CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 101/07
[2008] ZACC 22

WILMOT MANDLA CHAGI AND 29 OTHERS Applicants

versus

SPECIAL INVESTIGATING UNIT Respondent

Heard on : 15 May 2008

Decided on : 3 December 2008

JUDGMENT

YACOOB J:

Introduction

[1] Mr Chagi and 29 other applicants request the leave of this Court to appeal against a judgment and order of the Supreme Court of Appeal.[1] The case concerns the interpretation and effect of a Proclamation published on 31 July 2001[2] (the 2001 Proclamation) that effectively disestablished one Special Investigation Unit (the First Unit) and established another in its place (the Second Unit). Both the First Unit and the Second Unit were established pursuant to a provision of the Special Investigating

[1] *Chagi and Others v Special Investigating Unit* 2008 (1) SACR 329 (SCA); [2008] 2 All SA 8 (SCA).

[2] Proclamation R118 of 2001, GG 22531, 31 July 2001.

Units and Special Tribunals Act (the SIU Act).[3] And both were charged by the President with, amongst other things, investigating the affairs of a state institution known as the Transkei Agricultural Corporation Limited (Tracor).[4]

[2] The First Unit was established in 1997 by Proclamation (the 1997 Proclamation).[5] The President commissioned the First Unit to investigate the affairs of Tracor on 30 June 1998[6] and it can safely be assumed that the investigation commenced shortly after this date. The applicants were employed by Tracor at the time of the investigation. They later sued an Investigation Unit[7] in the High Court for damages in delict arising out of the alleged conduct of the representatives of the First Unit in the course of that investigation. I do not at this stage identify the investigation unit against which proceedings were brought because, as will appear later, one of the issues in the application before us has turned out to be the identity of that Special Investigation Unit. All that needs to be said at this stage is that the Second Unit

[3] In terms of sections 2(1)(a) and 3 of the Special Investigating Units and Special Tribunals Act 74 of 1996.

[4] According to section 2(2) of the SIU Act the President may appoint an SIU if there is any alleged—

> "(a) serious maladministration in connection with the affairs of any State institution;
>
> (b) improper or unlawful conduct by employees of any State institution;
>
> (c) unlawful appropriation or expenditure of public money or property;
>
> (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
>
> (e) intentional or negligent loss of public money or damage to public property;
>
> (f) offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences [were] committed in connection with the affairs of any State institution; or
>
> (g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof."

[5] In terms of Proclamation R24 of 1997, GG 17854, 14 March 1997.

[6] In terms of Proclamation R66 of 1998, GG 19030, 30 June 1998.

[7] The SIU Act uses "investigation unit" and "investigating unit" interchangeably. I use "investigation unit" in this judgment.

entered the fray and defended the case throughout its journey through the High Court, the Supreme Court of Appeal and this Court.

[3] Only two of the applicants' claims in the High Court are relevant to this application.[8] The conduct of the First Unit relied upon in support of both claims occurred between August 1998 and August 1999. The applicants claimed, first, that the First Unit had wrongfully and unlawfully defamed them in summonses issued in the course of its investigation. The summonses alleged that the applicants had perpetrated fraud and theft. The second claim was that the applicants had been injured in their dignity as a direct result of the First Unit having unlawfully caused the freezing of their banking accounts.

[4] These claims for damages were initiated by summons issued on 15 August 2001, [9] about two weeks after the publication of the 2001 Proclamation. The problem however was that that Proclamation had by then replaced the First Unit with the Second.[10] As has been pointed out, the Second Unit defended the proceedings. Predictably, a defence embraced by the Second Unit was that, because the conduct of members of the First Unit had been relied upon, the Second Unit was not liable. This was so, according to the respondent, because upon a proper construction of the 2001 Proclamation, the Second Unit had not assumed the liabilities of the First. The point

[8] There were four claims altogether.

[9] A total of R16,5 million in damages was claimed.

[10] On 31 July 2001.

was argued before the High Court[11] and the Supreme Court of Appeal on the footing that the Second Unit had in fact been sued. Both courts held that the Second Unit had been wrongly sued because, on a proper interpretation of the 2001 Proclamation that had created it, the Second Unit had not assumed the liabilities and obligations of the First.

[5] The only issue before this Court when the case was argued before us was whether the High Court and the Supreme Court of Appeal were correct in holding that the Second Unit was not liable for damages that may have been suffered as a consequence of the conduct of the members of the First Unit. The applicants contended that both the High Court and the Supreme Court of Appeal were wrong in their construction of the 2001 Proclamation. They argued that this Proclamation, properly read in the light of the authorising statute,[12] does by implication burden the Second Unit with the obligations of the First. The Second Unit, as was to be expected, supported the reasoning and conclusion of the Supreme Court of Appeal on the substantive issue. The respondent however was inclined to accept that the Supreme Court of Appeal incorrectly concluded that it was possible for people in the position of the applicants to sue the Minister of Justice as the representative of the state.[13]

[11] *Wilmot Mandla Chagi & 29 Others v Special Investigating Unit and Others* Case No 1062/2001 Eastern Cape High Court, 28 April 2005, unreported.

[12] Above n 3.

[13] The issue is discussed at [18]-[21] below.

[6] The applicants had relied on the provisions of section 12(2)(c) of the Interpretation Act[14] in the High Court. When asked during oral argument before this Court whether they continued to rely on this provision, the applicants' legal representative informed us that they did not. The case before all the courts including this Court has been conducted on the basis that the Second Unit had been cited in the summons and particulars of claim. After argument was heard, however, the members of the Court became concerned that the application for leave to appeal might not properly be decided without considering the impact of section 12(2)(c) of the Interpretation Act. In addition the issue of the identity of the entity cited in the summons had also to be considered because there was doubt about whether the parties had been correct in proceeding on the assumption that the Second Unit had been cited in the summons.

[7] In the circumstances, the Chief Justice issued the following further directions:[15]

> "The parties are required to submit further written argument covering the following issues:
>
> a. Whether on a proper construction of the summons the applicants cited the Unit headed by Mr Hofmeyr [the Second Unit] or that headed by Judge Heath [the First Unit] as the first defendant?
>
> b. The implications of section 12(2)(c) of the Interpretation Act 33 of 1957 as amended, if any, for the construction of Proclamation R118 of 2001 concerning the liability of the Unit headed by Mr Hofmeyr

[14] 33 of 1957.

[15] On 2 October 2008.

> [the Second Unit] for the acts and omissions of the unit headed by Judge Heath [the First Unit]; and
>
> c. The implications of section 12(2)(c) of the Interpretation Act 33 of 1957, as amended, if any for construction of Proclamation R118 of 2001 concerning the continued liability, despite its abolition, of the Unit headed by Judge Heath [the First Unit] for its acts and omissions during its existence."

[8] The applicants and the respondent furnished additional written argument pursuant to these further directions. Both urged that the case be determined on the footing that the Second Unit had been sued. That is where their agreement ended however. The applicants insisted that section 12(2)(c) supported the conclusion that the Second Unit had been burdened by the 2001 Proclamation with the liability of the First. The Second Unit submitted that this interpretation would be contrary to the provisions of the SIU Act which did not empower the President to lumber it with the liability of the First Unit. It contended further that the First Unit too was not liable because its disestablishment by the President evinced the intention that it should not be liable. The respondent submitted, in effect, that neither Unit would be liable and that no entity was liable to the applicants for any damages they might have suffered.

[9] Before determining the issues, it must be pointed out that this Court cannot be bound by any agreement between the parties in connection with the identity of the party sued. That question must be determined by an interpretation of the pleadings. If that interpretation produces a result that is inconsistent with the agreement between

the parties, it will not be in the interests of justice for this Court to give effect to the agreement.

The issues

[10] The directions described earlier[16] and the argument consequently submitted has widened the issues. I describe them briefly:

(a) The primary set of issues concerns state liability and involves a determination of the effect of the 2001 Proclamation in the light of section 13 of the SIU Act and 12(2)(c) of the Interpretation Act. More specifically, it is necessary to decide whether the liabilities of the First Unit have been extinguished by the 2001 Proclamation in the sense that no entity remains liable for the unlawful conduct of the members of the First Unit. If the liabilities had not been extinguished, we must decide whether the liabilities were transferred to the Second Unit by the 2001 Proclamation or whether the First Unit continued to be liable despite its disestablishment.

(b) Another issue that might potentially call for decision is whether the summons cites the First Unit or the Second Unit. It arises only if we conclude that either the First Unit or the Second Unit would be liable and capable of being sued for the damages in issue. If it is held that the First Unit remained liable despite its disestablishment by the 2001 Proclamation, a finding that the Second Unit was cited in the summons would result in the applicants being non-suited in these proceedings. By the same token, a finding that the Second Unit was

[16] Above [7].

encumbered with the liability would mean that the applicants cannot succeed if the First Unit was cited in the summons.

Should the application for leave to appeal be granted?

[11] We can grant leave to appeal only if the case raises a constitutional matter or an issue connected with a decision on a constitutional matter and only if it is in the interests of justice to do so.[17] That question must now be considered.

Does the case raise a constitutional issue?

[12] No constitutional issue was squarely raised by the applicants. It is fair to say that they placed much reliance on the contention that their predicament rendered them victims of injustice. They pointed out that it would be neither just nor equitable for the President to disestablish a Special Investigation Unit with the effect that claims that have arisen against it consequent upon its unlawful conduct were destroyed. They relied, in particular, on section 13 of the SIU Act which is set out later in this judgment.[18]

[13] The applicants contended that the SIU Act had imposed liability on the First Unit and that the President could not relieve it of that liability without making the Second Unit liable. They also pointed to the fact that the Second Unit was, like the First Unit, also to investigate Tracor. This, they say, is enough to imply the liability of the Second Unit for the conduct of the First Unit.

[17] Section 167(3)(b) of the Constitution.

[18] Below [26].

[14] The correct interpretation and effect of a statutory provision is not ordinarily a constitutional matter. A debate on the construction of a particular provision does however raise a constitutional issue or a matter connected with a decision on one if the provision is capable of two reasonable constructions, the one being more constitutionally compliant than the other.[19] A court is obliged always to interpret any legislative provision consistently with the Constitution and to avoid a construction that is inconsistent with the Constitution. Where one party champions a meaning of the disputed provision that will result in its unconstitutionality, a constitutional matter is raised if there is a reasonable prospect that the interpretation contended for is wrong and that there is another construction that results in the provision being constitutional. In my view—

(a) the meaning which the applicant submits is the correct meaning would result in the unconstitutionality of the 2001 Proclamation;

(b) there is a reasonable prospect that this interpretation is wrong; and

(c) there is also a reasonable prospect that the 2001 Proclamation can be given a meaning that will render it constitutionally compliant.

The question of the correct construction of the 2001 Proclamation does indeed raise a constitutional matter as will more fully appear from what is contained later in this judgment when I elaborate on each of the propositions raised here.

[19] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC); 2000 (10) BCLR 1079 (CC) at para 23.

[15] But what of the issue of the identity of the parties cited in the summons? Is the question whether the First Unit or Second Unit has been cited in the applicants' summons and particulars of claim a constitutional matter or an issue connected with a decision on a constitutional matter? The issue would arise only if this Court were to conclude, on the primary constitutional question, either that the First Unit remained liable for any damages that might have been suffered as a result of any unlawful conduct on the part of its representatives that might ultimately be proved, or that this liability lay with the Second Unit. The question would not otherwise arise. In other words, the issue will need to be decided only if the constitutional question is determined in a particular way. It would come into play as a direct result of the determination of the constitutional matter properly before us. In the circumstances, whether the First or the Second Unit has been cited is an issue closely connected to the decision of this Court on the constitutional matter.

Interests of justice

[16] It is in the interests of justice for this Court to consider the appeal. The question whether the repeal of a proclamation can result in the extinction of the liability incurred by the unlawful conduct of the representatives of an entity that had been established under the repealed proclamation is of public importance. This question is directly raised on the facts of this case and it is not in the interests of justice to ignore it.

Consequences of the respondent's interpretation

[17] We are not in this section concerned with the correctness or otherwise of the respondent's argument on the interpretation and effect of the 2001 Proclamation. The consequence of the respondent's assertions must be measured on the assumption that they are correct. As I have already pointed out, the respondent would have it that neither the First Unit nor the Second Unit could be held liable for the damages consequent upon any unlawful conduct that might have been committed by representatives of the First Unit. If this is right, there would be no claim against any entity for damages that might have been suffered by any person as a result of the unlawful conduct of the First Unit unless the claim was justiciable against any other state entity in terms of any law. If the claim were to be so justiciable, it would not be extinguished. If it were not justiciable against any state entity, it would for all intents and purposes be extinguished in the sense that it would not be justiciable in any court.

[18] During the course of argument the members of this Court raised concern about the propriety of the 2001 Proclamation effectively depriving people who allege that they have a claim for damages against the First Unit from having that claim adjudicated in a court.[20] These concerns are rooted in the possibility that the repeal of the 1997 Proclamation that established the First Unit without more would result in the obliteration of the applicants' claims, regardless of their genuineness. The Supreme Court of Appeal held in this regard:

[20] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

> "It should perhaps be added that the appellants were not without remedy. They could have brought the relevant department of National Government before court by citing the responsible political head of that department in a representative capacity. In this case that would have been the Minister of Justice. That is what s 2 of the State Liability Act 20 of 1957 provides. Approached thus, the mishap encountered here may well have been avoided."[21] (Footnote omitted.)

[19] The provision of the State Liability Act adverted to by the Supreme Court of Appeal reads:

> "In any action or other proceedings instituted by virtue of the provisions of section one, the Minister of the department concerned may be cited as nominal defendant or respondent."[22]

[20] The effect of the provision is that, when the state is sued, the minister of the state department concerned must be cited. The Supreme Court of Appeal held that it is permissible for a claimant in the position of the applicants whose claims lie against an investigation unit established in terms of the SIU Act, not against the state generally or against a particular state department, to cite the Minister of Justice in terms of section 2 of the State Liability Act. However, section 13(2) of the SIU Act (a provision not expressly considered by the Supreme Court of Appeal) makes the correctness of the approach and conclusion that the Minister of Justice could have been cited as the nominal defendant in the applicants' summons quite untenable. Section 13(2) provides:

[21] Above n 1 at para 14.

[22] Section 2(1) of Act 20 of 1957.

> "The State Liability Act, 1957 (Act No. 20 of 1957), shall apply with the necessary changes in respect of a Special Investigating Unit, and in such application a reference in that Act to 'the Minister of the department concerned' shall be construed as a reference to the Head of the Special Investigating Unit concerned."

[21] The section says that a reference in the State Liability Act to "the Minister of the department concerned" is to be "construed as a reference to the Head of the Special Investigation Unit concerned." This means that section 2 of the State Liability Act is to be read as referring to the head of the investigation unit concerned. Section 2 of the State Liability Act read with section 13 of the SIU Act precludes the Minister of Justice from being cited as a nominal defendant in a case in which a special investigation unit is being sued. The head of the unit concerned, and only that head, can be cited. In the case brought by the applicants in the present circumstances, only the head of an investigation unit could properly be named as the nominal defendant. The Supreme Court of Appeal was accordingly not correct in its view that the Minister of Justice could be sued by the applicants in terms of the State Liability Act.

[22] It follows that any person or entity in the applicants' position who has a justiciable claim arising out of the alleged unlawful conduct of members or representatives of the First Unit would, on the interpretation of the 2001 Proclamation proffered by the respondent, be precluded from having the dispute adjudicated by a court. They could not cite the First Unit or the Second Unit; nor could they cite the Minister of Justice. That would plainly be in conflict with section 34 of our Constitution. Accordingly, if there is a reasonable prospect that this interpretation is wrong and that an alternative interpretation renders the provision constitutionally

unobjectionable, that course must be followed. I now consider the meaning and effect of the 2001 Proclamation against this background.

The meaning and effect of the 2001 Proclamation

[23] We must consider the meaning and effect of the 2001 Proclamation to determine whether the liabilities consequent upon any unlawful conduct of the representatives of the First Unit were extinguished by it and, if not extinguished, whether they were transferred to the Second Unit or remained with the First Unit.

Were the liabilities extinguished?

[24] The 2001 Proclamation, to the extent relevant, reads:

> "1. Proclamation No. R.24 of 14 March 1997, as amended by Proclamation No. R.72 of 11 November 1997 and Proclamation No. R.42 of 28 April 1998, is hereby repealed.
>
> 2. Under section 2(1)(a) of the [SIU Act], I hereby establish a Special Investigating Unit.
>
> 3. Under section 3(1)(a) of the said Act, I hereby appoint William Andrew Hofmeyr as head of the Special Investigating Unit.
>
> . . . .
>
> 6. The Special Investigating Unit established under paragraph 2 of this Proclamation shall continue to investigate all the matters which were referred to the Special Investigating Unit established by Proclamation No. R.24 of 14 March 1997, including those matters referred to it by the said Proclamation and the Proclamations mentioned in the Schedule."

[25] The 2001 Proclamation does not in terms disestablish or abolish the First Unit. It repeals the 1997 Proclamation that established it. The 2001 Proclamation then

establishes the Second Unit and empowers it to investigate matters that had been referred to the First Unit. The Proclamation is silent on the fate of the liabilities that might have been incurred by the First Unit consequent upon the unlawful conduct of its representatives. The respondent seized upon this silence and contended that it shows the intention of the President to disestablish the First Unit without making any provision for the way in which the liabilities of that Unit would be satisfied. The argument ran that the fact that the First Unit had ceased to exist meant that it could not be sued.

[26] There are two obstacles to this interpretation. First, it flies in the face of section 13 of the SIU Act read with the provisions of section 2 of the State Liability Act. Section 13 of the SIU Act provides:

> "(1) Any Special Investigating Unit shall be a juristic person.
>
> (2) The State Liability Act, 1957 (Act No. 20 of 1957), shall apply with the necessary changes in respect of a Special Investigating Unit, and in such application a reference in that Act to 'the Minister of the department concerned' shall be construed as a reference to the Head of the Special Investigating Unit concerned.
>
> (3) No member of a Special Investigating Unit shall be liable in his or her personal capacity in respect of anything done by him or her in good faith in the course of performing the functions or exercising the powers of such Special Investigating Unit in terms of this Act."

[27] Section 2 of the State Liability Act may be conveniently repeated:

> "(1) In any action or other proceedings instituted by virtue of the provisions of section one, the Minister of the department concerned may be cited as nominal defendant or respondent.

> (2) For the purposes of subsection (1), 'Minister' shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province."

[28] The two provisions read together are straight-forward. They provide in effect that the head of the investigation unit concerned must be the nominal defendant in any proceedings brought consequent on the conduct of the representatives of that unit. In the present case, these provisions mean that the First or Second Unit must be cited through its head as the nominal defendant. The point to be made here is this: the necessary implication of section 13 is that it provides for the liability of any investigation unit that arises from the unlawful conduct of its members within the course and scope of their duties. The liability of any investigation unit is not provided for in the proclamation that establishes that unit. It is confirmed and regulated by the SIU Act and exists even if the proclamation establishing the unit does not expressly provide for it. Indeed, neither the 1997 Proclamation nor the 2001 Proclamation provides for the liability of the First Unit or the Second Unit respectively.

[29] This liability, having been regulated by section 13 of the SIU Act and not by any proclamation, could not have been extinguished by presidential conduct, even less so by the silence of a proclamation. The President had no power to extinguish it in the circumstances of this case as this would have been in conflict with the Act. It follows that the only possible consequence of the silence of the 2001 Proclamation on the question of the fate of the liabilities that may have been incurred by the First Unit is that those liabilities could not have been and were not extinguished. They remain alive.

[30] The second barrier in the way of the respondent is that created by section 12(2)(c) of the Interpretation Act. I set out the whole of section 12(2):

> "Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not—
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

[31] Section 12(2) applies when one law repeals another law. The purpose of the provision is to control the consequences of the repeal of a law so as to ensure that the dislocation and unfairness that might follow upon the repeal would, if not altogether avoided, be kept to an absolute minimum.[23] Section 12(2) is of application here because the 1997 Proclamation has been repealed and replaced by the 2001 Proclamation.

[23] See *Oudebaaskraal (EDMS) Bpk v Jansen Van Vuuren* 2001 (2) SA 806 (SCA) at 811G-H and *R v Sillas* 1959 (4) SA 305 (AD) at 309H.

[32] Section 12(2)(c) is concerned with, amongst other things, rights accrued and liabilities incurred under the repealed law. It specifically provides that these rights and liabilities will remain unaffected by the repeal of the law. In other words they must be dealt with as if the law concerned had not been repealed.

[33] The applicants acquired, at the very least, the right to bring proceedings against the First Unit to claim any damage that might be found to have been suffered by them. The other side of this coin is that the First Unit would be liable for any damages suffered as a result of any unlawful conduct of any of its members. It cannot be gainsaid therefore that this right of the applicants and the potential liability of the First Unit remained unaffected by the repeal and were to be dealt with as if the 1997 Proclamation had not been repealed.

[34] Moreover, we are concerned here with proceedings that have been instituted by the applicants in the exercise of the right that accrued while the 1997 Proclamation was in operation. And in terms of section 12(2)(c), these proceedings may be instituted as if the 1997 Proclamation had not been repealed.

[35] So, the rights and liabilities remain unaffected unless any contrary intention is revealed. We must determine whether any contrary intention is evident from the repealing law (the 2001 Proclamation) pointing to an extinction of the liability. I have already pointed out that the 2001 Proclamation is silent on the question of the fate of the liabilities that may have accrued under the 1997 Proclamation which it repealed.

The contention that a contrary intention must be inferred from this silence has, in the circumstances, no merit. Any provision in the 2001 Proclamation that had the effect of extinguishing all liability occasioned by the unlawful conduct of the representatives of the First Unit would have been wholly incompetent. This is so because the President had no power to extinguish a liability confirmed and regulated by the SIU Act and which, perhaps more significantly, had to remain unaffected according to section 12(2)(c) of the Interpretation Act. If any inference can indeed be drawn from the silence of the 2001 Proclamation, it is that nothing was said of these liabilities and their fate is accordingly modulated by the Interpretation Act.

[36] I accordingly hold that neither the right of the applicants to institute proceedings nor the potential liability of the First Unit to compensate for damage arising out of the unlawful conduct of its members has been extinguished by the 2001 Proclamation.

[37] We must now consider the appropriate route to have been followed by the applicants in their effort to recover the damages allegedly suffered by them. There are notionally three possibilities. The first is that the Minister of Justice could have been cited as the nominal defendant; the second and third routes involve citing the First Unit or the Second Unit respectively. I have already pointed out that the Supreme Court of Appeal favoured the first option and have held that this approach is

precluded.[24] The appropriateness of the second and third possible directions remains to be considered.

Was the potential liability of the First Unit transferred to the Second Unit by the 2001 Proclamation or did the liability remain with the First Unit?

[38] The applicants contend that the Second Unit was the appropriate entity to have been cited because the liability of the First Unit was transferred to the Second Unit by the 2001 Proclamation. They rely on the circumstance that the First Unit has been disestablished by that Proclamation and emphasise that the First Unit was indeed substituted by the Second Unit in a case before the Full Court of the Eastern Cape. *Twani*[25] was however different. In that case the Second Unit applied to be substituted for the First Unit in appeal proceedings concerning the award of costs. There was no dispute in that case about whether the First Unit or the Second Unit should properly have been cited. The First Unit had been cited; it had ceased to exist with its functions having to be performed by the Second Unit before the hearing of the appeal; the Second Unit, at its own instance, was substituted for the First Unit by the Court on appeal. It is not necessary to investigate whether this case was correctly decided.

[39] The respondent argued with much force before this Court that the disestablishment of the First Unit could not have resulted in the creation of an entitlement to cite the Second Unit. It was pointed out that the approach urged by the

[24] Above [20]-[21].

[25] *ZR Twani v Special Investigating Unit and Another* Case No CA234/2000 Eastern Cape High Court, 28 September 2001, unreported.

applicants would be at odds with section 12(2)(c) of the Interpretation Act which requires the rights and liabilities to remain unaffected. They powerfully draw attention to the fact that a liability transferred from the First Unit to the Second Unit could not be said to have remained unaffected as if the 1997 Proclamation had not been repealed.

[40] I agree with the respondent. In the same way that the President had no power to extinguish the liabilities that the First Unit may have incurred, the SIU Act conferred no power upon the President to transfer the liabilities of the First Unit to the Second Unit. They remained the liabilities of the First Unit.

[41] The Supreme Court of Appeal was accordingly correct in holding that there was no warrant for any inference that the liabilities of the First Unit had been transferred to the Second Unit.

[42] It follows from all this that it was appropriate for the applicants in this case to have cited the head of the First Unit despite the fact that the First Unit had been disestablished by necessary implication. The applicants had to proceed as if the 1997 Proclamation had not been repealed. If the 1997 Proclamation had not been repealed, they would have had the right to institute proceedings against the First Unit and cite its head as the nominal defendant. It was submitted on behalf of the respondent that the liability of the First Unit could be kept alive only if that Unit had been kept alive. I disagree. The fact that the Unit was not in existence mattered not because its head

was cited as nominal defendant only. The true party, the party that would satisfy the judgment, is the state.

Was the First or Second Unit cited in the summons as the first defendant?

[43] I have come to the conclusion that the liabilities of the First Unit have not been extinguished. As I have already pointed out, the issue whether the First Unit or Second Unit was cited in the summons arises only because of the construction that has been placed on the 2001 Proclamation. In other words, it arises directly and only as a result of the decision in this judgment on the constitutional matter.

[44] The First Unit is fairly and squarely cited on the face of the summons itself as being the Special Investigation Unit established by the 1997 Proclamation. This much is conceded by the respondent. However, the respondent goes on to say that this description was fatally flawed because the First Unit no longer existed. That contention is incorrect in the light of this judgment. Indeed, the description is not fatally flawed at all. It is undoubtedly correct.

[45] Contradictorily however, paragraph 31 of the applicants' (plaintiffs') particulars of claim describes the Special Investigation Unit as having been established by another Proclamation (the 1998 Proclamation).[26] This Proclamation did not establish the First Unit and could not do so because the 1997 Proclamation had already established it. The 1998 Proclamation established no other investigation unit either.

[26] Proclamation R66 of 1998, GG 19030, 30 June 1998.

It did, however, refer to the 1997 Proclamation and to the First Unit. The 1998 Proclamation entrusts the First Unit with the investigation of the affairs of Tracor. It must be remembered that the allegation that the First Unit was charged with the investigation of Tracor was essential to the applicants' claim. The particulars of claim then allege that the Special Investigation Unit, "took over all the rights, liabilities and obligations of its predecessor", but do not reveal the identity of the predecessor. Nothing can be made of this phrase.

[46] The applicants' particulars also say:

> "First Defendant, upon its establishment in terms of Proclamation No. R.66 . . . of 30 June, 1998 took over all the rights, liabilities and obligations of its predecessor which was established under Proclamation No. R.24 . . . of 14 March 1997."

This statement is confusing as the defendant has been identified in the summons as the Unit established in terms of the 1997 Proclamation, and cannot therefore be its own predecessor. This contradictory and confusing averment in the particulars of claim no doubt gave rise to the confusion in these proceedings that the Second Unit had been sued. However, there is no mention in the summons or particulars of the Proclamation that established the Second Unit, so it does not seem to me that this can be the proper interpretation of the pleadings. Moreover, in dealing with the conduct alleged to give rise to liability, the particulars of claim refer simply to the acts of the first defendant, and not the conduct of the predecessor of the first defendant. Construed as a whole, therefore, I am satisfied that the first defendant as identified in the summons is indeed the First Unit and not the Second Unit.

[47] I can see no basis for the suggestion that the Second Unit had been cited. Only the First Unit had been cited but the wrong proclamation, a proclamation that referred to the essential averment of the subject matter of the investigation of the First Unit, was named in the particulars of claim.

Conclusion

[48] The High Court and the Supreme Court of Appeal have considered this case on the hypothesis that the Second Unit had been cited. It was on this basis that the respondent's special plea had been upheld by the High Court and the applicants' appeal against that decision to the Supreme Court of Appeal had been dismissed. This premise has been held to be incorrect. The special plea should have been dismissed because the Second Unit had not been cited in the summons or the particulars of claim. In the circumstances, the appeal should succeed and the orders of the High Court and the Supreme Court of Appeal should be replaced by an appropriate order. That order requires the High Court to deal with this matter on the basis that the First Unit was at all times cited in the summons and particulars of claim.

Costs

[49] Matters went awry in the High Court and in the Supreme Court of Appeal because both parties urged that the case be decided on the basis that the Second Unit had been sued. The parties must take equal responsibility for this in all the courts that

have had to consider this case. In the circumstances there should be no order as to costs in the High Court, in the Supreme Court of Appeal or in this Court.

Order

[50] The following order is made:

(1) The application for leave to appeal is granted.

(2) The appeal is upheld.

(3) The orders of the Eastern Cape High Court upholding the special plea and of the Supreme Court of Appeal are set aside.

(4) The respondent's special plea is dismissed.

(5) The case is referred back to the Eastern Cape High Court to be dealt with on the basis that the Special Investigation Unit established in terms of Proclamation No. R24 of 14 March 1997 had at all times been cited in the summons and particulars of claim.

(6) There will be no order as to costs in relation to the proceedings before the High Court, the Supreme Court of Appeal or this Court.

Langa CJ, Kroon J, Madala J, Mokgoro J, Nkabinde J, O'Regan J and Van der Westhuizen J concur in the judgment of Yacoob J.

For the Applicants:	Mr M Tshiki instructed by Tshiki & Sons Inc.
For the Respondent:	Advocate W Trengove SC, Advocate M Chaskalson and Advocate K Mclean instructed by Special Investigating Unit.