CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/00

SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS	Appellant
versus	
HEATH, WILLEM HENDRIK	First Respondent
THE SPECIAL INVESTIGATING UNIT	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent

Heard on : 7 September 2000

Decided on : 28 November 2000

JUDGMENT

CHASKALSON P:

Introduction

[1] The Special Investigating Units and Special Tribunals Act[1] (the Act) came into force in November 1996. According to the long title of the Act, its purpose is:

> "To provide for the establishment of Special Investigating Units for the purpose of

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1 Act 74 of 1996.

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

[2] This appeal concerns the constitutionality of important provisions of the Act and of two proclamations issued by the President pursuant to its provisions. It reflects a tension that often exists between the need on the part of government to confront threats to the democratic state, and the obligation on it to do so in a manner that respects the values of the Constitution.

[3] The tension is evident in the affidavit of the Minister of Justice, the fourth respondent in the application, who said:

> "It is a regrettable and notorious fact that the levels of crime in South Africa are unacceptably high. One aspect of crime which requires special investigative measures relates to corruption and unlawful conduct involving state institutions, state property and public money. Very often, such conduct is perpetrated by public servants and state officials. The experience of other countries suggests that the investigation of conduct of this nature requires special measures beyond the routine investigations conducted by conventional law enforcement agencies."

[4] Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our

democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done.

The background

[5] In March 1997 the President, acting under the provisions of the Act, established a special investigating unit (SIU), which is the second respondent in this appeal. The head of the SIU is the first respondent who is a judge of the High Court. I will deal later with the role of the head of the SIU and with the powers vested in the SIU by the Act. For the moment, it is sufficient to say that the SIU has extensive powers including powers to investigate allegations of corruption, maladministration and unlawful or improper conduct which is damaging to State institutions, or which may cause serious harm to the interests of the public or any category thereof and to take proceedings to recover losses that the state may have suffered in consequence thereof.

[6] On 26 March 1999 an allegation was referred to the second respondent for investigation in terms of the Act. The allegation was that there had been

> "a failure by attorneys, acting on behalf of any person with regard to a claim for compensation from the Road Accident Fund, to pay over to such persons the total nett amount received in respect of compensation from the Road Accident Fund after deduction of a reasonable and/or taxed amount in respect of attorney-client costs . . ."[2]

[2] Proclamation R31 of 1999, Government Gazette 19882 RG 6469, 26 March 1999.

[7] The appellant is a voluntary association whose members are attorneys and advocates whose practices involve personal injury litigation. It contends that the investigative powers vested in the second respondent by the Act are highly intrusive, that the exercise of such powers against any of its attorney members would constitute an invasion of their privacy, and would cause irreparable damage to their professional reputation. Although the appellant denies that any of its members has ever acted unlawfully or improperly in connection with amounts received by them on behalf of their clients in respect of compensation from the Road Accident Fund (RAF), it says that it has ascertained that the SIU is soliciting complaints against some of its members to enable the unit to investigate the way they deal with RAF claims.

[8] It was in these circumstances that the appellant brought proceedings in the Transvaal High Court. It asked for an order declaring certain provisions of the Act to be inconsistent with the Constitution. Further, the appellant asked for orders reviewing and setting aside the proclamation under which the first respondent was appointed and the proclamation under which allegations concerning personal injury lawyers were referred to the second respondent for investigation. Other relief not relevant to this appeal was also claimed.

[9] The application was dismissed by Coetzee AJ in the High Court[3] and, with leave granted in terms of rule 18, the appellant has appealed directly to this Court against that order. The first and second respondents indicated in the High Court that they took a neutral stand in the matter, and that they would abide the decision of that Court. They have made no representations to this Court. The third and fourth respondents opposed the appeal.

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3 *South African Association of Personal Injury Lawyers v Heath and Others* 2000 (10) BCLR 1131 (T).

The issues

[10] In the High Court the third and fourth respondents (the respondents) raised a number of preliminary issues. They disputed the standing of the appellant to claim the relief sought by it and they contended that the application was premature. They also contended that the appellant lacked the capacity to litigate because it had more than 20 members, was an association formed for the purpose of carrying on a business for the acquisition of gain by its members, and in contravention of the Companies Act 61 of 1973[4] was not registered as a company under that Act. The preliminary objections were dismissed by Coetzee AJ.[5] Although the appellant raised the issues again in its written argument before this Court, we were informed at the hearing of the appeal that it no longer relied on these contentions, and that it abandoned them. In the circumstances there is no need to say anything more about this.

[11] Three separate issues are raised by the appellant in the appeal. It contends that:

a) section 3(1) of the Act and the appointment of the first respondent[6] as head of the SIU are inconsistent with the Constitution because they undermine the independence of the judiciary and the separation of powers that the Constitution requires;

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4 Sections 30(1) and 31.

5 Above n 3 at 1146E-1151G.

6 In terms of section 3(1) of the Act and Proclamation R24 of 1997, Government Gazette 17854 RG 5884, 14 March 1997.

b) the Proclamation referring the allegation concerning the conduct of attorneys dealing with RAF claims[7] was in any event beyond the scope of the Act and accordingly invalid; and

c) the powers of search vested in the second respondent by the Act are contrary to the right to privacy which everyone has under section 14 of the Constitution, and are accordingly invalid.

Before considering these contentions it will be convenient to set out the scheme of the Act and the provisions relevant to this appeal.

The scheme and relevant provisions of the Act

[7] In terms of Proclamation R31 of 1999, above n 2.

[12] The President is empowered by the Act[8] to establish an SIU for the purpose of investigating allegations of maladministration or unlawful or improper conduct on any of the grounds specified in section 2(2) of the Act. The grounds referred to in sub-section (2) are any alleged:

> "(*a*) serious maladministration in connection with the affairs of any State institution;
> (*b*) improper or unlawful conduct by employees of any State institution;
> (*c*) unlawful appropriation or expenditure of public money or property;
> (*d*) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
> (*e*) intentional or negligent loss of public money or damage to public property;
> (*f*) corruption in connection with the affairs of any State institution; or
> (*g*) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof."

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8 Section 2(1) of the Act provides:

> "The President may, whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2) by proclamation in the *Gazette* - *(a)* (i) establish a Special Investigating Unit in order to investigate the matter concerned; or
> (ii) refer the matter to an existing Special Investigating Unit for investigation. . ."

[13] Section 3(1) of the Act provides that the President must appoint a judge or an acting judge of a High Court as head of the SIU. The head of the SIU appoints the staff of the unit which consists of "as many . . . fit and proper persons" as in the opinion of the head of the unit are necessary for its effective functioning.[9] The SIU has extensive powers of investigation including the power to summon and interrogate persons and to conduct searches for evidence that may be relevant to its investigations.

[14] If the SIU obtains evidence "substantiating any allegation contemplated in section 2 (2)" it may institute civil proceedings in respect of such matters in a Special Tribunal (ST)[10] established in terms of the Act to deal with such matters.

[15] The Act vests the ST with jurisdiction to adjudicate upon any civil dispute emanating from the SIU's investigations and brought before it by the SIU. The ST may make any order which it deems appropriate to give effect to its decision. The ST functions in the same way as a court according to rules made by its President.

The role of the first respondent as head of the SIU

[16] The SIU is a juristic person.[11] According to Mr Rheeder, who describes himself as the manager of a team of investigators and the person in charge of the investigation against the

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9 Section 3(2) of the Act.

10 Section 5(5).

11 Section 13(1).

attorneys, the first respondent is the full time head of the SIU and has not sat as a judge since the establishment of the second respondent in March 1997.

[17] The extensive nature of the functions performed by the head of the SIU appears from the Minister's affidavit. The SIU is currently engaged in investigations into approximately 100 organs of state said to involve 221580 cases. The investigations extend over all 9 provinces and include 12 national investigations. Very substantial sums of money, amounting in all to about R3 billion are said to be at stake. As head of the unit the first respondent is required to perform executive functions. He is responsible for the appointment of the staff of the unit[12] who may include officers seconded from the public service.[13] He is also responsible for their supervision and has the power to remove any member of the unit from office "if there are sound reasons for doing so".[14] The SIU may require any person to provide it with information that may be reasonably necessary for the performance of its functions,[15] may require any person to appear before it to produce books, documents or objects,[16] may question any person under oath,[17] may

12 Section 3(2).

13 Section 3(3).

14 Section 3(4)(c).

15 Section 5(2)(a).

16 Section 5(2)(b).

17 Section 5(2)(c).

enter and search premises in accordance with the provisions of the Act,[18] and for that purpose may "use such force as may be necessary to overcome resistance against such entry and search of the premises, including the breaking of any door or window".[19] The SIU must refer evidence pointing to the commission of an offence to the relevant prosecuting authority,[20] and may institute civil proceedings in a ST if it has obtained evidence substantiating any allegation contemplated in section 2(2) of the Act.[21] The first respondent is ultimately accountable for the performance of these functions. As head of the unit he may also refer matters to the Public Protector[22] and to the state attorney or a State institution for the institution of legal proceedings against any person, if during the course of an investigation information comes to his attention which in his opinion justifies the institution of such proceedings by a State institution.[23] The first respondent has to determine how each of the investigations is to be conducted,[24] and as head of the unit he also has the power to issue interdicts or suspension orders if he has reason to believe that delay in applying to the ST for such orders would cause serious and irreparable harm to the interests of the public. Any such order has to be confirmed by the ST within 48 hours.[25] The

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18 Section 6(1).

19 Section 6(8)(a).

20 Section 4(1)(d).

21 Section 5(5).

22 Section 5(6)(b).

23 Section 5(7).

24 Section 5(1).

25 Section 5(8). In *Konyn and Others v Special Investigating Unit* 1999 (1) SA 1001 (Tk) at 1015H Locke AJ expressed the opinion, *obiter*, that "[t]he constitutionality of this section would seem to be highly questionable." It is not necessary for the purposes of this judgment to express an opinion on this.

size of the SIU's staff and its budget are not referred to in the papers, but they must be substantial. The SIU must "from time to time as directed by the President" report on progress,[26] and upon the conclusion of the investigation make a final report to the President.[27] At least twice a year the SIU must report to parliament on its investigations, activities, composition and expenditure.[28] The State Liability Act 20 of 1957 is applicable to the SIU, and for the purposes of that Act, the head of the SIU is equated to a Minister of a department.[29]

[18] Coetzee AJ held that the functions that the first respondent is required to perform under the Act as head of the SIU are not inconsistent with the independence of the judiciary. He held that under our Constitution there is no express provision dealing with the separation of powers, and that it was not competent for a court to set aside a legislative provision on the basis that it violates what, at best for the appellant, is no more than a "tacit" principle of the Constitution.[30] He held further that United States and Australian authorities relied upon by the appellant were

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26 Section 4(1)(f).

27 Section 4(1)(g).

28 Section 4(1)(h).

29 Section 13(2).

30 Above n 3 at 1160A.

not relevant, because the constitutions of those countries provide for a rigid separation of powers, whereas our Constitution does not do so.[31]

[31] Above n 3 at 1159H-I.

[19] In the law of contract a distinction is drawn between tacit and implied terms. The former refers to terms that the parties intended but failed to express in the language of the contract, and the latter, to terms implied by law.[32] The making of such a distinction in this judgment might be understood as endorsing the doctrine of original intent, which this Court has never done.[33] I prefer, therefore, to refer to unexpressed terms as being "implied" or "implicit".[34]

[20] Coetzee AJ cited no authority for his finding that a legislative provision cannot be set aside on the grounds that it is inconsistent with an implied provision of the Constitution. Counsel were unable to refer us to any authority for such a proposition and Mr Marcus who appeared for the respondents placed no reliance on it. I cannot accept that an implicit provision

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32 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 526C-F.

33 A much disputed issue in the United States. See: Tribe *American Constitutional Law*, 3 ed, vol 1 (Foundation Press, New York 2000) at 47-59. For the position in Canada see Hogg *Constitutional Law of Canada* 3 ed, vol 2 (Carswell, Toronto 1992) at 57.1(e) who contrasts the approach to "originalism" in Canadian jurisprudence with that in the United States.

34 This is the language used in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 56-59.

of the Constitution has any less force than an express provision. In *Fedsure*[35] this Court held that the principle of legality was implicit in the interim Constitution, and that legislation which violated that principle would be inconsistent with the Constitution and invalid.[36]

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35 Id at para 58.

36 Implied constitutional provisions have formed the basis of decisions by the Australian High Court to invalidate legislative provisions. See, for example, *Theophanous v Herald & Weekly Times Ltd and Another* (1994) 182 CLR; (1994) 124 ALR 1 at 11 where freedom of communication was accepted as being implicit in the Commonwealth Constitution although the implication was found not to extend to freedom of expression generally. In *Roe v Wade* 410 US 113 (1973) at 152-7 the United States Supreme Court found that there was an invasion of the right to privacy even though such right was not expressly protected in the Constitution.

[21] The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts.[37] The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle.[38] In this respect, our Constitution is no different.

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37 See article 1, section 1 (legislative power), article 2, section 1(1) (executive power) and article 3, section 1 (judicial power) of the Constitution of the United States. See section 1, chapter I (legislative power), section 61, chapter II (executive power) and section 71, chapter III (judicial power) of the Commonwealth of Australia Constitution Act, 1900.

38 For a similar approach in Australia, see *Attorney-General for Australia v The Queen and the Boilermakers' Society of Australia and Others* [1957] AC 288 (HL) at 311-2, and Sri Lanka, see *Liyanage and Others v R* [1966] 1 All ER 650 (PC) at 657-9.

[22] In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers.[39] In the *Western Cape* case[40] it enforced that separation by setting aside a proclamation of the President on the grounds that the provision of the Local Government Transition Act,[41] under which the President had acted in promulgating the Proclamation, was inconsistent with the separation of powers required by the Constitution, and accordingly invalid. It has also commented on the constitutional separation of powers in other decisions.[42] There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid.

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39 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 106-113. The issue was whether the Constitution met the requirements of Constitutional Principle VI in Schedule 4 of the interim Constitution, which required that there be "a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

40 *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

41 Act 209 of 1993.

42 See *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC); *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 45; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 105.

[23] In the United States the President is head of government and head of state. The President is popularly elected,[43] and neither the President nor the cabinet are members of Congress. The President is, however, vested with the power to veto legislation passed by Congress.[44] In South Africa the President is head of government and head of state. The President is elected by parliament from amongst its members but ceases to be a member of parliament after having been elected. Cabinet Ministers are appointed by the President from amongst members of parliament, remain members of parliament after their appointment, and are directly answerable to it. There is accordingly not the same separation between the legislature and the executive as there is in the United States. In this respect, the South African system of separation of powers is closer to the Australian system.[45] There, the head of state is the Queen, represented in Australia by the Governor General. The Commonwealth government is headed by the Prime Minister, and the Prime Minister and cabinet are members of parliament. Under this system of "responsible government" the separation between the legislature and the executive is not as strict as it is in the United States. In all three countries, however, there is a clear though not absolute separation between the legislature and the executive on the one hand, and the courts on the other:[46] it is that

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43 The popular election is for delegates to an electoral college that elects the President.

44 Section 7(2) of article 1 of the Constitution of the United States of America confers a power of veto on the President of the United States by requiring every bill that has been passed by the House of Representatives and the Senate, before it becomes law, to be presented to the President. If the President does not approve it, the bill must be returned to the house in which it originated, which must reconsider it. Presidential objection can be overridden with two thirds support from both houses.

45 See the *Western Cape* case, above n 40, at paras 55-56.

46 In the first certification judgment, above n 39, at para 123, this Court held:

> "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."

separation that is in issue in the present case.

[24] The practical application of the doctrine of separation of powers is influenced by the history, conventions and circumstances of the different countries in which it is applied. In *De Lange v Smuts* Ackermann J said:

> "I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.
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> This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that, whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here — ie the power to commit an unco-operative witness to prison — is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers."[47]

The present case is concerned not with the intrusion of the executive into the judicial domain, but with the assignment to a member of the judiciary by the executive, with the concurrence of the legislature, of functions close to the "heartland" of executive power.

[25] The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the

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47 *De Lange v Smuts*, above n 42, at paras 60-61.

courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power.[48] Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

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48 The *Western Cape* case, above n 40, at para 64. *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 123.

[26] The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the state to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice.[49] No organ of state or other person may interfere with the functioning of the courts,[50] and all organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.[51]

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49 Section 165(2) of the Constitution.

50 Section 165(3).

51 Section 165(4).

[27] Mr Marcus submitted that the principle of separation of powers is not necessarily compromised whenever a particular judge is required to perform non-judicial functions. He accepted, however, that the performance of functions incompatible with judicial office would not be permissible. This is consistent with what this Court said in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[52] where it stated that "judicial officers may, from time to time, carry out administrative tasks" but noted that "[t]here may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers."[53]

[28] It is also consistent with the United States and Australian cases referred to by Mr Trengove, who appeared for the appellant. No precise criteria are set in those decisions for establishing whether or not a particular assignment is permissible. The courts in both these countries determine this in the light of relevant considerations referred to in the judgments.

[29] Mr Trengove sought to distill from these authorities certain criteria, which he submitted are relevant to considering whether or not under our Constitution it is permissible to assign a non-judicial function to a judge. They are whether the performance of the function

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52 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 141.

53 Above n 107.

(a) is more usual or appropriate to another branch of government;[54]

(b) is subject to executive control or direction;[55]

54 *Mistretta v United States* 488 US 361 (1989) at 388; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

55 *Wilson*, above n 54, at 17-20.

(c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;[56]

(d) creates the risk of judicial entanglement in matters of political controversy;[57]

(e) involves the judge in the process of law enforcement;[58]

(f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.[59]

To this may be added Blackmun J's summary of the American jurisprudence as showing that:

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56 *Wilson*, above n 54, at 19; *Mistretta*, above n 54, at 407.

57 *Mistretta*, above n 54, at 407; *Wilson*, above n 54, at 9; *Grollo v Palmer* (1995) 184 CLR 348 at 366.

58 *Grollo*, above n 57, at 366-367.

59 *Grollo*, above n 57, at 365.

> "Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogative of another Branch and that are appropriate to the central mission of the Judiciary."[60]

[30] These considerations seem to me to be relevant to the way our law of separation of powers should be developed. Mr Marcus did not dispute their relevance, but submitted that they must be seen in the context of each particular case. They should be given a weight appropriate to the nature of the function that the judge is required to perform, and the need for that function to be performed by a person of undoubted independence and integrity.

[31] It is undesirable, particularly at this stage of the development of our jurisprudence concerning the separation of powers, to lay down rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office. The question in each case must turn upon considerations such as those referred to by Mr Trengove, and possibly others, which come to the fore because of the nature of the particular function under consideration. Ultimately the question is one calling for a judgement to be made as to whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of

60 *Mistretta*, above n 54, at 388.

government in order to maintain the independence of the judiciary. In making such judgement, the court may have regard to the views of the legislature and executive, but ultimately, the judgement is one that it must make itself.

[32] Counsel for the respondents contended that our Constitution makes specific provision for the judiciary to perform certain functions that are of a non-curial character, and that it accordingly contemplates a less rigid separation of powers than the United States and Australian constitutions. The non-curial functions referred to in the Constitution include the following. The President of the Constitutional Court presides over the election of the President, and designates judges to preside over the election of Premiers.[61] If there is a vacancy in the office of President or Premier, the President of the Constitutional Court sets the time for such elections to be held.[62] The President of the Constitutional Court determines the time for the first sitting of the National Assembly[63] and also presides over the election of the Speaker of the National Assembly.[64] Judges designated by the President of the Constitutional Court determine the time for the first sittings of provincial legislatures,[65] and preside over the election of Speakers of such legislatures.[66] A judge is appointed to perform these functions to ensure that they are carried out

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61 Sections 86(2) and 128(2) of the Constitution.

62 Sections 86(3) and 128(3).

63 Section 51(1).

64 Section 52(2). The President of the Constitutional Court may designate another judge to perform this function.

65 Section 110(1).

66 Section 111(2).

impartially and strictly in accordance with constitutional requirements and this is not inconsistent with the role of the judiciary in a democratic society. Counsel also referred to section 178 of the Constitution, which makes provision for judges to sit on the Judicial Service Commission, the majority of whose members are not judicial officers. The Commission has a central role in the appointment of judges and may also give advice to the government on matters relating to the judiciary or the administration of justice. The functions of the Judicial Service Commission are not inconsistent with the role of the judiciary in a democratic society. The appointment of judges is crucial to the functioning of independent courts. The giving of advice on the administration of justice is also related to the subject matter of the judicial office. Government is not bound by the advice given, and if the subject on which advice is sought is contentious, the judges concerned can decline to participate in the giving of such advice.

[33] Coetzee AJ held that it was part of the legal tradition of our country for judges to perform executive functions such as presiding over commissions of inquiry and sanctioning the issuing of search warrants. He equated an appointment as head of the SIU to these functions.[67] The "tradition" referred to by Coetzee AJ comes from the era of parliamentary sovereignty. What is now permissible must be determined in the light of our new Constitution, and not necessarily by past practices.

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67 Above n 3 at 1158A-1159A.

[34] In dealing with the question of judges presiding over commissions of inquiry, or sanctioning the issuing of search warrants, much may depend on the subject matter of the commission and the legislation regulating the issue of warrants. In appropriate circumstances judicial officers can no doubt preside over commissions of inquiry without infringing the separation of powers contemplated by our Constitution. The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions - independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the judge is required to determine whether grounds exist for the invasion of privacy resulting from searches.[68]

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[68] This is a task commonly performed by judges in open and democratic societies. Thus, in *Inland Revenue*

Commissioners and another v Rossminster Ltd and related appeals [1980] 1 All ER 80 at 87 Viscount Dilhorne, commenting on the judicial authorisation procedure in section 20C of the Taxes Management Act, noted:

> "(i)f the terms of this section are reconsidered by Parliament, it might be thought desirable to replace a circuit judge by a High Court judge as the appropriate judicial authority. The power given by s 20C to seize and remove other person's property and the fact that tax frauds more often than not are of great complexity suggest that it should be the responsibility of a High Court judge to satisfy himself of the matters specified in sub-s (1)(*a*) and (*b*). In saying that I do not wish to cast any reflection on the Common Serjeant. As the requirement that a judge should be so satisfied is the final safeguard against abuse of the powers given by the section, it might be preferable to place the responsibility for their exercise on a more senior judge."

[35] The fact that it may be permissible for judges to perform certain functions other than their judicial functions does not mean that any function can be vested in them by the legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government. For instance under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not "appropriate to the central mission of the judiciary."[69] They are functions central to the mission of the legislature and executive and must be performed by members of those branches of government.

[36] The first respondent has not intruded into the affairs of the executive at his own instance. The legislature made provision for the appointment in the Act and the executive, through the President, requested the first respondent to accept the appointment. I have no doubt that in accepting the appointment the first respondent acted in what he perceived to be the national interest. The fact, however, that all involved acted in good faith and in what they perceived to be the interests of the country, does not make lawful, legislation or conduct that is inconsistent with the separation of powers required by the Constitution.[70]

[37] The respondents contend that the position of head of the SIU is not incompatible with judicial office. They stress the importance of the SIU in the fight against corruption, and support

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69 Above para 29.

70 See *Western Cape* case above n 40, at para 100 where it was held that constitutional cases cannot be decided on the basis that parliament acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out.

the appointment of a judge as head of the SIU on the ground that it is important that the unit be headed by a person whose integrity is beyond reproach. This, said the Minister,

> "was especially important given the nature and ambit of the tasks which the Unit would be required to perform. It was for this reason that it was thought desirable that these tasks should be supervised by a judge or acting judge of the High Court. Not only was the view taken that a judge or acting judge would be possessed of the necessary integrity, but it was also believed that a judge or acting judge would have the requisite skills and expertise to perform the functions envisaged by the Act."

[38] I accept that it is important that the head of the SIU should be a person of integrity. But judges are not the only persons with that attribute. The functions that the head of the SIU has to perform are executive functions, that under our system of government are ordinarily performed by the police, members of the staff of the National Prosecuting Authority or the state attorney. They are inconsistent with judicial functions as ordinarily understood in South Africa.

[39] I have already referred to the functions that the head of the SIU has to perform.[71] They include not only the undertaking of intrusive investigations, but litigating on behalf of the state to recover losses that it has suffered as a result of corrupt or other unlawful practices. Judges who perform functions such as presiding over a commission of inquiry, or sanctioning search warrants, may also become involved in litigation. But that is an unwanted though possibly unavoidable incident of the discharge of what are essentially judicial functions. One of the purposes of the Act is to provide special measures for the recovery of money lost by the state, and in the case of the head of the SIU therefore, litigation on behalf of the state is an essential

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[71] See above para 17.

part of the job.

[40] The functions a judge who heads the SIU has to perform are all related to the purpose of recovering money for the state, if necessary through litigation. By their very nature, such functions are partisan. The judge cannot distance himself or herself from the actions of the SIU's investigators. The evidence in this case provides illustrations of partisan conduct on the part of investigators of the SIU, which are inconsistent with the judicial office.

[41] The first respondent has not been able to perform his judicial duties for a period of more than 3 years. His appointment is indefinite, and will continue unless he resigns, or is requested by the President, with the consent of the Judicial Service Commission, to resign. Given the workload of the SIU and the indefinite nature of his appointment, he might never return to his judicial duties, yet he remains a judge.

[42] Mr Marcus contended that the fact that the head of the unit has been unable to perform his judicial duties for a long period of time, and will continue to be unable to do so for as long as he remains head of the unit, is not relevant. If the functions of head of the SIU and judge are incompatible, that incompatibility existed on the day of the appointment. If they are not incompatible, they do not become so because the appointment is for a long period of time.

[43] Whilst the length of the appointment is not necessarily decisive in the determination of the question whether the functions a judge is expected to perform are incompatible with the

judicial office, it is, as indicated above, a relevant factor.[72] There may be cases where as a matter of urgency a judge is required in the national interest to perform functions which go beyond the functions ordinarily performed by judicial officers. I express no opinion as to whether the performance of such functions for a limited period in such circumstances would be permissible under our Constitution. The present case, however, is not such a case. The Act contemplates that the head of the Unit will be appointed indefinitely, and the nature of the functions that have to be performed, require that this should be so. The unit could not function effectively if the appointment of its head were to be made on a temporary basis, calling for changes at regular intervals. That would be destructive of the work of the Unit which requires the continuity and control that comes from a permanent appointment, or at least an appointment for an indefinite but long term.

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72 See above para 29.

[44] In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[73] the Australian High Court reviewed the Australian authorities dealing with the separation of powers. The case concerned the question whether the constitution permitted the Minister to appoint Justice Mathews to prepare a report about the declaration for preservation and protection from injury or desecration of land of particular significance to Aboriginals, and whether it permitted Justice Mathews to accept such appointment. The report was to be used as an aid to the exercise of the Minister's discretionary power to make a declaration with regard to land in relation to which a group had sought protection. Under the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 the Minister was required to commission a report from a person nominated by him. The majority held that the nomination and appointment of Justice Mathews was not effective as the performance of the reporting function would be inconsistent with the separation of powers required by the Constitution. Kirby J dissented. Notwithstanding his dissent, he expressed sympathy for the view taken by Mc Hugh J in *Grollo's* case[74] in words that seem to me to be of particular relevance to the present case:

> "it is not compatible with the holding of federal judicial office in Australia for such an office holder to become involved as 'part of the criminal investigative process', closely engaged in work that may be characterised as an adjunct to the investigatory and prosecutory functions. Such activities could 'sap and undermine' both the reality and the appearance of the independence of the judicature which is made up of the courts

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73 Above n 54.

74 Above n 57. *Grollo's* case was concerned with the power of a judge to authorise telephone surveillance in connection with criminal investigations. The majority of the Australian High Court held that this function was not incompatible with the judicial office, being similar to the function of authorising search warrants. Mc Hugh J dissented.

> constituted by individual judges. They could impermissibly merge the judiciary and the other branches of government. The constitutional prohibition is expressed so that the executive may not borrow a federal judge to cloak actions proper to its own functions with the 'neutral colours of judicial action'.[75]

[45] The functions that the head of the SIU is required to perform are far removed from "the central mission of the judiciary." They are determined by the President, who formulates and can amend the allegations to be investigated. If regard is had to all the circumstances including the intrusive quality of the investigations that are carried out by the SIU, the inextricable link between the SIU as investigator and the SIU as litigator on behalf of the state, and the indefinite nature of the appointment which precludes the head of the unit from performing his judicial functions, the first respondent's position as head of the SIU is in my view incompatible with his judicial office and contrary to the separation of powers required by our Constitution.

[46] Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of

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[75] Above n 54 at 44-45 (footnotes omitted). I should not be understood as expressing a preference for the decision of Mc Hugh J or that of the majority. The comments are, however, particularly relevant to the facts of the present case, in which the head of the SIU is required to devote all his time to functions that are ordinarily performed by employees of the executive.

a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions, which are not appropriate to the "central mission of the judiciary." Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive's power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order. It follows that section 3(1) of the Act and Proclamation R24 of 1997, appointing the first respondent as head of the SIU, must be declared to be invalid.

Appropriate relief

[47] Mr Marcus contended that the role of the head of the SIU as litigator could be separated from the role of the head of the unit as investigator. He submitted that the latter, taken on its own, is similar to the role performed by a judge who presides over a commission of inquiry, and would not be inconsistent with the judicial office. He referred in this regard to New South Wales legislation, which makes provision for a judge to preside over a commission into corruption. The terms of the New South Wales legislation were not referred to, nor the demands that it makes on the ordinary duties of the judge. In any event, a judge of the New South Wales Supreme Court is not subject to the separation of powers that applies to judges of the Australian High Court and federal judges. The latter hold office under the Commonwealth Constitution which provides for a separation of powers. The former hold office under the New South Wales Constitution, which

does not make the same provision for a separation of powers.[76]

[48] In the view that I take of this matter, however, it is not necessary to decide whether the investigatory functions of the head of the SIU are consistent with the Constitution. Investigation and litigation by the SIU are inextricably linked, and the Act makes no provision for them to be dealt with by separate functionaries. Moreover, the appointment of the head of the SIU is for an indefinite period involving the performance of numerous ongoing tasks, and is not an appointment for a single inquiry of limited duration, which permits the judge to return to his or her judicial functions once the inquiry has been completed. In my view this is not a case in which severance or notional severance would be an appropriate order. What then is appropriate?

[49] If the declarations of invalidity were to have immediate effect, that would undermine the important work being done by the SIU. The legislation has been drafted on the basis that the head of the SIU will control its activities, and will be a person of integrity and independence. If that person cannot be a judge, other criteria must be set for measuring the independence and integrity of the person to be appointed to that office.

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[76] Although state judges in New South Wales may be vested with administrative functions under Australian law, and state courts are not the sole repositories of judicial power in New South Wales, state laws cannot deprive judges of their independence in the exercise of judicial functions: *Kable v The Director of Public Prosecutions for New South Wales* (1995-1996) 189 CLR 51.

[50] The fact that the head of the SIU is a judge does not prejudice the persons being investigated. What is involved is the principle that judges must be, and be seen to be, separate from and independent of the legislature and executive. The blurring of this line has already occurred, and is not likely to be increased in a material respect if the first respondent continues temporarily to be head of the unit until appropriate arrangements are made for his replacement. On the other hand, the SIU cannot function without a head of the unit. In the circumstances of the present case, there are good reasons to suspend the declarations of invalidity pertaining to section 3(1) of the Act and the appointment of the first respondent as head of the unit. If the declarations of invalidity are suspended provision can be made for an orderly transfer of the powers of the head of the unit to a functionary who is not a member of the judiciary. That will require amendments to be made to the legislation and time will be required for that purpose. In the meantime the important work being done by the SIU can continue. I will deal later with what is an appropriate period.

The Interpretation of section 2(2) of the Act

[51] The President may refer matters to the SIU for investigation only on the grounds mentioned in section 2(2) of the Act: namely, allegations concerning matters detailed in the subsection.[77] The appellant contends that the allegations in the present case do not fall within the

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[77] See above n 8. Section 2(2) provides:
"The President may exercise the powers under subsection (1) on the grounds of any alleged —
a) serious maladministration in connection with the affairs of any State institution;
b) improper or unlawful conduct by employees of any State institution;
c) unlawful appropriation or expenditure of public money or

purview of section 2(2).

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property;

d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;

e) intentional or negligent loss of public money or damage to public property;

f) corruption in connection with the affairs of any State institution; or

g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof."

[52] Section 2(2) deals with the ambit of the application of the Act which contains various provisions that impact upon an entrenched constitutional right to privacy[78] of the persons affected by them; the broader the reach of the Act, the greater the invasion of privacy. In construing section 2(2) regard must be had to the "the spirit, purport and objects" of the Bill of Rights.[79] The spirit, objects and purport of the Bill of Rights, here the protection of privacy, will better be met in this case by giving a narrow rather than a broad interpretation to these provisions.

[53] Section 2(2) contains seven sub-paragraphs.[80] The President relied on sub-paragraphs (c) and (g) in referring the matter to the SIU for investigation. Counsel for the respondents correctly did not suggest that there were other grounds on which the matter could be referred. Sub-paragraphs (c) and (g) provide:

> "(c) unlawful appropriation or expenditure of public money or property.
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> . . . .

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78 Section 14 of the Constitution.

79 Section 39(2) of the Constitution.

80 See above n 77.

(g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof."

[54] The purpose of the Act appears from its long title which is referred to in paragraph [1] above. That purpose is to provide mechanisms for the investigation of "serious malpractices or maladministration in connection with the administration of State institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public," and for the adjudication of civil matters emanating from such investigations.

Section 2(2)(c)

[55] The RAF is a State institution[81] and investigation of any fraud on the RAF would fall within the scope of the Act. But the matters referred to the SIU do not deal with this. The allegations in question[82] relate not to the RAF, but to dealings between particular attorneys and their clients. There is no suggestion that payments made by the RAF to attorneys, on behalf of their clients, were in any way improper or unlawful, or that the investigation can possibly give rise to the recovery of any money on behalf of the state. On the face of it, the investigation is not concerned with the appropriation or expenditure of public money. It is concerned with the reasonableness of charges made by particular attorneys to particular clients for services rendered

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81 Section 1 of the Act defines a"State institution" as:

> "[A]ny national or provincial department, any local government, any institution in which the State is the majority or controlling shareholder or in which the State has a material financial interest, or any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act 93 of 1992)."

This definition of public entity reads:

> "[A]n institution that operates a system of financial administration separate from the national, provincial and local spheres of government and in which the State has a material financial interest."

by them in connection with RAF claims, and to the possible over-reaching of those clients by their attorneys. It involves an investigation into what would be "a reasonable and/or taxed amount in respect of attorney-client costs", and whether a particular attorney has either overcharged his or her client, or failed in some other way to account properly to such client for the compensation paid to that attorney as the client's agent.

[56] The respondents rely on the definition of "public money" in the Act, which reads:

> "[A]ny money withdrawn from the National Revenue Fund or a Provincial Revenue Fund, as contemplated in the Constitution, and any money acquired, controlled or paid out, by a State institution."[83]

They contend that money paid by the RAF to an attorney in settlement of a client's claim is money "paid out" by a State institution, and that it remains public money in the hands of the attorney. If that attorney fails to account properly to the client for the money received on the client's behalf, that, so it is contended, constitutes an "unlawful appropriation" of "public money" within the meaning of section 2(2)(c).

[57] I am prepared to accept for the purposes of this judgment that section 2(2)(c) may linguistically be capable of such an interpretation. In my view, however, the section should not

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82 See above para 6.

83 Section 1 of the Act.

be given such a wide meaning.

[58] The primary purpose of the Act is to enable the state to recover money that it has lost as a result of unlawful or corrupt action by its employees or other persons. The public money contemplated by the Act, is the money of a State institution that has been paid out or expended, and which that institution is entitled to recover. Hence the special mechanism for the investigation by the SIU and the recovery of money through the ST.

[59] When the RAF pays compensation to an attorney, as agent for the claimant, the RAF's obligations to the claimant are thereby lawfully discharged. In the hands of the attorney it is money lawfully paid and received, in which the State institution no longer has a legal interest, and which the attorney is then obliged to pay to the client in accordance with the contract between them. If the attorney unlawfully appropriates that money, it would be an unlawful appropriation of the client's money and not an unlawful appropriation of money of a State institution.

Section 2(2)(g)

[60] Section 2(2)(g) contemplates unlawful or improper conduct by "any person". It is the conduct of that person that has to cause "serious harm" to "the interests of the public or any category thereof". Each of these requirements has to be met, and that is not done by rolling up all attorneys who overcharge their clients, and all clients who are overcharged, and treating the totality of all the attorneys as "any person", the totality of all the clients as "the public or any category thereof", and the total overcharging as "serious harm".

[61] The allegation that is the subject matter of the investigation in the present case is in extremely wide terms. It makes no distinction between overcharging that is an isolated occurrence and overcharging that is a persistent practice. It makes no distinction between the theft of money and the charging of excessive fees. It makes no distinction between cases in which a full and proper disclosure has been made to clients concerning the compensation received and the fees charged and cases in which clients might have been misled. It covers cases in which the harm that may have been suffered by a particular client is not "serious harm", and cases in which the conduct of a particular attorney who may be investigated affects only the interests of that client and not those of any other person. It is in substance an allegation relating to the way attorneys conduct their practices and not an allegation concerning unlawful conduct alleged to have been committed by a particular attorney in respect of a particular client or clients; nor is it an allegation relating to corruption or maladministration within State institutions, or relating to any matter that affects the state's financial interests.

[62] The allegation requires the SIU to undertake a fishing expedition to establish whether there may have been malpractices by individual attorneys. It lacks the specificity required by section 2(2)(g) to justify the launching of an investigation. In particular, it fails to specify particular acts by a particular attorney which can be said to cause "serious harm" to the "interests of the public or any category thereof".

[63] It follows that the matter referred by the President to the SIU did not relate to an allegation contemplated by section 2(2) and the President had no power to refer an allegation in

those terms to the SIU for investigation under the Act. The Proclamation ordering the investigation therefore violates the principle of legality and is accordingly inconsistent with the Constitution and invalid.[84]

[64] The allegations do, however, reveal a serious concern about the handling of RAF claims. If true, they call for urgent attention. This Court is not in a position to say whether or not the allegations are well founded. But as an editorial of *De Rebus*[85] of April 1999 pointed out, the allegations are damaging to the attorneys profession and it is in the interests both of the profession and those victims of road accidents who may have complaints about the way their cases have been handled, that there be proper channels for resolving such complaints. There are various ways in which such problems can be addressed. They need not involve the lodging of a formal complaint against the attorney, or complicated investigations. Clients are often reluctant to lodge such complaints and are not likely to do so if there are other less confrontational ways of resolving their concerns.

[65] In most cases all that is necessary is accurate accounting and a means of verifying accounts where the client has reservations concerning its accuracy. This does not call for

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84 *Fedsure*, above n 34, at paras 56-59.

85 The official publication of the attorneys' profession. April (1999) at 4.

complicated investigations or extensive powers of search. The relevant information is readily available and can be ascertained through enquiries directed to the RAF and the attorney concerned. If there is a structure that facilitates the making of such enquiries, and the provision of such information, without clients having to adopt a confrontational attitude to their attorneys, this is likely to resolve most of the problems. The provision of explanations and accurate information will ordinarily be sufficient to put the client's mind at rest. If, however, as a result of those enquiries it should emerge that a client may possibly have been overreached by an attorney, appropriate action can then be taken to investigate the complaint.

The Power of Search

[66] The powers of search vested in the SIU by the Act are apparently seldom used. We were informed from the bar that searches have been undertaken by the SIU on only three occasions, none of which was concerned with the investigation of the allegations that are the subject matter of this appeal. It follows from the finding that has been made concerning the invalidity of the referral that there is no threat to the appellant or its members that these powers will be used against them. In the circumstances there is no need to deal with the challenge to the constitutionality of section 6 of the Act.

Order

[67] I have previously indicated that it is appropriate to suspend the declarations of invalidity made concerning section 3(1) of the Act and Proclamation R24. Apart from this judgment, there have been judgments in which it has been held that the SIU has exceeded its jurisdiction,[86] and

86 *Athimoolan Nadasen v The Special Investigating Unit*, Case AR786/99, 31 August 2000, an as yet

has undertaken recoveries beyond its powers.[87] The constitutionality of other provisions has also been questioned.[88] I express no opinion on these matters, but as amending legislation will be required to address the matters decided by this judgment, the state may wish to consider other issues relating to the structure of the Act and its provisions.

[68] If the declaration of invalidity concerning Proclamation R31 of 1999 takes effect from the date of this order, past investigations that were undertaken by the SIU in good faith will be protected. If it is alleged that investigations were not undertaken in good faith or that they went beyond what was permissible under the Act, the persons affected thereby will retain such remedies as they might have in relation to such conduct. An appropriate order is therefore to declare Proclamation R31 to be invalid with effect from the date of this order.

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unreported judgment of the Natal High Court, in which the SIU was found to have acted outside its jurisdiction after conducting its investigation on a matter that arose in KwaZulu-Natal when it had jurisdiction only in the Eastern Cape.

87 *Konyn*, above n 25; *Toto v Special Investigating Unit and Others* 2000 (5) BCLR 553 (E).

88 *Konyn*, above n 25, at 1015H.

[69] If the legislature wishes to address all the issues raised in this and other decisions concerning the constitutionality of the Act, that may take a significant period of time. Less time will, however, be needed for an amendment to address the declarations of unconstitutionality made in relation to section 3(1) and Proclamation R24, and to appoint a functionary other than a judge to head the SIU. These are the only declarations that are to be suspended. Although there may be reasons for allowing sufficient time for all matters to be dealt with simultaneously, there are good reasons for the first respondent's position as the head of the SIU to be regularised without undue delay. Time will however be required for the various committees of parliament to consider what is to be done and for appropriate legislation to be drafted. Time must also be allowed for a new appointment to be made, and for the first respondent to transfer his responsibilities to the new head of the SIU in an orderly fashion. I consider that a period of 1 year will be sufficient for this purpose and the declarations of invalidity pertaining to section 3(1) of the Act and Proclamation R24 should accordingly be suspended for that period.

[70] The following order is made:

1. The appeal is upheld with costs, which are to include the costs of two counsel.

2. The order made by the High Court is set aside and the following order is made in its place:

    2.1 Section 3(1) of Act 74 of 1996 is declared to be inconsistent with the Constitution and invalid.

2.2 Proclamation R24 of 1997 is declared to be inconsistent with the Constitution and invalid.

2.3 The declarations of invalidity made in regard to section 3(1) of Act 74 of 1996 and Proclamation R24 of 1997 are suspended for a period of 1 year.

2.4 Proclamation R31 of 1999 is declared to be inconsistent with the Constitution and invalid.

2.5 The declaration of invalidity made in regard to Proclamation R31 of 1999 is to take effect from the date of this order.

2.6 The third and fourth respondents must pay the applicant's costs which are to include the costs of two counsel.

Langa DP, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Madlanga AJ concur in the judgment of Chaskalson P.

For the appellant	:	WH Trengove SC and M Chaskalson instructed by Haasbroek & Boezaart.
For the third and fourth respondents	:	GJ Marcus SC, A Cockrell and SM Lebala instructed by the State Attorney, Pretoria.