President to remove the IG only if the JSCI has undertaken an investigation and concluded that the IG's conduct meets the requirement of s 7(4). Such an interpretation better fits the National Assembly's powers of approval of the IG in terms of FC s 210. So although FC s 210(b) does not provide for the removal of the IG, once the National Assembly has approved a particular person for the post of IG, it makes sense that it should be consulted about his or her removal. Furthermore, this reading of the Act and FC s 210 possesses the added virtue of protecting the

---

RS3, 05-11, ch23B-p58

independence of the IG and of preventing him or her from being subject to undue pressure from the President through the threat of unilateral dismissal.<sup>284</sup>

In addition to oversight, the IG handles complaints from the public, as well as members of the intelligence services, about various forms of misconduct on the part of the intelligence services.<sup>285</sup> In order to carry out these functions, the IG has the power to enter any premises under the control of any intelligence service or any civilian premises that he or she deems it necessary to enter, and to demand intelligence information from members of the intelligence services or civilians in the possession of such information.<sup>286</sup> Over and above his investigative powers, the IG receives information in the form of annual reports as well as reports on '... any unlawful intelligence activity or significant intelligence failure' from the heads of the security services.<sup>287</sup> The IG is supported in his task by staff specifically assigned to him from the office of the Minister of Intelligence.<sup>288</sup> It seems obvious that such an assignment of intelligence staff undercuts the IG's independence. The IG can hardly be called independent when he or she takes direction or relies on operational

---

284 A further anomaly with regard to the dismissal of the IG is that, in terms of s 8(1)(d) of the Oversight Act, the Minister of Intelligence is empowered to make regulations with regard to the suspension or removal of the IG as well as the termination of employment of the IG. As discussed above, the Oversight Act appears to place the decisions regarding the appointment, dismissal and suspension of the IG with the President and the JSCI. The Minister does not have any role to play in this regard. It is therefore unclear how the regulations to be made by the Minister would fit into the sections discussed above. It is suggested that as s 7(4) of the Oversight Act requires that the President may remove the IG on the basis of '... misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence as prescribed' such regulations should be limited to defining the scope of the factors for dismissal listed in s 7(4) and defining the procedural aspects relating to suspension of or dismissal of the IG.

285 Oversight Act s 7(7)(cA).

286 Oversight Act s 7(8). In the case of civilians, the IG is only entitled to information if it is 'necessary' for the performance of his functions. An appropriate search warrant under the Criminal Procedure Act 51 of 1977 must also be obtained before civilian premises can be entered. Oversight Act s 7(8)(c). The same principles do not apply to information held by intelligence agencies. On the contrary, the Oversight Act s 7(9) specifically states that '[n]o access to intelligence information or premises contemplated in sub-s 8(a) may be withheld from the Inspector-General on any ground.'

287 Oversight Act s 7(11).

assistance from the very executive entities he or she may be called upon to investigate.<sup>289</sup> One can owe loyalty to but one master.

Some measure of independence — at least on paper — is secured by Parliament's control over the IG's budget.<sup>290</sup> (Of course, that last proposition assumes an independent Parliament with respect to budgetary matters: thus far, the Executive has demonstrated that it exercises the lion share of power over annual budgets and line items within the budget.)

---

RS3, 05-11, ch23B-p59

The office of the IG has been faced with a number of challenges. Prior to the commencement of the tenure of the previous IG in 2004, the office of the IG remained largely vacant. Government apparently could not attract a suitable candidate to hold down the position for more than a few months at a time.<sup>291</sup> The reason for this high turnover in the post remains unclear. However, the lack of a stable occupant in the post initially stunted the development of the IG's office.<sup>292</sup> The difficulties faced by an office operating under such limitations — and the dangers it posed to an intelligence community serving a constitutional democracy — were candidly summarized by Imtiaz Fazel in 2009:

Recent investigations conducted by the office have highlighted a number of abuses and malpractices in sections of the intelligence community, which has severely tested our oversight capacity and ability to access information. While we believe that we have acquitted ourselves well under very difficult circumstances, the challenges inherent in pioneering intelligence oversight in South Africa were amplified and many valuable lessons were drawn. In the process, the cardinal requirement upon which the democratic functioning of intelligence hinges, the rule of law and due process, was re-established, and *the notion of bending the rules* was banished from the philosophy of intelligence conduct, while the intelligence mandate was re-examined and tightened up in certain areas.<sup>293</sup>

---

288 Oversight Act s 7(12). The Minister is responsible for the appointment of such staff: but he or she is required to consult with the IG with regard to such appointments.

289 Ultimately, the report of the IG was rejected by the National Executive Council of the ANC. The ANC's NEC chose to launch its own investigation. Institute for Security Studies (*supra*) at 27. The rejection of the IG's report may indicate a lack of confidence and trust in the office. However, the rejection of the report may merely be a function of the hard-ball politics that have become a regular feature of the ANC presidential succession debate. It may not reflect a genuine lack of confidence in the IG.

290 Oversight Act s 7(13).

291 See O'Brien (*supra*) at 214.

292 The position was ultimately given the solidity and stability that it required. ZT Ngcakani held the post for a period of six years – from 2004 through 2010.

293 I Fazel *To Spy or Not To Spy? Intelligence and Democracy in South Africa* Institute For Security Studies Monograph No 157 (February 2009)(emphasis added)(OIG'S COO Fazel's admission regarding 'the bending of the rules' - and the abuse of the rule of law — within the intelligence services is noteworthy.)

The position was ultimately given the solidity and stability that it required. ZT Ngcakani held the post for a period of six years — from 2004 through 2010. As a high level ministerial report recognized, however, even a stable IG at the helm cannot make up for other deficiencies if 'there is a substantial gap between the Office of the Inspector-General's legislative mandate and its organizational capacity.'<sup>294</sup> Even with a current complement of 14 staff members — and a potential doubling of that staff to 28 — the report concluded that the IG lacked the manpower necessary to 'prevent and detect misconduct and illegality in the intelligence community ... without additional resources.'<sup>295</sup> It deemed the proposed budget increases insufficient to meet the IG's substantial responsibilities (even as it suggested reducing those responsibilities to solely those discharged by an ombudsman). Without substantially significant increases, the report found that the office of the IG could not carry out investigations into illegal or corrupt activity with the requisite independence. Moreover, as already noted above, its dependence on the NIA for both finances and administration compromised its capacity to review objectively the behaviour of the NIA.<sup>296</sup>

Such shortcomings in the office of the IG, and indeed in the intelligence services as a whole, were revealed in 2005 when the office of the IG undertook its

---

RS3, 05-11, ch23B-p60

first big investigation. Then Director-General of the NIA, Billy Masetlha, was accused of using the NIA to conduct surveillance operations on a number of South African civilians and abusing NIA structures for partisan political purposes. The alleged surveillance encompassed both physical surveillance by NIA agents and the interception of private communications in the form of telephone calls and e-mails. A prominent businessman and ANC politician complained to the Minister for Intelligence Services that he had been placed under surveillance. The Minister, in turn, requested that the IG conduct an investigation.<sup>297</sup> After examining the report on the Masetlha affair tabled by the IG, the JSCI noted that the office of the IG lacked a standard operating procedure for dealing with such investigations and that the office also suffered from a lack of adequate resources.<sup>298</sup> As I have already noted, the ability of the IG to perform his or her functions effectively hinges on the willingness of Parliament to provide a budget that will guarantee that the IG has a sufficient number of suitably qualified staff members.

---

RS3, 05-11, ch23B-p61

### **(iii) The National Intelligence Co-ordinating Committee**

FC s 210(a) requires that legislation provide for the coordination of all intelligence services. Accordingly, the National Strategic Intelligence Act<sup>299</sup> established the National Intelligence Co-ordinating Committee. Its primary function is to co-ordinate the intelligence supplied by the four intelligence services and to interpret that

---

294 J Matthews, F Ginwala & L Nathan *Intelligence in a Constitutional Democracy: Final Report to the Minister of Intelligence Services, Ronnie Kasrils, Ministerial Review Commission on Intelligence* (10 September 2008) 116.

295 Ibid.

296 Ibid at 117.

information so that it might be employed by policy-makers.<sup>300</sup> As a clearing house for the intelligence supplied by different agencies, the Co-ordinating Committee is meant to limit the ability of various intelligence services to manipulate information and, in so doing, to influence improperly the political decisions taken by policymakers.

The Co-ordinating Committee is comprised of the Intelligence Co-ordinator<sup>301</sup> and the Director Generals of the NIA and SASS, the head of the intelligence division of the SANDF, and the head of the CID of the SAPS.<sup>302</sup> The Co-ordinating Committee's direct clients are the President, Cabinet, and the Cabinet Committee for Security and Intelligence Affairs. Other clients include government departments, Premiers, provincial governments and parliamentary committees.

#### **(iv) Executive control and oversight**

---

297 See Institute for Security Studies 'Submission on Intelligence Oversight and Governance in South Africa' Document submitted to the Ministerial Review Commission on Intelligence (May 2007) available at <http://www.iss.co.za/uploads/intelsubmitmay07.pdf> (accessed on 6 May 2011) at 10-11. The surveillance was conducted as part of 'Project Avani'. Project Avani was an intelligence operation that was meant to investigate possible security risks to the country posed by the presidential succession debate within the ANC as well as the protests against poor service delivery that had erupted in many communities across the country. The operation was initiated by Masetlha in his capacity as the DG of Intelligence, allegedly upon the instruction of Cabinet. However, the Minister of Intelligence was never informed of its existence. The report of the IG found that Masetlha had not followed the correct NIA procedures in ordering the surveillance and that the interception of private communications had been illegal because no judicial authorisation was sought as required by s 16 of the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002. The IG also found that Masetlha had been involved in the so called 'hoax e-mail' saga. The hoax e-mails were a number of e-mails that purported to outline a political conspiracy against the former Deputy President of the country, Jacob Zuma. The IG's investigation concluded that Masetlha and various accomplices had fabricated the e-mails. Institute for Security Studies (supra) at 11-12. Masetlha was charged with fraud. However, the charges were eventually dismissed. In the wake of the Masetlha scandal, the Minister of Intelligence established an independent Ministerial Review Commission on Intelligence to assess the current structure and functioning of the civilian intelligence services. According to the Commission's terms of reference, the purpose of the review was to 'strengthen the mechanisms of control over the civilian intelligence structures in order to ensure compliance and alignment with the Constitution, constitutional principles and the rule of law, and particularly to minimise the potential for illegal conduct and abuse of power'. The Commission reviewed all the relevant legislation and policies around the security services and received submissions from the intelligence services, interested parties, civil society organisations and individual members of the public. The Commission handed its final report to the Minister of Intelligence Services in September 2008. See J Matthews, F Ginwala & L Nathan *Intelligence in a Constitutional Democracy: Final Report to the Minister of Intelligence Services, Ronnie Kasrils, Ministerial Review Commission on Intelligence* (10 September 2008), available at [http://www.ssronline.org/edocs/review\\_commission\\_final\\_report20080910.doc](http://www.ssronline.org/edocs/review_commission_final_report20080910.doc) (accessed on 18 May 2011).

298 Institute for Security Studies (supra) at 27.

299 Act 39 of 1994.

300 National Strategic Intelligence Act s 4(2).

301 The Intelligence Co-ordinator is appointed by the President at his sole discretion. National Strategic Intelligence Act s 5(1).

302 National Strategic Intelligence Act s 4(1).

Direct executive control of the NIA, SASS, crime intelligence and military intelligence is exercised by the Ministers of Intelligence, Police and Defence.<sup>303</sup> The Ministers report to the Cabinet Committee for Security and Intelligence Affairs. Since 2000, a National Security Council — comprised of the President, the Deputy President, and the Ministers for Safety and Security, Finance, Home Affairs, Defence, Intelligence and Foreign Affairs — has taken responsibility for general formulation of security policy.

The Masetlha scandal brought into stark relief some of the internal problems within the NIA. The litigation that ensued reflected an additional problem: a lack of clarity, in both the Final Constitution and the legislation on intelligence services, with respect to the suspension and the dismissal of the head of an intelligence service.

In *Masetlha v The President of the Republic of South Africa & Another*, the applicant, former NIA head Billy Masetlha, challenged his suspension and dismissal as Director-General of the NIA by President Mbeki.<sup>304</sup> The suspension was communicated by way of a letter signed by the Minister for Intelligence Services.<sup>305</sup>

---

RS3, 05-11, ch23B-p62

However, the President later recorded the decision as his own by way of a Presidential Minute.<sup>306</sup> Masetlha contended that the Presidential Minute was a belated attempt by the President to legalise Masetlha's suspension by passing it off as his own. The dismissal was effected through a notice bringing forward the date on which Masetlha's term of office was due to expire from 31 December 2007 to 22 March 2006.

Masetlha argued that the suspension and the dismissal constituted administrative action subject to the Promotion of Administrative Justice Act ('PAJA')<sup>307</sup> and that the actions taken had been procedurally unfair. The High Court rejected this argument. It found that — taking into consideration that there are no constitutional or other legislative provisions dealing with the dismissal of the head of the NIA — the President's power to dismiss the head of the NIA was inherent in his power to appoint him in terms of FC s 209(2). As a result, the President's power to dismiss fell within FC s 85(2)(e)'s grant of executive power and was not subject to PAJA.<sup>308</sup>

However, the High Court noted that while the powers of the National Executive in FC s 85(2)(e) are expressly excluded from the definition of action subject to review under PAJA, the courts still retained the authority to review the President's conduct in

---

303 Oversight Act s 7(11)(a) requires the heads of all the intelligence agencies to submit annual reports to the Minister in charge of that agency.

304 [2006] ZAGPHC 107 ('*Masetlha HC*').

305 Masetlha contended that the decision to suspend him had been taken by the Minister and not by the President and was consequently unlawful. The High Court found it unnecessary to decide this issue on the grounds that determining the validity of the dismissal rendered the suspension issue moot. *Masetlha HC* (supra) at 6.

306 FC s 101(1) requires all legally binding decisions of the President, or those taken in terms of national legislation, to be in writing.

307 Act 3 of 2000.

terms of the principle of legality or the rule of law doctrine.<sup>309</sup> The High Court concluded that for the exercise of executive power to be lawful, the power must not be exercised in bad faith, arbitrarily or irrationally.<sup>310</sup>

As a factual matter, it was common cause that the relationship of trust between the former Director-General and the President had broken down. (The degree of the breakdown remained a matter of dispute.) The President asserted that the relationship had been compromised by Masetlha's actions subsequent to the Inspector General's report and Masetlha's attacks on the President's integrity.<sup>311</sup> Masetlha contended that the breakdown was not irreparable and the relationship could be repaired if the President made 'appropriate amends' for the harm that the President had caused to Masetlha's reputation by suspending and then dismissing him.<sup>312</sup>

---

RS3, 05-11, ch23B-p63

The High Court ruled that, based on the role and the functions of the NIA in ensuring national security, the mutual trust between the Director General and the President is essential for the proper functioning of the NIA and for the safety of the public.<sup>313</sup> Given that Masetlha did not argue that the President acted in bad faith, the High Court held that the breakdown of trust — whatever its dimensions — was a rational basis for dismissal. The President's dismissal of Masetlha therefore constituted lawful executive action.<sup>314</sup> Masetlha took the matter on direct appeal to the Constitutional Court.<sup>315</sup>

---

308 *Masetlha HC* (supra) at 13-14. FC s 85(2)(e) provides: '[t]he President exercises the executive authority, together with the other members of the Cabinet, by performing any other executive function provided for in the Constitution or in national legislation.' The definition of administrative action in s 1 of PAJA specifically excludes the 'executive powers or functions of the National Executive'.

309 *Masetlha HC* (supra) at 14. FC s 1(c) provides: '[t]he Republic of South Africa is one, sovereign, democratic state founded on ... supremacy of the constitution and the rule of law.' As authority for this proposition, the High Court relied on the decisions of the Constitutional Court where it has held that the exercise of all public power must conform with the principle of legality. See, eg, *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC), [1999] ZACC 11 at paras 142-8. For more on the principle of legality and the rule of law doctrine, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

310 *Masetlha HC* (supra) at 15.

311 *Ibid.*

312 *Ibid.*

313 *Masetlha HC* (supra) at 15-16.

314 *Ibid.* at 17. Since the dismissal was found to be within the President's legitimate powers and lawful, it was unnecessary for the court to address the issue of the suspension.

A majority of the Constitutional Court found that the President — as a matter of fact, not law — had specifically relied on ss 12(2) and 12(4) of the Public Service Act<sup>316</sup> to shorten Masetlha's term of office. The President had not, in fact, relied on his powers of dismissal in terms of FC s 209(2).<sup>317</sup> Moseneke DCJ then held that s 12(2) and 12(4) of the PSA does not confer on a member of the executive the power to appoint or to dismiss a head of department. The provisions simply create a framework for the manner in which such appointment or dismissal may take place. The *Masetlha* Court further concluded that in view of the fact that no written employment contract was entered into with Masetlha, the ordinary principles of employment contracts were applicable to the manner in which the contract could be terminated. The President, as the employer, could not unilaterally change the terms of the contract.

However, the *Masetlha* Court then found that the dispute between the parties could not be reduced to a private law dispute about the unlawful termination of an employment contract. The power to appoint and to dismiss the head of the NIA is a public law power derived from FC s 209(2). So although, as a matter of fact, the President had not relied upon FC s 209(2), as a matter of law, the dispute had to be resolved by first determining whether this power had been properly exercised.<sup>318</sup>

---

RS3, 05-11, ch23B-p64

Some disagreement exists in academic circles as to the coherence of that last proposition. In *Minister of Education v Harris*, the Constitutional Court specifically held that if an official only has the power to do 'X' under a provision in Statute A, but relies on a provision in Statute B, the decision is invalid.<sup>319</sup> That, as the argument goes, is precisely what happened here. The *Masetlha* Court mentions *Harris* in passing but

---

315 *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) ('*Masetlha*'). The Court was willing to grant leave to appeal despite Masetlha's failure to approach the Supreme Court of Appeal on the basis that the issues did not involve development of the common law and there was thus no significant disadvantage in not having the benefit of a decision of the Supreme Court of Appeal.

316 Act 103 of 1994.

317 The relevant portions of PSA s 12(2) and 12(4) state: '(2) As from the date of commencement of the Public Service Laws Amendment Act, 1997 (a) a person shall be appointed in the office of head of department in the prescribed manner, on the prescribed conditions and in terms of the prescribed contract between the relevant executing authority and such a person for a period of five years from the date of his or her appointment, or such shorter period as that executing authority may approve ... (4) Notwithstanding the provisions of subsection (2), a contract contemplated in that subsection may include any term and condition agreed upon between the relevant executing authority and the person concerned as to ... (c) the grounds upon, and the procedures according to which, the services of the head of department may be terminated before the expiry of his or her term of office or extended term of office, as the case may be; and (d) any other matter which may be prescribed.' PSA s 3B(1)(a), in pertinent part, reads: 'Notwithstanding anything to the contrary contained in this Act, the appointment and other career incidents of the heads of department shall be dealt with by, in the case of (a) a head of a national department or organisational component, the President.'

318 *Masetlha* (supra) at paras 58-63.

319 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC).

avoids the logical consequences of a *Harris*-inflected syllogism. As Michael Bishop contends: 'The President picked the wrong section. End of story.'<sup>320</sup>

Other commentators such as Jason Brickhill and Jacques de Ville view the *Harris*-inflected position as unduly rigid and overly formalistic. De Ville writes:

It may occur that a public authority exercises its powers purportedly in terms of a specific statutory provision or it fails to state in terms of which statutory provision it had exercised its powers. [Questions arise] where a specific provision was mentioned [and] that that specific provision does not authorise the action, although another provision does, or — where none was mentioned — that there is in fact a provision that authorises such action. Would the action taken in such instance[s] be invalid? The approach of the courts is that such exercise of powers is not invalid provided the action is indeed authorised by another enabling provision.<sup>321</sup>

The Court agreed with the High Court that the power to dismiss the head of an intelligence service is a necessary corollary to the power to appoint and read this power into FC s 209(2) when read with s 3(3)(a) of the ISA<sup>322</sup> It rejected Masetlha's argument that allowing the President to rely on FC s 209(2), as an afterthought, violated the principle of certainty — a core component of the principle of legality. The actual certainty of the President's decision was reflected in his use of s 12(2) and 12(4) read with s 3B(1)(a) of the PSA — even if the statute itself did not grant the President the power to dismiss Masetlha. It held that although the President had — improperly — used the mechanism of the PSA to effect the dismissal, the source of the power exercised was ultimately to be found in FC s 209(2).<sup>323</sup>

The *Masetlha* Court then considered the question of whether the President's decision — taken in terms of FC s 209(2) — was nevertheless subject to review for procedural fairness. The majority held that the requirement of procedural fairness could hamper the ability of the executive to take appropriate policy decisions in such a sensitive domain as national security.<sup>324</sup> That said, the Deputy Chief Justice agreed with the High Court that executive decisions must comply with the requirements of the principle of legality. These principles require the exercise of

---

RS3, 05-11, ch23B-p65

power by the President to be rationally related to the purpose for which they were conferred.<sup>325</sup>

---

320 E-mail Correspondence with Michael Bishop (5 May 2011).

321 J De Ville *Judicial Review of Administrative Action in South Africa* (2003) 101-102, fn 107. Further support for this proposition can be found in *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at paras 62-63. I am grateful to Jason Brickhill for bringing this line of argument, and this body of literature, to my attention. E-mail Correspondence with Jason Brickhill (6 May 2011).

322 *Masetlha* (supra) at para 68.

323 *Ibid* at para 71.

324 *Ibid* at para 77.

325 *Masetlha* (supra) at paras 78-82.

The *Masetlha* Court concluded that the decision by the President to dismiss Masetlha based on an irretrievable breakdown of trust complied with the principle of legality. The *Masetlha* Court noted that even if procedural fairness had been required, those requirements had been satisfied. Masetlha had had a number of meetings with the Minister at which he gave his version of events, had been given a chance to hand in a report stating his views on the unauthorised surveillance, and had met with the President to discuss the matter prior to his dismissal.<sup>326</sup>

As far as the breach of the employment contract was concerned, the Constitutional Court held that the breakdown of trust did not entitle the President to terminate the contract unilaterally. However, it also found that reinstatement would not be an appropriate remedy given the trust that must exist between the head of the NIA and the President. Having regard, in particular, to the fact that the President had made a tender to pay out Masetlha for the duration of his contract (an offer which Masetlha declined), the majority then held that Masetlha was still entitled to some form of compensation commensurate with his position.<sup>327</sup> Given its general ratification of the President's dismissal of Masetlha, the majority found it unnecessary to engage the issues surrounding Masetlha's suspension.<sup>328</sup>

## **(c) Rights issues facing the intelligence agencies**

### **(i) Interception of private communications**

---

326 Ibid at paras 84–6.

327 Ibid at paras 87–9.

328 In his dissent, Ngcobo J found that Masetlha's employment had not been validly terminated. The minority was of the view that FC s 209(2) does not deal with the term of office or the terms and conditions of service of the head of a security service. Rather, FC s 209(2) contemplates that such issues would be dealt with in terms of the provisions of the PSA. Ibid at para 152. This conclusion was bolstered by reference to various provisions of the PSA which indicate that members of the NIA – including the Director-General of the NIA — fall within the purview of the PSA. The minority concluded that the power to appoint and dismiss the Director-General is regulated by s 12(2) and 12(4) of the PSA read with s 3B(1)(a). They give effect to FC s 209(2) and are not limited to determining the manner in which such appointment and dismissal is to take place. Ibid at paras 153–7. The minority agreed with the majority that the power to appoint implies the power to dismiss. However, with regard to the question of whether the decision taken by the President is subject to review, the minority decided that any such test of the President's exercise of power warranted much more than mere legality. It concluded that the Final Constitution contemplates that all exercise of public power must not only avoid arbitrariness but must also comply with the principle of fundamental fairness. Ibid at para 179. The minority offered FC s 33, which provides for the right to just administrative action, and FC s 34, which provides for access to courts, as evidence that that the Final Constitution contemplates review of executive decisions that is substantive in nature. Ibid at para 180. According to Ngcobo J, the Final Constitution embodies an objective normative value system that requires fairness, not mere rationality, from its political office bearers. Ibid at para 183. Ngcobo J then concludes that the President does not have the power to unilaterally and arbitrarily alter the term of appointment of the head of the NIA and that the opportunities given to Masetlha to meet with the Minister and the President and to submit a report on the unauthorised surveillance were insufficient to meet the requirement of fairness. Ibid at para 205. Professor Cora Hoexter has criticised the majority decision in *Masetlha*, for 'set[ting] the law of procedural fairness back twenty years'. C Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209, 210.

The intelligence agencies operate primarily in a covert manner. Their intelligence gathering operations encompass the secret surveillance of individuals and organisations and, as a consequence, the interception of private correspondence and communications between individuals. Such surveillance engages directly FC s 14(d)'s express protection of private communications.<sup>329</sup>

The Regulation of Interception of Communications and Provision of Communication-Related Information Act ('Interception Act') was adopted to ensure a proper legal framework for interception of private communications.<sup>330</sup> The preamble offers a glimpse of the sweeping nature of the powers granted to the Intelligence Services and the SAPS:

To regulate the interception of certain communications, the monitoring of certain signals and radio frequency spectrums and the provision of certain communication-related information; to regulate the making of applications for, and the issuing of, directions authorising the interception of communications and the provision of communication-related information under certain circumstances; to regulate the execution of directions and entry warrants by law enforcement officers and the assistance to be given by postal service providers, telecommunication service providers and decryption key holders in the execution of such directions and entry warrants; to prohibit the provision of telecommunication services which do not have the capability to be intercepted; to provide for certain costs to be borne by certain telecommunication service providers; to provide for the establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund; to prohibit the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment; to create offences and to prescribe penalties for such offences; and to provide for matters connected therewith.

A number of the Act's provisions give the reader cause for immediate pause. In many instances, a law enforcement officer is able to intercept any communication — without a warrant — if he or she believes that the interception of the

---

RS3, 05-11, ch23B-p67

---

329 The right to privacy, FC s 14, states: 'Everyone has the right to privacy, which includes the right not to have

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized;

(d) the privacy of their communications infringed.'

For more on FC s 14, see D McQuoid-Mason 'Privacy' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 38.

330 Act 70 of 2002. The Act has been amended three times. See Prevention and Combating of Corrupt Activities Act 12 of 2004 (effective as of 20 May 2005); Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (effective as of 20 May 2005); Electronic Communications Act 36 of 2005 (effective as of 19 July 2006).

communication is reasonably necessary.<sup>331</sup> In many instances, judicial oversight, by a designated judge, is ex post facto — to the extent that it is required at all. In other cases, the interception is vindicated by the permission of another party to the communication. These provisions, on their face, would appear to constitute prima facie violations of the right to privacy. Whether these 'reasonably necessary' incursions into private communications are constitutionally justifiable under FC s 36 is another matter. We live, sadly, in an age when all electronic communications can be — and are — analysed by intelligence agencies and private commercial entities around the world. While such incursions cannot be stopped, the courts can assert some authority with respect to the manner in which such private communications are used.

---

RS3, 05-11, ch23B-p68

## **(ii) Compliance with the principle of open justice**

331 Interception Act ss 4 and 5 read, in pertinent part:

4...

(2) Any law enforcement officer may intercept any communication if he or she is—

(a) a party to the communication; and

(b) satisfied that there are reasonable grounds to believe that the interception of a communication of another party to the communication is necessary on a ground referred to in section 16 (5)(a), unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.

5. Interception of communication with consent of party to communication

(1) Any person, other than a law enforcement officer, may intercept any communication if one of the parties to the communication has given prior consent in writing to such interception, unless such communication is intercepted by such person for purposes of committing an offence.

(2) Any law enforcement officer may intercept any communication if—

(a) one of the parties to the communication has given prior consent in writing to such interception;

(b) he or she is satisfied that there are reasonable grounds to believe that the party who has given consent as contemplated in paragraph (a) will

(i) participate in a direct communication or that a direct communication will be directed to him or her; or

(ii) send or receive an indirect communication; and

(c) the interception of such direct or indirect communication is necessary on a ground referred to in section 16(5)(a), unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.

(4) The law enforcement officer who intercepts a communication under subsection (1) or (2) must, as soon as practicable after the interception of the communication concerned, submit to a designated judge

(a) a copy of the written confirmation referred to in subsection (3)

(b) an affidavit setting forth the results and information obtained from that interception; and

(c) any recording of the communication that has been obtained by means of that interception, any full or partial transcript of the recording and any notes made by that law enforcement officer of the communication if nothing in the communication suggests that bodily harm, attempted bodily harm or threatened bodily harm has been caused or is likely to be caused.

## **(aa) MISS and the missing Open Democracy Bill**

It is somewhat ironic that with the end of the apartheid security state, we should then witness the construction of a new security apparatus with powers almost equal to its predecessor. On 4 December 1996 Cabinet approved the Minimum Information Security Standards ('MISS') document as national information security policy.<sup>332</sup> The 'MISS' purpose, as reflected in its introduction, is:

1. The need for secrecy and therefore security measures in a democratic and open society, with transparency in its governmental administration, is currently the subject of much debate, and will continue to be for a long time.
2. However, the issue need not be controversial, since the intended Open Democracy Act (not yet promulgated at the time of going to press) itself will acknowledge the need for protection of sensitive information, and therefore, will provide for justified exemption from disclosure of such information.
3. Although exemptions will have to be restricted to the minimum (according to the policy proposals regarding the intended Open Democracy Act), that category of information which will be exempted, as such needs protection. The mere fact that information is exempted from disclosure in terms of the Open Democracy Act, does not provide it with sufficient protection. Such information will always be much sought after by certain interest groups or even individuals, with sufficient access to espionage expertise, and highly sophisticated technological backing. The extent of espionage against the new South Africa should never be underestimated - it has actually escalated alarmingly during the past few years.
4. Where information is exempted from disclosure, it implies that security measures will apply in full. This document is aimed at exactly that need: providing the necessary procedures and measures to protect such information. It is clear that security procedures do not concern all information and are therefore not contrary to transparency, but indeed necessary for responsible governance.

At the time of press, the Open Democracy Act remains the Open Democracy Bill.<sup>333</sup> Thus, we continue to have the apparatus of a security state in place without an Act that vouchsafes an open and democratic society. We need an act that grants citizens access to documents of public interest that do not pose any threat to the nation's security. That Act ought to enable civil servants and judges to determine which documents may be released and which documents must remain classified.

## **(bb) Independent Newspapers and the principle of open justice**

---

(5) A telecommunication service provider who, in terms of subsection (2), has routed duplicate signals of indirect communications to the designated interception centre must, as soon as practicable thereafter, submit an affidavit to a designated judge setting forth the steps taken by that telecommunication service provider in giving effect to the request concerned and the results obtained from such steps.

(6) A designated judge must keep all written confirmations and affidavits and any recordings, transcripts or notes submitted to him or her in terms of subsections (4) and (5), or cause it to be kept, for a period of at least five years.

332 Available at [http://right2info.org/resources/publications/SA\\_Minimum%20Information%20Security%20Standards.pdf](http://right2info.org/resources/publications/SA_Minimum%20Information%20Security%20Standards.pdf) (accessed on 7 May 2011).

333 B67-98.

A good example of the consequences of the absence of such an Act — and the absence of political commitment to the principle of open justice — was reflected in *Independent Newspapers*.<sup>334</sup> Prior to the hearing — concerning the

President's dismissal of the Director General of the NIA — various government documents from the intelligence services forming part of the record were made publicly available on the Constitutional Court's website. A few days before the hearing, the Court noticed that some of the documents were marked 'Secret' and 'Confidential'. It removed all documents related to the case from its website and refused to make them available to journalists. The Independent Newspapers filed an urgent application requesting that the government documents and the record again be made public. Following a hearing on merits of the urgent application, and with the consent of the Minister for Intelligence Services, the better part of the record was again made public. However, the Minister continued to object to the disclosure of a limited set of documents that had been deemed classified or which contained classified information.

The released documents were quite benign. Moreover, most of the documents had not been classified in the first place. Those facts invariably begged the question as to why the Minister objected to their release to the editors and the lawyers of Independent Newspapers. As counsel for Independent Newspapers and the Freedom of Expression Institute argued:

[T]his Court's commitment to open justice in the conduct of its proceedings ... requires a challenge to the grounds for the Minister's continuing objection to the remaining restricted documents. Such a challenge can only be mounted by a party fully apprised of its target. Accordingly, Independent Newspapers' legal representatives and senior editors should be afforded sight of the remaining restricted documents, on the conditions specified or other reasonable conditions, in order to frame their submissions to this Court on whether the Minister's objection thereto should be sustained.

Only such in camera access would enable the senior editors to make a meaningful assessment as to whether the public would benefit from their release.

Counsel for Independent Newspapers grounded their claim for in camera review — or some mechanism that furthers public access to important political documents — in terms of a constitutional principle of 'open justice'. This principle, they argued, is a necessary consequence of a Bill of Rights committed: in FC s 16 to '(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas'; in FC s 34 to the resolution of 'any dispute that can be resolved by the application of law decided in a fair *public* hearing before a court'; in FC s 35(3)(c) to a '*public* trial before an ordinary court' and in FC s 1(c); to the 'rule of law'. Counsel did not create this principle out of whole cloth. The Constitutional Court had previously articulated the

---

334 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa & Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 ('*Independent Newspapers*').

grounds and content of this principle in *SABC*<sup>335</sup> and *Shinga*.<sup>336</sup> The *Shinga* Court wrote:

Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based... . Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal

---

RS3, 05-11, ch23B-p70

[matters] to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.<sup>337</sup>

In *SABC*, the Court explained the principle of open justice in the following terms:

[O]pen justice is observed in the ordinary course in that the public are able to attend all hearings. The press are also entitled to be there, and are able to report as extensively as they wish and they do so ... . Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. The values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to the time-honoured standards of independence, integrity, impartiality and fairness.<sup>338</sup>

After a further hearing, a majority of the Court rejected the interim request without reasons. Nevertheless, the *Independent Newspapers* Court then proceeded to hear the main question: Should the documents in question be made publicly available?

Independent Newspapers claimed that the Constitutional Court's commitment to the principle of open justice would require — with respect to allegedly classified documents — that:

- (a) Restrictions on public access to proceedings or any part thereof, should be an exceptional occurrence and occur only to the extent demonstrably justifiable;
- (b) Any restriction to all or a part of open court proceedings may be imposed only by court order following:
  - (i) a formal application to court;
  - (ii) on notice to interested parties;

---

335 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions & Others* 2007 (1) SA 523 (CC), 2007 (2) BCLR 167 (CC), [2006] ZACC 15 ('*SABC*').

336 *S v Shinga* 2007 (4) SA 611 (CC), 2007 (5) BCLR 474 (CC), [2007] ZACC 3 ('*Shinga*').

337 *Shinga* (supra) at paras 25–26.

338 *SABC* (supra) at paras 31–32.

- (iii) a hearing in open court on the issue of whether the proceedings or any part thereof should be subject to restriction;
- (c) where necessary the application to close proceedings may be heard partially, or entirely in camera;
- (d) this does not, however, dispense with the need for notice and the opportunity to oppose;
- (e) in exceptional circumstances the application may be brought ex parte under the usual condition that notice is subsequently given and that any party wishing to oppose may do so subsequently.

When the Constitutional Court did finally opine on the merits of this argument, it handed down a judgment with ramifications many had feared: namely, that in the absence of the promised Open Democracy Act, courts will be forced into constructing, *ab initio*, security classifications and rights to revelation that ought to have first been captured in legislation.

In a split decision, the Constitutional Court in *Independent Newspapers* offered up a number of different visions of the relationship between the principle of open

---

RS3, 05-11, ch23B-p71

justice and the protection of information deemed necessary for national security.<sup>339</sup> The majority judgment by Moseneke DCJ crisply captured the issues before the Court:

- (1) Does the right to open justice entitle Independent Newspapers to access to the restricted materials in the court record?
- (2) Does the Minister's objection premised on national security constitute adequate justification?
- (3) What is the proper approach to harmonising these competing constitutional claims? and
- (4) Is it desirable to set guidelines on a procedure to be adopted when a court record is sought to be withheld from the public?<sup>340</sup>

Moseneke DCJ, tracking *Shinga* and *SABC*, begins his analysis by noting that a constellation of fundamental rights inform the Court's determinations as to whether court documents ought to be released:

There exists a cluster ... of related constitutional rights which ... may be termed 'the right to open justice'. ... First, [FC] s 16(1)(a) and (b) provides in relevant part that everyone has the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas. [FC s] 34 does not

---

339 For further analysis of this case, see J Klaaren 'Open Justice and Beyond: *Independent Newspapers v Minister for Intelligence Services: In Re: Masetlha*' (2009) 126 *SALJ* 24; D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) §§42.9(c) and 42.9(g). See also J Klaaren 'Dominant Democracy in South Africa: A Reply to Choudhry' (2009) 2 *Constitutional Court Review* 87; J Klaaren 'Structures of Government in the 1996 Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3. Klaaren's work is notable for its unwavering commitment to understanding constitutionalism in terms of the interaction of the political institutions the basic law creates, and not simply assessing a constitutional jurisdiction's virtues in terms of the judgments that emanate from its highest court.

340 *Independent Newspapers* (supra) at para 15.

only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in [FC s] 35(3)(c), which entitles every accused person to a public trial before an ordinary court. [Moreover], this systemic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of State function.<sup>341</sup>

One might have thought that the Deputy Chief Justice would then go on to analyze the restrictions placed on the material in question in terms of this constellation of fundamental rights reinforced, as he notes, by FC s 1's commitment to an open and democratic society based upon the rule of law, constitutional supremacy and other founding values such as transparency, accountability and responsiveness. Not so.

Having noted the jurisprudential basis for the principle of open justice, the Deputy Chief Justice appears to change tack. Rather than analyze the applicant's request in terms of open justice, he writes:

---

RS3, 05-11, ch23B-p72

The 'exceptional circumstances' standard advanced is inconsistent with the design of our Constitution and the jurisprudence of this court on several counts. The better approach, I think, is to recognise that the cluster of rights that enjoins open justice derives from the Bill of Rights and that, important as these rights are individually and collectively, like all entrenched rights, they are not absolute. They may be limited by a law of general application provided the limitation is reasonable and justifiable. It is not uncommon that legislation and the common law in this country, and elsewhere in open and democratic societies, limit open court hearings when fair trial rights or dignity or rights of a child or rights of other vulnerable groups are implicated.<sup>342</sup>

But what law of general application does the Deputy Chief Justice have in mind? He does not say.<sup>343</sup> Were there to exist a law of general application in the matter, the first stage of analysis would require the Court to determine whether the law in question impaired the right to open justice or any one of the express substantive rights in the Bill of Rights that give the judicially created principle of open justice substance. Were a limitation found, the Court would then proceed to FC s 36 and determine whether the limitation of the rights asserted was justified.

No such analysis takes place in the majority's judgment.

---

341 Ibid at paras 39-40.

342 *Independent Newspapers* (supra) at para 44.

343 In his heads of argument, the Minister relied on s 4 of the 1982 Protection of Information Act: 'Section 4 of the Protection of Information Act 84 of 1982 prohibits the disclosure of protected documents or information in relation to, *inter alia*, security matters... . We submit that the definition of "security matter" which includes, but is not limited to, any matter dealt with by the Intelligence Services and any matter which relates to the functions of the Intelligence Services is wide enough to accommodate a legal prohibition on the unauthorised disclosure of information protected in terms of the MISS.' The Deputy Chief Justice would seem to accept the Minister's contention that s 4 authorized the restriction of access to documents that speak to national security concerns. See *Independent Newspapers* (supra) at fn 50. However, as we shall see, he later states that no statute or rule of law governs or speaks directly to the release of the documents under review. Ibid at para 55.

Instead, Deputy Chief Justice Moseneke rejects the 'exceptional circumstances' argument proffered by the applicants on the grounds that other constitutional and statutory imperatives place duties upon the state to secure information vital to the well-being of the commonweal:

The Constitution imposes upon the government the duties, amongst others, to preserve the peace and secure the wellbeing of the people of the Republic; to maintain national security; to defend and protect the Republic; to establish and maintain intelligence services; and to prevent, combat and investigate crime. Effect is given to these constitutional obligations through legislation, the establishment of institutions as permitted by law and by the exercise of executive authority vested in the President and the Cabinet. The Minister draws attention to the national information security policy, known as Minimum Information Security Standards (MISS), which was adopted by the Cabinet on 4 December 1998. It applies to all departments of State that handle classified information in the national interest. It provides for measures to protect classified information and empowers the Minister to protect information by classifying it as 'restricted' or 'confidential' or 'secret' or 'top secret'. In addition national legislation and regulations prohibit the disclosure of certain classified information.<sup>344</sup>

---

RS3, 05-11, ch23B-p73

One might have thought that the principle of open justice would have to be harmonized with these competing constitutional dictates, or that national information security policy — MISS — that restricted access to classified information would have to be tested against the principle of open justice in the context of judicial proceedings. Both approaches would reflect accepted forms of constitutional analysis. Again, the Deputy Chief Justice refuses to follow his own analysis of the matter before him. Instead, he contends that the analysis of the matter before the *Independent Newspapers Court*

must begin with the fact that ordinarily court proceedings and hence the record are open to the public. A mere classification of a document within a court record as 'confidential' or 'secret' or even 'top secret' under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.<sup>345</sup> ... . The classification of a document as classified does not in itself place these documents beyond the reach of the Court. As part of their inherent power to regulate their own process in terms of section 173, the Court may decide whether to make the documents available to the public or other parties.<sup>346</sup>

The Deputy Chief Justice then dispenses of the remaining leg of the argument advanced by the amicus curiae, the Freedom of Expression Institute: namely that the Court should establish clear procedures for the analysis of those documents that should remain classified and those documents that should enter the public domain. Though sympathetic to the request for clear guidance, the Deputy Chief Justice refuses this invitation. Instead, he falls back on the overused canard that each matter

---

344 Ibid at para 49.

345 *Independent Newspapers* (supra) at para 54.

346 Ibid at para 53.

will raise different issues and no rubric for declassifying documents can be laid out in advance of the specific facts brought before a court.<sup>347</sup>

Having refused to engage in rights analysis or establish guidelines for dealing with cases in which a court record is sought to be withheld, the Deputy Chief Justice falls back on FC s 173: Is it in the interests of justice for a court record to be opened or to be withheld? This test, according to the Deputy Chief Justice, becomes an entirely factual matter to be decided on a case-by-case basis:

It follows that where a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public. This forms part of a court's inherent power to regulate its own process that flows from section 173 of the Constitution. In my view, a court in that position should give due weight both to the right to open justice and to the obligation of the state to pursue national security within the context of all relevant factors. As in the present matter,

---

RS3, 05-11, ch23B-p74

it would not be concerned with a statute or other law of general application as the basis for restricting the disclosure of the material. In deciding whether documents ought to be disclosed or not, a court will have regard to all germane factors which include the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-disclosure on the ultimate fairness of the proceedings before a court. These factors are neither comprehensive nor dispositive of the enquiry.<sup>348</sup>

Moseneke DCJ goes on to hold that the grounds for refusal need not be 'exceptional':

I am, however, unable to agree with the submission that a restriction placed on public access to proceedings is only permissible as an exceptional occurrence and that the party seeking to restrict the court record bears a true onus of demonstrating that the restriction is justifiable. The logical consequence of this stance is that all court records may not be restricted except in exceptional circumstances, by a court order after a formal application, on notice to interested parties and after a hearing in an open court. In other words, I accept that the default position is one of openness. My difficulty arises in defining the circumstances in which that default position does not apply.<sup>349</sup>

Since the majority cannot define standards in terms of which the default position would not apply, it concludes that it can offer no standards at all. Its standard-free analysis results in the release of some documents and the refusal to produce others

---

347 Ibid at 48. Could it be that the reason the Court refused to accept FXI's submission is because it would require the Court to admit that it had acted improperly in removing the record from the public domain? Had they not done so, it is quite likely that nobody would have noticed (or cared) that a few of the documents had been deemed classified. After all, they were already in the public domain. See M Bishop 'Stamped: A Comparative Analysis of Access to Classified Documents in Court Records' (April 2009)(Paper on file with author.)

348 *Independent Newspapers* (supra) at para 55.

349 Ibid. at para 43.

deemed to contain sensitive information, such as the names of agents. The Deputy Chief Justice suggests that the Court's decision to release some documents while denying access to others was motivated, at least in part, by the Minister's determination to protect only those documents 'necessary to achieve specified national security objectives'.<sup>350</sup>

The dissenting judgments are substantially more sanguine about the ability to undertake fundamental rights analysis of open justice matters and to establish frameworks with which other courts could operate when asked to determine whether openness or security should win out. All three dissenting judgments agreed that 'the issue of the appropriate test should ... remain open to be decided on another day.'<sup>351</sup> It is an invitation that one trusts the Court will later take up.

One might also hope that any future judgment will be informed by Justice Yacoob's clear commitment to 'openness' and his witty 'Catch-22' take on the notion of 'secrecy' that animates the Minister's objections and the majority's concerns about national security with respect to documents already made public. His Hellenesque approach to such matters is expressly reflected in the following broadside that he delivers regarding the Court's ostensible inability to impose appropriate limits and sanctions on the use and the publication of sensitive documents:

---

RS3, 05-11, ch23B-p75

I was convinced that the responsible legal representatives and senior newspaper editors would handle the matter with sensitivity and care. I was also persuaded that all were bona fide and would comply with their undertaking not to publish the material. I accordingly concluded that the material should be made available to them. The NIA and the government would have been embarrassed by the information. I saw no possibility that the newspapers would have revealed the bungling, the identity of Mr Fichot, the foreign French intelligence service known as the DGSE, the names of the junior operatives or any information which might endanger them. The legal representatives and the newspaper editors are responsible citizens as much interested in the security of the South African State as anyone else might be, including the NIA, the Minister's attorneys and counsel, Mr Masetlha's attorneys and counsel in the High Court, the prosecuting team in the Hatfield Community Court, Mr Masetlha's legal team in the criminal proceedings before the Hatfield Community Court, certain staff members in the magistrates' court, certain staff members in the High Court, as well as 24 South African clerks and four foreign clerks employed in this court at the time.<sup>352</sup>

To find otherwise, Yacoob J intimates in his disarmingly cheeky concluding paragraph, would force one to describe all the parties to the matter — including the prosecuting authorities and Constitutional Court clerks — as potential 'enemies of the state.' But the true devious genius of his dissent flows from his ability to steal the case from the majority by making *all* of the interesting information in the documents public through his searching analysis — in the judgment — of why the majority was wrong not to disclose the previously classified information (as expressly revealed in the judgment).

Yacoob J's final words — on viewing ordinary citizens as enemies of the state — really belong to Justice Sachs. His dissent not only lays out the philosophical

---

350 Ibid at para 77.

351 Ibid at para 81 (Yacoob J).

352 *Independent Newspapers* (supra) at para 149.

foundations for the 'open and democratic society' contemplated by the Final Constitution, but constitutes a sweeping rejection of the majority's conclusions. In rebuffing the majority's cramped understanding of the Court's role in promoting an open and democratic society, while highlighting its failure to acknowledge the damage done by the security services under apartheid, Sachs J writes that 'special attention [must] be paid to the importance of openness, a theme that until now has not been given much attention in our jurisprudence.'<sup>353</sup> Sachs J writes that 'an open and democratic society', cannot, by definition, 'view its citizens as enemies.'<sup>354</sup> He continues:

Nor does it see its basic security as being derived from the power of the State to repress those it regards as opponents. Its fundamental philosophy is quite opposed to the authoritarianism of the past. Its starting point is not repression, but the promotion of positive elements of social stability, such as food security and job security. Above all, [our] society is bound together not by ties of arrogance combined with fear, but by a shared sense of

---

RS3, 05-11, ch23B-p76

security that comes to all citizens from the feeling that their dignity is respected and that each and every one of them has the same basic rights under the Constitution.'<sup>355</sup>

Contrary to the holding of the majority, Sachs J concludes that the default position for government documents is disclosure and that those instances that justify non-disclosure are, in fact, exceptional.

Van der Westhuizen J's dissent departs from the Deputy Chief Justice's opinion on the grounds that 'the test put forward in the majority judgment lacks specificity and provides insufficient guidance to courts on how to balance the competing interests of open justice and national security'.<sup>356</sup> His opinion comes closest to identifying the basis upon which future courts should assess the conflicting demands of the principle of open justice and the need for national security. After finding that the withholding of documents constitutes a limitation of the principle of open justice in terms of MISS, Van der Westhuizen J writes:

Upon a prima facie demonstration that the failure to disclose would implicate the right to a fair trial or any other right in the Bill of Rights, the government has to show that those individual rights are not implicated, or only minimally interfered with, or that non-disclosure is necessary for the preservation of national security. The number of documents withheld, the type of information withheld (such as individual names, locations of military installations, etc), and the percentage of the document withheld have to be evaluated. . . . A court should take into account the availability of the information in the public domain, how the documents came to be in the public domain . . . and whether further disclosure would increase the risks to national security... . Even if it is shown that national security requires non-disclosure, it must be shown that the non-disclosure that is specifically being sought is the least restrictive method to achieve the purpose. A court [faced with such a matter should] look favourably upon

---

353 Ibid at para 153.

354 Ibid at para 155.

355 *Independent Newspapers* (supra).

356 Ibid at para 170.

alternatives to full disclosure, or absolute non-disclosure, for example, redaction of highly sensitive materials, or summaries of documents that allow the public to understand the substance if not the specifics of the material. [Finally], [r]edaction is an especially attractive option when the material sought to be withheld relates to individual names.<sup>357</sup>

Van der Westhuizen J's dissent: (a) fits comfortably with approaches to disclosure of sensitive documents in foreign jurisdictions; (b) gives the principle of open justice appropriate recognition; and (c) suggests that standard two-stage Bill of Rights analysis could provide sufficient guidance to other courts faced with the challenge of whether and how to release sensitive documentation into the public domain.

### **(iii) The Protection of Information Bill: A necessary evil with potential constitutional infringements**

The Constitutional Court is likely to be confronted with far greater challenges to the principle of open justice, along with the constitutional ideals of transparency and accountability and the right of access to information, should the Protection of

---

RS3, 05-11, ch23B-p77

Information Bill become law.<sup>358</sup> The bill gives various organs of state — from the intelligence services to the police force to tourism boards to parastatals to Chapter Nine Institutions to parks boards and virtually every government ministry — broad powers to restrict access to information that they deem sensitive. The bill — as currently structured — is unlikely to pass constitutional muster in its entirety. At the same time, most of the commentary about the content of the bill has generated far more heat, than light. For example, when Nichola de Havilland, director of the Centre for Constitutional Rights contends that 'the Bill facilitates a culture of opacity and its corollary, the abuse of power,'<sup>359</sup> can she really be understood to prefer the out-dated 1982 apartheid-era act currently in place? We need new legislation to handle appropriately the classification of documents and to ensure that the public has access to information essential for well-informed decision-making and necessary for meaningful self-governance. We desperately need new legislation to provide the kinds of mechanisms for handling and revealing sensitive information commensurate with the requirements of a constitutional democracy, as Jason Brickhill contends, flawed as the current bill may currently be.<sup>360</sup>

Human Rights Watch ('HRW') offers a nuanced provision by provision assessment of the Bill. HRW submitted its review to Parliament's Ad Hoc Committee on the

---

357 Ibid at paras 179-182.

358 Protection of Information Bill, B 6-2010 (5 March 2008).

359 L Donnelly 'The Right to Demand Answers' *Mail & Guardian* (29 April 2011) 13, available at <http://mg.co.za/article/2011-04-29-the-right-to-demand-answers/> (accessed on 7 May 2011).

360 E-mail Correspondence with Jason Brickhill (7 May 2011).

Protection of Information Legislation for its consideration in November 2010.<sup>361</sup>  
Human Rights Watch's evaluation and primary critiques read as follows:

1. As it currently stands, the bill raises serious concerns about its compatibility with South Africa's human rights obligations under both international treaties to which it is a party and its own Constitution... . South Africa's obligations regarding freedom of information and expression derive from a number of sources: Articles 16 and 32 of the Constitution, Article 19 of the International Covenant on Civil and Political Rights (ICCPR), and Article 9 of the African Charter on Human and People's Rights. While these rights may be subject to restrictions on grounds of national security, the restrictions must be provided for in law, necessary to achieve a specific, permitted purpose, and be proportionate to the aim.
2. The burden of demonstrating the validity of the restriction rests with the government, which must show that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.
3. In addition, the Johannesburg Principles state that laws on public information must be accessible, unambiguous, and drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful. The laws should also provide for adequate safeguards against abuse, including access to prompt, full, and effective judicial scrutiny by an independent court or tribunal of any imposed restriction.
4. Weaknesses of South Africa's Proposed Protection of Information Bill:

---

**RS3, 05-11, ch23B-p78**

- a. Based on these standards and principles, we believe that South Africa's proposed Protection of Information Bill as currently drafted is overly broad and vague and would promote secrecy over transparency ... Its curtailing [of] the right of access to information to an extent that would be very damaging for public participation and good governance, which are central to South Africa's democracy. These concerns are compounded by the bill's proposed creation of a series of broad offences that impose substantial criminal penalties, and the absence of a public interest defense clause.<sup>362</sup>
- b. We therefore welcome the indications Minister Cwele has already given that sections ... of the Bill, relating to the withholding of information in the 'national interest' and protection of 'commercial information,' respectively, may be withdrawn... . As provided for in the Johannesburg Principles, the law should sanction the restriction of information only to protect a legitimate national security interest that is specifically and narrowly defined (Principle 12).
- c. Amend the scope of sections ..., which, taken together, allow a very wide category of persons to determine what information may be subject to classification, a situation which is likely to lead to over-classification and abuse. Moreover as pointed out by the Human Rights Commission, the scope of persons empowered under section 16 is inconsistent with the Promotion of Access to Information Act.

---

361 Human Rights Watch 'South Africa: Revise Protection of Information Bill - A Letter to Mr CV Burgess, Chairperson of the Ad Hoc Committee on the Protection of Information Legislation (November 23, 2010), available at [www.hrw.org](http://www.hrw.org), (accessed on 1 April 2010.)

362 See, eg, POI Bill Chapter 12, ss 44-56.

- d. Amend Chapter [12]: [they] create overly broad offences. These offences, which range from 'hostile activity offences' to 'prohibition of disclosure of state security matter,' are punishable for up to 25 years, yet are very broad, with ill-defined concepts of intent. Under such provisions, a person could face criminal sanctions, for example, for unauthorized communication, delivery, collection, or copying of 'top secret' information without knowledge of the potential harm the information could pose. No person should be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.
- e. No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.
- f. Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.
- g. [The Act ought to embrace] a public interest defense clause that recognizes the standard codified in principle 13 of the Johannesburg Principles: ... . all laws concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.
- h. [The Act ought to provide] an effective mechanism to oversee classification decisions that would result in information not being subject to disclosure. Any decision to classify information so that it cannot be disclosed should be reasoned and in writing and subject to a review of the merits by an independent judicial authority.<sup>363</sup>

---

RS3, 05-11, ch23B-p79

Human Rights Watch's request for an 'effective mechanism' brings to mind a number of the specialist courts, commissions, tribunals and Chapter Nine Institutions that work so well in various realms of the South African legal system (those fora that engage, for example, issues of competition, labour, tax, human rights, gender relations and alternative dispute resolution). A system in which each and every government information-related request (or denial or punishment) had to be reviewed by a court of law would be unduly cumbersome. An independent, specialized tribunal would likely prove superior in terms of efficacy, efficiency and justice. Thus far, the Minister for State Security has rejected this proposal and only committed the state to the creation of an advisory board that assist the Minister with requests for declassification.

Perhaps the most balanced account of the Bill, as it currently stands, is offered by media law experts Dario Milo and Okyerebea Ampofo-Anti.<sup>364</sup> Milo and Ampofo-Anti credit State Security Minister Siyabonga Cwele for engaging the public on the Bill and for making some necessary changes. That said, they take the Minister to task for doing no more than narrowing the 'overly broad' definition of national interest found

---

363 Ibid.

364 See D Milo and O Ampofo-Anti 'A Baby Step when a Quatum Leap is Needed' *Business Day* (9 September 2010) available at <http://www.businessday.co.za/Articles/Content.aspx?id=122234> (accessed on 11 May 2011).

in the Bill. (The Minister's failure to keep his word in this regard will disappoint Human Rights Watch as well.) The absence of a public-interest defence is also difficult to explain. Such a defense does not automatically immunize a person who discloses information from potential prosecution. As Milo and Ampofo-Anti note: 'Editors and whistleblowers will have to apply their minds diligently to whether a public interest justification may reasonably be employed to reveal the information, and if they get it wrong there is a risk of imprisonment.'<sup>365</sup> The absence of a carefully crafted defence will invariably chill the ability of the media and other social actors to expose 'wrongdoing, hypocrisy, mismanagement, criminality and gross negligence.'<sup>366</sup> Perhaps the most disheartening provision of the bill can be found in Chapter 13 (said to govern the protection of information in courts). Whereas the principle of open justice currently allows courts to regulate their own processes when it comes to the public disclosure of court documents, the proposed bill would require the court submissions from the 'classifying authority; providing that these submissions 'may not be publicly disclosed'; and that any hearing 'must be held in camera'.' According to Milo and Ampofo-Anti, the public gets the wrong end of the stick: the state should be the party that offers justification for maintaining the secrecy of the classified documents.<sup>367</sup>

Milo and Ampofo-Anti analysis also buttresses the claim made above that a POI Act so constructed will clash directly with the Court's principle of open justice: either the courts may, under FC s 173 and other constitutional provisions, control their own processes and the documents in their possession or they may not. As matters currently stands, the Bill and the principle are on a collision course that cannot but result in constitutional litigation that potentially pits the Constitutional

---

RS3, 05-11, ch23B-p80

Court against the Executive in the never-ending battle between security and liberty that takes place in societies that claim to be 'open and democratic'.

The Freedom of Expression Institute ('FXI') has added its own well-considered criticism to the mix.<sup>368</sup> FXI identifies a number provisions in the Bill as particularly worrisome and suggests a number of positive mechanisms for engagement between the state and the public over ostensibly sensitive documents:

1. The 'double blind provision' is ... fundamentally unconstitutional. It invites an element of untruthfulness, equivocation and obstruction of fair and reasonable enquiry. It is virtually impossible to make any reasonable headway in discovering the true state of affairs when such provisions are in operation. The provision allows public servants rights which are directly contradictory to the obligations that the Bill imposes on all citizens not to provide false information to Intelligence Services.

---

365 Milo and Ampofo-Anti (supra).

366 Ibid.

367 Ibid.

368 Freedom of Expression Institute 'Comprehensive Submission to the Ad Hoc Committee on Intelligence Legislation in respect of the Protection of Information Bill (20 June 2008) available at [www.fxio.org](http://www.fxio.org). D Steward 'South Africa's Orwellian Information Bill' *PoliticsWeb* (14 July 2010) available at [www.politicsweb.co.za](http://www.politicsweb.co.za).

2. The crucial role of the media ... will be adversely affected by the omission of a 'public interest clause.' The severe penalties included in the Bill will have a powerful disincentive effect on investigative journalism. It is cold comfort to purport that prosecutions would not be lightly undertaken since the threat constitutes a proper Sword of Damocles.
3. The creation of an Ombud type office would go a long way to allaying the disquiet of the public regarding intelligence affairs. [An] Ombud would [be] a ... cost effective method of addressing inquiries and complaints in respect of the status of classified information.<sup>369</sup>

The concerns expressed by HRW, FXI, Milo and Ampofo-Anti constitute neither idle speculation nor overheated rhetoric.<sup>370</sup> They strike, as Jason Brickhill would have it, the proper balance between constitutionally mandated rights of access to various kinds of information and undue interference with the government's discharge of its responsibilities to protect the commonweal. All agree that the need for a post-apartheid era Act is a matter of pressing concern. As HRW noted in its 2011 Country Report on South Africa, government intimidation of journalists has taken on the appearance of official ANC party policy:

On August 4, 2010, Mzilikazi Wa-Afrika, a prominent journalist with the *Sunday Times* who had exposed corruption by officials, was arrested without a warrant by 20 policemen in six vans. He was then taken to a secret location in Mpumalanga and interrogated at 2 a.m. without a lawyer. The police also searched his home and took notebooks without a search warrant. Wa-Afrika was eventually released on R5,000 (US\$725) bail after his newspaper went to the High Court; the charges cited upon his arrest have since been dropped. The

---

RS3, 05-11, ch23B-p81

incident heightened fears that such politically motivated intimidation of the press could become the norm if the ANC-proposed tribunal is established.<sup>371</sup>

## 23B.6 Other Role Players in the Security Sector

### (a) The Directorate for Special Operations ('DSO' or 'Scorpions')<sup>372</sup>

The Scorpions were, until 2009, the most 'visible' law enforcement operation in the country. And by visible, I do not mean their 'day-to-day' operations. Rather, the Scorpions made their mark by laying the foundation for the prosecution of a broad array of organized crime syndicates, political officials and prominent private figures.

Jean Redpath, the author of the leading monograph on the activities of the DSO,<sup>373</sup> described the manner in which the DSO decided whether a matter fell within their

---

369 Ibid.

370 At the time of press, several other prominent voices expressed their opposition to the Bill, including former Intelligence Minister Ronnie Kasrils, the Public Protector, Thuli Mandosela, and ANC-alliance partner COSATU. See South African Press Service 'Rushing Info Bill is Worrying' — Kasrils *News24* (1 June 2011) available at [www.news24.com/South Africa/Politics/Rushing-info-bill-is-worrying-kasrils-20110601](http://www.news24.com/South Africa/Politics/Rushing-info-bill-is-worrying-kasrils-20110601); SAPA 'COSATU: Proposed Info Bill "Goes Against Will of the People"' *Mail & Guardian* (4 June 2011) available at [www.mg.co.za/article/2011-06-01-proposed-bill-goes-against-will-of-the-people](http://www.mg.co.za/article/2011-06-01-proposed-bill-goes-against-will-of-the-people).

371 Human Rights Watch 'Report on South Africa' *Country Reports* (2011) available at [www.hrw.org](http://www.hrw.org) (accessed on 1 April 2011.)

operational mandate as follows: 'In deciding whether to declare an investigation, ... the first criterion [was whether] the matter concerned [fell] within the strategic focus areas of the DSO. The DSO ... refined these as being: drug trafficking, organized violence (including taxi violence, urban terror and street gangs), precious metals smuggling, human trafficking, vehicle theft and hijacking syndicates, serious and complex financial crime, and organised public corruption... . A further fourteen general criteria or factors [then had to be] taken into account.'<sup>374</sup> The DSO's broad brief, and the apparent independence with which the DSO operated, garnered significant attention. The DSO initiated or had been drawn into investigations associated with the arms deal, the accusations of bribery surrounding Jacob Zuma, Hout Bay Fishing Industries, Nigerian 419 scams, and high levels of fraud within both the Road Accident Fund and the Land and Agricultural Development Bank of South Africa. Redpath makes out an extremely compelling case for the DSO being quite good at what it was asked to do:

On average, 90% of cases prosecuted result in convictions. In one region of the DSO, the rate is even higher, at 97%. This suggests that the DSO is astute in choosing to prosecute

---

RS3, 05-11, ch23B-p82

only those cases likely to be successful in court. The data also suggests that the DSO is unlikely to make a frivolous arrest: the ratio of envisaged and finalised prosecutions to arrests is 92%, suggesting that almost all arrests lead to prosecutions. The DSO also appears to have been somewhat restrained in carrying out searches: only 166 searches were conducted, which works out to about one per finalised investigation. Again, this suggests that searches are conducted only where necessary, thereby not squandering resources.<sup>375</sup>

In 2007, I opined that the DSO might find itself the victim of its own success. The high conviction rate and the high profile of its targets led many politicians to call for its incorporation into the SAPS.

---

372 The Scorpions had a long, venerable and complicated legislative history. Their first predecessor – The Office for Serious Economic Offences ('OSEO') – was established during 1992 in terms of the Investigation of Serious Economic Offences Act 117 of 1991. The OSEO was then incorporated into the National Prosecuting Authority as an Investigating Directorate in terms of s 43(7) of the Act. Proclamation R123 of 1998, *Government Gazette* 19579 (4 December 1998) identifies the categories of offences that fall within the mandate of the Investigating Directorate Serious Economic Offences ('IDSEO'). The Investigating Directorate Organised Crime and Public Safety ('IDOC') was established by Presidential Proclamation R102 of 1998, *Government Gazette* 19372, (16 October 1998). The IDSEO was granted fairly broad discretion to identify and to investigate areas deemed essential for national safety. On 8 July 1999 the Minister of Justice and Constitutional Development, on behalf of the President, announced the establishment of the DSO. A further Investigating Directorate – the Investigating Directorate Corruption ('IDCOR') – was established in terms of Proclamation R14/2000, *Government Gazette* 20997 (24 March 2000). The DSO, although able to operate in terms of the other Investigating Directorates, only came into being in terms of a further Amendment to the National Prosecuting Authority Act. R3/2001, *Government Gazette* 21976 (12 January 2001).

373 J Redpath *The Scorpions: Analysing the Directorate of Special Operations* Institute for Security Studies Monograph 96 (March 2004) available at <http://www.iss.co.za/uploads/Mono96.pdf> (accessed on 7 May 2011).

374 Ibid at Chapter 6.

375 Redpath (supra) at Chapter 7.

The relationship between the DSO and the SAPS was particularly acrimonious. While the reasons given for the disputes vary, most turned on the overlap of their respective jurisdictions.<sup>376</sup> By 2005, the relationship was so severely impaired that the President appointed an independent commission headed by Judge Sisi Khampepe ('Khampepe Commission') to inquire into the mandate and the location of the DSO.<sup>377</sup> The Khampepe Commission was asked specifically for advice as to whether the DSO should be relocated from the NPA and incorporated into the SAPS.<sup>378</sup>

The SAPS contended that the DSO, as an entity carrying out investigations and law enforcement, ought to be located within the SAPS and to operate under the political control of the Minister of Safety and Security. The DSO opposed this suggestion.<sup>379</sup> Other parties drew attention to 'excessive' media attention given to the work of the DSO. Still others complained that the DSO and the NIA failed to cooperate sufficiently with regard to intelligence gathering activities.<sup>380</sup>

Ultimately, the Commission recommended that the DSO remain within the NPA. It found that no constitutional restriction existed on having a law enforcement agency located within the prosecuting authority: the only constitutional imperative was that the prosecuting authority remain independent.<sup>381</sup>

The Commission offered a number of recommendations to improve the working relationship between the DSO and other security agencies. The most significant of these suggestions was that the political responsibility or oversight responsibility for the DSO be shared by the Minister of Safety and Security and the Minister of Justice and Constitutional Development. The Minister of Safety and Security would exercise control over the law enforcement component of the DSO's activities. The Minister of Justice and Constitutional Development would

---

RS3, 05-11, ch23B-p83

oversee the DSO's work for the NPA. The Commission further found that the Ministerial Co-ordinating Committee ('MCC') set up under the NPA Act to co-ordinate the activities of the DSO and the SAPS was not functioning properly. It recommended that a new committee be set up to support the MCC.

- 
- 376 P Mashele 'Will the Scorpions Still Sting? The Future of the Directorate of Special Operations' (2006) 17 *SA Crim Quarterly* 25, 25.
- 377 Government Communications 'Statement on the Report of the Khampepe Commission' (29 June 2006) available at [www.info.gov.za/speeches/2006/06062915451001.htm](http://www.info.gov.za/speeches/2006/06062915451001.htm) (accessed on 22 October 2007).
- 378 F Blandy 'Khampepe: Leadership must Walk the Same Walk' *Mail & Guardian* (13 October 2005) available at <http://mg.co.za/article/2005-10-13-khampepe-leadership-must-walk-the-same> (accessed on 7 May 2011). See also E Mabuza 'Report on Elite Unit Still with Mbeki' *Business Day* (19 August 2005) available at [http://www.armsdeal-vpo.co.za/articles08/elite\\_unit.html](http://www.armsdeal-vpo.co.za/articles08/elite_unit.html) (accessed on 7 May 2011).
- 379 Blandy (supra).
- 380 Mashele (supra) at 25-26.
- 381 The report is available at <http://www.thepresidency.gov.za/docs/reports/khampepe/> (accessed on 7 May 2011).

With regard to the SAPS, the Khampepe Commission recommended that the SAPS's investigations and law enforcement capacity be enhanced so that it possessed capacity comparable to that of the DSO. The Commission was critical of the DSO's media strategy and recommended that the organisation should refrain from publicising its investigations in a manner that could be prejudicial to the rights of the person under investigation. The Commission also recommended that the Independent Complaints Directorate be empowered to receive and to investigate complaints against the DSO.<sup>382</sup>

The recommendations of the Khampepe Commission were approved and accepted by Cabinet and the National Security Council.<sup>383</sup> But the acceptance and approval of the Commission's recommendations proved hollow indeed. A resolution of the African National Congress' December 2007 National Conference in Polokwane called for the dissolution of the DSO. The ANC-led government ultimately disbanded the DSO in 2009. The National Prosecuting Authority Amendment Act,<sup>384</sup> assented to on 27 January 2009, repealed the enabling provisions that had created the DSO.<sup>385</sup> The DSO was replaced with the Directorate of Priority Crimes Investigation ('DPCI' or 'Hawks') through amendments to the NPA Act and the SAPS Act.

Was the DSO a 'victim of its own success'? While one would rather not entertain idle speculation, the series of events described above — from the Polokwane Conference to the (ignored) Khampepe Commission report to the subsequent disbandment of the DSO — suggest, at the very least, government discomfort with the DSO method of operation and its targets. Moreover, while the Constitutional Court is in no position, as an institutional matter, to discuss the 'naked preferences' that may have motivated the dissolution of the DSO, its finding in *Glenister II* that the subsequent creation of the DPCI failed to meet the constitutional desiderata and the demand for an effective independent law enforcement unit lend some support for the view that the DSO was, in fact, a victim of its own success at rooting out public and private corruption.

## **(b) Directorate of Priority Crimes Investigation ('DPCI' or 'Hawks')**

### **(i) Powers and Functions of the DPCI**

The DPCI was created shortly after the dissolution of the DSO through an amendment to the SAPS Act.<sup>386</sup> The DPCI was quite consciously designed to assume the

---

RS3, 05-11, ch23B-p84

'powers, investigations, assets, budget and liabilities of the DSO'.<sup>387</sup> It would be, however, incorrect to infer from the words of the SAPS Amendment Act that the DPCI

---

382 Government Communications 'Statement on the report of the Khampepe Commission' (29 June 2006). [www.info.gov.za/speeches/2006/06062915451001.htm](http://www.info.gov.za/speeches/2006/06062915451001.htm) (accessed on 22 October 2007).

383 Ibid.

384 Act 56 of 2008.

385 Preamble.

386 SAPS Amendment Act 57 of 2008.

is identical in function and power to the DSO. The pertinent differences between the two entities are made clear in the Constitutional Court's judgments in *Glenister I* and *Glenister II*.

## (ii) **Glenister I: Not ripe enough**<sup>388</sup>

The *Glenister* litigation began in 2008 when Hugh Glenister, a South African businessman, challenged a bill tabled in Cabinet designed to disband the DSO. Glenister's initial challenge in the North Gauteng High Court was dismissed on 27 May 2008.<sup>389</sup> The High Court held that it did not have jurisdiction to hear the matter. Glenister then appealed directly to the Constitutional Court.

The Chief Justice in *Glenister I* requested argument solely on one point: '[W]hether, in the light of the doctrine of the separation of powers, it is appropriate for this Court, in all the circumstances, to make any order setting aside the decision of the National Executive that is challenged in this case.'<sup>390</sup> The case turned almost entirely on the timing of the application. That is, the Constitutional Court expressed concern about its involvement in the legislative process prior before a bill was enacted as an Act of Parliament. The *Glenister I* Court held that such abstract review should occur only on exceptional occasions and that intervention would only be appropriate 'if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible.'<sup>391</sup> That standard was not met. The legislation could always be challenged after it was enacted.

Given that *Glenister I* has been supplanted by *Glenister II*, and that the *Glenister I* Court, following *Doctors for Life*, was absolutely correct for dismissing the claims before they were ripe, one might be inclined to overlook (entirely) the *Glenister I* Court's refusal to engage the substantive grounds for the action. In addition to timing issues, the *Glenister I* Court was asked to address substantive concerns regarding the status of ostensibly 'independent' entities — such as the DSO — under the Final Constitution and the extent to which such entities could be undermined by a dominant political party. The question can hardly be said to be new. In the Court's ur-text — *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the*

---

387 Preamble.

388 *Glenister v President of the Republic of South Africa & Others* 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC), [2008] ZACC 19 ('*Glenister I*').

389 [2008] ZAGPHC 143.

390 *Ibid* at para 9.

391 *Ibid* at para 43.

important grounds for refusing certification of the Constitutional Assembly's New (Constitutional) Text were that the New Text failed to vouchsafe the independence of such entities as the Auditor-General and the Public Protector and fell short with respect to the special majority amendment requirements necessary to protect the Bill of Rights. Both shortcomings were deemed to undermine the 34 Constitutional Principles' clear commitment to a constitutional democracy based upon the rule of law and constitutional supremacy. When the question of the politicization of independent organs of state such as the DSO was put before the *Glenister I* Court, it offered a somewhat puzzling answer:

The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it. Moreover, the considerations raised by the UDM do not establish that irreversible and material harm will eventuate should the Court not intervene at this stage.<sup>393</sup>

Again: the issue here is not about timing — for the Court's approach is irreproachable on that score. However, it did feel obliged to respond to the quite brazen formulation of the problem by the United Democratic Movement: the Constitutional Court must act 'because nobody else will'.<sup>394</sup>

### (iii) Between *Glenister I* and *Glenister II*: Legality, rationality review and an anti-domination doctrine

As Jason Brickhill and others have asked, what if the *Glenister I* Court had been in a position to address the substantive concerns raised by the United Democratic Movement? For starters, as Theunis Roux has repeatedly made clear, the Court in such a charged case would have had to navigate between the Scylla of principal and Charybdis of pragmatism in order to maintain its moral, social, political and institutional legitimacy.<sup>395</sup> But, of course, that would only be a start. Had it concluded that a principled basis existed for the challenge, it would have had to identify the constitutional principle that would support such a challenge. Brickhill suggests that one consequence of a successful constitutional challenge — again assuming the time was right — might have been a more robust conception of the legality doctrine and rationality review. That contention, it turns out, is not an idle arm-chair rumination.

392 1996 (4) 744 (CC), 1996 (10) BCLR 1253 (CC), [1996] ZACC 26 ('*First Certification Judgment*'). See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC), [1996] ZACC 24 ('*Second Certification Judgment*').

393 *Glenister I* (supra) at para 43.

394 *Ibid.*

395 See T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106. See also See T Roux *The Politics of Principle: The First South African Constitutional Court 1995-2005* (forthcoming 2012); F Michelman 'On the Uses of Interpretive Charity: Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1.

Support for Brickhill's intuition pump can be found in recent work by Sujit Choudhry on constitutional courts that operate in a one party dominant democracy. Choudhry's arguments amplify many of Roux's points on the challenges that face our Constitutional Court in our 'one party dominant democracy'.<sup>396</sup> In his analysis of South Africa's Constitutional Court and similarly situated apex courts, Choudhry begins by noting that a social-liberal constitutional

system characterised by the (largely unopposed) dominance of a single party over the political system almost invariably suffers from a common mix of pathologies — from rent-seeking behaviour, corruption in the public domain and the private domain and the use of the political dominance for the economic gain of the party and its further entrenchment as the only party in town.<sup>397</sup> Choudhry does not deny the difficulties faced by constitutional courts that operate in such a political environment. Instead, he identifies legal strategies that can be deployed by a court faced with blatant abuses of power and furtive attempts to skirt the dictates of the basic law. A court with constitutional jurisdiction might well expand its actual jurisdiction by relying, as I noted above, on the kind of rule of law arguments that drove the Constitutional Court's conclusions in the *First Certification Judgment* and in subsequent path-breaking 'legality doctrine' decisions in *Fedsure*<sup>398</sup> and *Pharmaceutical Manufacturers*.<sup>399</sup> *The rationality arguments that underpin the legality doctrine are narrow enough so that it can accommodate allegations of corruption without appearing to unnecessarily intrude on domains that clearly remain within executive and legislative prerogatives.*<sup>400</sup> Choudhry describes this new spin on the legality doctrine as an 'anti-domination doctrine':

*Anti-domination* is a doctrine that would render illegitimate any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party. Deliberate attempts to co-opt and fragment the opposition are two examples of measures that would trigger the operation of the doctrine, although a range of different policies might achieve the same end. The

---

396 S Choudhry "'He had a mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

397 For an 'only game in town' case, see *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC), 2002 (10) BCLR 1086 (CC), [2002] ZACC 21.

398 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), [1999] ZACC 17 at para 58 (Applies the principle of legality to: (a) 'the legislature ... in every sphere'; and (b) for each kind of administrative decision to which applicable.)

399 *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241(CC), [2000] ZACC 1 (Applies legality to all executive action).

400 For more on the possibilities of the legality doctrine and the rationality doctrine, see M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (2010) 25(2) *SAPL* 313; A Price 'The Content and Justification of Rationality Review' (2010) 25(2) *SAPL* 346; M Bishop 'Vampire or Prince? The Listening Constitution and *Merafong v President of the Republic of South Africa*' (2009) 2 *Constitutional Court Review* 313; A Price 'Rationality Review of Legislative and Executive Decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580.

focus is on the purpose underlying the challenged measure. The doctrinal roots of the anti-domination doctrine accordingly lie in the doctrine of rationality.<sup>401</sup>

In brief, the doctrine of rationality emerged from the jurisprudence on the principle of legality, which holds that 'the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. (Although originally set out by the Constitutional Court under the Interim Constitution, the principle of legality was later held to operate under the terms of the Final Constitution.) The principle applies to both the legislature and the executive — that is, to primary legislation and the whole range of exercises of public power (eg, promulgation of

---

RS3, 05-11, ch23B-p87

secondary legislation, exercise of statutory discretion) undertaken by the executive. The doctrine of rationality is one limb of the principle of legality, and at its core, bars arbitrary state action. At its most abstract level, the requirement of rationality, or non-arbitrariness, holds that all public power must be rationally related to a legitimate government purpose. But the heart of rationality review, as Michael Bishop has argued, is a commitment to root out improper motives, either by holding that the stated motive is illegitimate, or by determining that the stated motive is not the true motive.<sup>402</sup> Spun out as a test of the exercise of public power, rationality review should be understood to have two limbs. As Choudhry notes:

The first is a requirement of means-ends rationality: that a public power be exercised for the purpose for which it was given. If the means chosen do not further the stated objective, then the measure is arbitrary or irrational. The second is a requirement that the purpose for which power has been exercised itself be legitimate. These two limbs are analytically distinct. The means chosen may further an end that is illegitimate; or the means may fail to further a legitimate end. But the two dimensions of arbitrariness are closely related in practice. In situations where there is a poor fit between means and ends, this is often because the reason proffered in support of a measure is pretextual, and that the true reason for the measure is to be found elsewhere. This true reason has been concealed, because it is illegitimate. The search for a rational relationship between means and ends often culminates in exposing an ulterior motive.<sup>403</sup>

Clearly then, rationality review can be employed to expose 'naked preferences' and attempts by a dominant party to further entrench its power.

The facts of *NICRO* provide a good example. At issue was a denial of the right to vote to prisoners who were imprisoned without the option of a fine. The reasons advanced in support of the denial of the right to vote were the logistical challenges and expense involved in arranging for special voting facilities (eg mobile voting stations) for those prisoners. But as the Court pointed out, there were two categories of prisoners who retained the right to vote — those who were incarcerated because of their failure to pay a fine, and those awaiting sentence — on whose behalf precisely

---

401 Choudhry (supra) at 34-35.

402 Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' (supra).

403 Choudhry (supra) at 35-36 citing, in particular, Y Dawood 'The Anti-domination Model and the Judicial Oversight of Democracy' (2008) 96 *Georgetown Law Journal* 1411 and *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC), [2004] ZACC 10.

such arrangements had to be made at the same facilities which housed the excluded prisoners. The government failed to adduce evidence regarding the *additional* logistical and financial hurdles associated with expanding these arrangements to encompass the excluded prisoners. The objective offered by the government was a pretext. The real justification for the measure was to dispel the 'concern that if prisoners are allowed to vote that will send a message to the public that the government is soft on crime'.<sup>404</sup> The Court rightly deemed this motive to be an illegitimate purpose.

Had the *Glenister I* Court possessed jurisdiction to hear the untimely matter, it might have been alive to legality doctrine concerns. It might then have developed an anti-domination conception of the principle of legality that would not have

---

RS3, 05-11, ch23B-p88

allowed the country to be left without an independent anti-corruption unit for almost three years. That's not how matters panned out, however. Instead, the Court revisited *Glenister I*'s original concerns in *Glenister II*.

#### **(iv) *Glenister II*: Rights, duties, international law, reasonableness review and a principle of anti-corruption<sup>405</sup>**

The laws contested in *Glenister I* were ultimately enacted. Glenister then renewed his challenge. The High Court dismissed the application for lack of jurisdiction.<sup>406</sup> However, it did so on a palpably erroneous interpretation of FC s 167(4)(e). Glenister then appealed to the Constitutional Court. In total, the applicant challenged the impugned laws on five different grounds:

- (1) The laws were irrational;
- (2) The flawed public participation process that preceded the passing of the two Acts;
- (3) The laws were structural unconstitutional because they undermined the NPA and the functions of the NDPP.
- (4) The laws infringed the bill of rights;
- (5) The laws violated South Africa's international treaty obligations.

*Glenister II* is an extraordinary judgment. The Court unanimously rejected the challenges based on rationality,<sup>407</sup> public participation<sup>408</sup> and structural unconstitutionality.<sup>409</sup> But the majority's judgment<sup>410</sup> upheld Glenister's challenge on a mix of grounds 4 and 5. In sum, the majority found that both the Constitution as a

---

404 Choudhry (supra) at 36.

405 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('*Glenister II*').

406 *Glenister v Speaker of the National Assembly & Others* [2009] ZAWCHC 1.

407 *Glenister II* (supra) at paras 55-70.

408 *Ibid* at paras 23-39.

whole and South Africa's commitments based on international law required that the security services possess the necessary degree of independence to root out corruption. The majority held that the Hawks were not sufficiently independent and that the state had therefore failed to fulfil its duty under FC s 7(2) to respect, protect and promote the rights in the Bill of Rights.

Although the majority opinion does not track Choudhry's deft analysis of both the constitutional text and the Court's own precedent, its message is much the same. Our constitutional regime, with its commitment to the rule of law and the protection of basic fundamental rights, will not tolerate the capture of its police force by a single party. The police, as a creature of the Constitution, must serve the people of South Africa by upholding the various provisions of the Constitution without fear, favour or prejudice. The critical paragraph in the opinion penned by Deputy Chief Justice Moseneke and Justice Cameron reads as follows:

---

RS3, 05-11, ch23B-p89

That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies 'binds the Republic' is of prime significance. It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.<sup>411</sup>

Much will be made of the novel use of FC s 7(2) to find a statute unconstitutional. It is somewhat disconcerting given that the majority identifies a panoply of rights, several paragraphs later, that have been violated by the legislation under attack:

---

409 Ibid at paras 71-82.

410 Froneman, Nkabinde and Skweyiya JJ concurred with the majority. Ngcobo CJ wrote the dissenting judgment (although it is the majority judgment for all the other issues) in which Mogoeng and Yacoob JJ and Brand AJ concurred.

411 *Glenister II* (supra) at para 194. The minority opinion, authored by Chief Justice Ngcobo, in canvassing the same terrain reaches a different conclusion with respect to the need for genuine (politically uninflected) independence of the police force:

Yet more insight is gained by comparing the relative level of political insularity called for by the Constitution with respect to different governmental institutions. The courts, for example, are required to be "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." The prosecuting authority, on the other hand, must exercise its functions "without fear, favour or prejudice." By contrast, the constitutional provisions related to the police service are silent as to the need for the service to operate either independently or without fear, favour or prejudice. This distinction is drawn not to support a conclusion that the police, or a specialised unit within the police, may lawfully operate with fear, favour and prejudice. Far from it. The distinction is significant merely because it reflects the Constitution's determination as to the appropriate level of independence from the political system of particular governmental institutions. These determinations must be kept in mind in assessing the specific provisions of the SAPS Act.

*Glenister II* (supra) at para 131.

[The] failure on the part of the state to create a sufficiently independent anti-corruption entity infringes a number of rights. These include the rights to equality, human dignity, freedom and security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.<sup>412</sup>

One can be forgiven for thinking that straightforward fundamental rights analysis might have done all the heavy lifting necessary in order to find the laws in question infirm. (It seems fair to ask, on the other hand, whether the analysis of any given right would have yielded even a prima facie violation: rights to equality before the law and freedom and security of the person might have shouldered such a load.) Likewise, much will be made of the use (or misuse) of international law in both judgments: the Court seems content to treat international law as an aid to constitutional interpretation in terms of FC s 39. However, the judgment possesses moments in which the majority appears to conflate the binding of the Republic by international agreement (FC s 231(2)) with the incorporation of international law into municipal law (FC s 231(4)). Such moments suggest that the Court may have mistakenly made too much of international law rather than too little. Such criticism — while formally correct, and worthy of the Court's consideration in future cases — misses the dramatic constitutional developments contemplated by Deputy Chief Justice Moseneke and Justice Cameron.

---

RS3, 05-11, ch23B-p90

In a form of analysis strikingly similar to the logic employed to develop the principle of legality and the rule of law doctrine, the majority rely on the structure and the basic commitments of the Constitution as a whole. The Bill of Rights, duties imposed upon the state to protect, respect, promote and fulfil those rights, international agreements that require South Africa to possess independent police and prosecutorial entities capable of fighting corruption and positive duties imposed upon the police 'to prevent, combat and investigate crime, to main public order, to protect and secure the inhabitants of the Republic and their protect, and to uphold and enforce the law' (FC s 205) constitute a constellation of constitutional obligations out of which the majority tease out a principle of anti-corruption. So while the Court unanimously found that rationality review was not up to the challenge of finding the apposite provisions of the NPA Act and SAPS Act unconstitutional,<sup>413</sup> the majority do think, as does Choudhry, that the Constitution (read as a whole) is committed to 'anti-domination, anti-corruption, anti-capture, non-usurpation, anti-seizure, and anti-centralisation.'<sup>414</sup> In Deputy Chief Justice Moseneke and Justice Cameron's words:

The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental

---

412 Ibid at para 198.

413 *Glenister II* (supra) at paras 55-70.

414 Choudhry (supra) at 34.

rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution.<sup>415</sup>

The majority found five fatal constitutional flaws in the statutory construction of the DPCI. First, unlike their predecessors in the DSO, the members of the DCPI do not enjoy security of tenure. Second, their remuneration and their conditions of service are subject to the whims of the Minister.<sup>416</sup> Third, the DPCI's activities are co-ordinated by a ministerial committee composed of members of Cabinet. The committee determines the policy guidelines for the DPCI. As the Court notes: 'The guidelines could, thus, specify categories of offences that it is not appropriate for the DPCI to investigate — or, conceivably, categories of political office-bearers whom the DPCI is prohibited from investigating.'<sup>417</sup> Fourth, the committee also has the power to engage in hands-on supervision. While the majority accepts that 'financial and political accountability of executive and administrative functions requires ultimate oversight by the executive[,] ... the power given to senior political executives to determine policy guidelines ... lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.'<sup>418</sup> Finally, given

---

RS3, 05-11, ch23B-p91

the lack of independence granted the DPCI under the NPA Act and SAPS Act, and the potential for its capture without such independence, it follows for the majority that the DPCI cannot discharge its constitutional obligation to respect, protect, promote and fulfil the substantive provisions of the Bill of Rights.

Having found the enabling provisions for the DPCI constitutionally infirm, it does not follow that the majority's opinion requires the resurrection of the DSO. The Court afforded Parliament 18 months to promulgate legislation that creates an independent police task force capable of combating corruption in all sectors of South African society. The new entity may still be housed in the SAPS. However, it must then possess the specific attributes of independence that the Court holds the Constitution to require.

This decision is not, as Pierre de Vos would have it, an outright victory for the poor.<sup>419</sup> (That this 'structural' constitutional argument services any discernable commitment to immediate basic service delivery (when no breach of any specific

---

415 *Glenister II* (supra) at para 175.

416 *Ibid* at paras 217-227.

417 *Ibid* at para 230.

418 *Ibid* at para 236.

419 P de Vos 'Glenister: A Monumental Judgment in Defense of the Poor' (18 March 2011) available at <http://constitutionallyspeaking.co.za/glenister-a-monumental-judgment-in-defense-of-the-poor/> (accessed on 9 May 2011) ('If one understood that section 7(2) ... requires the state to respect protect, promote and fulfil the rights in the Bill of Rights' it becomes clear that the failure on the part of the state to create a sufficiently independent anti-corruption entity infringes on the rights to equality, human dignity, security of the person, administrative justice and socio-economic rights - including the rights to education, housing, and health. Corruption was there an assault on the poor and those who suffered from discrimination in the past.')

fundamental rights has been found) seems implausible.) But it does signal a willingness on the part of the Constitutional Court to push back against a government rightly beleaguered by charges of rampant corruption and a failure to make good on the promise of liberation.<sup>420</sup> Such a reading fits a Rouxian understanding of a pragmatic Court that knows exactly when to take a principled stand.<sup>421</sup>

### (c) Electronic Communications (Pty) Ltd ('Comsec')

The Electronic Communications (Pty) Ltd Act ('Comsec Act')<sup>422</sup> establishes a communications company wholly owned by the state and commonly known as Comsec. Comsec's primary function is to cater for the electronic communications security needs of the state.<sup>423</sup> With the state as its only shareholder, Comsec is controlled by a board of directors appointed by the Minister of Intelligence. The

---

RS3, 05-11, ch23B-p92

Minister of Intelligence also appoints a Chief Executive Officer to manage the affairs of the company.<sup>424</sup>

Comsec's core business is the provision, the development and the vetting of systems designed to protect the electronic communications of organs of state against unauthorised access.<sup>425</sup> Its principle clients are government departments and organs of state.

Comsec is funded in two primary ways: by budgetary allocations made by Parliament and by payments for services it renders to government departments and organs of state.<sup>426</sup> The financial affairs of Comsec are reviewed annually by the Auditor General. Comsec's CEO is also required to prepare an annual report in

---

420 Have other courts picked up the scent? On 1 June 2011, the Supreme Court of Appeal ordered the Public Protector to re-open an inquiry into 'Oilgate' on the grounds that the previous inquiry was ' cursory ' at best. *Public Prosecutor v Mail & Guardian* [2011] ZASCA 108 (Nugent J's strongly worded judgment suggests a complete abdication of responsibility by the previous Public Protector and accused him of 'disboweling the complaints right from the start'.

421 For a slightly more extended engagement with Choudhry and the degree to which we can, and should, tease out an 'anti-domination doctrine' from *Glenister II*, see M Bishop & N Raboshakga 'National Legislative Authority' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 17. Moreover, it is important to note that not everyone would describe *Glenister II* as a principled stand. As Michael Bishop notes, we might like the outcome (as opposed to the argument) in *Glenister II*, but that does not make the majority's conclusions any more principled than the conclusions arrived at by Chief Justice Ncgobo when writing for the *Glenister II* minority.

422 Act 68 of 2002.

423 Comsec Act ss 3 and 4(2).

424 Comsec Act ss 8 and 13.

425 Comsec Act s 7.

426 Comsec Act s 18(1) and (2).

accordance with the Public Finance Management Act for review by the Minister of Intelligence and the JSCI.<sup>427</sup>

#### **(d) National communications centre ('NCC')**

Despite its rather benign designation, the NCC is responsible for the coordination of all of the government's communication interception activities. Among other things, the NCC plays a role in the development of technology to be used for this purpose. The NCC also provides advice to the Minister for Intelligence Services on matters related to signals intelligence procurement, management and direction.<sup>428</sup>

#### **(e) Office for interception centres ('OIC')**

The Regulation of Interception of Communications and Provision of Communication Related Information Act is the enabling legislation for the OIC.<sup>429</sup> The OIC 'reports to the Minister for Intelligence Services' and 'provides a centralised interception service to law enforcement agencies involved in combating threats to national security.'<sup>430</sup>

---

---

427 Comsec Act s 18(10).

428 Information on the NCC is available at [http://www.intelligence.gov.za/Functions/national\\_communications\\_centre.htm](http://www.intelligence.gov.za/Functions/national_communications_centre.htm) (accessed on 6 November 2007).

429 Act 70 of 2002.

430 The tasks of interception and collation of data had previously been undertaken by the Law Enforcement Agency (LEA). The ostensible motivation for the creation of the OIC was improved management of interception, minimal duplication of resources, and increased control over state-sponsored interception.