IN THE CONSTITUTIONAL COURT

Case CCT 27/00

In the matter between:

SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS Appellant

and

WILLEM HENDRIK HEATH First Respondent

THE SPECIAL INVESTIGATING UNIT Second Respondent

THE PRESIDENT OF THE RSA Third Respondent

THE MINISTER OF JUSTICE Fourth Respondent

APPELLANT'S SUBMISSIONS

TABLE OF CONTENTS

INTRODUCTION

1 The Special Investigating Units and Special Tribunals Act 74 of 1996 gives the president the power to establish Special Investigating Units and Special Tribunals.

2 On 14 March 1997 the president established an SIU headed by his lordship Mr Justice Heath. He did so by Proclamation R24 of 1997 in terms of sections 1(1)(a)(i) and 14(1) of the Act.

Proclamation R24, FA3, 1:55

3 On 26 March 1999 the president referred an allegation to the SIU for investigation. He did so by Proclamation R31 of 1999 in terms of section 2(1)(a)(ii) of the Act.

Proclamation R31, FA4, 1:57

The essence of the allegation was that attorneys who act on behalf of road accident victims, pay to their clients less than full amounts due to them.

4 The appellant is an association of lawyers engaged in personal accident litigation. Its members commonly act on behalf of road accident victims.

Founding affidavit 1:9:5

5 They say that they have never been guilty of the malpractice under investigation. Their assertion of innocence is not disputed or even challenged.

Founding affidavit 1:21:17

Rheeder 2:105:12

Maduna 2:167:42.1

6 They fear however that they may unfairly and without justification be subjected to an investigation without warning and suffer irreparable harm as a result of it.

Founding affidavit 1:21:27 to 31

7 They point to the fact that the investigation is apparently based on complaints from former clients actively solicited by the RAF by underhand means.

Founding affidavit 1:14:16.2

Reply 3:267:28.2 to 28.3

8 Shortly after this application was launched, the SIU for instance actively and improperly sought to elicit a complaint from a client of Ms Woods, the deponent to the appellant's founding affidavit.

Reply 3:281:42.5

Menezes, RA14, 5:409:2 to 7

9 The SIU does not deny that it might investigate the appellant's members without warning. It seems on the contrary to contemplate it. The SIU denies merely that such an investigation would be unlawful and would cause irreparable harm to the appellant's members.

Maduna 2:105:12 to 16

10 The SIU denies that its investigation "*is aimed indiscriminately at all personal injury practitioners"*,

Rheeder 2:104:7.7

and says that it intends to investigate "*only those attorneys where there are grounds as set out in section 2(2) of the Act"*.

The latter statement of their intention is disturbing to say the least. It is based on a clear misconception about the meaning of section 2(2). The section describes the grounds on which the president is entitled to establish an SIU or refer a matter to it if he deems it necessary to do so. It does not describe the grounds upon which the SIU may undertake an investigation. It is for the president to decide whether to act on those grounds and not the SIU. The fact that the latter seems to think that it may undertake an investigation on any of those grounds, is disconcerting.

11 The fact of the matter is however, as we will more fully indicate below, that every attorney who has acted for a road accident victim since January 1990, may without warning be targeted for investigation, however innocent he or she might be, based purely on a mere allegation of misconduct, which may be wholly unsubstantiated and indeed utterly unfounded. The investigation may involve a raid on and search of the attorney's offices and seizure of hundreds of his clients' files. Such an investigation inevitably irreparably tarnishes the attorney's reputation. The news of the investigation usually leaks. But even if it does not, the attorney would be honour-bound to inform his clients of the fate of their confidential files. It follows that, if the attorney is indeed innocent of any wrongdoing, great injustice will have been done.

12 In their answering affidavits, the respondents however repeatedly assert,

12.1 that "*no attorney will be the subject of investigation unless there are reasonable grounds for suspecting that an investigation is warranted"*;

Maduna 2:160:32.2

12.2 that attorneys who are innocent of any wrongdoing, have nothing to fear, and

Rheeder 2:105:12

Rheeder 2:106:15

Maduna 2:160:32.3

12.3 that the powers exercised by the SIU in its investigations, are neither far-reaching nor intrusive and "*go no further than is necessary to deal with this serious problem"*.

Maduna 2:166:41.1

Maduna 2:167:42.2

Maduna 2:168:44.2

Maduna 2:168:44.3

Maduna 2:169:45.1

Maduna 2:187:61.2

13 But these assertions are belied by the experience of three attorneys who have been subjected to investigation by the SIU. They are messrs Ungerer, Meintjies and Nkanunu. Their experiences vividly demonstrate that the fears expressed in the appellant's founding affidavit, are well-founded.

Ungerer, RA1, 4:288:1 to 15

Meintjies, RA2, 4:338:1 to 13

Nkanunu, 4:337:1 to 8

Lubbe, 5:436 to 439:5 to 7

Rheeder, 5:442 to 443:3

14 Mr Ungerer's evidence reveals the following:

14.1 He has been an attorney for more than twenty years and has handled thousands of motor vehicle accident cases. He says that he has never overreached a client. The SIU does not make any suggestion to the contrary.

Ungerer 4:289:3

Lubbe 5:436 to 437:5

14.2 In about July 1999 Mr Ungerer heard that a Mr Spies from the RAF had approached some of his clients to enquire whether they were satisfied about the way in which his firm had handled their claims. He complained to the Law Society but they could not help him.

Ungerer, RA1, 4:289:4

Letter 4:298

Letter 4:299

14.3 On 6 September 1999 Mr Ungerer became aware of an SIU investigation into his affairs when a Mr Saunders of the SIU served a notice on him for production of specified clients' files. Mr Saunders said that the investigation was prompted by seven complaints they had received. He refused however to identify the complainants or divulge any particulars of their complaints.

Ungerer, RA1, 4:290:5 to 6

14.4 Although the investigation was based on no more than seven unidentified complaints, the notice served on Mr Ungerer called for production of 820 clients' files of claims he had handled over a period of almost ten years.

Ungerer, RA1, 4:290:6

Notice 4:300

Letter 4:302

Letter 4:304

Schedule 4:306

14.5 Mr Lubbe of the SIU now says, some five months later, that it was "*a genuine mistake by Mr Saunders to have asked for files which were not covered by the investigation and to have refused to identify the seven cases which were under investigation"*.

Lubbe 5:436:5.1

But this excuse is clearly absurd. Mr Lubbe can firstly not speak for Mr Saunders. The SIU does not explain why Mr Saunders has not made an affidavit. The excuse is secondly belied by the notice which called for the production of the files and the letter which accompanied it. They were issued by one Kidson, purportedly under authority delegated to him by the head of the SIU. He has also not made an affidavit. The excuse is thirdly belied by the fact that the SIU still fails to disclose the identity of the seven complainants or any particulars of their complaints, even in their reply to Mr Ungerer's affidavit.

Notice 4:300

Letter 4:302

Lubbe 5:437:5.6

14.6 Mr Ungerer says that, if he had to comply with the notice for the production of 820 clients' files, his whole firm would have to devote themselves to the task and that it would take them at least seven days during which his entire office would come to a standstill.

Ungerer 4:291:7 to 8

14.7 Mr Ungerer has a duty to his clients to preserve their files and the confidentiality of their contents. He is consequently ethically obliged at least to inform them of the seizure of their files by the SIU. It would not only place a very significant burden on his firm but would also irreparably tarnish their reputation.

Ungerer 4:292:9 to 13

14.8 Mr Ungerer will consequently suffer irreparable harm despite his protestations of innocence and the complete absence of any evidence to the contrary.

15 Mr Meintjies had a similar experience:

15.1 He has been an attorney since 1981 and has also handled thousands of motor accident cases. He says that he has never overreached a client and has never charged

more than an appropriate professional fee. The SIU does not dispute or challenge his assertion of innocence.

Meintjies, RA2, 4:339:3

Lubbe 5:437 to 438:6

15.2 On 11 May 1999 Messrs Lubbe and Rheeder of the SIU served a notice on him calling for production of 231 clients' files. Mr Lubbe moreover indicated to him that, if they were not satisfied with their inspection of those files, "*they would return to requisition every file in my office"*.

Meintjies, RA2, 4:339:4

Lubbe 5:437 to 438: 6

15.3 Mr Lubbe suggested to Mr Meintjies "*that serious allegations relating to overcharging had been made by these 231 clients or in respect of their cases"*. He promised to provide Mr Meintjies "*with details of each and every charge made against me"*. But has not yet done so.

Ungerer, RA2, 4:339:4

Lubbe 5:437 to 438:6

15.4 Mr Meintjies however says that it is quite clear that at least some of the clients whose files were confiscated, would not have made complaints against him. They for instance include his own cousin (Schalk Meintjies), the widow of a colleague and friend (Mrs Beyers), a client who recently expressed satisfaction with the handling of his claim and denied any contact with the SIU (Mr MacKenzie)

and even two claimants who were not clients of Mr Meintjies at all but against whom he had acted. The SIU does not deny that this is so.

Meintjies, RA2, 4:340:6 to 7

Letter 4:369 to 371

Lubbe 5:437 to 438:6

15.5 Although the investigation has been suspended pending the outcome of this application, news of it has leaked and spread. It has irreparably tarnished Mr Meintjies and his firm and has already caused them very material loss.

Meintjies, RA2, 4:341:11 to 13

Lubbe 5:438:6.3

16 Mr Nkanunu's experience demonstrates how an attorney targeted for investigation by the SIU can suffer irreparable harm even before the investigation has begun:

16.1 Mr Nkanunu is a senior attorney, the president of NADEL, the president of SARFU and has held an appointment as an acting judge of the High Court.

Nkanunu, RA3, 4:374:1

Lubbe 5:439:7

Rheeder 5:442 to 443:3

16.2 On 27 August 1999, while he was an acting judge of the High Court seconded to the Special Tribunal,

- Mr Nkanunu learnt for the first time that the SIU had targeted him for investigation when he was told about an article which had appeared in the Mail & Guardian newspaper of allegations of fraud and theft made against him;
- Messrs Rheeder and Saunders of the SIU called on him to tell him that they had indeed decided to launch an investigation against him and
- he was plagued by calls from the media inquiring about the allegations that had been made against him.

Nkanunu, RA3, 4:374:3 to 5

Lubbe 5:439:7

Rheeder 5:442 to 443:3.3

16.3 The SIU denies that it had leaked the story to the media. But they must have been responsible for the leak because it was published in the Mail & Guardian before Mr Nkanunu himself learnt of the investigation against him.

16.4 As a result of the publicity, Mr Nkanunu has suffered "*extreme humiliation and embarrassment"* and his practice has been materially harmed.

Nkanunu, RA3, 4:376:7.2 to 8

17 The experiences of Messrs Ungerer, Meintjies and Nkanunu make it clear that the fears expressed in the appellant's founding affidavit, are well-founded. Any personal injury attorney may at any time become the target of an SIU investigation without warning. It may happen despite the attorney's complete innocence and the absence of

any reason to suspect him of wrongdoing. That is so because the investigation may be based on no more than an unfounded complaint which is unsubstantiated and untested.

18 The important point for present purposes however, is that an attorney may suffer that fate, even if the SIU acts strictly in accordance with the Act and the proclamations issued under it, because they confer wide and unchecked powers on the SIU. They do so in a manner which is inconsistent with the constitution.

19 We will make the following submissions in this regard:

19.1 The appointment of a judge as head of the SIU in terms of section 3(1) of the Act, is inconsistent with the requirement of the constitution and particularly section 165(2), that judges be independent of the executive. An SIU is an executive organ of state. When a judge is appointed head of an SIU, he becomes a member of the executive.

19.2 Proclamation R31 is *ultra vires* for two reasons:

19.2.1 The allegation referred to the SIU for investigation by Proclamation R31, was not an allegation of the kind described in section 2(2) of the Act. It was accordingly not competent for the president to refer the allegation to the SIU.

19.2.2 On a proper interpretation of the Act in a manner which minimises its inconsistency with the constitution, it requires an allegation referred to an SIU for investigation, to be expressed in reasonably specific terms. The allegation referred to the SIU in this case, lacks the necessary degree of specificity.

19.3 Section 6 of the Act which vests an SIU with far-reaching search and seizure powers, infringes the right to privacy in terms of section 14 of the constitution and its infringement cannot be justified in terms of section 36(1) of the constitution.

20 We address each of these submissions more fully below. Before we do so however, we will do an analysis of the Act and the proclamations to identify their features upon which the three objections are based.

THE ACT

21 We will focus on the first half of the Act which governs the establishment, functions and powers of SIU's.

22 The main functions of an SIU are to investigate matters referred to it by the president and to institute civil proceedings in the Special Tribunal arising from its investigation. The Special Tribunal is a special court with the status of a High Court whose jurisdiction is limited to civil matters brought before it under the Act.

23 An SIU functions only in respect of matters referred to it by the president. He may refer a matter to it only of three conditions are met:

23.1 There must be an allegation of the kind described in section 2(2). They are broadly allegations of harm improperly done to the state. No more is required than a mere allegation. There need be no evidence to support it. There need be no reason to believe that it is true. It need not be an allegation of criminal conduct. It may be a mere allegation of improper conduct which does not constitute a crime.

23.2 The president must deem it "*necessary"* to refer "*the matter*" to an SIU for investigation.

23.3 If the matter is within the exclusive competence of a province, the president may refer it only at the request or after consultation with the premier of the province concerned.

24 When the president does refer a matter to an SIU, his referral must comply with the following requirements:

24.1 He must make the referral by proclamation in the Gazette in terms of section 2(1).

24.2 The proclamation must set out the terms of reference of the SIU in terms of section 2(3).

24.3 It is implicit in sections 2(1) and (3) that the terms of reference must at least identify "*the matter*", that is, the allegation referred to the SIU for investigation.

25 The following provisions govern the SIU's investigation of a matter referred to it by the president:

25.1 In terms of section 4(1)(a), the subject matter of its investigation is "*the matter concerned"*, that is, the original allegation referred to it for investigation.

25.2 Its investigation is however not limited to the original allegation. Section 4(1)(a) provides that it must investigate "*all allegations regarding"* the matter concerned, that is, regarding the original allegation.

25.3 Section 4(1)(b) goes on to provide that it must collect evidence regarding acts or omissions which are relevant to its investigation, that is, relevant to the original allegation referred to it for investigation and all other allegations regarding the matter concerned.

25.4 It has powers of subpoena in terms of sections 5(2) to (4). It may subpoena witnesses to give evidence or to produce any book, document or object. In terms of section 5(3) a witness may be compelled to answer questions even if they incriminate him or her.

25.5 The SIU also has powers of search and seizure in terms of section 6. We will later deal with these powers in greater detail.

26 Section 5(8) gives the head of an SIU the power to issue interim suspension orders and interdicts. In Konyn v Special Investigating Unit 1999 (1) SA 1001 (Tk) 1015 the court remarked in passing that the constitutionality of this provision "*would appear to be highly questionable"*.

27 There are two ways in which the SIU may initiate civil proceedings flowing from its investigation:

27.1 The SIU itself may institute and prosecute civil proceedings before the Special Tribunal in terms of sections 4(1)(b) and (c).

27.2 If the head of the SIU is of the opinion that the institution of legal proceedings by a state institution is justified, he may refer the matter to the State Attorney or the institution concerned in terms of section 5(7).

28 The SIU itself does not institute and prosecute criminal proceedings. Sections 4(1)(d) and 4(2) provide that if it uncovers evidence of a commission of an offence, it must refer the evidence to the relevant prosecuting authority.

29 The remaining functions of the SIU include the following:

29.1 In terms of section 4(1)(e) the SIU must perform any other function the president may request of it provided that it is not in conflict with the provisions of the Act.

29.2 In terms of sections 4(1)(f) and (g) the SIU must report to the president whenever the latter requests it to do so and upon completion of its investigation.

29.3 It must also render a report to parliament at least twice a year in terms of section 4(1)(h).

THE PROCLAMATIONS

30 The SIU was established by Proclamation R24 published on 14 March 1997.

Proclamation R24, FA3, 1:55

31 The SIU investigation which is the subject matter of this application, was initiated by the referral made by Proclamation R31 published on 26 March 1999.

Proclamation R31, FA4, 1:57

32 The following features of the referral are germane to the present inquiry:

32.1 The allegation referred to the SIU, and therefore the subject matter of its investigation, is said to be 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 net 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*".

32.2 The matter is referred to the SIU for investigation and for the adjudication for civil disputes emanating from it.

32.3 The proclamation goes on to provide that, for purposes of the investigation of that matter, the terms of reference of the SIU are to investigate any conduct of the

kind described in sections 2(2)(c) and (g) which has taken place between January 1990 and 26 March 1999 when the proclamation was published.

THE INDEPENDENCE OF THE JUDICIARY

Introduction

33 In terms of section 3(1) of the Act, the head of an SIU has to be a judge of the High Court. It follows that he or she will always hold dual offices, both judicial office as a judge of the High Court and executive office as head of the SIU.

34 This arrangement violates the constitutional requirement that the judiciary be separate from and independent of the other branches of government. It is an element of the rule of law which is one of the founding values entrenched in section 1(c) of the constitution. It is also a specific requirement of section 165(2) of the constitution. Both of these provisions are absolute in the sense that neither is part of the bill of rights subject to limitation in terms of section 36(1).

The judicial office of the head of the SIU

35 A judge of the High Court holds office in terms of sections 174 to 177 of the constitution. A judge appointed before the constitution came into effect, is deemed to hold office under those provisions in terms of item 16(4) of schedule 6 of the constitution.

36 In terms of section 176(2) of the constitution, a judge of the High Court holds office until discharged from active service in terms of an act of parliament.

37 Section 3 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 provides for their discharge from active service. There is no suggestion that his lordship Mr Justice Heath has been so discharged.

38 The head of the SIU accordingly still holds office as a judge of the High Court.

The executive office of the head of the SIU

39 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.

40 We have already dealt with the main functions of the SIU. They are ordinary executive functions including,

- the investigation of allegations of misconduct including allegations of criminal conduct and civil wrongs;
- the collection of evidence by the exercise of powers of search and seizure and subpoena in the course of those investigations;
- the institution and prosecution of civil proceedings;
- the referral of evidence of criminal conduct for prosecution, and
- the performance of such other functions as the president might request.

41 The SIU performs those functions under the control of the president as head of the national executive in terms of sections 85(1) and (2) of the constitution:

41.1 The power to establish an SIU vests in the president in terms of section 2(1) of the Act.

41.2 An SIU may only investigate such matters as the president refers to it in terms of section 2(1).

41.3 The SIU must also perform such other functions as the president might request in terms of section 4(1)(e), provided only that those functions do not conflict with the provisions of the Act.

41.4 The president prescribes the terms of reference of the SIU in terms of section 2(3). The opening words of section 4(1) make it clear that it has to perform all its functions "*within the framework of its terms of reference"* determined by the president. It means that it may only perform the functions permitted by the president and has to perform them in the manner prescribed by him.

Konyn v Special Investigating Unit 1999 (1) SA 1001 (Tk)

Toto v Special Investigating Unit 2000 (5) BCLR 553 (E) 564-5

41.5 Section 2(4) allows the president to amend his proclamation from time to time. It means that he may at any time extend, curtail, suspend or revoke any referral to the SIU.

41.6 The SIU is entirely dependent on the executive for its funding. In terms of section 3(5) the remuneration of its members is determined by the Ministers of Justice and Finance. It has no other claim to funding and has no sources of income of its own. It is consequently entirely financially dependent on the executive.

41.7 In terms of sections 4(1)(f) and (g) the SIU reports to the president whenever directed to do so by the latter and upon conclusion of its work.

42 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.

The requirement of independence

43 Section 165(2) provides that the courts "*are independent and subject only to the constitution and the law"*. It encapsulates the principle of judicial independence which requires the judiciary to be separate from and independent of the other two branches of government and particularly the executive branch.

44 The minister's understanding of this provision on the other hand, is with respect quite extraordinary. He makes the point that, although section 165(2) says that the courts must be independent, it does not say that they must be independent of the executive. He accordingly contends that the constitutional requirement of independence is not in any way negated when judges are required to perform non-judicial functions. Maduna 2:173:47.1.4

45 We submit with respect for the reasons that follow, that the minister's understanding of the constitutional requirement of judicial independence is quite wrong.

46 The constitutional principle that the judiciary are required to be independent of the other two branches of government and particularly the executive, is derived from English law. Its history is told by Schutz P in his judgment in the Lesotho Court of Appeal in Law Society of Lesotho v Prime Minister of Lesotho [1986] LRC (Const) 481 (LCA) 490 to 494. His lordship concluded at 494e that the independence of the judiciary "*is perhaps the most important human right of all in that without it other human rights may be largely writ in water"*.

47 Lord Denning made the same point in his address to the Wits Law School in 1954: "*What is necessary for a fair trial? There are many principles, but the first and most important principle is that the judges should be absolutely independent of the government."*

Denning, The Independence and Impartiality of the Judges (1954) 71 *SALJ* 345 at 345

48 When Schreiner JA described the essential qualities of our superior courts in Minister of the Interior v Harris 1952 (4) SA 769 (A), he said the following at 789:

"*The Superior Courts of South Africa have at least for many generations had characteristics which, rooted in the world's experience, are calculated to ensure, within the limits of human frailty, the efficient and honest administration of justice according to law. Our courts are manned by full-time judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them, whose tenure of office and emoluments are protected by law and whose independence is a major source of the security and well-being of the state."*

49 Mahomed CJ more recently emphasized that,

"*... the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundations of the civilization which it protects."*

Mahomed, "The role of the judiciary in a constitutional state" (1998) 115 *SALJ* 111 at 112

50 Under the new constitutional dispensation, the requirement of judicial independence has been constitutionally entrenched. It was first done in the interim constitution. Section 96(2) provided that the judiciary "*shall be independent, impartial and subject only to this constitution and the law"*. Section 22 in turn guaranteed the right of every

person to have justiciable disputes settled by a court of law or another independent and impartial forum. In Bernstein v Bester 1996 (2) SA 751 (CC) para 105 Ackermann J said that, in the light of section 96(2), the purpose of section 22 seems to be clear:

"*It is to emphasize and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes, are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the 'regstaatidee' ...".*

51 Schedule 4 of the interim constitution described the constitutional principles to which the final constitution had to conform. CPVI provided that there shall be "*a separation of powers between the legislature, executive and judiciary"* and CPVII *inter alia* required the judiciary to be "*independent"*. When this court had to judge whether the new constitutional text conformed to the constitutional principles, it identified "*the basic structures and premises"* required of the new constitutional text and said that they included,

"*(a) a constitutional democracy based on the supremacy of the constitution protected by an independent judiciary;*

(b) .....

(c) a separation of powers between the legislature, executive and judiciary ...."

It concluded that the new constitutional text complied with these requirements.

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996 (4) SA 744 (CC) paras 44 to 46

52 Later in the same judgment, this court referred to the requirement of CPVI that there be a separation of powers between the legislature, executive and judiciary and said the following:

"*An essential part of the separation of powers is that there be an independent judiciary .... 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. NT165 is directed to this end."*

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996 (4) SA 744 (CC) para 123

53 The final constitution includes a range of provisions designed to ensure the independence of the judiciary:

53.1 Section 1(c) provides that "*the rule of law"* is one of the founding values of the constitution. Ackermann J made the point in Bernstein in the paragraph referred to above, that the separation of the judiciary from the other arms of state was fundamental to the rule of law.

53.2 Section 165(2) provides that the courts "*are independent and subject only to the constitution and the law"*.

53.3 In terms of section 165(3) no organ of state may interfere with the functioning of the courts.

53.4 Section 165(4) obliges all organs of state, through legislative and other measures, to assist and protect the courts to ensure their independence.

53.5 Sections 174 and 175 describe the procedures for the appointment of judges designed to ensure their independence.

53.6 Section 176(3) protects the remuneration of judges.

53.7 Section 177 protects judges against suspension or removal from office.

54 The bill of rights also includes a range of provisions which have been held to require by implication that the judiciary be independent of the executive:

54.1 As we have already mentioned, Ackermann J held in Bernstein that the right of access to court in section 22 of the interim constitution, impliedly incorporated the principle of independence of the judiciary. The corresponding provision in section 34 of the final constitution does likewise.

54.2 In De Lange v Smuts 1998 (3) SA 785 (CC) this court held that section 66(3) of the Insolvency Act 24 of 1936 was unconstitutional insofar as it permitted officials from the Master's office who presided in insolvency inquiries, to imprison

recalcitrant witnesses. It held that this provision violated the right to freedom and security of the person entrenched in section 12(1) of the constitution. The ratio of its finding was that only a judicial officer could be empowered to sentence recalcitrant witnesses to imprisonment because officers in the public service lacked the independence from the executive required for the performance of this judicial function. Ackermann J who wrote for the majority of the court, referred in paragraphs 70 to 72 of his judgment, to the meaning and content given to the constitutional requirement of judicial independence by the Supreme Court of Canada, and concluded as follows:

"*When the above principles are applied to the present case it illustrates even more clearly why officers in the public service do not enjoy the necessary independence, notwithstanding their actual competence and impartiality, for making the judicial decision to commit a recalcitrant examinee to prison. I am far from convinced that the first two essential requirements for independence referred to in the Canadian cases, namely those of security of tenure and a basic degree of financial security free from arbitrary interference by the executive in a manner that could affect judicial independence, are present in the case of officers in the public service. It is unnecessary, however, to pronounce definitely on these requirements, for such officers undoubtedly lack the required objective structural independence and are not reasonably perceived to possess it."* (para 73)

"*In sum, officers in the public service, who answer to higher officials in the executive branch, do not enjoy the independence of the judiciary ...".* (para 75)

55 The leading judgments of the Supreme Court of Canada are indeed instructive on the constitutional principle of independence of the judiciary and its implications:

55.1 In Valente v The Queen (1985) 24 DLR (4th) 161 (SCC) the court emphasized that the requirement of judicial independence was related to, but nevertheless separate and distinct from, the requirement of judicial impartiality. It did so in the two paragraphs of its judgment quoted by Ackermann J in paragraph 71 of his judgment in De Lange. It said the following in the first of those paragraphs: "*Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and th parties in a particular case. The word 'impartial' ... connotes absence of bias, actual or perceived. The word 'independent' ... reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the executive branch of government, that rests on objective conditions or guarantees."*

55.2 Ackermann J also referred in para 70 of his judgment in De Lange, to the three essential conditions of independence identified in Valente. The first is 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 is a basic degree

of financial security free from "*arbitrary interference by the executive in a manner that could affect judicial independence"*. The third is "*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."*

55.3 In The Queen v Beauregard (1986) 30 DLR (4th) 481 (SCC) the court emphasized the need for institutional independence of the judiciary from the executive:

"*There is, therefore, both an individual and a collective or institutional aspect to judicial independence. As stated ... in Valente ... (judicial independence) connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees."* (491)

"The role of the courts as resolver of disputes, interpreter of the law and defender of the constitution, requires that they be completely separate in authority and function from all other participants in the justice system.

I emphasize the word "all" in the previous sentence because, although judicial independence is usually considered and discussed in terms of the relationship between the judiciary and the executive branch, in this appeal the relevant relationship is between the judiciary and parliament ....

Although particular care must be taken to preserve the independence of the judiciary from the executive branch (because the executive is so often a litigant

before the courts) the principle of judicial independence must also be maintained against all other potential intrusions, including any from the legislative branch." (494)

55.4 In R v Lippé (1991) 5 CRR (2nd) 31 (SCC) the court affirmed the principles laid down in Valente and followed in Beauregard. In his concurring judgment, Lamer CJC emphasized that the overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality and added that,

"*... judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary pre-requisite, for judicial impartiality." (*52*)*

55.5 In R v Généreux (1992) 88 DLR (4th) 110 (SCC) the court reaffirmed the approach adopted in Valente and the line of cases that followed it.

55.6 In Provincial Court Judges Association (Manitoba) v Manitoba (Minister of Justice) (1997) 46 (CRR 2nd) 1 (SCC) the court recently again affirmed the same approach. Lamer CJC emphasized that the judiciary was not merely required to be independent but also had to be reasonably perceived as independent:

"*The reason for this additional requirement was that the guarantee of judicial independence has the goal not only of ensuring that justice is done in individual cases, but also of ensuring public confidence in the justice system as (was said in Valente):*

> *'Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.' However, it would be a mistake to conclude that (Valente) intended the objective guarantees and the reasonable perception of independence to be two distinct concepts. Rather, the objective guarantees must be viewed as those guarantees that are necessary to ensure a reasonable perception of independence."* (43)

He went on to emphasize that,

> "*... the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government."* (47)

56 The following accordingly seems clear:

56.1 The requirement of judicial independence is an aspect of the rule of law entrenched as a founding value in section 1(c) of the constitution and a specific requirement of section 165(2) of the constitution.

56.2 The purpose of the requirement is to ensure that the judiciary are in fact independent and are perceived to be so, because it is an essential condition for the proper exercise of their judicial function.

56.3 One of the aspects of judicial independence is that the judiciary has to be separate from and independent of the executive branch. This is particularly important because the executive is so often a litigant before the courts.

The test for independence

57 The principle of judicial independence requires, not only that judges in fact be personally and institutionally independent of the other two branches of government, but also that they be perceived to be independent of them. That is so because the underlying purpose of the requirement is to foster public confidence in the performance of their judicial function. Public confidence depends, not only on judicial independence in fact, but also on the public perception of judicial independence.

58 That was so at common law. In his judgment in Law Society of Lesotho v Prime Minister of Lesotho [1986] LRC (Const) 481 (LCA) Schutz P said at 504e that "*the public's right to feel confidence in the independence of judges is in itself part of the concept of independence"*.

59 The judgments of the Supreme Court of Canada on which Ackermann J drew in De Lange, have consistently held that the principle of judicial independence requires, not merely that judges be independent in fact, but that they be perceived to be so.

Valente v The Queen (1985) 24 DLR (4th) 161 (SCC) 172

R v Lippé (1991) 5 CRR (2nd) 31 (SCC) 55

R v Généreux (1992) 88 DLR (4th) 110 (SCC) 130

Provincial Court Judges Association (Manitoba) v Manitoba (Minister of Justice) (1997) 46 CRR (2nd) 1 (SCC) 43

60 In para 71 of his judgment in De Lange, Ackermann J for instance referred with approval to the following passage from Valente:

"*Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence … should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees."*

61 In his judgment in Généreux, Lamer CJC referred to the same passage from Valente and elaborated as follows at 130d:

"*I emphasize that an individual who wishes to challenge the independence of a tribunal ... need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent.*"

Judges who perform non-judicial functions

62 The requirement of judicial independence does not mean that judges may not perform any non-judicial functions. There are certain non-judicial functions which judges may perform without compromising their independence and without creating any perception to that effect. It is, for instance, not uncommon for judges to perform administrative functions incidental to their judicial role, to sit on the Judicial Service Commission, to sit on the Law Commission and so on. But those are non-judicial functions which are compatible with judicial independence because they do not render the judges dependent on the executive or the legislative branches of government and do not create any perception of such dependence.

63 It is not necessary for purposes of this appeal to determine precisely where the line lies between the non-judicial functions that judges may perform without compromising their judicial independence and those that they cannot perform without doing so. Difficult distinctions sometimes have to be made when judges perform non-judicial functions which may create a perception of an unduly close relationship with the other branches of government. But this is not such a case. This is a clear case because a

judge appointed as head of an SIU does not merely perform a non-judicial function which might create a perception of an unduly close relationship with the other branches of government. 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.

64 We are not aware of any South African or Canadian jurisprudence on the non-judicial functions that judges may perform without compromising their judicial independence. The issue has however received considerable judicial attention in the United States and Australia. It is instructive to refer to the learning from those jurisdictions.

65 The leading US authority is the judgment of the Supreme Court in Mistretta v US (1989) 488 US 361 (SC). A statute passed by Congress created a Sentencing Commission, an independent body in the judicial branch with power to promulgate binding sentencing guidelines which established a range of sentences for all categories of federal offences and people convicted of those offences according to specific and detailed factors. The court held that federal judges could serve on the commission without violating the constitutional principle of judicial independence. The ratio of its judgment was that their membership of the commission was compatible with the judicial function. Justice Blackmun who delivered the opinion of the court, said the following in this regard:

65.1 The only non-judicial functions that the legislature may delegate to the judiciary, are those "*that do not trench upon the prerogatives of another branch and that are appropriate to the central mission of the judiciary"* (388).

65.2 The principle upon which the distinction is made, is the following:

"*That the constitution does not absolutely prohibit a federal judge from assuming extra judicial duties, does not mean that every extra-judicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extra-judicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extra-judicial assignment undermines the integrity of the judicial branch."* (404)

65.3 The court warned against the risk of executive exploitation of the judicial reputation for impartiality and non-partisanship:

"*The legitimacy of the judicial branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action."* (407)

65.4 The court concluded however that judicial participation in the Sentencing Commission was constitutionally permissible and expressed its ratio as follows:

"*Although it is a judgment that is not without difficulty, we conclude that the participation of federal judges on the sentencing commission does not threaten, either in fact or in appearance, the impartiality of the judicial branch. We are drawn to this conclusion by one paramount consideration: that the Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the judicial branch. In our view, this is an essentially neutral endeavour and one in which judicial participation is particularly appropriate. Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the judicial branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law."* (407)

66 In Grollo v Palmer [1995] 184 (CLR) 348 (HC of A) the High Court of Australia followed the principles adopted in Mistretta. The issue was the constitutionality of certain statutory provisions which empowered certain judges to authorise warrants permitting the police to intercept telephone calls. These statutory provisions were upheld despite the fact that it vested the judges with an administrative non-judicial function, but only because it was held to be compatible with their judicial function. The following was said:

66.1 The court adopted the principle established in Mistretta, that "*no function can be conferred (on a judge) 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".

It called this principle "*the incompatibility condition"*. (365)

66.2 It mentioned the following examples of the ways in which the incompatibility condition might arise:

"*Incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished."* (365)

66.3 It echoed Mistretta in saying that,

"*The legitimacy of the judicial branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action."* (366)

66.4 It cautioned that judges could not participate in the issuing of interception warrants if it could reasonably be regarded as judicial participation in criminal investigation:

"*If the issuing of interception warrants were reasonably to be regarded as a judicial participation in criminal investigation, it would be a function which could not be conferred on a judge without compromising the judiciary's essential separation from the executive government."* (366-367)

66.5 It concluded however that judges could fulfil the role of authorising interception warrants because it was commonly regarded as a judicial function performed in a judicial manner (367-369).

67 The issue came before the High Court of Australia again Wilson v Minister for Aboriginal and Torres Strait Islander Affairs [1997] 1 LRC 22 (HC of A). A statute empowered the minister to protect aboriginal land by declaring it a significant aboriginal area. Before issuing such a declaration, he had to consider a report on the matter. He appointed a federal judge to prepare the report. The court held that the appointment was invalid because it violated the constitutional principle of judicial independence:

67.1 It made the point that the judge was not appointed to render the report in her capacity as judge. She was appointed to do so in her individual capacity. (30h)

67.2 It held that the question for decision was "*whether performance of the function of reporting to the minister ... is a function which is constitutionally compatible with the holding of office as a judge appointed under ... the constitution"*. (31b)

67.3 It followed Mistretta and Grollo by adopting "*the incompatibility condition*" as the principle which guided its determination. (31c-f)

67.4 It again echoed Mistretta in saying that,

"*The legitimacy of the judicial branch ultimately depends upon its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action."* (31g-h)

67.5 It made the point that judicial independence was a necessary condition for the performance of the judicial function:

"*The function of the federal judicial branch is the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation ... The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government."* (33d-f)

67.6 It noted that it was "*well recognised dogma ... that the judicial power is to be exercised separately from the exercise of the other two powers, and by different people"*. (34d-e)

67.7 It said that the separation of judicial function from the political functions of government was designed to ensure judicial independence,

"*... not only by avoiding the occasions when political influence might affect judicial independence but by proscribing occasions that might sap public confidence in the independence of the judiciary"*. (34g)

67.8 It said that the rationale of the incompatibility condition was to ensure that "*judges not only are, but are seen to be, independent of the other branches of government"* and added that "*the appearance of independence preserves public confidence in the judicial branch"*. (35i)

67.9 It made the point that it was not constitutionally competent for the legislature or the executive to appoint judges to non-judicial office incompatible with the performance of their judicial functions:

"*The capacity of ... judges to perform their judicial duties throughout the terms of their appointment independently of the political branches of government cannot be prejudiced by their appointment to non-judicial office or to perform non-judicial functions. If an appointment to non-judicial office or performance of non-judicial functions prejudices that capacity, it is incompatible with the office and function of a ... judge and that is inconsistent*

with ... the constitution. Thus constitutional incompatibility limits legislative and executive power; it does not affect a vacation of judicial office." (37g-h)

"Bearing in mind that public confidence in the independence of the judiciary is achieved by a separation of the judges from the persons exercising the political functions of government, no functions can be conferred on a '... judge that would breach that separation'." (38a-b)

67.10 It went on to describe the steps in the application of the incompatibility condition. We have divided the description into sub-paragraphs for easier identification of each of the steps:

"*The statute or the measure taken pursuant to the statute must be examined in order to determine, first, whether the function is an integral part of, or is closely connected with, the functions of the legislature or the executive government. If the function is not closely connected with the legislature or the executive government, no constitutional incompatibility appears." (*38d-e)

"Next, an answer must be given to the question whether the function is required to be performed independently of any institution, advice or wish of the legislature or the executive government, other than a law or an instrument made under a law ... If an affirmative answer does not appear, it is clear that the separation has been breached ... The breach is not capable of repair by the ... judge on whom the function is purportedly conferred, for the breach invalidates the conferral of the function." (38e-f)

"If the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the ... judge to be exercised on political

grounds - that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?" (38f-g)

"In considering these questions, it will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests. An obligation to observe the requirements of procedural fairness is not necessarily indicative of compatibility with the holding of judicial office ..., for many persons at various levels in the executive branch of government are obliged to observe those requirements. But, conversely, if a judicial manner of performance is not required, it is unlikely that the performance of the function will be performed free of political influence or without the prospect of exercising a political discretion." (38g-i)

67.11 It went on to apply this approach to the matter in hand and concluded that the appointment of the judge to render the report was not constitutionally permissible. (39h-41b).

68 It is accordingly clear that judges may only perform those extra-judicial functions which are either incidental to their judicial role or at least not incompatible with it. An extra-judicial role is incompatible with judicial independence if it in fact erodes the judge's independence of the other two branches of government or creates a perception that it does so. The circumstances which might have that effect, include the following:

68.1 If the function is one more usually or appropriately performed by another branch of government.

Mistretta v US (1989) 488 US 361 (SC) 389

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs [1997] 1 LRC 22 (HC of A) 38 and 39

68.2 If the performance of the function is subject to executive control or direction.

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs [1997] 1 LRC 22 (HC of A) 38, 40 and 41.

68.3 If the performance of the function requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law.

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs [1997] 1 LRC 22 (HC of A) 38 and 40

68.4 If the performance of the function creates the risk of judicial entanglement in matters of political controversy.

Mistretta v US (1989) 488 US 361 (SC) 407

Grollo v Palmer [1995] 184 (CLR) 348 (HC of A) 366

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs [1997] 1 LRC 22 (HC of A) 31

68.5 If the performance of the function involves the judge in the process of law enforcement.

Grollo v Palmer [1995] 184 (CLR) 348 (HC of A) 366

68.6 If the performance of the function occupies the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.

Grollo v Palmer [1995] 184 (CLR) 348 (HC of A) 365

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs [1997] 1 LRC 22 (HC of A) 36, 61 and 64

The functions of the head of the SIU

69 We submit that the appointment of a judge as head of an SIU is entirely incompatible with the principle of judicial independence because it makes the judge a fully fledged member of the executive branch of government or at least creates that perception:

69.1 The functions of the SIU are executive functions. The investigation of civil and criminal misconduct with a view to civil and criminal redress, are ordinary executive functions performed by the police, the attorney-general and the state attorney. They are quintessentially the executive functions of civil and criminal law enforcement.

69.2 The SIU does not perform those functions in a judicial manner. It performs its investigative functions in private. It does so by the means normally employed by the executive. Evidence is gathered by search and seizure, subpoena and

interrogation. The SIU's role in the process is directed at investigation and prosecution and not adjudication.

69.3 The SIU performs those functions under the control of the president. He alone decides what matters to refer to them. He determines their terms of reference. They may exercise their powers only within the parameters of those terms of reference. He may amend their terms of reference at any time to extend, restrict, suspend or terminate any investigation. When he calls them to account, they have to report to him on the performance of their functions.

69.4 They are entirely financially dependent on the executive. The latter can at any time stultify their efforts by withholding the funding necessary to perform them.

69.5 The very reason for the existence of the SIU and the ultimate object of its efforts, is to protect the state against abuse and to obtain redress for abuses committed against the state. All the efforts of the SIU are in other words directed at protection of the interests of the state. That is in itself enough to create a perception that the head of the SIU has compromised his judicial independence in pursuit of the interests of the state.

69.6 The performance of the function of head of the SIU, occupies the judge to such an extent that he is no longer able to perform his normal judicial functions. The SIU says that he acts as its full-time head and has not

performed any judicial functions since its appointment in March 1997.

Rheeder 2:107:17

70 It is inevitable in those circumstances that the SIU and the judge who heads it, will be perceived as tools of the executive, however fair-minded and independent they might in fact be in the performance of their functions. That much is apparent from the examples of the media coverage of the activities of the SIU.

Press reports, RA6, 4:383 to 394

We do not suggest that the media coverage is fair or accurate. But it is coverage of a kind which is inevitable given the executive functions performed by the SIU and particularly their politically controversial nature. The criticism of the SIU is of a kind which is commonplace in the political arena. But it is extremely damaging to public perceptions of the independence of the judge who heads the SIU and to the independence of the judiciary generally. In his judgment in Law Society of Lesotho v Prime Minister of Lesotho [1986] LRC (Const) 481 (LCA) 505g, Schutz J noted that one of the undoubted, if less frequently stressed, elements of the requirement of independence of the judiciary, is "*that the courts should be legitimately protected against contempt"*. This purpose is undermined when judges perform executive functions which tend to embroil them in public controversy.

The judgment of the court below

71 The court below referred extensively to the history of the judicial performance of extra-judicial functions in South Africa over the last 150 years and concluded that they were not regarded by the public as a violation of the principle of judicial independence.

Judgment 5:484 - 498.

It placed particular emphasis on the participation of judges in commissions of inquiry. It asserted that "*the performance of such functions* [by judges] *did not create a perception of an unduly close relationship with the other branches of government*". It equated the position of the head of the SIU with that of a judge heading a commission of enquiry and held that his appointment was therefore constitutionally unobjectionable.

Judgment 5:498

72 We submit with respect that this line of reasoning was incorrect in three respects:

72.1 The court's assertion that the 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. It has from time to time been a matter of considerable controversy.

72.2 Whatever the practice might have been in the past when the independence of the judiciary was not constitutionally protected, this practice cannot serve as the standard for judicial conduct under the constitution.

72.3 The head of the SIU can in any event not be equated with a judge who heads a commission of inquiry. The functions he performs and the manner in which he does so, are materially different from those of judges who head commissions of inquiry.

73 The assertion of the court below that the appointment of judges to commissions of inquiry in the past, "*did not create a perception of an unduly close relationship with the other branches of government"*, was with respect not correct. It has from time to time been a matter of considerable controversy:

73.1 The court did not cite any evidence or authority in support of its assertion. It acknowledged on the contrary that it was at odds with the views expressed by Professor Kahn in the article from which it drew its account of the history of judicial participation in extra-judicial activities in South Africa.

Judgment 5:493

Kahn 'Extra-judicial activities of judges' (1980) 13 *De Jure* 188

73.2 Professor Cameron described the controversial role that judges sometimes play when they head commissions of inquiry:

"*The use of judges to sit on commissions of enquiry has long been a controversial aspect of South African political life. It is often suspected that commissioners are selected to make findings and recommendations which would suit the government. When judges are used in this process the discrediting effect on the judicial system is severe.*

Unfortunately, judges are so used. Perhaps the most flagrant instance in recent history was the Munnik Commission which sat earlier this year. ... In evident response to Mr Justice Munnik's performance the General Council of the Bar issued a statement in which it pointed out that:

> *'By drawing too frequently on the widespread public confidence in the impartiality and independence of the judiciary by involving judges in inquiries with pronounced political aspects, governments may dissipate those very assets that are essential to the judiciary for the satisfactory discharge of its proper adjudicative function.'*

This statement lays too much blame on the government and too little on those judges who agree to make themselves party to political manoeuvres. Of the participation by the Judge President of the Cape in this Commission it has been said that he 'lent an air of respectability to what [was] simply a political exercise."

> Cameron 'Nude monarchy: the case of South Africa's judges' (1987) 3 *SAJHR* 338 at 340

See also the 'Administration of justice' chapter in *Annual Survey of South African Law* for 1987 at 493-5 where Cameron, Marcus and Van Zyl Smit commented that the controversy generated by the Munnik Commission could serve "*only ... to inhibit the free and untarnished administration of justice in this country"*.

73.3 The judge-president of the Cape Provincial Division of the High Court expressed similar sentiments in his personal submission to the Truth and Reconciliation Commission in 1998:

"*There has over the years been a tendency to appoint judicial commissions of inquiry into matters of a political nature. By appointing a judge to head such a commission, the government sought to create the impression of fairness, relying on the independence of the judiciary as its justification. Unfortunately, there were judicial commissions which were appointed to investigate and report on controversial political issues and which brought in findings that suited the government. Whether such findings were, on the evidence, justified or not is irrelevant. The public perception is that these commissions were hand-picked and therefore disposed towards the government's point of view. These judicial commissions, therefore, far from enhancing the image of the judiciary, did much to bring it into disrepute*."

G Friedman, 'Submission to the truth and reconciliation commission on the role of the judiciary' (1998) 115 *SALJ* 56 at 62.

73.4 Davis J also very recently referred in scathing terms to the role played by some judges who headed commissions of inquiry in the past.

Davis, 'Look back in anger: a reply to David Zeffertt' (2000) 117 *SALJ* 125 at 131 to 132

74 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. On the contrary, the manner in which judges performed their judicial and non-judicial functions in the past, has been a matter of much controversy. The most recent polemic triggered by the work of Professor Dyzenhaus is but one example.

Dyzenhaus *Truth, reconciliation and the apartheid legal order* (1998), Juta & Co

Zeffertt 'Review of Dyzenhaus' (1999) 116 *SALJ* 665

Davis 'Look back in anger: a reply to David Zeffertt' (2000) 117 *SALJ* 125

Klug 'Dyzenhaus truth, reconciliation and the apartheid legal order' (2000) 117 *SALJ* 133

It is not for present purposes necessary to take sides in the controversy. There is every reason however to avoid controversies of this kind in future. But that will not be achieved if the practices of the past are uncritically accepted as the standard by which judicial conduct is judged under the constitution in future.

75 The functions of the head of the SIU can in any event not be equated with those of judges who head commissions of inquiry. His functions and the manner in which he is required to perform them, are materially different:

75.1 A commission of inquiry gathers evidence merely to report to the executive. It does not act on the outcome of its investigation. That is left to the executive which may respond to the report as it sees fit.

Bell v Van Rensburg NO 1971 (3) SA 693 (C) 705

S v Mulder 1980 (1) SA 113 (T) 120

SARFU v President of the RSA 2000 (1) SA 1 (CC) paras 147 and 220

The investigative functions of the SIU on the other hand, are not performed with a view to mere findings of fact and recommendations to the executive. Its investigations are undertaken with a view to the civil and criminal redress in which it actively participates.

75.2 A commission of inquiry undertakes its investigation in a judicial manner. It normally does so by hearing evidence in public. It does not do so by search and seizure and indeed has no powers of that kind.

Section 4 of the Commissions Act 8 of 1947.

The SIU on the other hand undertakes its investigations in a manner indistinguishable from that of the other law enforcement agencies of the executive arm of government such as the police, the Attorney-General and the State Attorney.

75.3 Perhaps most important is the fact that a commission of inquiry does not hold a brief for anybody. The judge is required to render a report according to his or her own conscience without regard to the particular interests of any party. The very purpose of the SIU on the other hand, is to protect the state. All its efforts are directed at the protection of its interests. The head of the SIU is an executive organ of state dedicated to the protection of its interests. It is in any event inevitable that he or she will be perceived in that way.

75.4 It is on these very grounds that the High Court of Australia distinguished Royal Commissions of Inquiry in Wilson.

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs [1997] 1 LRC 22 (SCC) 39a to b and 45h to i

The judgment of the majority of the court made the point at 39a to b in the following terms:

"*A judge who conducts a Royal Commission may have a close working connection with the executive government yet will be required to act judicially in finding facts and applying the law and will deliver a report according to the judge's own conscience without regard to the wishes or advice of the executive government except where those wishes or advice are given by way of submission for the judge's independent evaluation."*

75.5 The Eastern Cape Provincial Division of the High Court recently commented on the stark difference between a commission of inquiry and the SIU. The case concerned a property transaction in which the first respondent had acted, first in his capacity as chair of the Heath Commission of Inquiry appointed by the Eastern Cape government and then in his capacity as head of the SIU:

"And so it came about that the chairperson of a commission of inquiry which had heard evidence relating to the appellant's acquisition of the farm, came to be the head of a body, the first respondent, which brought civil proceedings against the appellant arising out of that evidence. The arbiter had turned into claimant: a somewhat startling state of affairs."

Toto v Special Investigating Unit and others 2000 (5) BCLR 553 (E) 561

Conclusion

76 The appointment of a judge as head of the SIU, violates the constitutional principle of independence of the judiciary. It follows that both,

- section 3(1) of the Act and
- the appointment of his lordship Mr Justice Heath as head of the SIU in terms of that section,

are unconstitutional and invalid.

PROCLAMATION R31

Introduction

77 We submit in this chapter that the referral by Proclamation R31 is *ultra vires* because the allegation referred for investigation,

- is not an allegation of the kind contemplated by section 2(2) of the Act and
- lacks the degree of specificity required by the Act.

It is not a section 2(2) allegation

78 In terms of sections 2(1) and (2) of the Act, the president may only refer a matter to the SIU if he deems it necessary to do so on the ground of an allegation of the kind described in section 2(2). If he does so, the "*matter*" referred for investigation is the allegation itself.

79 The allegation upon which the president acted and which he referred to the SIU for investigation by Proclamation R31, is described in the proclamation. We submit that it is not one of the kind described in section 2(2). The respondents contend that it is an allegation of the kind described in sub-sections 2(2)(c) and (g). We will deal with each of those possibilities in turn.

80 The allegation is not one of the kind contemplated by section 2(2)(c):

80.1 This sub-section speaks of "*any alleged ... unlawful appropriation or expenditure of public money or property"*. We assume that the respondents' contention is that attorneys who receive compensation from the RAF on behalf of their clients and then fail to pay over to their clients the full amounts due to them, are guilty of the unlawful appropriation of public money. We submit however that an attorney guilty of such misappropriation, is not guilty of the unlawful appropriation of "*public money*".

80.2 Section 1 defines "*public money*" to include "*any money acquired, controlled or paid out, by a state institution"*. It also defines a *"state institution"*. We accept that the RAF is such an institution. It means that any money acquired, controlled or paid out by the RAF, constitutes public money.

80.3 But public money cannot indefinitely retain its public character. If it is lawfully paid over to a private person or entity, then it loses its public character and becomes private money.

80.4 If the RAF for instance lawfully pays compensation to a claimant, the money becomes his on receipt. It loses its public character and becomes private money. If a thief should steal the money from the claimant, it would be a theft of private money despite the fact that it was once public money.

80.5 The allegation referred for investigation in this case, postulates a lawful payment of compensation by the RAF, not to the claimant himself, but to his attorney

acting as his agent. But as between the RAF and the claimant, payment to the attorney constitutes payment to the claimant. As between the attorney and the claimant on the other hand, the attorney (or literally the attorney's banker) becomes owner of the money subject to a duty to account for it to the claimant. Geyser v Fuhri 1979 (1) SA 747 (N) 749 and 1980 (1) SA 598 (N) 600

80.6 In other words, whether the RAF pays the compensation to the claimant personally or to his attorney acting as his agent, it ceases to be public money once it is received by the claimant or his attorney acting as his agent. The money ceases to be public money and becomes private money in their hands.

80.7 The allegation postulates misappropriation thereafter when the attorney accounts to his client. But that would then be a misappropriation of private money. It would not be an unlawful appropriation of public money within the meaning of section 2(2)(c).

81 The allegation is also not one of the kind contemplated by section 2(2)(g):

81.1 The section speaks of "*any alleged ... 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*".

81.2 The allegation postulates unlawful or improper conduct by certain attorneys who fail to pay their clients the full amounts due to them. Those attorneys would be the exception and not the rule.

81.3 The people harmed by their conduct, are motor accident victims who suffer the added misfortune of being represented by an attorney who misappropriates money due to them.

81.4 But those victims do not constitute "*the public*" or "*any category thereof*". They are no more than the victims of a narrowly defined species of crime. People who have no more in common than that they have been the victims of the same kind of crime, do not constitute "*the public"* or a *"category thereof"*. Even the victims of more common crimes cannot be characterised in that way. It would for instance be absurd to describe the victims of hijackings as "*the public*" or as *"a category of the public"* when they have no more in common than that they have been the victims of the same kind of crime.

81.5 All crime of course causes harm to those members of the public who are its victims. But that is clearly not what the section has in mind. It was clearly not intended to embrace any allegation of any criminal conduct. That is why it speaks of the public or a category of the public at large. It uses those concepts in their collective sense to refer to society at large or any part thereof, rather than its individual members. This interpretation is moreover consistent with the scheme of the Act as a whole and section 2(2) in particular which make it clear

that their purpose is to protect the state and society at large rather than its individual members.

82 The allegation upon which the president acted and which he referred to the SIU for investigation, is accordingly not one of the kind contemplated by section 2(2). The referral was consequently *ultra vires*.

The allegation is too unspecific

83 A referral of an allegation vests the SIU with drastic powers of investigation which can have far-reaching implications for those affected by it:

83.1 In terms of sections 5(2) and (3) any person may be ordered to appear before the SIU and produce to it specified books, documents or objects in their possession or custody or under their control and may be interrogated without protection of the privilege against self-incrimination. Section 12(1)(b) provides that anyone who does not obey, is guilty of an offence punishable by a fine or imprisonment for up to five years.

83.2 Sections 6(1), (6) and (8) vests the SIU with far-reaching powers of search and seizure for purposes of its investigation. The people against whom those powers are invoked are in other words exposed to searches of their homes and workplaces, if needs be by force and, if they resist, guilty of a criminal offence in terms of section 12(1)(a) punishable by a fine or imprisonment of up to five years.

83.3 The evidence so gathered by the SIU may be used in civil or criminal proceedings against anyone.

83.4 Those consequences flow, not only for the culprits accused of wrongdoing, but for any innocent third party who happens to have information or evidence relevant to an SIU investigation.

84 The only restriction upon those powers, is that the SIU have to exercise them in terms of section 4(1), "*within the framework of its terms of reference as set out in the proclamation"*. It means that those terms of reference have to be formulated with precision because they circumscribe what the SIU may and may not do and what people against whom its powers are invoked, must and must not do on pain of criminal conviction followed by the imposition of a fine or imprisonment.

Erasmus v S A Associated Newspapers 1979 (3) SA 447 (W) 450A-B

S v Mulder 1980 (1) SA 113 (T) 121-122

President of the RSA v SARFU 2000 (1) SA 1 (CC) para 229

In S v Mulder, Boshoff AJP for instance said:

"*Die buitengewone inkwisitoriale magte wat aan so 'n kommissie verleen word, stel die gewone burger noodwendig bloot aan die risiko dat sekere aspekte van sy privaatlewe ontbloot mag word, wat andersins privaat sou bly, en aan die risiko dat ongegronde bewerings teen hom gemaak kan word. So-iets kan verleentheid en skade aan sy reputasie veroorsaak ...*

Om te verseker dat 'n getuie wat onder die verpligtinge en dwang van arts 3(1) en 6(1) van die Kommissiewet is, beskerm word, in die sin dat hy alleen verplig word om vrae te antwoord wat hom kan benadeel, oor sake vir openbare belang ten opsigte waarvan die Kommissiewet van toepassing gemaak is, moet die opdrag wat aan die kommissie gegee word, duidelik lees sodat redelik maklik vasgestel kan word wat ter sake en wat nie ter sake is nie."

85 In this instance the allegation referred to the SIU by Proclamation R31, lacks the necessary degree of specificity:

85.1 It speaks merely of "*attorneys*" who are guilty of the misconduct it describes. It does not in any way identify the attorneys concerned. Any attorney may conceivably be guilty of misconduct of that kind. Every attorney is accordingly vulnerable to investigation.

85.2 The misconduct of which the "*attorneys*" are accused, is a failure to pay to their clients "*the total net 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"*. It does not matter what the reason for the failure is. It is for instance not uncommon for attorneys of indigent road accident victims to fund their medical treatment pending finalisation of their claims on the understanding that the costs so incurred would be deducted from the award of compensation once it is received. That would be a perfectly legitimate and indeed generous arrangement. An attorney who implemented it,

would however be guilty of the misconduct contemplated by the proclamation and vulnerable to investigation.

85.3 The misconduct is moreover defined as a failure to pay over the full amount of compensation after deduction of a "*reasonable"* amount in respect of attorney-client costs. Whether a deduction was reasonable, depends not only on the attorney's fee structure but also on the work done on the case. It is consequently impossible, from the mere globular amount of the deduction, to assess whether it was reasonable or not. And yet that seems to be the very basis upon which the allegation was made and referred and is being investigated.

85.4 In other words, the investigation is not limited to attorneys reasonably suspected of being guilty of misconduct. The vague and general terms of the referral renders all attorneys potentially vulnerable to investigation.

86 We accept that there are attorneys who overreach their clients whose conduct ought to be investigated and who should be brought to book. We would not have made this objection to the terms of the referral, had it been more carefully tailored to be confined to attorneys who are either guilty of misconduct of that kind or about whom there is at least a reasonable suspicion of guilt. But the broad and unspecific terms in which the referral has been made, renders all attorneys vulnerable to investigation, including the overwhelming majority of them who have never been guilty of any misconduct. It

renders the referral subject to the same flaw as that of the by-law described by Schreiner J in Amoils v Johannesburg City Council 1943 TPD 386 at 390:

"*For a by-law that would be grossly unreasonable if applied in some cases covered by its language, is also grossly unreasonable as a whole and cannot be saved by the fact that it could be reasonably applied to many or even the great majority of cases."*

87 Nor is it an answer to this objection to suggest that the SIU will exercise its discretion to ensure that innocent attorneys are not investigated.

Rheeder 2:105:12

Rheeder 2:106:15

Maduna 2:160:32.3

An investigation affects an attorney's privacy and dignity and the protection of fundamental rights "cannot depend on the exercise of discretion"

S v Zuma 1995 (2) SA 642 (CC) para 28

Mistry v Interim Medical and Dental Council 1998 (4) SA 1127 (CC) para 29 fn 55.

Dawood v Minister of Home Affairs (unreported judgment of this court in Case CCT 35/99, 7 June 2000) paras 45 to 50.

88 We accordingly submit that the referral is also *ultra vires* for lack of the required specificity.

Conclusion

89 We submit that the referral by Proclamation R31 is *ultra vires* on either or both of the grounds set out above.

SECTION 6 OF THE ACT

Introduction

90 Section 14 of the constitution guarantees the right to privacy in the following terms:

"*Everyone has the right to privacy, which includes the right not to have -*

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed."

91 Sections 6(1), (3), (6) and (8) infringe and limit the constitutional right to privacy because they permit an SIU,

- to search the homes of people;
- to search their property;
- to seize their possessions, and
- to infringe the privacy of their communications.

Kriegler, Suid-Afrikaanse Strafproses, 5th ed, 30

Mistry v Interim Medical and Dental Council of SA 1998 (4) SA 1127 (CC) para 23.

Thompson Newspapers v Canada (1990) 47 CRR 1 (SCC) 30 to 31

R v McKinlay Transport (1990) 47 CRR 151 (SCC) 169

CBS v New Brunswick (AG) (1991) 7 CRR (2nd) 270 (SCC) 280

Baron v Canada (1993) CRR (2nd) 65 (SCC) 83 to 85

92 Their infringement of the right to privacy is not avoided by section 6(2)(c). It provides that the SIU must exercise its search and seizure powers "*with strict regard to decency and order, including the protection of a person's right to ... his or her personal privacy"*. The powers conferred by sections 6(1), (3), (6) and (8) cannot be exercised without invading the privacy of those against whom they are invoked. To make sense of section 6(2)(c), it can mean no more than that, in the exercise of those powers, the SIU is obliged to minimise their invasion of the privacy of others. The remainder of section 6 would be rendered nugatory if section 6(2)(c) were given a wider meaning.

93 Insofar as sections 6(1), (3), (6) and (8) authorise the SIU to invade the privacy of others, they limit the constitutional right to privacy and can only pass constitutional muster if they are justified under section 36(1) of the constitution. Before we embark on that inquiry, we will do a closer analysis of the search and seizure powers under section 6 because their nature and extent are germane to the justification inquiry itself.

The search and seizure powers

94 In terms of section 6(5)(a) read with section 6(1), a member of a Special Tribunal, magistrate or judge, may issue an "*entry warrant"* if it appears to him or her from information on oath that there are reasonable grounds for believing that any book, document or object which may have a bearing on the investigation is in the possession

or under the control of any person or on or in any premises and cannot reasonably be obtained in any other manner.

95 The first important feature of this provision is that there need merely be reasonable grounds for believing that the book, document or object is one "*which may have a bearing on the investigation"*. This requirement is so wide as to be almost meaningless for the following reasons:

95.1 The investigation itself is based on a mere allegation referred to the SIU in terms of sections 2(1) and (2). Section 4(1)(a) moreover provides that the SIU must investigate, not only the original allegation, but "*all allegations regarding"* the matter raised by the original allegation. The investigation is in other words one into mere allegations. Those allegations need not be true. There need not be any evidence of their truth. There need indeed be no reason at all to believe that they are true.

95.2 These underlying allegations need not be allegations of criminal conduct. Section 2(2) makes it clear that an investigation may be based on allegations of conduct which is not criminal. An investigation may for instance be undertaken into allegations of,

- "*serious maladministration"* - section 2(2)(a)
- "*improper conduct"* - section 2(2)(b)
- any "*irregular or unapproved acquisitive act, transaction, measure or practice"* - section 2(2)(d)

- "*negligent loss of public money or damage to public property*" - section 2(2)(e), and
- "*improper conduct"* - section 2(2)(g).

95.3 The evidence sought to be obtained by search and seizure, need not be evidence of the misconduct contemplated by the referral. It need merely be evidence that "*may have a bearing on the investigation"*. It may in other words include evidence which either proves or disproves the allegations under investigation.

95.4 It follows that the judicial officer responsible for issuing the entry warrant, merely has to believe on reasonable grounds, that the evidence sought to be obtained by search and seizure, may have some bearing on an investigation into any one of a number of mere allegations of conduct which need not be criminal conduct.

96 The second important feature of section 6(5) read with section 6(1), is that it only governs *"entry"* of the premises, and not the search and seizure undertaken pursuant to it. The only requirement set by section 6(5) is that the premises may only be "*entered by virtue of an entry warrant"*. All that it constrains is the entry of the premises and not the search and seizure. The warrant does not limit the search and seizure. Once an entry warrant is issued, the SIU is at large to search for and seize any evidence for purposes of their investigation. That much is made clear by section 6(1) read with 6(3).

97 The powers of search and seizure are not limited to premises of any particular kind. They extend to "*any premises"* which would include private homes.

98 The powers of search and seizure may be invoked, not only against those alleged to have been guilty of wrongdoing, but also against innocent third parties. The privacy of their homes and workplaces may be invaded and subjected to a wide-ranging search and seizure, even when it is common cause that they are utterly innocent of any wrongdoing.

The test for justification

99 The test for justification in terms of section 36(1) of the constitution, is by now well established. The limitation imposed on the right to privacy by the search and seizure powers, are justified only if they are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those specified in section 36(1). Ackermann J made the point in National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) para 34 that, although the section did not expressly mention the importance of the right infringed, "*this is a factor which must of necessity be taken into account in any proportionality evaluation"*.

100 The respondents who defend the constitutionality of the search and seizure powers, bear the onus of satisfying this court of their justification.

101 The minister purports to do so in the following terms:

"*It is submitted that powers of search and seizure are constitutionally justified if the following procedural safeguards are in place:*

* *First: if there is a system of 'prior authorisation' which provides for the granting of warrants before a search is conducted.*
* *Second: if the evidence is required to satisfy the relevant authority that the person seeking the warrant has reasonable grounds for suspecting that an offence has been committed before a warrant for search and seizure is issued.*
* *Third: if the evidence before the relevant authority must be given on oath."*

Maduna 2:185:58.4

102 The minister is correct that those are the normal requirements set for search and seizure powers to pass constitutional muster.

Hunter v Southam Inc (1984) 9 CRR 355 (SCC) 357 to 373

Hogg, Constitutional Law of Canada, loose-leaf edition vol 2 para 45.7(a).

Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others 2000 (2) SA 934 (T) 963-6

103 But, as we have already indicated, section 6 of the Act falls short of these requirements. Section 6(5) does even not require that there be reasonable grounds "*for suspecting that an offence has been committed"*. It requires merely that there be reasonable grounds for believing that there is a book, document or object in or on the premises "*which may have a bearing on the investigation"*. The investigation itself may be one into mere unsubstantiated and untested allegations of conduct falling short

of criminal conduct. The system of prior authorisation in other words falls short of the constitutional requirements which the minister himself advances.

104 But that is not their only shortcoming. We will deal with their failure to meet the test for justification with reference to the factors listed in section 36(1) as supplemented by Ackermann J in the National Coalition case referred to above.

The nature and importance of the right

105 The right to privacy is of the utmost importance. In Mistry v Interim Medical and Dental Council of SA 1998 (4) SA 1127 (CC) para 25 Sachs J who gave the judgment of the court, said the following in this regard:

"*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."*

The importance and purpose of the limitation

106 The purpose of the Act is to investigate allegations of abuse of public money and property and, if established, to obtain civil and criminal redress. It is undoubtedly a worthy objective.

107 The limitation on the right to privacy in issue, is however imposed, not by the Act as a whole, but by the search and seizure powers created by section 6. They are conferred

on an SIU to enhance its ability to gather evidence that may have a bearing on its investigations. They obviously advance that purpose. It must be borne in mind however that the ultimate purpose is merely to investigate unsubstantiated and untested allegations of misconduct which may fall short of criminal conduct.

108 The purpose of the search and seizure powers is in other words a legitimate state purpose but less important than for instance, the ordinary investigation of criminal conduct suspected on reasonable grounds.

The nature and extent of the limitation

109 The search and seizure powers by their very nature constitute a very drastic invasion of the right to privacy.

Thompson Newspapers v Canada (1990) 47 CRR 1 (SCC) 30 to 31

CBS v New Brunswick (AG) (1991) 7 CRR (2nd) 270 (SCC) 280 to 281

Baron v Canada (1993) 13 CRR (2nd) 65 (SCC) 84 to 85

In the latter case, Sopinka J for instance said the following at 84 to 85:

"*Physical search of private premises (I mean private in the sense of private property, regardless of whether the public is permitted to enter the premises to do business) is the greatest intrusion of privacy short of a violation of bodily integrity. It is quite distinct from compelling a person to appear for examination under oath and to bring with them certain documents, under a subpoena* duces tecum *... or to produce documents on demand ...*"

110 The searches and seizures authorised by section 6, are particularly intrusive for the following reasons:

110.1 They may be based on mere unsubstantiated and untested allegations.

110.2 The allegations need not be allegations of criminal conduct.

110.3 The evidence thought to be on the premises, need not be evidence of the misconduct alleged. It merely has to have some bearing on the investigation, whether to prove or disprove the allegations of misconduct.

110.4 The system of prior authorisation requires no more than an "*entry warrant*" which governs entry to the premises but not the search and seizure pursuant to it.

110.5 The search and seizure may be undertaken on any premises, including private dwellings.

110.6 The powers of search and seizure may be invoked, not only against those who are alleged to have been guilty of misconduct, but also against innocent third parties.

111 The invasion permitted by section 6 is in other words drastic, even more so than the search and seizure permissible in the course of ordinary criminal investigation.

Kriegler, Suid-Afrikaanse Strafproses, 5th ed, 30 to 37

The relation between the limitation and its purpose

112 We accept that the search and seizure powers do advance the purpose for which they have been created.

113 However, while their purpose is only of modest importance, the powers themselves are of the most drastic kind.

Less restrictive means to achieve the purpose

114 There is no reason why the Act should confer search and seizure powers on an SIU at all:

114.1 The respondents do not advance any reason why an SIU should have search and seizure powers at all.

114.2 The principal purpose of an SIU investigation in general and of its search and seizure powers in particular, is to investigate and gather evidence of misconduct which can ultimately be used to obtain civil redress for wrongs committed against the state. But the state is in that regard no different from an ordinary civil litigant. The claim for damages of a victim of police torture, is for instance at least as important and usually more important than any civil claim arising from any

wrong committed in relation to state money or property. Such a litigant does not have any search and seizure powers except that our civil procedure now allows for the possibility of an application to court for an Anton Piller order. Orders of that kind are carefully tailored to maintain a balance in the context of the investigation and prosecution of civil claims, between the interests of the claimant on the one hand and the common law and constitutional rights of the defendant on the other.

114.3 In Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A) 15 Corbett CJ said that an applicant for an Anton Piller order must *prima facie* establish the following:

"*(1) That he, the applicant, has a cause of action against the respondent which he intends to pursue;*

(2) that the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which applicant cannot claim a real or personal right); and

(3) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery."

The terms of the order if granted, are moreover carefully designed to prevent abuse and limit the intrusion into the respondent's private domain. That is why Farlam J held in Dabelstein v Hildebrandt 1996 (3) SA 42 (C) 61 to 67 that the Anton Piller remedy passed constitutional muster.

114.4 This same remedy is available to the state in the investigation and collection of evidence in pursuit of civil redress for wrongs committed against it. There is no reason why it should not suffice, as it does for all other civil litigants.

114.5 Other investigatory bodies comparable to an SIU, have for decades succeed in the performance of their investigatory functions, without powers of search and seizure. The Commissions Act 8 of 1947 for instance allows the president to confer certain powers of investigation on commissions of inquiry into matters "*of public concern"*. Those powers include a power of subpoena but not a power of search and seizure. There is no apparent reason why an SIU should be vested with such a power.

115 But even if the conferral of some search and seizure powers on an SIU could be justified, the unchecked scope of the powers vested in it by section 6 of the Act cannot. There is no reason why its search and seizure powers should not be more carefully tailored, for instance in the following respects:

115.1 There is no justification for any search and seizure powers in the absence of reasonable grounds to believe that a criminal offence has been committed. That is after all, as we have already indicated, an element of the test advanced by the minister himself.

Maduna 2:185:58.4.2

In Hunter v Southam Inc (1994) 9 CRR 355 (SCC), the leading judgment of the Supreme Court of Canada on this issue, the court said at 373 that,

> "*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.... 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 s.8 of the Charter ....*"

115.2 The search and seizure should be permissible only in pursuit of evidence of the suspected crime. It should not be permitted in pursuit of any evidence which have some bearing on the investigation into the crime.

115.3 The system of prior authorisation should require, not merely an entry warrant which governs entry into or onto the premises, but a search warrant which also governs the subsequent search and seizure and limits it to documents of a kind specified in the warrant itself. The Appellate Division for instance said in Divisional Commissioner of SA Police, Witwatersrand Area v S A Associated Newspapers 1966 (2) SA 503 (A) 512 that, even in the context of ordinary criminal investigation, "*it has long been established that the courts will refuse to recognise as valid a warrant, the terms of which are too general*". An open-ended search warrant is manifestly unconstitutional.

Minister of National Revenue v Kruger (1984) 12 CRR 45 (FC of A)

Vespoli v The Queen (1984) 12 CRR 185 (FC of A)

R v Print Three Inc (1985) 16 CRR 187 (Ont. CA)

115.4 There is indeed no reason why the search and seizure powers conferred on an SIU, should not be subject to the same requirements and restrictions as those which govern Anton Piller orders.

Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A) 15

Dabelstein v Hildebrandt 1996 (3) SA 42 (C) 61 to 67

Conclusion

116 The search and seizure powers conferred on an SIU by section 6 of the Act, are unconstitutional and invalid because,

- they infringe the right to privacy guaranteed in section 14 of the constitution and
- they are not justified in terms of section 36(1) of the constitution.

PRAYERS

117 The appellant asks for an order in the following terms:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the Transvaal Provincial Division is replaced with an order in the following terms:

"(i) It is declared that section 3(1) of the Special Investigating Units and Special Tribunals Act 74 of 1996 and the the first respondent's appointment as head of the second respondent are unconstitutional and invalid.

(ii) It is declared that Proclamation R31 of 26 March 1999 is unconstitutional and invalid.

(iii) It is declared that section 6 of the Special Investigating Units and Special Tribunals Act 74 of 1996 is unconstitutional and invalid.

(iv) The first and second respondents are interdicted from

(1) conducting any investigation into the affairs of any of the members of the appellant, or

(2) entering or searching the premises of any of the members of the appellant, pursuant to the powers conferred on them by the Special Investigating Units and Special Tribunals Act 74 of 1996 read with Proclamation R31 of 26 March 1999.

(iv) The third and fourth respondents are directed to pay the costs of the applicant including the costs of two counsel."

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WIM TRENGOVE SC

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MATTHEW CHASKALSON

Chambers
Johannesburg
31 July 2000