IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT27/00

In the matter between:

SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS	Appellant

and

HEATH, WILLEM HENDRIK	First Respondent
THE SPECIAL INVESTIGATING UNIT	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent

THIRD AND FOURTH RESPONDENTS' SUBMISSIONS

G. J. MARCUS SC
A. COCKRELL
S. M. LEBALA

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I INTRODUCTION: OVERVIEW OF THE RESPONDENTS' ARGUMENT

1. The Appellant's case is based on three distinct complaints. We will consider each complaint in turn, and will submit that each is without merit. In broad terms, the following submissions will be made on behalf of the Respondents.

1.1. *Objection in limine*: it will be submitted that the application ought to have been dismissed on the basis that the Appellant lacks *locus standi in judicio* since it does not have a sufficient interest in the subject matter of the litigation. The Appellant states that **'all the members of [SAAPIL] deny they have in any way acted unlawfully or improperly'** (**founding affidavit of Woods para 27, record volume 1 page 21**). It necessarily follows that the Appellant has an insufficient legal interest in the relief claimed and the entire application is premature.

1.2. *As regards the Appellant's first complaint*: it will be submitted that the legislative requirement that the Special Investigating Unit must be headed by a Judge does not compromise the independence of the

judiciary, nor does it violate the rule of law or the doctrine of separation of powers.

1.2.1. It will be argued that the Appellant's first complaint is based upon a number of factual and legal fallacies. In particular, it will be contended that the central premise of the Appellant's argument – namely, that because the head of the Special Investigating Unit performs executive functions he thereby becomes a 'fully-fledged member of the executive' – is not correct in law and hence the conclusions which flow from this premise are mistaken.

1.2.2. It will also be contended that there is no rigid or inflexible separation of powers under the Constitution. Moreover, the legislation presently under consideration does not threaten or undermine the independence of the judiciary, nor does it compromise the rule of law.

1.3. *As regards the Appellant's second complaint:* it will be submitted that Proclamation R31 of 1999 is *intra vires* for the following reasons.

1.3.1. Proclamation R31 of 1999 identifies the subject matter of the investigation with sufficient precision and is not void for vagueness.

1.3.2. Proclamation R31 of 1999 falls within the terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 ('the Act').

1.3.3. The allegations which prompted the Third Respondent to promulgate Proclamation R31 of 1999 fell squarely within the ambit of the Act.

1.4. *As regards the Appellant's third complaint*: it will be submitted that section 6 of the Act does not unjustifiably violate the constitutional right to privacy.

1.4.1. The section embodies a wide range of safeguards before a warrant may be issued, and accordingly meets the requirements for justification under s 36 of the Constitution.

1.4.2. In addition, it will be argued that the Appellant has not made out a proper case for the striking down of s 6 and that the relief sought is premature.

1.5. *Relief*: In the event of it being held that either s 3 or s 6 of the Act is unconstitutional, this Court will be asked to suspend the order of invalidity in terms of s 172 of the Constitution for a period of 2 years in order to enable Parliament to correct such defects as may be identified.

II OBJECTION IN LIMINE: THE APPELLANT'S INTEREST IN THE SUBJECT MATTER OF THE LITIGATION

1 **We begin with the Respondents' objection *in limine*. It is submitted that the Appellant lacks *locus standi* since it has an insufficient interest in the relief which is the subject-matter of the present application.**

1 **The objection *in limine* was properly raised in the Respondents' papers:**

> **Answering affidavit of Maduna para 8, record volume 2 pages 122-125.**

2 Coetzee AJ rejected the Respondents' objection *in limine*:

> **Judgment pages 27-33, record volume 5 pages 473-479**.

3 The Respondents are entitled to rely on the point *in limine* without noting a cross-appeal, since they are not seeking any variation of the order of Coetzee AJ:

> ***Sentrale Kunsmiskorporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 3 SA 367 (A) at 395H**.

4 The Respondents accordingly persist in the objection *in limine*. The grounds for this objection are set out in more detail below.

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Section 38 of the Constitution provides as follows:

> **'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are** –
>
> **(a) anyone acting in their own interests;**
>
> **(b) anyone acting on behalf of another person who cannot act in their own name;**
>
> **(c) anyone acting as a member of, or in the interest of, a group or class of persons;**
>
> **(d) anyone acting in the public interest; and**
>
> **(e) an association acting in the interest of its members.'**

3 Section 38 of the Constitution applies only where a litigant alleges that **'a right in the Bill of Rights has been infringed or may be threatened'**. In the present matter, the Appellant's complaint is based partly on an alleged violation of certain 'main text' provisions which do not form part of the Bill of Rights – in particular, the requirement that courts must be independent (s 165); the rule of law (s 1(c)); and the 'implied' doctrine of separation of powers. Insofar as the Appellant's complaint is based on allegations that provisions of the 'main text' have been violated, the Appellant is unable to rely on s 38 in order to claim *locus standi*. In other words, the **'extended rights of standing under s 38 of the Constitution do not apply to a claim**

for such relief' (*New National Party v Government of RSA* 1999 3 SA 191 (CC) para 106). In the absence of recourse to s 38, the Appellant as a voluntary association has failed to establish a sufficient interest in the present proceedings:

> ***Ahmadiyya anjuman ishaati-islamlahore (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 855 (C);**
>
> ***South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 3 SA 100 (O).**

4 Although section 38 clearly widens the common-law grounds for standing where litigants seek to enforce their constitutional rights, even a generous approach to *locus standi* requires that the Appellant must have some legitimate interest which it seeks to protect. Were this not so, the doors of the courtroom would be thrown open to busybody litigants:

> ***Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 (HL).**

5 It is trite that the Appellant was required to set out in its founding affidavit sufficient allegations to establish that it has *locus standi*. This forms part of a general principle which has been summarised as follows:

> **'The Applicant must … raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it**

relies to discharge the onus of proof resting on it in respect thereof.'

***Swissbourough Diamond Mines v Government of the RSA* 1999 2 SA 279 (T) at 323J-324A**.

See further:

***Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 4 SA 362 (T) at 369;**

***Lipschitz and Schwartz v Markowitz* 1976 3 SA 772 (W) at 775H-776A;**

***Bowman v De Souza Roldao* 1988 4 SA 326 (T) at 327E-H;**

***Administrator Transvaal v Theletsane* 1991 2 SA 192 (A) at 195-196, 200G;**

***Naude v Fraser* 1998 4 SA 539 (SCA) at 553I-J.**

It is equally trite that the Appellant may not, save in exceptional circumstances which are not relevant in this case, make out a case in reply. It is the practice of the courts in South Africa to strike out matter in replying affidavits (including facts to establish *locus standi*) which should have appeared in the founding affidavit:

***Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 4 SA 362 (T) at 368;**

***Director of Hospital Services v Mistry* 1979 1 SA 626 (A) at 635H-636D.**

The need to make sufficient allegations in the founding papers is especially important in cases where constitutional issues are raised. See:

> ***Prokureursorde van Transvaal v Kleynhans* 1995 1 SA 839 (T) at 849A-B;**
>
> ***Swissbourough Diamond Mines v Government of the RSA* 1999 2 SA 279 (T) at 324A-C;**
>
> ***Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 4 SA 174 (T) at 185B-H.**

6 It is submitted that the Appellant failed to make sufficient allegations in its founding papers to establish that it has *locus standi*. We say so for the following reasons.

7 The founding affidavit states explicitly that **'the Applicant brings this application in its own interest and in the interest of its members'** (**founding affidavit of Woods paragraph 5, record volume 1 page 9**). It is therefore clear that the Appellant has *not* sought to bring this application in the interest of a class of persons or in the public interest (in the manner authorised by s 38(*c*) and (*d*) of the Constitution).

8 The founding affidavit contains the following crucial averment:

> **'All the members of the applicant deny that they have in any way acted unlawfully or improperly in connection with amounts they**

have received on behalf of their clients in respect of compensation from the RAF.'

Founding affidavit of Woods paragraph 27, record volume 1 page 21

It is submitted that it follows from this averment that the Appellant and its members have an insufficient interest in the subject-matter of the present litigation. If neither the Appellant nor its members have acted unlawfully or improperly, then their interests will not be prejudicially affected by the investigation which is to be conducted by the Special Investigating Unit in terms of Proclamation R31 of 1999. The investigation is directed only at '**unlawful appropriation or expenditure of public money**', and '**unlawful or improper conduct by any person which has caused or may cause harm to the interests of the public**' (Proclamation R31 of 1999, paras (a) and (b)).

9 In short, the position is as follows. The investigation in terms of Proclamation R31 of 1999 is directed at '**unlawful**' and '**improper**' conduct. The Appellant denies that either it or its members have been involved in unlawful or improper conduct. If the Appellant's members have not acted 'unlawfully or improperly' (as the founding affidavit avers), they will not be the subject of any adverse finding by the Special Investigating Unit or of any judgment by

the Special Tribunal. It follows that the Appellant's members have no direct and substantial interest in the relief which is sought in the present application.

10 The Appellant counters this objection by alleging that it has an interest in the present litigation since '**the vast majority of honourable and professional personal injury practitioners have been tainted by association and have been exposed to material prejudice'** by Proclamation R31 of 1999 (**founding affidavit of Woods paragraph 18, record volume 1 page 17**). It is submitted that this contention is without substance for two reasons.

1 *First*: there is no factual basis for the contention that the Special Investigation Unit's investigation might prejudice the interests of the Appellant's members *even though those members have not committed any unlawful acts.*

1 The Appellant contends that the investigation will cause injury to the 'guilty' and the 'innocent' alike:

replying affidavit of Woods paras 4-6, record volume 3 pages 248-9.

2 In support of this averment, the Appellant relies on the affidavits of Ungerer, Meintjies and Nkanunu:

annexures RA1, RA2 and RA3 to the replying affidavit of Woods, record volume 4 pages 288-377.

3 However the Appellant's contentions in this regard are misconceived, since neither Ungerer, Meintjies nor Nkanunu were members of the Appellant at the time of the launching of the application. It should be borne in mind that the application was brought solely in the interest of the Appellant and its members (**founding affidavit of Woods para 5, record volume 1 page 9**), and that the Appellant has not sought to vindicate the public interest. Since Ungerer, Meintjies and Nkanunu were not members of the Appellant, their averments are irrelevant and cannot establish that the Appellant or the Appellant's members have any interest in the present matter.

4 In sum, the Appellant has sought to meet the objection that it has no interest in the proceedings by adducing evidence that certain attorneys *who were not members of the Appellant* at the relevant time have suffered injury as a result of the Unit's investigation. It is submitted that such evidence is irrelevant, and fails to establish that *the Appellant and its members* have an interest in the present litigation.

5 We point out that the Appellant has conspicuously sought to place reliance upon the affidavits of Ungerer, Meintjies and Nkanunu notwithstanding the fact that their allegations were all made for the first time in reply.

2 *Second*: the Appellant's contention incorporates a *non sequitur*.

1 The investigation in terms of Proclamation R31 of 1999 is aimed at rooting out only those attorneys who are guilty of unlawful or improper conduct. Indeed the Appellant itself concedes that such **'bad elements'** exist in the attorneys' profession (**founding affidavit of Woods paragraph 16, record volume 1 page 16**) and that they deserve to be exposed (**founding affidavit of Woods paragraph 17, record volume 1 page 17**).

2 But if this is so, then it is a *non sequitur* for the Appellant to contend that the investigation should be halted since it will also 'taint by association' those attorneys who have not acted unlawfully or improperly. Members of the public are sufficiently discriminating to appreciate that Proclamation R31 of 1999 does not imply that *all* attorneys have acted unlawfully. It

implies no more than that *some* attorneys may have acted unlawfully or improperly. In the nature of things, it is not possible to identify who those attorneys are in advance of the investigation itself.

3 The Appellant seeks to create an impossible dilemma for the Respondents. On the one hand, the Appellant concedes that there are some attorneys who have acted improperly with regard to RAF money and that those attorneys deserve to be rooted out. On the other hand, the Appellant contends that an investigation should not be initiated in order to identify such corrupt attorneys since this will 'taint by association' those attorneys who have not acted improperly. If the Appellant's contentions were correct, the Third and Fourth Respondents would be trapped in a legally untenable situation.

11 Insofar as the Appellant relies on s 38 of the Constitution in order to establish *locus standi*, it is required to allege that a right in the Bill of Rights has been **'infringed or threatened'**.

1 The Appellant does not allege that any constitutional rights of its members have been **'infringed'**.

2 The Appellant was accordingly required to establish that the constitutional rights of its members have been **'threatened'**. It is submitted that this requires proof of a reasonable apprehension of injury, i.e. **'one which a reasonable man might entertain on being faced with certain facts'** (***Nestor v Minister of Police*** **1984 4 SA 230 (SWA) at 244**; see also ***Minister of Law and Order v Nordien*** **1987 2 SA 894 (A) at 896F-I**). The Appellant has failed to make the necessary averments in its founding papers in order to establish that the rights of its members have been threatened. Such case as the Appellant seeks to advance flows exclusively from the affidavits of Ungerer, Meintjies and Nkanunu. None of those individuals was a member of the Appellant when the application was launched. In any event, the averments of Ungerer, Meintjies and Nkanunu are made for the first time in reply.

3 If the rights of the Appellant or its members were to be violated or threatened, it would be appropriate to institute proceedings for an interdict or review at that stage. See:

> ***Bernstein and Others v Bester and Others NO*** **1996 (2) SA 751 (CC)**
>
> ***Nel v Le Roux NO*** **1996 3 SA 562 (CC).**

Since there is no threatened or actual violation of rights, the Appellant lacks *locus standi* and the entire application is premature:

> ***Mathyssen Busvervoer (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Kimberley* 1987 4 SA 490 (NC);**
>
> ***Netto v Clarkson* 1974 1 SA 66 (D);**
>
> ***Meyer v South African Medical and Dental Council* 1982 4 SA 450 (T);**
>
> ***Nisec (Pty) Ltd v Western Cape Provincial Tender Board* 1998 3 SA 228 (C) at 236F.**

4 It is a settled principle of law that constitutional issues – particularly those entailing the striking down of statutes – are issues of last resort only.

> ***Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC) para 2**.

5 The Appellant appears to conflate an attack upon a power with the manner in which the power may be exercised in the future. Obviously if a power is unlawfully exercised, it will be subject to review. As was pointed out in ***Bernstein and Others v Bester and Others NO* 1996 (2) SA 751 (CC)** para 52, **'the fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the**

person subjected to such abuse does not mean that the power should, for this reason, be characterised as infringing s 11(1) of the Constitution'. See further:

***Nel v Le Roux NO* 1996 3 SA 562 (CC).**

12 The Appellant relies on a series of untenable averments in an attempt to establish that it has an interest in these proceedings.

1 *First*: The Appellant repeatedly avers that the constitutional rights *of the clients of its members* will be violated by the conduct of the investigation in terms of Proclamation R31 of 1999. See for example:

founding affidavit of Woods para 31, record volume 1 page 22;

affidavit of Meintjies para 9, record volume 4 page 341.

But these averments are irrelevant, since the application has not been brought in an attempt to vindicate the rights of the clients of the Appellant's members at all. Such averments cannot establish that *the Appellant or its members* have any interest in the outcome of the present litigation.

2 *Second*: The Appellant avers that the **'privileged documents'** of the clients of its members **'could be exposed to inspection' (founding affidavit of Woods para 31.1, record volume 1 page 22**). However this overlooks s 6(9) of the Act, which provides for privilege to be claimed in the course of an investigation. Section 6(9) provides as follows:

> **'If during the execution of a warrant or search under this section, a person claims that any book, document or object found on or in the premises contains privileged information and refuses the inspection or removal of such book, document or object, the person executing the warrant may request the secretary of the Special Tribunal which has jurisdiction or his or her delegate, to cause that book, document or object to be attached and removed in the manner prescribed by the rules for safe custody until such Special Tribunal has made a ruling on the question whether or not the information in question is privileged.'**

3 *Third*: The Appellant repeatedly avers that its members may be prejudiced since the Special Investigating Unit is empowered to investigate the affairs of its members in the absence of any evidence suggesting that a wrongdoing has been committed. However the Act requires the Special Investigating Unit to exercise its powers in a reasonable manner. Thus, for example, section 5(2)(a) of the Act provides that a member of the Special Investigating Unit may require a person to provide **'such particulars and information <u>as may be</u>**

reasonably necessary'. Similarly, a notice requiring a person to appear before the Special Investigating Unit is required to contain **'the reasons why such person's presence is needed'** (s 5(2)(b)).

13 For the reasons set out above, it is submitted that the Appellant has failed to establish that it has a sufficient interest in the present proceeding. The Appellant is accordingly deprived of *locus standi*, and the application ought to have been dismissed on this *in limine* basis.

IIII THE APPELLANT'S FIRST COMPLAINT: INVOLVEMENT OF A JUDGE IN THE SPECIAL INVESTIGATING UNIT

14 We turn now to consider the relief which the Appellant claims. The Appellant's first complaint is that s 3(1) of the Act is unconstitutional because it requires a member of the judiciary to head the Special Investigating Unit. By corollary, the Appellant contends that para 2 of Proclamation R24 of 1997 is unconstitutional since it purports to appoint Judge Heath as head of the Unit.

15 We accept that s 1(c) and s 165 of the Constitution create justiciable rights and that a legislative provision in conflict with these provisions might, in appropriate circumstances, be struck down.

16 The Appellant's first complaint runs together the doctrine of *separation of powers*, the doctrine of *judicial independence* and the requirements of *the rule of law*. It will be convenient for us to consider the relevant doctrines separately, since they raise different issues of principles. This does not mean that the doctrines do not overlap, but merely that it is necessary to appreciate the conceptual underpinning of each doctrine in order to determine its application in any particular case.

Separation of powers

17 The Appellant contends that the doctrine of separation of powers functions as a ***'tacit principle of the Constitution'*** *(****founding affidavit of Woods para 32, record volume 1 page 23****).*

1 As the word ***'tacit'*** *suggests, there is no express* provision in the Constitution which refers to the doctrine of separation of powers.

2 It is submitted that it is not competent to set aside a legislative provision on the basis that it violates a '*tacit*' principle of the Constitution. There is simply no 'peg' in the Constitution on which the Appellant is able to hang its argument that s 3(1) of the Act violates the doctrine of separation of powers.

3 The Constitutional Principles which formed part of Schedule 4 to the interim Constitution do not assist the Appellant in this regard.

1 Constitutional Principle VI provided as follows:

> **'There shall be separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'**

2 The text of the new Constitution was required to comply with Constitutional Principle VI, and was so certified by the Constitutional Court:

> ***Ex parte Chairperson of the Constitutional Assembly; In re Certification of the Constitution of the Republic of South Africa 1996*** **1996 4 SA 744 (CC)** ('the first Certification Judgment')
>
> ***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)** (‘the second Certification Judgment’).

3 The Certification process was designed to certify that the new Constitution complied with the Constitutional Principles. Now that the certification process has been completed, the Constitutional Principles have no further role to play. It follows that it is not open to the Appellant to base its argument regarding the doctrine of separation of powers on Constitutional Principle VI.

18 We will assume for the sake of argument that our previous submission is mistaken, and that the doctrine of separation of powers functions as a ‘tacit constitutional principle’ which can be used to strike down legislation. On the basis of this assumption, it is important to be clear regarding the meaning of separation of powers and the limitations which attach to this doctrine.

19 *The meaning of separation of powers*.

1 The doctrine of separation of powers recognises the functional independence of the three branches of government, viz. the legislature, the executive and the judiciary. In other words, it recognises that there should be a division of tasks between those

agencies which make the law, those agencies which implement the law and those agencies which enforce law.

2 The doctrine of separation of powers is an imprecise concept. It varies in its application from country to country. It has been described as follows:

> "**The doctrine of the separation of powers, like the rule of law, has usually been discussed as one which *ought* to be embodied in a system of government. But whereas commentators are almost unanimous that the rule of law (whatever it may mean) is splendid, the virtues of the separation of powers do not evoke so enthusiastic a chorus. Perhaps this is partly because the doctrine has acquired a harder core of generally accepted meaning, and because some constitutions survive adequately without relying on it for sustenance.**
>
> **This is not to say that the quintessence of the separation of powers is easy to distill. The doctrine has emerged in several forms at different periods and in different contexts. It is traceable back to Aristotle. It was developed by Locke; its best-known formulation, by the French political philosopher Montesquieu, was based on an analysis of the English Constitution of the early 18th Century, but an idealised rather than a real English Constitution; the disciples of Montesquieu, particularly numerous in the North American colonies, added their own refinements; and today the doctrine survives in a number of curious manifestations. No writer of repute would claim that it is a central feature of the modern British Constitution. However, a brief survey of the doctrine brings out more clearly some features of the British system of government.**
>
> **The doctrine, as propounded by Montesquieu and his followers, may be stated briefly as follows:**

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1 There are three main classes of governmental functions: The legislative, the executive and the judicial.

2 There are (or should be) three main organs of government in a State: The Legislature, the Executive and the Judiciary.

3 To concentrate more than one *class* of function in any one person or organ of government is a threat to individual liberty. For example, the Executive should not be allowed to make laws or adjudicate on alleged breaches of the law; it should be confined to the Executive functions of making and applying policy and general administration.

Even if one accepts the first two propositions, one is not obliged to accept the third. To concentrate a large *quantity* of power in the hands of one person, in the absence of proper safeguards, is surely more dangerous than to combine a few powers analytically different in *quality* in the same hands, if adequate safeguards exist. And a rigorous segregation of functions may be highly inconvenient. In many countries subscribing to versions of the separation of powers doctrine, rule-making powers have been vested in the Executive because it is manifestly impracticable to repose such powers exclusively in the Legislature. The third proposition stated above is therefore both extreme and doctrinaire, and is not taken literally by all proponents of the theory.

One of the implications commonly read into the separation of powers doctrine is that the three branches of government ought to be composed of different *persons*. In the United States for instance, the President and his cabinet cannot be members of Congress (although the Vice-President presides over the Senate). It does not inevitably follow that the one branch of government should not be in a position to dominate the others. Matters may be so designed that each branch operates as a check on the others. Again we can use the United States as an illustration. The President may veto

legislation but has no power to dissolve Congress; although he holds office for a fixed term and is not dependent on the support of a congressional majority, he can be impeached by Congress, he appoints Federal judges but his appointments need to be confirmed by the Senate, the courts can determine the constitutionality of legislative enactments and administrative action, but judges cannot validly be given powers totally alien to the judicial office; Federal judges cannot be removed by the Executive but they can be impeached by Congress. In France, on the other hand, the separation of powers has been understood to preclude the ordinary courts from determining the constitutionality of legislation; yet judicial and administrative functions are comingled in the Conseil d'Etat, and legislative and executive powers in the presidency.

In Britain we have cabinet government with a parliamentary executive; the law lords act both as judges and as legislators; the Lord Chancellor is a Minister as well as head of the judiciary and an active member of the House of Lords in its legislative capacity. Legislative powers are delegated by parliament to members of the Executive (the Queen in Council, and ministers); powers to determine justiciable controversies are also confided in ministers and other non-judicial agencies. Indeed, there never was a time in English constitutional history when the functions of government were neatly compartmentalised. The medieval Curia Regis, the King's Council, exercised all three classes of functions. Parliament was a high court as well as a legislative body. For several centuries the local government authorities in the counties were judicial officers, the justices of the peace. But the modern judiciary does stand in a special position. Professional full time judges are disqualified from membership of the House of Commons because any other arrangement would hardly be compatible with the judicial office; the law lords generally abstain from politically controversial debate in the Upper House, and only the Lord Chancellor and former occupants of that office have a free reign. Moreover, a number of rules and practices insulate judges in office from political pressure."

De Smith and Brazier *Constitutional and Administrative Law* (6th ed) at 19 - 21

3 Commenting on the position in the United States, Tribe states as follows:

> "**The separation of powers doctrine that has evolved over the last two hundred years is a product less of political philosophy than of practical experience. Modern notions of the separation of powers cannot easily be distilled from the philosophical inclinations of the Framers, whatever normative force those intentions might hold for constitutional interpretation today. Both the Framers and the men participating in the first administration under the new Constitution (often, of course, the same persons) were concerned more with improving the efficiency and capabilities of the national government than with creating a system of government based on the abstract maxims of political philosophers. Although separation of powers concepts played a role in shaping the views of those who forged the nascent government, 'the views expressed were not doctrinaire - in part because there was no clear doctrine'. Although it may be something of an overstatement, it is roughly true that 'the historical evidence suggests that the Framers' idea of separation of powers was unformed and tentative, and that they had few fixed institutional arrangements in mind beyond the basic principle that there should be a separation'. In many instances, separation of powers ideas were used 'as a rhetorical weapon with which to belabor political opponents or legitimise one's own constitutional preferences, rather than as a clear guide for the construction of a safe and effective government.**
>
> **We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers' sought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does. What counts is not in the abstract theory**

of separation of powers, but the actual separation of powers 'operationally defined by the Constitution'."

Laurence Tribe *American Constitutional Law* (3rd ed) Vol 1 at 127

4 With regard to the operation of the doctrine in the United States, Tribe observes the following:

"**In understanding the division of authority among the branches of the Federal government or between the States and the Federal government, one must take into account how each of those entities engage (and often share) the powers of the others. Although it is a misnomer as a matter of intellectual history, 'separation of powers' is often used as a shorthand phrase for the complex system of checks and balances created by the Constitution - checks and balances that in fact *mingle* the different types of governmental power. To be sure, the Constitution provides that Congress is given 'all legislative powers herein granted', that 'the Executive power' is vested in the President, and that 'the judicial power of the United States' is vested in the Supreme Court and lower courts created by Congress. But the Constitution does not itself define 'legislative', 'executive', or 'judicial' powers, and the functions assigned to each branch belie any suggestion that the Constitution establishes a strict separation. The President's veto power, for example, gives him an often decisive role in law making - as does his enumerated power (with the Senate's advice and consent) to make treaties, since treaties, too, are the law of the land. Conversely, the Senate's 'advice and consent' role in the appointment of Executive officials would seem to be a form of executive power as that concept is normally understood. Indeed, opponents of the Constitution were especially concerned about the powers vested in the Senate and warned that 'only a part of the executive power is vested in the President. The most influential part is in the Senate. The Constitution specifies a further bending of powers with respect to the**

executive departments - those essential organs of executive power whose creation, structure and continued existence (through appropriations) are the responsibility not of the President, but of Congress. Similarly, if the judicial power were to be truly independent of the other branches, one might expect that the Constitution would have granted the judiciary greater power over its own structure and jurisdiction."

Tribe op cit pp 137-8

5 As regards the purpose of separation of powers under American constitutional law, the following has been observed:

"**Throughout American history, the distribution of national powers has been said to serve two distinct purposes. The first is efficiency. In this view, a division of labor among the various branches makes government more efficient, especially because of the concentration of executive power in the President, we can act with despatch. The second purpose is the prevention of tyranny. The separation of powers diffuses governmental power, diminishing the likelihood that any one branch will be able to use its power against the citizenry."**

Stone, Seidman, Sunstein and Tushnet *Constitutional Law* (3rd ed) at 388

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Limitations on the doctrine of separation of powers.

1 The doctrine of separation of powers does not require that the three branches of government must be kept in watertight compartments. Since this is a point of great significance for present purposes, we consider it in more detail below.

2 The limitations on the doctrine of separation of powers emerge clearly from the First Certification judgment, where the Constitutional Court stated as follows (paras 108-109):

> **'There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute….**
>
> **…. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, "[t]he areas are partly interacting, not wholly disjointed".'**

3 Four principles emerge from the First Certification judgment.

1 *First:* There is no universal model of separation of powers (para 108).

2 *Second:* In democratic systems of government "**in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute**" (para 108). Moreover, "**no constitutional scheme can reflect a complete separation of powers: The scheme is always one of partial separation**" (para 109).

3 *Third*: The principle of separation of powers "**recognises the functional independence of branches of government**" (para 109)

4 *Fourth*: The principle of checks and balances **"focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another**" (para 109).

4 These principles are reflected in the constitutional scheme itself. An analysis of the Constitution bears out this Court's observations that the separation of powers is not – and cannot be – absolute.

1 The concept of judicial review of legislation (in terms of which an unelected court can strike down legislation) is itself a departure

from a system of parliamentary sovereignty in which it is the Legislature which has the power to make and repeal laws.

2 Under the Constitution, the President has the power to pardon or reprieve offenders and to remit fines, penalties or forfeitures.

Section 84(2)(j) of the Constitution

First Certification Judgment: paras 114 - 117

***President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at paras 13 - 16**

This power of pardon and reprieve could be considered an interference with the judicial process.

3 The National Executive enjoys legislative powers for the purposes of negotiating and signing certain types of international agreements in terms of s 231 of the Constitution.

4 Under the Constitution, judges are appointed by the Judicial Service Commission which consists (*inter alia*) of judges, lawyers and political appointees. In this regard, it has been stated:

> "**The mere fact, however, that the Executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VII. In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the Executive or by Parliament or by both. What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the Legislature and the Executive.**"
>
> **First Certification Judgment: paras 122 - 124**
>
> **Section 178 of the Constitution**

5 In terms of section 177 of the Constitution, a judge may be removed from office if (*a*) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or guilty of gross misconduct; and (*b*) the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members. This provision exemplifies the absence of a complete separation of powers in two respects. First: the Judicial Service Commission performs a judicial function by making a finding of gross incompetence or gross misconduct. Second: the National Assembly – representing the legislative

arm of government – is vested with the power to remove a judge.

6 In terms of section 175 of the Constitution, appointments of acting judges can be made on the recommendation of certain members of the Executive. This too has been held not to constitute a violation of separation of powers.

First Certification Judgment: paras 125 - 132

7 Section 179 of the Constitution requires that there be a single national prosecuting authority which has the power to institute criminal proceedings on behalf of the State. The National Director of Public Prosecutions is appointed by the President as head of the National Executive. This has been held not to constitute a violation of separation of powers.

First Certification Judgment: paras 141 - 146

8 Although legislative powers are vested in the National Assembly, this does not mean that the delegation of legislative powers to the Executive is not competent.

9 In terms of sections 58, 71 and 117 of the Constitution, members of the National Assembly, National Council of Provinces and provincial legislatures are vested with immunity from civil or criminal proceedings, arrest, imprisonment or damages in relation to their rights of freedom of speech.

10 In terms of section 89 of the Constitution, the President may be removed by the National Assembly by a resolution adopted with a supporting vote of at least two-thirds of its members on grounds of "**a serious violation of the Constitution or the law**", "**serious misconduct**" or "**inability to perform the functions of office**". Similar powers apply in relation to the removal of a Premier in terms of section 130 of the Constitution. Again, this is a clear example of judicial power being vested in the Legislature.

11 In terms of sections 79 and 80 of the Constitution, the Constitutional Court may be required to give what amounts to an advisory opinion on the constitutionality of an Act. In a narrow sense, this may be considered as the **'giving to the**

executive of advisory opinions on questions of law' (cf ***Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*** **[1997] 1 LRC 22 at 40h-i**).

12 Separation of powers does *not* require that the executive should have no say in the appointment of judges. In the first Certification Judgment, the Constitutional Court stated as follows (para 123):

> **'An essential part of the separation of powers is that there must be an independent judiciary. The mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VII.… What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.'**

13 Section 165(4) of the Constitution places an affirmative duty on organs of state to **'assist and protect the courts'** through **'legislative and other means'**. In other words, the Constitution expressly requires the executive to provide active support for the judiciary.

5 The examples cited above reinforce the absence of any rigid separation of powers in the South African Constitution. In short, the doctrine of separation of powers does not apply in this country in a 'pure' form. The point was made by Ackermann J in ***De Lange v Smuts NO and Others*** **1998 3 SA 785 (CC) para 60** as follows:

> **'I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.'**

21 The preceding analysis of separation of powers brings to the fore the misconceptions which underlie the Appellant's first complaint. The Appellant complains that s 3(1) of the Act violates the doctrine of separation of powers (and the independence of the judiciary), since it requires a member of the judiciary to exercise functions as part of the executive. This argument rests on at least three misconceptions.

22 *First misconception: the nature of the Special Investigating Unit*.

1 The first misconception is the Appellant's contention that s 3(1) of the Act makes the head of the Special Investigating Unit a 'fully-fledged member of the executive'.

2 The Appellant contends that the Special Investigating Unit forms part of the executive, such that it violates the principles of separation of powers and judicial independence if the Unit is headed by a judge. The Appellant formulates the argument as follows:

> **'The SIU is an executive organ of state. It performs executive functions. It does so under the control of the president in his capacity as head of the national executive. The head of the SIU is accordingly also a member of the executive branch of government.'**
>
> **(Appellant's submissions page 25 para 39)**

> **'The head of the SIU is accordingly not merely dependent on the executive, but is a fully fledged member of the executive branch of government charged with ordinary executive functions, who is accountable to the president and subject to his control in his capacity as head of the national executive.'**
>
> **(Appellant's submissions page 27 para 42)**

> **'An SIU is an executive organ of state which performs purely executive functions. Its head is a fully fledged member of the executive who exercises his functions subject to the control of the president in his capacity as head of the national executive. His judicial independence**

is compromised, not by his association with the executive branch, but by his unambiguous membership of it.'

(Appellant's submissions page 43 para 63)

See also **Appellant's submissions page 55 para 69**.

3 It is submitted that the Appellant errs in assuming that any person who performs *executive functions* necessarily becomes *part of the executive*. There is clearly a difference between the *functionary* and the *function.* The distinction was recognised in ***President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC),** where the Constitutional Court held that the test for what constitutes 'administrative action' focuses on *the function performed* rather than on *the functionary*. The fact that a particular function is performed by a member of government does not necessarily mean that such a function will qualify as 'administrative conduct'. The Constitutional Court explained the point as follows (paras 141-142);

'In section 33 [of the Constitution] the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or

> **not….. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.**
>
> **…. It follows that some acts of members of the executive, in both the national and provincial spheres of government, will constitute "administrative action" as contemplated by section 33, but not all acts by such members will do so.'**

4 The Appellant contends that any organ of state must necessarily fit into one of three available 'boxes' labelled 'the legislature', 'the judiciary' and 'the executive'. Since the Special Investigating Unit does not fit into the first box or the second box, the Appellant contends that it must necessarily be squeezed into the third box. However this contention rests on a formalistic and artificial understanding of the modern state. It is not correct that an organ of state must necessarily form part of 'the executive' if it does not form part of the legislative or judicial branches of government. Thus, for example, chapter 9 of the Constitution establishes a number of 'state institutions supporting constitutional democracy'. No doubt these institutions perform *executive functions*, but it would be misleading to say that they are part *of the executive*. In short, a body which performs executive functions might be **'an independent agency'** (*Mistretta v United States* (1989) 488 US 361 at 393).

5 The Unit is a body which has been established in order to investigate corruption within various bodies, including the executive itself. The Unit does not form part of the executive. It is apparent from s 4(1)(h) of the Act that the Unit reports to Parliament, rather than to government. Although an investigation by the Unit is 'triggered' by a referral on the part of the President, the Unit is not subject to operational control by the President. In other words, the Unit has a '**discretion of its own'** and is not subject to '**control by the Executive over the exercise of that discretion'** (***Posts and Telecommunications Corporation v Modus Publications (Pvt) Ltd*** **1998 3 SA 1114 (ZSC) at 1123C**).

6 The point may be restated as follows. The Appellant argues that s 3(1) of the Act co-opts a judge in order to serve as a fully-fledged member of the executive arm of government. However the argument breaks down since a judge who is required to perform *non-judicial functions* does not thereby become *a member of the executive.* Although section 3(1) of the Act envisages that a judge will perform non-curial tasks, this does not mean that Judge Heath has become part of *the executive.* The doctrine of separation of powers erects a notional wall between the judicial and the executive arms of the state

in order to ensure that the government does not meddle in judicial affairs. This wall is not breached by s 3(1) of the Act, since Judge Heath is not a 'fully fledged member of the executive branch of government' (**Appellant's submissions para 42 and para 63**).

23 *Second misconception: judges acting in a personal capacity*.

1 The second misconception is the Appellant's contention that a person who is appointed to head the Special Investigating Unit functions *qua* judge when discharging those statutory responsibilities.

2 Section 3(1) of the Act stipulates that the head of a Special Investigating Unit must be someone who *is* a judge (or an acting judge). That person does not head the Special Investigating Unit *qua* judge, and his or her position as a judge plays no role when he or she functions as 'head of the Special Investigating Unit'. The situation is indistinguishable from that in *Mistretta v United States* (1989) 488 US 361, where the Supreme Court stated as follows with regard to judges appointed to sit on the Sentencing Commission:

> **'The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges yield as Commissioners is not judicial power, it is administrative power derived from the enabling legislation.'** (at 404)

3 In the present context, Judge Heath is not required to perform any judicial functions in his capacity as head of the Special Investigating Unit . Judge Heath has been relieved of all judicial duties for so long as he heads the Special Investigating Unit:

> **answering affidavit of Maduna para 47.1.3, record volume 2 page 174.**

4 In short, Judge Heath does not wear the 'cap' of a Judge when he discharges his functions as head of the Special Investigating Unit. It follows that s 3(1) of the Act does not violate the doctrine of separation of powers when it requires that the Unit be headed by a person who happens to be a Judge. Section 3(1) merely requires that certain functions must be exercised by **'the judge as an individual who, because he is a judge, possesses the necessary qualifications to exercise it'** (*Hilton v Wells* (1985) 157 CLR 57 at 72).

Third misconception: performance of functions at the same time.

1 The third misconception is the Appellant's contention that Judge Heath is required to perform both judicial functions and non-judicial functions *at the same time*.

2 The Appellant submits that **'the performance of the function of the SIU occupies the judge to such an extent that he is no longer able to perform his normal judicial functions'** (**Appellant's submissions page 57 para 69.6**). This implies that Judge Heath is placed in an untenable position by virtue of the fact he is required simultaneously to perform both judicial functions (*qua* judge of the High Court) and non-judicial functions (*qua* head of the Special Investigating Unit).

3 However Judge Heath has been relieved of all judicial duties for so long as he heads the Special Investigating Unit:

> **answering affidavit of Maduna para 47.1.3, record volume 2 page 174.**

Since Judge Heath is not currently sitting as a judge, his responsibility to perform non-judicial duties does not conflict with any of his judicial duties.

4 The essential point was made crisply by the majority of the Supreme Court in *Mistretta v United States* (1989) 488 US 361:

> **'… the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.'** (at 404)

5 A similar point was made by Kirby J in his powerful dissent in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1997] 1 LRC 22 at 58-59:

> **'Where a federal judge, otherwise than as a judge or a member of a court, performs functions within another branch of government, they cannot be performed at the same time as the judicial power is being exercised. The judge may hold two offices but it must be plain, at any given time, whether he or she is exercising the judicial power for it is to be kept separate'.**

25 We turn now to consider the foreign jurisprudence on which the Appellant relies. We do so with some diffidence, since the exercise of legal transplantation is inevitably fraught with danger. As Ackermann J pointed out in ***De Lange v Smuts NO* 1998 3 SA 785 (CC) para 60**, the model of separation of powers which will develop in this country will be **'distinctively South African'**. Such a model will be **'informed both by South Africa's history and its new dispensation'**, and will seek to avoid **'diffusing power**

so completely that the government is unable to take timely measures in the public interest' (*ibid*).

26 The shortcomings in the Appellant's first complaint emerge clearly from consideration of a trilogy of Australian cases dealing with separation of powers. The Appellant contends that the present case is of the sort considered in ***Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*** **[1997] 1 LRC 22 (HC**). We submit that the cases of ***Hilton v Wells*** **(1985) 157 CLR 57 (HC)** and ***Grollo v Palmer*** **(1995) 184 CLR 348 (HC)** provide a far more appropriate analogy.

1 The Australian courts have articulated the principle of *persona designata* in order to make clear that the doctrine of separation of powers is not necessarily compromised whenever a particular judge is required to perform non-judicial functions.

2 *Hilton v Wells* (1985) 157 CLR 57 concerned the lawfulness of a legislative provision which required judges to issue warrants authorising the interception of communications in certain circumstances. The High Court of Australia held that this provision did not violate the doctrine of separation of powers, since although it required judges to perform non-judicial powers such a duty was

imposed **'on the judges individually as designated persons'** (at 69). The principle was explained as follows:

> **'Although the Parliament cannot confer non-judicial powers on a federal court, or invest a state court with non-judicial powers, there is no necessary constitutional impediment which prevents it from conferring non-judicial power on a particular individual who happens to be a member of a court'** (at 68, emphasis added).

In other words, the doctrine of separation of powers is not necessarily violated if non-judicial powers are vested in **'the judge as an individual who, because he is a judge, possesses the necessary qualifications to exercise it'** (at 72). In the circumstances, the Court held that the relevant legislative provision was not invalid:

> **'The section designates the judges as individuals particularly well qualified to fulfil the sensitive role that the section envisages, and confers on them a function which is not incompatible with their status and independence or inconsistent with the exercise of their judicial powers.'** (at 74)

3 *Grollo v Palmer* (1985) 184 CLR 348 concerned a similar legislative provision which authorised judges to issue telecommunication interception warrants. A majority of the High Court of Australia held that this provision did not violate the doctrine of separation of powers. We respectfully submit that this decision provides an appropriate

analogy to the present case. We accordingly deal with this case in some detail.

1 Section 39(1) of the Telecommunications (Interception) Act authorised certain agencies to apply to an "**eligible judge**" for the issue of an interception warrant. Section 45 of the Act stipulated the circumstances in which a warrant could be issued. The common procedure for obtaining an interception warrant was for an appointment to be made with an eligible judge in his or her chambers and for an agency to attend with the application. At no stage was the application for a warrant filed with the Court registry and (except in South Australia where a copy could be kept in security) all documents relating to the matter were retained or destroyed by the agency (at 357-358).

2 On a proper construction of the legislation, the majority held that the power to issue interception warrants was "**conferred on judges as designated persons and not on the courts of which eligible judges are members**" (at 362).

3 The majority indicated that **'there is no necessary inconsistency with the separation of powers required by Ch III of the Constitution if non-judicial power is vested in**

individual judges detached from the Court they constitute'

(at 363). The Court stated as follows:

> **'The conditions … on the power to confer non-judicial functions on judges as designated persons are therefore: first, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent; and second, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.'** (at 364-5)

4 It was argued that the vesting of the relevant powers in a Federal Judge violated the doctrine of separation of powers. In particular, it was contended that "**judicial integrity is compromised and the confidence in the exercise of the jurisdiction of the Federal Court is prejudiced by the conferral of power on judges of the Federal Court to issue interception warrants.**" A number of contentions were advanced in support of this proposition, all of which were rejected. The Court observed at 367:

> "**Yet it is precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's running battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law protection of privacy ... and property (both real and personal), be authorised to control the official**

> **interception of communications. In other words, the professional experience and cast of mind of a judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime, on the other. It is an eligible judge's function of deciding independently of the applicant agency whether an interception warrant should issue that separates the eligible judge from the executive operation of law enforcement. It is the recognition of that independent role that preserves public confidence in the judiciary as an institution.**"

4 The Australian state of New South Wales provides for an Independent Commission against Corruption which must be headed by a judge:

> **answering affidavit of Visagie para 5, record volume 1 page 98.**

We are not aware of any legal challenge to this legislation.

27 It is submitted that the present case provides a textbook illustration of the Australian doctrine of *persona designata*. Section 3(1) of the Act requires that the Special Investigating Unit must be headed by a Judge *as an individual*. The fact that Judge Heath happens to hold judicial office is irrelevant to the performance of his duties as head of the Unit. This is clearly acknowledged in s 6(5)(a) of the Act, which empowers a Judge **'other than the head of the Special Investigating Unit'** to issue a search warrant.

Moreover, Judge Heath has been relieved of all judicial duties for as long as he heads the Special Investigating Unit.

28 The Appellant apparently concedes that Judge Heath has been appointed to head the Unit in his personal capacity. However the thrust of the Appellant's complaint is that the performance of this office is incompatible with the holding of judicial office. It is submitted that this contention is incorrect for the reasons which follow.

29 In support of its incompatibility argument, the Appellant relies extensively on the American case of *Mistretta v United States* (1989) 488 US 361.

1 *Mistretta* is distinguishable on the basis that the non-judicial power which had been assigned to the Sentencing Commission in that case involved a *legislative* power of rule-making (see at 371). It is clear that the powers of the Special Investigating Unit in the present circumstances are not legislative in character.

2 In *Mistretta*, Blackmun J stated that Congress might delegate certain non-judicial tasks to the Judiciary. Blackmun J provided several examples of instances where American judges had in the past been required to perform non-judicial activities (at 400-401):

- In 1877, five Justices served on the Electoral Commission;

- Judges have in the past served on a variety of arbitral commissions;
- Justice Roberts was a member of the Commission that investigated the attack on Pearl Harbour;
- Justice Jackson was one of the prosecutors at the Nuremberg trial;
- Chief Justice Warren presided over the commission investigating the assassination of President Kennedy.

(For a survey of the use of judges to perform non-judicial activities in a variety of countries, see the dissenting judgment of Kirby J in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1997] 1 LRC 22 (HC) at 51-52 and 62.)

1.1. In the light of these examples, Blackmun J extracted the following lesson from the American experience:

- **'Our 200 year tradition of extrajudicial service provides additional evidence that the doctrine of separation of powers does not prohibit judicial participation in certain extrajudicial activity.'** (at 401)

1.1. The majority of the Court accordingly held that the legislative establishment of a Sentencing Commission on which Federal Judges were represented did not violate separation of powers:

> **'Our system of checked and balanced authority [does not] prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges.'** (at 412)

1.2. The Appellant contends that Judge Heath's performance of functions as head of the Special Investigating Unit is incompatible with judicial office. However many of the factors on which the Appellant relies in support of the alleged incompatibility were also present in *Mistretta*, and were expressly discounted by the Supreme Court.

1.2.1. *First*: the Appellant complains that the Special Investigating Unit is involved in 'political' activities. But this was also the case in *Mistretta*. The Supreme Court referred expressly to **'the degree of political judgment about crime and criminality exercised by the Commission'** (at 392-3). Nonetheless, it held as follows:

> 'We do not believe … that the significantly political nature of the Commission's work renders unconstitutional its placement within the Judicial Branch. Our separation-of-powers analysis does not turn on the labeling of an activity as "substantive" as opposed to "procedural", or "political" as opposed to "judicial".' (at 393)

1.2.2. *Second*: the Appellant complains that the Special Investigating Unit is accountable to Parliament. However this was also the case in *Mistretta*, where the Supreme Court observed as follows:

> **'In contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit …'** (at 393-4)

1.2.3. *Third*: the Appellant complains that Judge Heath may be removed from his position as head of the Special Investigating Unit by the executive. However this was also the position in *Mistretta*, where the Supreme Court noted as follows:

> **'In contrast to a court, the Commission's members are subject to the President's limited powers of removal.'** (at 394)

1.2.4. *Fourth*: the Appellant complains that Judge Heath performs an *executive* function as head of the Unit, and that the performance of such a function is necessarily incompatible with judicial office. However that argument was rejected in *Mistretta* as follows:

> **'… Congress may authorize a federal judge, in an individual capacity, to perform <u>an executive function</u> without violating separation of powers.'** (at 403, emphasis added)

1.2.5. *Fifth*: the Appellant complains mysteriously that having Judge Heath perform functions as head of the Special Investigating Unit 'weakens' the standing of the judiciary. Again, such an argument was rejected in *Mistretta* as follows:

> **'What Mistretta's argument comes down to, then, is … that [the Judicial Branch] is inevitably weakened by its participation in policy-making. We do not believe, however, that the placement within the Judicial Branch of an independent agency charged with the promulgation of sentencing guidelines can possibly be construed as preventing the Judicial Branch from "accomplishing its constitutionally assigned functions".'** (at 395-6)

1. The Appellant relies heavily on the judgment of the High Court of Australia in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1997] 1 LRC 22 [(1996) 189 CLR 1] in support of its incompatibility argument.

1.1. At the outset, it should be noted that the majority decision in *Wilson* is controversial even within Australian jurisprudence. It was subjected to powerful criticism by Kirby J who labelled it **a 'significant narrowing'** of the court's earlier jurisprudence (at 65). Kirby J had this to say:

> **'… the decision in this case involves a departure from long-standing practice in Australia in the use of judges, including federal judges; a rejection of the principles found to be appropriate in the more rigid constitutional context considered by the Supreme Court of the United States; … and a serious limitation on the privilege of the executive government to choose a person, who happens to be a judge, where the sensitivity and importance of the particular case is considered by it to warrant that course.'** (at 66)

1.2. *Wilson* is in any event distinguishable on the facts. The majority in *Wilson* held that the exercise of non-judicial functions by a judge must be compatible with the performance of judicial duties. In the circumstances of *Wilson*, certain reporting functions were held to be incompatible with judicial office since

> **'the performance of such a function by a judge places the judge firmly in the echelons of administration, liable to removal by the Minister before the report is made and shorn of the usual judicial protection, in a position equivalent to that of a ministerial advisor'.**

1.3. The position is wholly different in the case of the Special Investigating Unit. As already indicated, the head of the Special Investigating Unit is not situated **'firmly in the echelons of administration'**. No incompatibility arises between his judicial office and his position as head of the Unit.

2. It is accordingly submitted that s 3(1) of the Act does not *in fact* violate the doctrine of separation of powers since there is no *actual* incompatibility. Indeed this much seems to be acknowledged in the Appellant's replying affidavit, which switches tack and contends that the real problem arises from the fact that Judge Heath is placed **'in a position where he is seen publicly to be subordinate to, and dependent on, executive authorities and the legislature'** (**replying affidavit of Woods para 15.2.3, record volume 3 page 255**). Warming to its theme, the Appellant contends in its written submissions that there exists a **'perception that the head of the SIU has compromised his judicial independence'** since **'all the efforts of the SIU are … directed at protection of the interests of the state'** (**Appellant's submissions page 57 para 69.5**).

2.1. It is submitted that these averments regarding **'perception'** are irrelevant. Whether s 3(1) of the Act violates the constitutional principle of separation of powers is a question *of law*. If the Appellant's arguments were valid, section 3(1) would have been unconstitutional from the moment of its enactment and without regard to the manner in which the current incumbent of the office has conducted himself.

2.2. In any event, the Appellant has not adduced any admissible evidence in order to establish that Judge Heath is **'perceived to be'** subordinate to the executive. Although it relies on media reports, the Appellant expressly disavows any suggestion that **'the media coverage is fair or accurate'** (**Appellant's submissions pages 58-59 para 70**).

2.3. The only evidence which purports to establish the 'perceptions' of the community consists of the newspaper reports which are annexed to the replying affidavit of Woods (**annexures RA6(i)-(x), record volume 4 pages 383-394).** However such evidence is irrelevant and inadmissible for three reasons.

2.3.1. *First*: The newspaper reports which are annexed to the replying affidavit of Woods (**annexures RA6(i)-(x), record volume 4 pages 383-394)** constitute hearsay evidence, and are inadmissible to prove the truth of their contents.

2.3.2. *Second*: the newspaper reports which are annexed to the replying affidavit of Woods (**annexures RA6(i)-(x), record volume 4 pages 383-394)** constitute new matter which should properly have formed part of the Appellant's founding papers.

2.3.3. *Third*: the newspaper reports are as irrelevant as would be newspaper reports which have praised the work of Judge Heath and which create the 'perception' that judicial independence has not been compromised. An instructive analogy is provided by *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC), where an attempt was made to rely on the views expressed by Mr R Van Schalkwyk in order to establish 'bias' on the part of Chaskalson P. This Court held that **'the opinion of Mr Van Schalkwyk is clearly as irrelevant as would be the opinion of any other member of the public'** (para 90).

2.4. What the Appellant contends in the light of its change of tack is that the doctrine of separation of powers is violated because Judge Heath is in a position where he *might be criticized by the Executive*. But the contention is misconceived, since the conclusion does not follow from the premise. The premise that Judge Heath is susceptible to criticism by the executive cannot generate the conclusion that that there has been a violation of the doctrine of separation of powers.

3. The truth of the matter is that Judges are routinely required to perform non-judicial functions in a manner which poses no threat to separation of powers.

3.1. Some examples of instances in which judges are required to perform extra-judicial tasks are set out below.

3.1.1. Judges are often asked to head commissions of enquiry into matters of public interest.

3.1.2. Judges are often asked to occupy an institutional position on the Law Commission.

3.1.3. The chairperson of the Amnesty Committee is required to be a judge (s 17(3) of the Promotion of National Unity and Reconciliation Act 34 of 1995).

3.1.4. Section 6(1) of the Electoral Commission Act 51 of 1996 requires the Commission to consist of five members, one of whom shall be a judge appointed by the President.

3.1.5. The members of the Legal Aid Board include Chaskalson P and Navsa J. In terms of s 4(1) of the Legal Aid Act 22 of 1996, one of the members of the Board must be a judge appointed by the Minister.

3.1.6. Judges are authorised by various statutes to issue warrants for search and seizure. See:

section 74D of the Income Tax Act 58 of 1962;

section 57D of the Value-Added Tax Act 89 of 1991.

3.1.7. Judges are authorised to perform special investigative tasks. See:

section 3 of the Prevention of Public Violence and Intimidation Act 139 of 1991;

section 15 of the Environment Conservation Act 73 of 1989.

3.1.8. Judges may issue directions authorising interception and monitoring in terms of s 3 of the Interception and Monitoring Prohibition Act 127 of 1992.

3.2. The Constitution itself stipulates the judges are required to perform certain non-curial functions.

3.2.1. Schedule 2 to the Constitution contains oaths which must be sworn to by members of the Legislature and the Executive **'before the President of the Constitutional Court or a judge designated by the President of the Constitutional Court'.**

3.2.2. The President is required to appoint judges of the Constitutional Court **'after consulting the President of the Constitutional Court'** (s 174(4) of the Constitution).

3.2.3. The Chief Justice and the President of the Constitutional Court are members of the Judicial Service Commission (s 178(1) of the Constitution).

3.3. The principle of separation of powers is not violated in the above-mentioned situations since there is no incompatibility between the judicial function and the performance of such extra-judicial functions. This much was acknowledged in *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 141, where the Constitutional Court observed that **'judicial officers may, from time to time, carry out administrative tasks'**. (The Court stated in footnote 107 that **'there may be circumstances in**

which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers').

3.4. Confronted with the prospect that its first complaint may render unconstitutional many routine examples of judges performing non-judicial tasks, the Appellant attempts to confess-and-avoid. It does so by contending that there is no need for this Court to decide on what side of the line the above-mentioned instances fall. However the fact of the matter is that the 'incompatibility test' which the Appellant puts forward will necessarily render many of those instances unconstitutional. For example, the power to issue warrants for search and seizure falls short of all the criteria which the Appellant prescribes for compatibility. If the Appellant's first complaint is correct then this will necessarily entail that judges may no longer issue such warrants. As Kirby J pointed out in his dissenting judgment in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1997] 1 LRC 22 at 65-66:

> **'If the suggested test is impermissible closeness to the legislature or the executive government and their respective functions, the activities of a federal judge, secretly and anonymously authorising telephonic intercepts, is clearly much closer to the functions of the other branches of government than those of a statutory reporter, publicly identified, evaluating evidence and submissions, judicially reviewable and presenting a report**

> **which reality suggests would inevitably find its way into the public domain…. It is said that "historically" judges have been vested with functions such as authorising the issue of warrants. So they have. But they have also, in our history, been called upon to report to the executive upon difficult and sensitive questions. History does not stand still'.**

4. The Appellant attacks the reasoning of the Court *a quo* in equating the position of the Head of the Special Investigating with that of a Judge heading a Commission of Inquiry.

4.1. In this regard the Appellant advances two contentions:

4.1.1. *First*: the Appellant contends that the Court's assertion that participation of judges in commissions of inquiry in the past did not create a perception of an unduly close relationship with the other branches of government is not correct. In any event, the Appellant contends that whatever the practice might have been in the past, this practice cannot serve as the standard for judicial conduct under the Constitution.

Appellant's Submissions: p 59 paras 72.1 - 72.2

4.1.2. *Second:* the Appellant contends that the head of the Special Investigating Unit cannot be equated with a judge who heads a Commission of Inquiry.

Appellant's Submissions: p 59 para 72.3

4.2. The Appellant does not unequivocally state whether it contends that the appointment of judges to head commissions of inquiry would be unconstitutional. The Appellant appears to imply, however, that this practice would indeed be constitutionally offensive. It argues that "**whatever the practice might have been in the past, there is no reason to proceed from the premise that it should be the benchmark of the permissible level of judicial performance of non-judicial functions in compliance with the constitutional requirement of judicial independence**" (**Appellants' Submissions: p 63 para 74**). Moreover, the Appellant cites examples of criticism of the use of judges to sit on commissions of inquiry in politically sensitive matters (**Appellant's Submissions: pp 60-62 paras 73.2 - 73.3**).

4.3. It is not clear what the Appellant seeks to make of the criticism levelled at the use of judges to sit on commissions of inquiry. It does not logically follow that because *some* judges have (by reason of their conduct) rendered themselves vulnerable to criticism, *all* appointments of judges to head commissions of inquiry are constitutionally offensive. The invocation of the work of Professor Dyzenhaus in this regard is particularly surprising (**Appellant's**

submissions para 74). While it is correct that in his "most recent polemic" Professor Dyzenhaus is critical of the manner in which judges performed their judicial and non-judicial functions in the past, much of his work is devoted to the conduct of present judges and his strident criticism of them for not appearing before the Truth and Reconciliation Commission. The conduct of the present judges, according to Professor Dyzenhaus, was open to severe criticism and, in his view, would not have compromised judicial independence. This view is one which is obviously not shared by the present judiciary nor by the United Nations Special Rapporteur on the Independence of Judges and Lawyers.

4.4. We do not suggest that the functions of the head of the Special Investigating Unit are identical to those of a judge who heads a commission of inquiry under the Commissions Act (although there may be a closer comparison to the functions of a commission established under the Prevention of Public Violence and Intimidation Act 139 of 1991). We submit, however, that the analogy is entirely appropriate for the purposes of determining the permissible limits of the separation of powers and the requirements of judicial independence.

4.5. The "**most important**" distinction to which the Appellant refers is "**the fact that a commission of inquiry does not hold a brief for**

anybody" whereas "**the very purpose of the SIU on the other hand, is to protect the State**" (**Appellants' Submissions: p 65 para 75.3**). It is not clear on what basis this contention is advanced. The long title to the Act describes its purpose as follows:

> "**To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations of Special Investigating Units; and to provide for matters incidental thereto.**"

4.6. It is quite artificial, in our submission, to suggest that the very purpose of the Special Investigating Unit is to protect the State. On the contrary, the purpose of the Special Investigating Unit is to investigate malpractices or maladministration within the State and to protect the public interest. It is also not clear in what sense the Appellant uses the word "**State**". (Cf *Inkatha Freedom Party v Truth and Reconcilation Commission* 2000 3 SA 119 (C) at 130J-131.) If by this it is intended to convey that the SIU is politically partisan, this is an incorrect characterisation.

5. For the reasons set out above, it is submitted that s 3(1) of the Act does not violate the doctrine of separation of powers.

Judicial independence and the rule of law

1 *The Appellant relies on s 165 of the Constitution in support of its first complaint. The Appellant also relies on the foundational value of the rule of law embodied in section 1(c) of the Constitution. However the Appellant does not appear to advance any particular conception of the rule of law which is not already embraced by its arguments based upon the separation of powers and the independence of the judiciary. We accept that the separation of the judiciary from the other arms of the State is fundamental to the rule of law as is the independence of the judiciary. Since, however, the rule of law has wider connotations unrelated to judicial independence and the separation of powers, it is unnecessary for us to consider this concept separately.*

2 *Section 165(2) of the Constitution provides as follows:*

> ***'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'***

3 *The definition of* ***'independent'*** *which is given in the Oxford English Dictionary* is the following:

'not depending upon the authority of another, not in a position of subordination or subjection; not subject to external control or rule; self-governing, autonomous, free.'

4 The meaning of 'independence' was considered by the Constitutional Court in ***De Lange v Smuts NO and Others*** **1998 3 SA 785 (CC).**

1 In *De Lange* the Constitutional Court was required to consider whether the presiding officer at an insolvency enquiry who commits a recalcitrant examinee to prison in terms of section 66(3) of the Insolvency Act 24 of 1936 is an 'independent and impartial tribunal' for the purposes of section 34 of the Constitution.

2 Ackermann J found the Canadian jurisprudence to be instructive in considering this issue (at 813D-E). He quoted with approval (at 813F) from ***The Queen in Right of Canada v Beauregard*** **(1986) 30 DLR (4th) 481 (SCC),** where the Canadian Supreme Court summarised the essence of judicial independence as follows:

> **'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another Judge – should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision…. The ability of individual Judges to make**

> **decisions on concrete cases free from external interference or influence … continues to be an important and necessary component of the principle [of judicial independence].'**

3 Ackermann J stated as follows (at para 70) with reference to the Canadian case of ***S v Valente*** **(1985) 24 DLR (4th) 161 (SCC):**

> **'In the leading case of *R v Valente* three essential conditions of independence were identified that could be applied independently and were capable of achievement by a variety of legislative schemes or formulas. The first was security of tenure, which embodies as an essential element the requirement that the decision-maker be removable only for just cause, "secure against interference by the Executive or other appointing authority". The second was a basic degree of financial security free from "arbitrary interference by the Executive in a manner that could affect judicial independence". The third was**
>
> > **"institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function … judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function". '**

4 Ackermann J stated with reference to ***R v Généreux*** **(1992) 88 DLR (4th) 110 (SCC)** that the requirement of independence implies that a tribunal must enjoy **'freedom from interference by the executive and legislative branches of government'** (at 815A-B).

5 In the same case, O'Regan J quoted with approval (at 853) the following dictum from *S v Valente* (1985) 24 DLR (4th) 161 (SCC):

> **'It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a Judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government…. The relationship between these two aspects of judicial independence is that an individual Judge may enjoy the essential conditions of judicial independence, but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.'**

5 The jurisprudence of the European Court of Human Rights is similar to the Canadian jurisprudence (which was cited with approval in *De Lange v Smuts*).

1 The European Convention for the Protection of Human Rights and Fundamental Freedoms provides that civil and criminal matters must be heard by an **'independent and impartial tribunal'** (article 6(1)).

2 In this context, 'independent' means **'independent of the executive and also of the parties'** (***Ringeisen v Austria*** **(1979-80) EHRR 455 para 95).**

3 In ***Piersack v Belgium*** **(1983) 5 EHRR 169 para 27**, the European Court of Human Rights pointed out that an independent tribunal must enjoy guarantees **'designed to shield them from outside pressures'**.

4 In the case of ***Campbell and Fell v United Kingdom*** **(1985) 7 EHRR 165 para 78**, the European Court stated that the following considerations are relevant when assessing independence:

> **'In determining whether a body can be considered to be "independent" – notably of the executive and of the parties to the case – the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.'**

6 In the light of the preceding authorities, it is submitted that the concept of judicial independence has three implications.

1 *First:* judges must enjoy security of tenure. This means tenure **'that is secure against interference by the executive or the appointing authority in a discretionary or arbitrary manner'** (***S v Valente*** **(1985) 24 DLR (4th) 161 (SCC) at 180**).

2 *Second*: judges must enjoy financial security. This means that **'the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect independence'** (***S v Valente*** **(1985) 24 DLR (4th) 161 (SCC) at 184**).

3 *Third*: judges must enjoy institutional independence with respect to matters of administration that relate directly to the exercise of their judicial functions. As the matter was put **in *R v Généreux* (1992) 88 DLR (4th) 110 (SCC)** at 129-130, **'it is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists'**.

7 The preceding analysis exposes the flaw in the Appellant's contention that s 3(1) of the Act compromises the independence of the courts. The fact that a Judge is required to head the Special Investigating Unit in no way touches on any of the above-mentioned aspects of judicial independence. In other words, the fact that a judge may be required to perform non-judicial functions by heading the Special Investigating Unit does not negate the injunction in s

165(2) of the Constitution that courts must be 'independent'. This is so for two reasons.

1 *First*: as the above-cited authorities make clear, curial independence means that courts must be independent *from the other branches of government*. Independence means '**not in a position of subordination or subjection; not subject to external control or rule; self-governing, autonomous, free**' (*Oxford English Dictionary*). To be independent necessarily means to be free from control *on the part of some other body.* The requirement of curial independence therefore speaks to the *functionaries* from which the courts must be independent; it does not speak to the *functions* which the courts may perform. In short, s 165(2) of the Constitution means that the executive may not meddle with the courts; it does not mean that judges may not perform non-judicial functions.

2 *Second*: Although the Appellant repeatedly states that s 165(2) of the Constitution requires *judges* to be independent (**Applicant's submissions para 19.1; para 34; para 43),** what s 165(2) in fact requires is that *courts* must be independent. Section 165(2) is therefore concerned with the institution of the courts rather than with the position of individual judges. The same concern emerges in s 34

of the Constitution, which provides that everyone has a right to have a justiciable dispute decided **'before a court or … another independent … tribunal or forum'**. The distinction between courts and judges should not be elided, since (as the Australian doctrine of *persona designata* demonstrates) curial independence is not necessarily compromised when individual judges exercise non-judicial functions in their personal capacity. In short, the requirement that *the Courts* must be independent is not violated by the fact that *Judge Heath* heads the Special Investigating Unit.

8 The Appellant has sought to avoid these difficulties by giving the concept of curial independence a considerably expanded meaning.

1 In effect, the Appellant conflates curial independence with the doctrine of separation of powers. The reason for the Appellant's strategy is clear: while the Constitution provides expressly that the courts must be independent, it does not expressly entrench the principle of separation of powers. The Appellant's device therefore represents an attempt to introduce through the back door of 'curial independence' principles which do not gain entrance through the front door of 'separation of powers'.

2 The meaning which the Appellant seeks to attribute to 'independence' is not supported by linguistic analysis.

1 Curial independence means that other branches of government may not interfere with the courts. In other words, it means that **'no outsider … should interfere … with the way in which a judge conducts his or her case'** (***The Queen in Right of Canada v Beauregard*** **(1986) 30 DLR (4th) 481 (SCC) at 491**). Differently expressed, curial independence refers to **'a Judiciary free from control by the Executive and the Legislature'** and to **'judges who are free from potential domination by other branches of government'** (***US v Will*** **449 US 200 (1980)** at 218, per Burger CJ).

2 As these dicta illustrate, to be independent necessarily means to be independent *from some other agency*. The Appellant attempts to give 'independent' a wholly different meaning, by contending that it requires that judges should not perform non-curial functions. This does not accord with the ordinary meaning of the word 'independent'. The point may perhaps be made as follows: the requirement of 'curial independence'

stops outsiders from '*looking in*'; it does not stop judges from '*looking out*'.

3 The meaning which the Appellant seeks to attribute to 'curial independence' is also not supported by foreign jurisprudence.

1 The Appellant cites ***Mistretta v United States* (1989) 488 US 361** as being relevant to the issue of judicial independence. But the reasoning of the majority in that case was based squarely on the principle of separation of powers (see at 380). That the doctrine of separation of powers was central to the court's reasoning emerges at 388, where Blackmun J summarised the American jurisprudence as follows:

> **'consistent with the separation of powers, Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogative of another Branch and that are appropriate to the central mission of the Judiciary.'**

2 Similarly, the Appellant relies on ***Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1997] 1 LRC 22** as authority for the meaning of 'judicial independence'. However the reasoning of the majority in that case was not based on judicial independence – indeed the majority pointed

out that chapter III of the Australian Constitution does not speak of '**judicial independence'** (at 34). Rather, the decision in that case was based on the doctrine of separation of powers (see in particular the dissenting judgment of Kirby J at 56). In other words, the reasoning of the majority was expressly based on the premise that in the Australian Constitution, **'the functions of the judicial branch are constitutionally separated from the functions of the legislature and the executive – the political branches of government'** (at 32).

9 It is accordingly submitted that s 3(1) of the Act does not violate the doctrine of judicial independence in general and s 165(2) of the Constitution in particular.

Conclusion

10 For the reasons stated above, it is submitted that the Appellant's first complaint is without merit.

IV THE APPELLANT'S SECOND COMPLAINT: THE VALIDITY OF PROCLAMATION R31 OF 1999

11 The Appellant's second complaint is that the referral by Proclamation R31 of 1999 is *ultra vires*. The Appellant contends that this is so because:

- the allegations which were referred for investigation lack the required degree of specificity;
- the allegations which were referred for investigation are not allegations of the kind contemplated in the Act.

We will consider each of these complaints in turn.

The terms of the Proclamation are sufficiently specific

1 ***The Appellant contends that Proclamation R31 of 1999 is ultra vires because the allegations referred for investigation lack the requisite degree of 'specificity' (Appellant's submissions paras 83-88)***. This

appears to amount to an argument that Proclamation R31 of 1999 is void for vagueness.

2 It is submitted that the test to be applied in the present circumstances is analogous to the test which has recently been formulated by this Court in the context of commissions of inquiry:

> **'Terms of reference constitute a mandate for the commissioner which he or she uses as a guide to determine the scope of his or her investigation. Consequently, the question to be answered is whether objectively the terms of reference are reasonably comprehensible to the commissioner and affected parties so as to determine the nature and ambit of the commissioner's mandate with reasonable certainty.'**
>
> ***President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 229.**

This question must receive an affirmative answer in the context of Proclamation R31 of 1999. We say so for the following reasons.

3 Section 2(1)(*a*)(*ii*) of the Act empowers the President to refer a **'matter'** to an existing Special Investigating Unit in certain circumstances. Acting in terms of this provision, Proclamation R31 of 1999 referred the following **'matter'** for investigation to the Special Investigating Unit:

> **'an allegation of a failure by attorneys, acting on behalf of any person with regard to a claim for compensation from the Road Accident Fund, to pay over to such persons the total nett amount received in respect of compensation from the Road Accident**

Fund after deduction of a reasonable and/or taxed amount in respect of attorney-client costs'.

4 Proclamation R31 of 1999 identifies the subject-matter of the investigation with sufficient precision.

1 Our courts have frequently emphasised that **'the law requires reasonable, not perfect, lucidity'** (***R v Pretoria Timber Co (Pty) Ltd* 1950 3 SA 163 (A) at 176F-H**).

2 The relevant standard is provided by the reasonable person:

> **'[A court] must approach the construction of the by-law from the angle that it is dealing with reasonable people: in other words, the enquiry must be whether the by-law gives, with reasonable certainty, sufficient guidance to a reasonable person. A capricious or foolish person might describe as insufficient guidance that which would be completely satisfactory to the reasonable man. The test of what is "sufficient guidance" must be measured by the yardstick of the reasonable person and not that of the foolish person.'**
>
> ***R v De Villiers* 1955 3 SA 403 (C) at 406B-D**.

3 The wording of Proclamation R31 of 1999 gives sufficient guidance to the reasonable person as regards the subject-matter of the investigation. Although the Appellant attempts to avoid this conclusion by suggesting that three aspects of the Proclamation are excessively

vague, it is submitted that the Appellant's objections in this regard are unfounded.

4 *First*: The Appellant complains that Proclamation R31 of 1999 speaks of **'attorneys'** in the abstract (**Appellant's submissions para 85.1**).

1 We experience some difficulty in understanding this complaint. The Appellant has not contended that the expression **'attorneys'** does not have a precise meaning. Nor could the Appellant pursue such a contention, since the class of 'attorneys' may be delineated with absolute precision. The expression **'attorneys'** is therefore not void for vagueness.

2 The Appellant's real complaint is that that the class of **'attorneys'** includes both 'the innocent' and 'the guilty alike'. In other words, the Appellant's complaint goes to the *number of people affected*. However the fact that a large number of people are potentially affected by Proclamation R31 of 1999 does not serve to render the Proclamation insufficiently precise – the scope of the investigation **'is clearly broad, but it is not indeterminate'** (*President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 230). In any event, the terms of reference of Proclamation R31

of 1999 require the Special Investigation Unit to investigate only **'unlawful appropriation'** and **'unlawful or improper conduct'** on the part of attorneys.

5 *Second*: The Appellant complains that Proclamation R31 of 1999 includes within its ambit of reference attorneys who might have withheld RAF funds from their clients for wholly legitimate reasons (**Appellant's submissions para 85.2**).

1 This complaint is unfounded simply as a matter of interpretation. The Proclamation states that for the purposes of the investigation, the terms of reference of the Special Investigating Unit are to investigate **'unlawful appropriation or expenditure of public money'** or **'unlawful or improper conduct … which has caused or may cause serious harm to the interests of the public'**. Since the Special Investigating Unit is required to investigate **'unlawful appropriation'** and **'unlawful or improper conduct'**, it is not empowered to investigate attorneys who withhold money for legitimate reasons. This provides a complete answer to the Appellant's complaint that the Proclamation confers on the

Special Investigating Unit a discretionary power to investigate **'innocent attorneys'** (**Appellant's submissions para 87)**.

2 In any event, the Appellant's complaint would not render the Proclamation insufficiently precise even if it were correct as a matter of interpretation. The Appellant's analysis of the relevant terms of the Proclamation shows that they are capable of precise interpretation. The Appellant's complaint is directed at the underlying rationality of the Proclamation; it is not directed at the vagueness of the relevant terms at all.

6 *Third*: The Appellant complains that the expression **'reasonable'** in Proclamation R31 of 1999 is surrounded by a penumbra of uncertainty (**Appellant's submissions para 85.3**). It is correct that a judgment call must be made when determining whether the amount deducted for attorney-client costs in any particular case is 'reasonable'. But this does not mean that the term 'reasonable' has an insufficiently precise meaning – courts of law and taxing masters make such decisions on a routine basis. In ***Genac Properties Jhb (Pty Ltd v NBC Administrators CC*** **1992 1 SA 566 (A)** Nicholas AJA pointed out as follows:

> **'There is authority in this Court for the view that, where there is an agreement to do work for remuneration and the amount thereof is not specified, the law itself provides that it should be reasonable…. In other jurisdictions it is not considered a contract of sale for a reasonable price is too vague to be enforced. Section 8(2) of the English Sale of Goods Act 1979 states that where the price is not determined as mentioned in s 8(1) the buyer must pay a reasonable price; and what is a reasonable price is a question of fact dependent on the circumstances of each particular case…. And in the United States of America it is stated in *Corbin on Contracts* para 99 that an agreement to pay a "reasonable price" is sufficiently definite for enforcement.'** (at 578B-C)

See also ***NBS Boland Bank Ltd v One Berg River Drive CC*** **1999 4 SA 928 (SCA) at 937A-I**.

5 In sum, it is submitted that the scope of the investigation **'is clearly broad, but it is not indeterminate'** (*President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 230). Differently expressed, Proclamation R31 of 1999 is **'reasonably comprehensible to … affected parties so as to determine the nature and ambit of [the investigation] with reasonable certainty'** (*President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 229).

The allegations are not ultra vires

6 *The Appellant complains that the referral by Proclamation R31 of 1999 is unlawful, since the relevant 'allegations' do not fall within the terms of the Act (**Appellant's submissions paras 78-82**). We experience some difficulty in understanding the true import of this complaint. Our difficulty arises from the fact that the Appellant uses the word **'allegation'** to refer (a)* to the allegation which gave rise to the referral under s 2(2) of the Act, *and* (*b*) to the matter which has been referred for investigation in terms of s 2(1) of the Act:

- **Appellant's submissions: para 19.2.1, para 25.1, para 82.**

1. In other words, it is not clear to us whether the Appellant's complaint is

- that the wording of Proclamation R31 of 1999 falls outside the empowering provisions of the Act (in which case the alleged defect would attach to the Proclamation), or

- that the allegations on which the President relied when he promulgated Proclamation R31 of 1999 did not justify the referral (in which case the alleged defect would attach to the allegations which were before the President).

1. We will accordingly consider both possibilities. We will begin by considering the Appellant's complaint on the assumption that it contends that the allegations which are referred to in Proclamation R31 of 1999 do not fall within the terms of the Act. Thereafter, we will consider the Appellant's complaint on the basis that it contends that the President's decision to refer the matter for investigation was unlawful since the allegations which were before him did not fall within the terms of the Act.

The allegations referred for investigation in terms of the Proclamation

1 The Appellant contends that the allegations referred for investigation in terms of Proclamation R31 of 1999 do not fall within the terms of s 2(2) of the Act.

2 It is apparent from the President's reasons (**annexure FA7, record volume 1 pages 85-86)** and from the wording of the Proclamation that the relevant allegations fall within s 2(2)(*c*) and 2(2)(*g*) of the Act. We say so for the following reasons.

3 *Section 2(2)(c) of the Act.*

1 The Appellant alleges that the failure of attorneys to pay over to claimants moneys that are lawfully due to them from the RAF does not qualify as **'unlawful appropriation or expenditure of public money'** within the meaning of s 2(2)(*c*) of the Act. The Appellant contends that moneys paid out by the RAF cease to be **'public moneys'** once they are received by an attorney acting for a claimant.

2 Section 1 of the Act contains the following definitions:

> **' "public money" means any money withdrawn from the National Revenue Fund or a Provincial Revenue Fund, as contemplated in the Constitution, and any money acquired, controlled or paid out, by a State institution'.**
>
> **' "State institution" means any national or provincial department, any local government, any institution in which the State is the majority or controlling shareholder or in which the State has a material financial interest, or any public entity as defined in section 1 of the Reporting by Public Entities Act 1992 (Act 93 of 1992)'.**

3 The RAF clearly falls within the definition of a **'State institution'**.

1 The RAF is an institution in which **'the State has a material financial interest'**, within the meaning of s 1 of the Act.

2 Further and in any event, the RAF falls within the definition of a '**public entity'** in the Reporting by Public Entities Act 93 of 1992. This Act contains the following definitions:

> **' "public entity" means an institution that operates a system of financial administration separate from the national, provincial and local spheres of government and in which the State has a material financial interest'.**

> **' "material financial interest", in relation to a public entity, means an interest arising when** –
>
> > **(a) 50 per cent or more of the entity's expenditure is defrayed directly or indirectly from funds voted by Parliament; or**
> >
> > **(b) the entity is or was dependent for 50 per cent or more of its total permanent capital needs, including share capital, loans or other forms of permanent capital, on funds voted by Parliament, and the State still holds a direct or indirect interest of 50 per cent or more in such permanent capital; or**
> >
> > **(c) the entity supplies products or services that are related to the broad public interest under monopolistic rights conferred on it by an Act of Parliament; or**
> >
> > **(d) the State has a financial interest and the majority of the entity's directors are appointed by the State; or**

> **(e) the State creates the possibility through contingent liability that funds voted by Parliament will have to be used in future to defray 50 per cent or more of the entity's expenditure or to provide 50 per cent or more of the entity's permanent capital; or**
>
> **(f) the State administers funds, assets or other property in an entity on a trust basis on behalf of the inhabitants of the Republic or a particular interest group'.**

The RAF is a '**public entity**' within the meaning of the Reporting by Public Entities Act 93 of 1992. It follows that the RAF also qualifies as a '**State institution**' for the purposes of the Special Investigating Units and Special Tribunals Act 74 of 1996.

3 It is common cause that the RAF is a '**state institution**' within the meaning of s 1 of the Act:

> **replying affidavit of Woods para 50, record volume 3 page 287.**

4 We submit that money which is paid out by the RAF to an attorney acting on behalf of a claimant falls within the definition of '**public money**', since it is money which has been '**acquired, controlled <u>or paid out</u> by a State institution**'.

1 In the nature of things, it is not possible for money to be **'paid out'** by a State institution unless that money has previously been **'acquired'** or **'controlled'** by a State institution. The words **'paid out'** must therefore add something to the preceding phrase **'acquired [or] controlled**', for else they would be redundant. What these words signify is that money which is *paid out* by a state institution will continue to be regarded as 'public money', *notwithstanding the fact that the money is no longer controlled by a state institution*.

2 It follows that the Appellant errs when it states that money which is paid out by the RAF ceases to be 'public money' once it is received by an attorney from the RAF (**Appellant's submissions para 80.3-80.4**). This contention fails to give any meaning to the phrase **'paid out'** in the definition of **'public money'**. It is also inconsistent with the Appellant's earlier concession that **'any money acquired, controlled or paid out by the RAF constitutes public money' (Appellant submissions para 80.2, page 69).**

5 The Appellant contends that once money is paid out by the RAF to an attorney, it ceases to be 'public money' and becomes 'private money'

since ownership now vests in the attorney. The Appellant implies that such money may thereafter not be misappropriated by an attorney, by virtue of the fact that ownership now vests in him or her. For the reasons already indicated, s 1 of the Act envisages that funds will continue to constitute **'public money'** notwithstanding the fact that they have been **'paid out'** by a State institution. But in any event, ownership of money which is paid by the RAF to an attorney does not vest in the attorney.

1 Section 78(1) of the Attorneys Act 53 of 1979 requires an attorney to keep a separate trust banking account and to deposit therein **'money held or received by him on account of any person'.**

2 Money which is received from the RAF by an attorney on behalf of a client constitutes trust money in the hands of the attorney. The attorney does not become the owner of such money. In ***R v Gush*** **1934 AD 260,** Wessels approved of the following dictum from *R v Mohr as* reported in 1932 Justice Circular 27:

> **'Where trust money is received for a certain purpose, the trustee does not become the owner of**

> **the money. He must keep it intact and apply it to the trust purpose.'**

3 Even if ownership of such money were to vest in the attorney by *confusio*, it is clear that the equivalent in value may be stolen by the attorney in spite of the fact that *confusio* has taken place (***S v Gathercole* 1964 1 SA 21 (A) at 25E**). The principle was expressed as follows in ***R v Manuel* 1953 4 SA 523 (A) at 526:**

> **'… it must be borne in mind that, under our modern system of banking and paying by cheque or kindred process, the question of ownership in specific coins no longer arises in cases where resort to that system is made. Even if an agent receives currency on behalf of a principal, there is ordinarily no obligation on him to hand over the notes or coin received by him or his principal. Nevertheless, it is trite law that this is trust money and that if he does not pay over to his principal what he has received … and uses the fund for his own purposes, he is guilty of theft.'** (emphasis added)

Similarly, in ***R v Scoulides* 1956 2 SA 388 (A)** Schreiner JA stated the principle as follows:

> **'… the ownership at different points of time of the individual notes or coins is not important in deciding whether a theft or them has been committed. What is decisive is whether the sum of money, considered as such and not as made up of**

> **individual notes and coins, which the accused person took or consumed was already wholly his to deal with as he pleased for his own benefit, or whether it was really held in trust for the complainant.'** (emphasis added)

6 It is accordingly submitted that Proclamation R31 of 1999 provides for an investigation into **'unlawful appropriation or expenditure of public money'** within the meaning of s 2(2)(c) of the Act.

7 Even if this Court were to take a different view and were to find that money which is paid by the RAF to an attorney ceases to be 'public money', such a finding would not invalidate para (*a*) of Proclamation R31 of 1999. This paragraph tracks the wording of s 2(2)(c) of the Act, and requires the Unit to investigate any **'unlawful appropriation of expenditure of public money or property'** for the purposes of the investigation described above. The Unit is required to exercise its powers **'within the framework of its terms of reference'** (s 4(1) of the Act). If this Court were to hold that money which is paid out by the RAF ceases to be 'public money', this would provide guidance to the Special Investigating Unit as regards the breadth of its powers in terms of para (a) of Proclamation R31 of 1999. However such a finding would not render para (a) of the Proclamation *ultra vires* the Act; far less would it invalidate the whole of the Proclamation.

4 *Section 2(2)(g) of the Act.*

1 The Appellant alleges that the failure of attorneys to pay over to claimants moneys that are lawfully due to them from the RAF does not qualify as conduct **'which has caused or may cause serious harm to the interests of the public or any category thereof'** within the meaning of s 2(2)(*g*) of the Act.

2 The Appellant takes the view that s 2(2)(g) refers to '**society at large or any part thereof, rather than to its individual members',** and that the Act is intended to **'protect the state and society at large rather than its individual members'** (**Appellant's submissions para 81.5**).

1 Such an aggregative concept of the state is unjustified, since the public interest is the sum of individual interests. **In *Jennings v Stephens* [1936] 1 All ER 409 (CA)** at 412, Lord Wright stated as follows:

> **' "The public" is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical**

purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or who would be interested in any particular matter professional, political, social, artistic or local…. Thus it is clear that by "public" is meant, in the words of Bowen LJ, "a portion of the public". That particular portion of the public which is meant may sometimes be very small indeed.'

(Emphasis added. This passage was quoted with approval in ***Asko Beleggings v Voorsitter van die Drankraad*** **1997 2 SA 57 (NC) at 66I-67A** and in ***President of the Republic of South Africa v South African Rugby Football Union*** **2000 1 SA 1 (CC) page 78 note 141.)**

2 In any event, there is no reason why road traffic victims who have been overreached by their attorneys might not constitute a **'category'** of the public, within the meaning of s 2(2)(g). See:

Aetna Insurance co v Minister of Justice **1960 3 SA 273 (A) at 286;**

Van Blerk v African Guarantee & Indemnity Ltd **1964 1 SA 336 (A) at 341;**

Coetzer v Santam Versekeringsmaatskappy Bpk **1976 2 SA 806 (T) at 811-812.**

3 It is abundantly clear that the failure of attorneys to pay over to victims the moneys that are lawfully due to them from the RAF causes serious harm to the interests of those particular victims.

4 Even if the Appellant's aggregative concept of the state were correct, the Appellant's understanding of what is meant by the expression **'the interests of the public'** is (to say the least) ascetic.

1 In ***Ex parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area*** **1998 1 SA 78 (LCC),** Moloto J pointed out that the *Oxford English Dictionary* **'defines "public interest" simply as "the common welfare"'** (at 83E). Conduct therefore falls within the scope of s 2(2)(g) of the Act if it causes serious harm to the common welfare.

2 The RAF is a form of social insurance. Many road accident victims are dependent on compensation from the RAF in order to guarantee their physical well-being. If such victims do not receive their full entitlement to compensation from the RAF, they will inevitably become a burden on the state. By virtue of South Africa's chronic scarcity of resources, the State cannot afford to dip into general government revenue in order to provide social welfare benefits to the victims of road accidents. The benefits which are paid by the RAF derive from the fuel

levy which is paid by all road users; RAF funds do not derive from general government revenue. The failure of attorneys to pay victims their proper entitlement to compensation from the RAF is therefore a source of considerable harm to the public interest, since the shortfall places an inevitable burden on government revenue:

> **Answering affidavit of Maduna para 11.7, record volume 2 page 132**
>
> **Answering affidavit of Maduna para 26.4.6, record volume 2 page 152**
>
> **Answering affidavit of Maduna para 57.2, record volume 2 page 184**
>
> **Answering affidavit of Greenland paras 6-15, record volume 3 pages 238-241.**

5 It is accordingly submitted that the investigation in terms of Proclamation R31 of 1999 involves a matter **'which has caused or may cause serious harm to the interests of the public or any category thereof'** within the meaning of s 2(2)(*g*) of the Act.

6 Even if this honourable Court were to take a different view, this would not have the effect of rendering para (b) of Proclamation R31 of 1999 *ultra vires.* Paragraph (b) tracks the wording of s 2(2)(g) of the Act,

and requires the Unit to investigate any **'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'** for the purposes of the investigation referred to above. The Unit is required to exercise its powers **'within the framework of its terms of reference'** (s 4(1) of the Act). Any interpretation of para (*b*) of the Proclamation by this Court would provide guidance to the Special Investigating Unit as regards the breadth of its powers. Even if the most restrictive interpretation of para (b) were to be adopted by this Court, this would not render para (b) of the Proclamation *ultra vires* the Act nor would it invalidate the entire Proclamation.

The allegations which gave rise to the Proclamation

5 We will assume that the Appellant complains in the alternative that the 'allegations' which prompted the referral in terms of Proclamation R31 of 1999 did not fall within the terms of the Act. We make this assumption for the following reasons.

1 Proclamation R31 of 1999 states that **'allegations as contemplated in s 2(2)(c) and (g) of [the Act] have been made'**.

2 The Appellant argues that **'the allegation upon which the president acted when he referred to the SIU for investigation is … not one of the kind contemplated by section 2(2)'** (**Appellant's submissions para 82**). In other words, the Appellant contends that **'it was … not competent for the president to refer the allegation to the SIU'** (**Appellant's submission para 19.2.1**).

3 The Appellant therefore appears to contend that the relevant allegations which were before the President did not fall within the terms of the Act (**Appellant's submissions para 82)**. On this basis, the Appellant argues that the President's decision to promulgate Proclamation R31 of 1999 was unlawful.

6 Nowhere in the Appellant's papers is it contended that the President's decision to promulgate Proclamation R31 of 1999 was vitiated on the basis that the allegations on which the President acted did not constitute allegations of the sort referred to in s 2(2)(c) or (g) of the Act. In other words, this it is not a complaint which was anticipated in the Appellant's papers. Be that as it may, the complaint is without substance for the reasons set out below.

7 Section 2(1)(*a*)(*ii*) of the Act provides that the President may refer a **'matter'** to an existing Special Investigating Unit **'on any of the grounds mentioned in subsection (2)**'. Insofar as relevant, s 2(2) provides that the President may exercise the powers under subsection (1) on the grounds

> **'of any alleged**
>
> …
>
> **(c) unlawful appropriation or expenditure of public money or property;**
>
> …
>
> **(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'.**

8 The meaning of the word **'alleged'** was considered in ***S v Tinto* 1979 3 SA 407 (C)**. Friedman J quoted the following dictionary definition from the *Oxford English Dictionary* as being the **'plain, ordinary meaning of the word "allege"'** (at 411A):

> **'To advance (a statement) as being able to prove it; hence, to assert without proof; to affirm, predicate.'**

The court also quoted the following definition from *Webster's Third New International Dictionary* with approval (at 411B):

> **'2*a*: To state or declare as if under oath positively and assuredly but without offering complete proof: to assert, affirm, state without proof**
>
> ***b*: to assert, affirm, state without proof or before proving (*alleged that* the suspect is a kidnapper)'**

9 In the light of these authorities, the Appellant erred when it contended in its replying affidavit that *evidence* of harm was required before the President exercised his powers in terms of s 2 of the Act:

> **replying affidavit of Woods para 35.2, record volume 3 page 274**
>
> **replying affidavit of Woods para 43.2, record volume 3 page 283.**

Indeed the Appellant now concedes that for the purposes of s 2(2), **'no more is required than a mere allegation'** and that **'there need be no evidence to support it'** (**Appellant's submissions para 23.1**).

10 Proclamation R31 of 1999 states that **'allegations as contemplated in section 2(2)(c) and (g) of [the Act] have been made in respect of the payment by attorneys to persons of compensation from the [RAF]**

and/or its predecessors in law'. The Proclamation refers to **'an allegation of a failure by attorneys, acting on behalf of any person with regard to a claim for compensation from the Road Accident Fund, to pay over to such persons the total nett amount received in respect of compensation from the Road Accident Fund after deduction of a reasonable and/or taxed amount in respect of attorney-client costs'**. For the reasons set out above, it is submitted that these qualify as sufficient allegations of **'unlawful appropriation or expenditure of public money'** (s 2(2)(*c*) of the Act), and of '**unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public'** (s 2(2)(*g*) of the Act). In other words, the allegations which were before the President fell squarely within the ambit of s 2(2)(*c*) and (*g*) of the Act.

11 In its replying papers, the Appellant has intimated that the allegations which prompted the promulgation of Proclamation R31 of 1999 may be susceptible to attack on the basis that they arose from Van Oudtshoorn and the Chairman of the RAF (**replying affidavit of Woods para 25.6 para 25.6, record volume 3 page 263**). The Appellant has also hinted that the allegations may have contained insufficient evidence of '**harm to the public interest'** (**replying affidavit of Woods para 43.2, record volume 3 page**

283). However these contentions may not be relied on by the Appellant in the present circumstances, since no basis therefore was laid in the Appellant's founding affidavits or supplementary affidavits. It is a fundamental principle of law that the Appellant may not build a case in reply on a foundation that was not previously laid: see

> ***Administrator Transvaal v Theletsane*** **1991 2 SA 192 (A) at 195-196, 200G;**
>
> ***Naude v Fraser*** **1998 4 SA 539 (SCA) at 553I-J.**

In other words, **'an Appellant must, generally speaking, make out a case in his founding affidavit and he cannot introduce for the first time in his replying affidavit facts or circumstances on which he seeks to found a new cause of action'** (***Ferreira v Premier of the Free State*** **2000 1 SA 241 (O) at 254C**).

12 The Appellant has made an additional attack on the justifiability of the President's decision to promulgate Proclamation R31 of 1999 in its papers. Since it is not apparent to us whether this attack has been abandoned in the Appellant's submissions, we proceed to deal with it below.

1 The supplementary affidavit of Woods contends that the Special Tribunal has no jurisdiction to investigate those disputes which arise

out of the allegations which motivated the President to promulgate Proclamation R31 of 1999 in the first place (**supplementary affidavit of Woods paras 7-8, record volume 1 pages 68-69).**

2 This contention is without substance for the following reasons.

3 It is not correct that the allegations which were referred for investigation to the Special Investigating Unit in terms of Proclamation R31 of 1999 did not involve **'public money'**. The flaws in this contention have been dealt with above.

4 In any event, it is clear that the President relied not only on s 2(2)(*c*) *but also on s 2(2)(g) of the Act* when he decided to refer the relevant allegations for investigation by the Special Investigating Unit.

> **Annexure PM4 to the answering affidavit of Maduna para 6, record volume 3 page 208**.

Section 2(2)(*g*) of the Act refers to allegations of **'unlawful or improper conduct which has caused or may cause serious harm to the interests of the public or any category thereof'**. Section 2(2)(*g*) does not require that the relevant allegations must involve **'public money'**.

5 Section 8(2) of the Act provides that a Special Tribunal '**shall have jurisdiction to adjudicate upon any civil dispute brought before it by a Special Investigating Unit … emanating from the investigation by such Special Investigating Unit'**.

1 The meaning of this provision was explained as follows in ***Konyn v Special Investigating Unit*** **1999 1 SA 1001 (Tk HC) at 1012G-H**:

> **'… what was obviously intended was that a Special Tribunal should have jurisdiction to adjudicate upon any justiciable civil dispute (arising out of civil proceedings instituted in that Special Tribunal) emanating from the investigations by the Special Investigating Unit within the framework of its terms of reference as set out in the proclamation referred to in s 2 of [the] Act'.**

2 Proclamation R31 of 1999 referred the relevant matters for investigation by the Special Investigating Unit and also **'for adjudication of justiciable civil disputes emanating from such investigation to the Special Tribunal'.** (Cf *Konyn v Special Investigating Unit* 1999 1 SA 1001 (Tk HC) at 1013H.)

3 It follows that the Special Tribunal has the power to adjudicate upon civil disputes which emanate from the Special Investigating Unit's investigations in terms of Proclamation R31 of 1999. Since the Special Tribunal has jurisdiction to investigate those disputes, the President's decision to promulgate Proclamation R31 of 1999 was clearly justifiable.

13 It is accordingly submitted that the allegations which were before the President and which prompted him to promulgate Proclamation R31 of 1999 fell within the ambit of the Act.

Conclusion

14 For the reasons set out above, it is submitted that Proclamation R31 of 1999 is not ultra vires and that the Appellant's second complaint is without substance.

V THE APPELLANT'S THIRD COMPLAINT: SECTION 6 OF THE ACT

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15 The Appellant's third complaint is that s 6 of the Act is unconstitutional since it violates the right to privacy.

16 Section 14 of the Constitution guarantees a right to privacy, which includes the right not to have one's **'person or home searched'**. As the following cases indicate, the right to privacy does not extend to business activities.

1 In ***Bernstein and others v Bester and others NNO*** **1996 2 SA 751 (CC) para 67**, Ackermann J stated as follows:

> **'The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.'**

(emphasis added)

2 In ***Mistry v Interim National Medical and Dental Council and others*** **1998 4 SA 1127 (CC) para 27,** Sachs J stated as follows:

> **'The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion. In *Bernstein and Others v Bester and Others NNO* Ackermann J posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated. In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation. The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored. If they are licensed to function in a competitive environment, they accept as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors. Members of professional bodies, for example, share an interest in seeing to it that the standards, reputation and integrity of their professions are maintained. In *Almeida-Sanchez v United States* [413 US 266 (1977)] Stewart J, writing for the majority, highlighted well the expectations of privacy involved in the modern world of closely regulated enterprises:**

> **'The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in Biswell:**
>
> > **" . . . (W)hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task."' '**
>
> (emphasis added)

3 In ***Deutschmann NO v Commissioner for the South African Revenue Services*** **2000 2 SA 106 (E) at 123I-J**, the court held that **'the concept of privacy does not extend to include the carrying on of business activities'**.

17 There is nothing in the Appellant's affidavits to indicate that its members fear that their *homes* will be subjected to searches in terms of s 6 of the Act. On the contrary, the only fear of the Appellant's members is that *the premises on which they conduct their businesses* will be subjected to such a search. For the reasons which are set out above, it is submitted that the Appellant has failed to make out a proper case in its founding affidavit that its members' rights to privacy have been violated or threatened.

18 Section 6(2) of the Act provides that an entry and search of premises in terms of s 6 must be conducted

> **'with strict regard to decency and order, including the protection of a person's right to** –
>
> **(a) respect for his or her dignity;**
>
> **(b) freedom and security;**
>
> **(c) his or her personal privacy'.**

This provision requires that powers of search and seizure in terms of the Act must be exercised in a manner that does not violate the constitutional rights of affected persons.

19 Even if s 6 of the Act authorises a violation of the constitutional right to privacy, it is submitted that such a violation is justified in terms of s 36(1) of the Constitution. We say so for the following reasons.

20 The Constitutional Court has given detailed consideration to the powers of search and seizure contained in s 28 of the Medicines and Related Substances Control Act 101 of 1965: see ***Mistry v Interim National Medical and Dental Council and others*** **1998 4 SA 1127 (CC**).

1 Section 28 of the Medicines and Related Substances Control Act authorises an inspector to enter premises and seize medicines or Scheduled substances which afford evidence of a contravention of the Act. The provision does not require the inspector to obtain a warrant before conducting a search. The Constitutional Court summarised the effect of this provision as follows:

> **'The most striking feature of section 28(1) is the lack of qualification of the powers of entry and inspection given to the inspectors. In general terms, the only requirement imposed is that the powers must be exercised at reasonable times. The single criterion for entering 'any premises, place, vehicle, vessel or aircraft' is that any medicine or Scheduled substance is there or is reasonably suspected of being there.'** (para 21)

2 The Constitutional Court held that this provision violated the right to privacy in the interim Constitution:

> **'What is clear, nevertheless, is that however the terms 'search' and 'seizure' may be interpreted in a particular case, to the extent that a statute authorises warrantless entry into private homes and rifling through intimate possessions, such activities would intrude on the 'inner sanctum' of the persons in question and the statutory authority would accordingly breach the right to personal privacy as protected by section 13. There can be no doubt that the language of section 28(1) is so sweeping as to permit such entry and inspection. Accordingly it is in breach of section 13 and has to be justified by the State as being reasonable and justifiable in terms of section 33 of**

the interim Constitution.' (para 23)

3 The Constitutional Court went on to hold that this violation of the right to privacy was not justified in terms of the general limitation clause in the interim Constitution:

> **'Irrespective of legitimate expectations of privacy which may be intruded upon in the process, and without any pre-determined safeguards to minimise the extent of such intrusions where the nature of the investigations makes some invasion of privacy necessary, section 28(1) gives the inspectors carte blanche to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the most intimate kind. The extent of the invasion of the important rights to personal privacy authorised by section 28(1) is substantially disproportionate to its public purpose; the section is clearly overbroad in its reach and accordingly fails to pass the proportionality test laid down in *S v Makwanyane & Ano.*'** (para 30)

21 It is apparent from the judgment in *Mistry* that the existence of adequate safeguards is crucial to any determination of the constitutionality of search-and-seizure provisions:

> '**The existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State.'** (para 25)

22 It is submitted that four safeguards are of particular importance in this regard. (These are derived from the judgment of the Canadian Supreme Court in ***Hunter v Southam Inc*** **(1984) 9 CRR 355 (SC) [(1985) 11 DLR (4th) SCC**], which was referred to with approval in ***Park-Ross v Director: Office for Serious Economic Offences*** **1995 2 SA 148 (C) at 169ff**.)

1 *First*: There should be a system of '**prior authorisation'** which provides for the granting of warrants before a search is conducted.

2 *Second*: The power to authorise a search and seizure should generally be entrusted to an impartial authority which is bound to act judicially. In *Hunter v Southam Inc* (supra), the Canadian Supreme Court held that that the decision need not necessarily be assigned to a judicial officer, provided that the person performing this function is '**capable of acting judicially'** and is in a position to assess the evidence in a '**neutral and impartial manner'.**

3 *Third*: before a warrant for search and seizure is issued, the evidence must satisfy the judicial authority that the person seeking the warrant has reasonable grounds for believing that there is relevant evidence to be found at the place of the search.

4 *Fourth*: the evidence before the judicial authority should generally be given on oath.

23 The above-mentioned safeguards require that a system of prior authorisation should be employed in order to ensure that competing interests are assessed in advance of any violation of the right to privacy. These procedural safeguards require that the state should demonstrate to an impartial adjudicator that it has a sufficiently important interest to justify an invasion of privacy. However the system of prior authorisation is 'neutral' as regards *what sorts of interests* may justify such an invasion. In particular, the range of relevant interests is not restricted to enforcement of the criminal law.

1 The state will often seek to justify a search by indicating that there is evidence on the premises which is relevant to the commission of a crime. However this need not necessarily be the only justification which is offered by the state. The underlying question of principle is whether the state's interests in intrusion prevail over the individual's interests in resisting intrusion. Where an individual is suspected of having committed a criminal offence, the state's interest is obviously a weighty one. However there is no reason why the state may not have

a sufficiently compelling interest even in circumstances where there is no evidence of a criminal offence.

2 That this possibility exists is contemplated in *Hunter v Southam Inc* (1984) 9 CRR 355 (SC). The Canadian Supreme Court indicated that the system of prior authorisation **'puts the onus on the state to demonstrate the superiority of its interest to that of the individual'** (at 367-8). The court made it clear that such an interest need not necessarily involve enforcement of the criminal law:

> **'The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. …**
>
> **The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with section**

8 of the Charter, for authorising search and seizure.'

(at 372-3, emphasis added)

3 In circumstances where the State has a legitimate interest in investigating matters *which do not involve a criminal offence*, the impartial authority which authorises a search will necessarily have to pay regard to factors other than enforcement of the criminal law. What is envisaged by the system of prior authorisation is that the relevant authority must be satisfied in advance that there are reasonable grounds for authorising the entry of premises. Those grounds need not necessarily relate to a criminal offence.

4 That this is so emerges from ***Thomson Newspapers Ltd v Canada* (1990) 47 CRR 1 (SC),** where the Canadian Supreme Court held that the stringent safeguards in *Hunter* do not apply in a regulatory context. La Forest J (speaking for the majority on this issue) summarised the approach the Canadian courts as follows:

> **'Since the adoption of the Charter, Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context….**

The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8. As Dickson J. made clear in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy (p. 159). But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity….

The situation is, of course, quite different when the state seeks information, not in the course of regulating a lawful social or business activity, but in the course of investigating a criminal offence. For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection.' (at 18-20, emphasis added)

'The foregoing conclusion is in no way inconsistent with this Court's decision in *Hunter v. Southam Inc.,* supra, notwithstanding that it also concerned the constitutionality of investigative powers under the Combines Investigation Act, specifically those provided by s. 10. While there are in that case some passing remarks that might arguably suggest that the Act was regarded as being of a criminal character (see pp. 154 and 167), the distinction between regulatory and true criminal offences was not even mentioned, let alone considered. I see no reason, therefore, why these elliptic references should be construed as holding that the Act and all the other legislation proscribing anti-competitive offences must, for

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<u>all purposes and in all situations, satisfy the stringent standards of reasonableness usually applicable in criminal investigations</u>. To do so would, in my view, severally hamper and perhaps render impossible the effective investigation of anti-competitive offences. These offences typically take the form of subtle alterations in otherwise perfectly legal business practices, and the effect they produce will often appear to be fully explicable by reference to the forces that normally determine success or failure in our economic system. Investigation to a much greater degree than is the case with regard to more traditional criminal offences will often be a necessary preliminary to the determination of whether the commission of an offence should even be suspected. To hold that anti-combines investigators must always obtain a warrant by showing reasonable and probable grounds as to the commission of an offence and the existence of relevant evidence before they exercise any power of investigation that falls within the ambit of s. 8 of the Charter would, in these circumstances, immunize perpetrators of anti-competitive offences from discovery and prosecution.' (at 29-30, emphasis added)

5 There are a number of statutory provisions in this country which authorise search-and-seizure in circumstances where no crime is suspected. See for example:

Human Rights Commission Act 54 of 1996, sections 9-10;

Commission on Gender Equality Act 39 of 1996, sections 12-13;

Public Protector Act 23 of 1996, sections 7-7A;

Board on Tariffs and Trade Act 107 of 1986, section 14;

Prevention of Public Violence and Intimidation Act 139 of 1991, section 8(6);

Competition Act 89 of 1998, sections 46-49.

24 It is submitted that s 6 of the Act provides for a system of prior authorisation which complies with the general limitation clause in the Constitution.

1 Section 6(5)(*a*) provides that, in general, premises shall only be searched **'by virtue of an entry warrant issued by a member of a Special Tribunal, magistrate or judge of the Supreme Court, other than the head of the Special Investigating Unit concerned, if it appears to such member, magistrate or judge from information on oath that there are reasonable grounds for believing'** that any document which may have a bearing on the investigation is on the premises, and cannot reasonably be obtained in any other manner. The presence of such a system of prior authorisation distinguishes the present case from that which was under consideration in *Mistry*.

2 Searches without a warrant are only authorised in the circumstances contemplated by s 6(6). A warrantless search may be conducted if a competent person consents thereto, or if there are reasonable grounds for believing that a warrant would be issued if it were applied for and **'the delay in obtaining such a warrant would defeat the object of the search'**. It is submitted that these circumstances are

narrowly defined and amount to a reasonable limitation of the right to privacy.

3 Special protection is afforded to privileged documents by s 6(9) of the Act. In terms of this provision, if a person claims that documents found on the premises are privileged the documents may be removed for safe-keeping pending a decision by the Special Tribunal as regard whether such documents are protected by privilege.

25 Since the investigations of the Special Investigating Unit need not involve a criminal offence, the issuing of a warrant in terms of s 6 of the Act is not necessarily tied to an apprehension of criminal conduct. The reason for this is clear: an investigation under the Act is not (in the first instance) intended to eventuate in a criminal prosecution – it is intended to culminate in the institution of proceedings before the Special Tribunal. The Act is designed to create a comprehensive mechanism for dealing decisively with corruption. To this end, it creates extraordinary mechanisms for the recovery of public money which has been misappropriated:

Answering affidavit of Maduna para 11, record volume 2 pages 129-135.

26 Section 36(1)(b) of the Constitution requires that regard must be had to the '**importance and the purpose of the limitation**' when assessing whether a

constitutional right is justifiably limited**.** The respondents' account of the mischief at which the Act was directed (**answering affidavit of Maduna para 11, record volume 2 pages 129-135)** is highly relevant to an assessment of the limitation of the right to privacy which is envisaged by s 6. The limitation is designed to further the end of fighting corruption. The purpose of the limitation is therefore of great social importance. See:

Director of Public Prosecutions: Cape of Good Hope v Bathgate **2000 2 SA 535 (C) at 559ff.**

27 Section 36(1)(e) of the Constitution requires that regard must be had to **'less restrictive means to achieve the purpose'** when assessing whether a constitutional right is justifiably limited. The Appellant contends that the Act fails to impose any restrictions on the powers of the Special Investigating Unit to search for evidence once an 'entry warrant' has been issued. But this is incorrect, since the powers of search are clearly subject to s 6(2) of the Act. Section 6(2) of the Act provides that the **'entry <u>and search</u> of premises … must be conducted with strict regard to decency and order, including the protection of person's right to**' dignity and privacy. This constrains the powers of a member of the Special Investigating Unit who executes an entry warrant.

28 The Appellant has sought to portray s 6 of the Act in the most oppressive terms. This approach is however constitutionally impermissible. Where there is more than one plausible interpretation of a statutory provision, the interpretation which best advances constitutional rights must be adopted:

> ***Bernstein and Others v Bester and Others NO* 1996 (2) SA 751 (CC) paras 59-64;**
>
> ***Nel v Le Roux NO* 1996 3 SA 562 (CC) paras 8-9;**
>
> ***Tshabalala v Attorney-General (Transvaal)* 1996 1 SA 725 (CC) para 9.**

This approach is in accordance with the constitutional imperative in s 39(2) that a court must adopt an interpretation which promotes the spirit, purport and objects of the Bill of Rights.

29 It is accordingly submitted that s 6 of the Act is not unconstitutional.

30 To the extent that some provisions of s 6 may be found by this Court to be unconstitutional, it is submitted that they are severable from the remaining provisions.

VI RELIEF

Declaratory relief

31 *The Appellant asks for an order declaring s 3(1) of the Act, s 6 of the Act, the First Respondent's appointment as head of the Second Respondent and Proclamation R31 of 1999 to be unconstitutional and invalid.*

Appellant's submissions para 117(b)(i) to (iii).

32 *For the reasons set out above, it is submitted that no basis exists for this declaratory relief.*

Interdict

33 *The Appellant seeks an order interdicting the First and Second Respondents from investigating the affairs of the Appellant's members.*

Appellant's submissions para 117(b)(iv).

34 *The requirements for a final interdict are clearly established as being*

(*a*) a clear right on the part of the Appellant;

(*b*) an injury actually committed or reasonably apprehended; and

(*c*) the absence of any other satisfactory remedy to the Appellant.

See for example ***Setlogelo v Setlogelo*** **1914 AD 221.**

35 For the reasons set out above, it is submitted that the Appellant has failed to establish a 'clear right'. Further and in any event, it is submitted that the Appellant has failed to establish 'an injury actually committed or reasonably apprehended'. Since the Appellant avers that its members have not committed any unlawful or improper acts **(founding affidavit of Monique Woods para 27, record volume 1 page 21**), it follows from the Appellant's own version that its members have nothing to hide. There is nothing in the Appellant's founding papers which establishes that its members have reasonable apprehension of injury, i.e. **'one which a reasonable man might entertain on being faced with certain facts'** (*Nestor v Minister of Police* 1984 4 SA 230 (SWA) at 244).

Suspension of order of constitutional invalidity

36 *We have submitted that that the Act, Proclamation R24 of 1997 and Proclamation R31 of 1999 are not invalid. However in the event that this honourable Court were to take a different view of the matter and were to find that these provisions are unconstitutional, it is submitted that any such order should be suspended for a period of at least 24 months.*

37 *Section 172(1)(b)*(*ii*) of the Constitution provides that a court which decides a constitutional matter may make any order that is just and equitable, including **'an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defects'**.

38 It would lead to undesirable consequences if the Act were to be declared unconstitutional with immediate effect. The Act constitutes an important pillar in the fight against corruption, and a large number of investigations are currently being conducted by the Special Investigating Unit in terms thereof:

> **Answering Affidavit of Maduna para 11.22, record volume 2 page 134.**
>
> **Annexure GV2 to the Answering Affidavit of Visagie, record volume 2 pages 115-117**.

It would be prejudicial to good government if all of these ongoing investigations were to be terminated with immediate effect.

39 The effect of striking down section 3(1) of the Act would have far-reaching consequences. It would effectively mean that every power exercised by Judge Heath would be invalid. The Act is the sole source of Judge Heath's power. If the section in terms of which he was appointed is invalid, everything he did pursuant to such an invalid appointment would be equally invalid.

1 It is trite that where a statute vests a particular individual with a power, only that individual can exercise the power. Ordinarily, the power cannot be delegated.

> ***Attorney-General, OFS v Cyril Anderson Investments*** **1965 4 SA 628 (A) at 639C-D**
>
> ***Chairman: Board on Tariffs and Trade v Teltron*** **1997 2 SA 25 (A) at 34 D- E**

2 An act by an improperly constituted tribunal is *ultra vires* the tribunal and is invalid.

> **Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* at 120 - 124**

3 Where a statute requires that a decision can only validly be taken by a person or tribunal constituted in a particular way, no power can validly be exercised save by the person or tribunal stipulated.

> ***Transvaal Coal Owners Association v Board of Control*** **1921TPD 447 at 452**
>
> ***Schierhout v Union Government*** **1919 AD 30 at 44**
>
> ***R v Price*** **1955 1 SA 219 (A) at 224 C - E**

4 The effect of a striking down, therefore, would be to close down the Special Investigating Unit and paralyse the Special Tribunal. In effect, it would amount to a striking down of the whole Act.

40 It is accordingly submitted that it would be **'just and equitable'** for this honourable Court to suspend any declaration of invalidity which it may choose to make. The period of suspension should be at least 24 months. Owing to the constraints of a tight Parliament timetable, it will take this long for Parliament to correct whatever defects might be found to exist in the legislation:

> **Answering Affidavit of Maduna para 72.4, record volume 2 page 193;**

Fraser v The Children's Court, Pretoria North **1997 2 SA 261 (CC).**

VII CONCLUSION

41 For the reasons stated above, it is submitted that the appeal should be dismissed.

G J MARCUS SC

ALFRED COCKRELL

S M LEBALA

Chambers
Johannesburg
10 August 2000

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