CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 120/12
[2013] ZACC 26

In the matter between:

NATIONAL SOCIETY FOR THE PREVENTION
OF CRUELTY TO ANIMALS — Applicant

and

MINISTER OF AGRICULTURE, FORESTRY
AND FISHERIES — First Respondent

DEPUTY DIRECTOR GENERAL: COURT SERVICES
DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT — Second Respondent

MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT — Third Respondent

and

LICENSED ANIMAL TRAINERS ASSOCIATION — Intervening Party

and

COMMERCIAL PRODUCERS ASSOCIATION — First Amicus Curiae

SOUTH AFRICAN ASSOCIATION
OF STILLS PRODUCERS — Second Amicus Curiae

Heard on : 19 March 2013

Decided on : 11 July 2013

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Mhlantla AJ, Nkabinde J and Skweyiya J concurring):

Introduction

[1] These are confirmatory proceedings brought in terms of section 167(5)[1] read with section 172(2)(d) of the Constitution[2] and Rule 16 of the Rules of this Court[3] arising from an order made by Legodi J in the North Gauteng High Court, Pretoria

[1] Section 167(5) of the Constitution reads: "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[2] Section 172(2)(d) of the Constitution reads: "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[3] Rule 16 reads:

"**Confirmation of an order of constitutional invalidity**

(1) The Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order.

(2) A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

(3) The appellant shall in such notice of appeal set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and the order it is contended ought to have been made.

(4) A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

(5) If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice."

(High Court).[4] The order was to the effect that the provisions of sections 2 and 3 of the Performing Animals Protection Act[5] (Act) were inconsistent with the Constitution in so far as they required a Magistrate to decide applications and issue licences for the training or exhibition or use of animals (animal training and exhibition licences).[6]

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[4] The High Court made the following order:

> "46.1 Sections 2 and 3 of the Performing Animals Protection Act 24 of 1935 are hereby declared constitutionally invalid insofar as they relate to the Magistrates.
>
> 46.2 The declaration of constitutional invalidity referred to in 46.1 above has no effect until it is confirmed by the Constitutional Court.
>
> 46.3 The First Respondent is hereby given six months within which to correct or cure the defect of constitutional invalidity in sections 2 and 3 from date of confirmation by the Constitutional Court.
>
> 46.4 Pending confirmation and curing of the defect, it is ordered as follows:
>
> 46.4.1 A committee shall be appointed to exercise the licensing function as set out in the impugned provisions.
>
> 46.4.2 This committee shall be comprised of two representatives appointed by the Applicant, two representatives appointed by the First Respondent and a representative appointed by the South African Veterinary Council.
>
> 46.4.3 A review procedure shall lie against the decisions of the committee to a retired judge, who shall be appointed by the First Respondent.
>
> 46.5 The First Respondent is hereby ordered to pay wasted costs caused by the postponements on the 18 October 2012 and 1 November 2012 and such costs to be on the opposed motion scale."

[5] 24 of 1935.

[6] Sections 2 and 3 of the Act read as follows:

> "**Magistrate may issue licence for exhibiting and training of performing animals and for use of dogs for safeguarding**
>
> 2 Any person intending to exhibit or train for exhibition any animal, or who uses a dog for safeguarding, may apply in writing in the prescribed form to the magistrate of the district in which such person resides, performs or carries on business, for a licence to do so, who shall grant the same: Provided that—
>
> (a) the magistrate is satisfied that such person is a fit and proper person;
>
> (b) such licence shall be granted for a calendar year and expire on the thirty-first December in every year;
>
> (c) the magistrate may, if in his opinion there is good and sufficient reason, refuse to renew such licence; and
>
> (d) the Minister may by regulation prescribe the form of an application for a licence and the form of the licence, the conditions subject to which such licence shall be held, and the fee which shall be paid for such licence and for the renewal thereof.

Issue for determination

[2] The issue for determination in this matter is whether a statutory provision that requires a Magistrate to decide applications for, and, issue, animal training and exhibition licences is consistent with the doctrine of the separation of powers under our Constitution. The issue arises within the context of the provisions of sections 2 and 3 of the Act.[7]

Parties

[3] The applicant is the National Society for the Prevention of Cruelty to Animals (NSPCA), a statutory body created by the Societies for the Prevention of Cruelty to Animals Act[8] (SPCA Act). Its objects include the prevention of the ill-treatment of

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Certificate in respect of licensed animals

3(1) The holder of a licence referred to in section 2 shall not exhibit or train any animal or cause it to be exhibited or trained for exhibition or use any dog for safeguarding unless he is in possession of a certificate authorising such exhibition, training or use of all animals in respect of which such licence is held.

(2) The certificate referred to in subsection (1) shall be issued by the magistrate in the prescribed form after submission to him of the prescribed information by the licenceholder.

(3) Upon such certificate shall be specified the form of training, exhibition and use, as the case may be, of the animal or animals in respect of which it is issued.

(4) It shall be competent for a magistrate upon the application of the holder of a certificate to amend such certificate by either—

(a) deleting therefrom animals which are no longer in the possession or custody of the holder; or

(b) adding other animals which have since the issue or renewal of the licence come into the possession or custody of the holder; or

(c) modifying the form of training, exhibition or use specified thereon,

and for such amendment no charge shall be made."

[7] See n 6 above.

[8] 169 of 1993.

animals,[9] the promotion of the awareness of the application of laws that affect animals,[10] making representations in that regard to relevant authorities[11] and doing all things reasonably necessary for the achievement of its objectives.[12] Section 6 of the SPCA Act makes provision for several functions, powers and duties of the NSPCA. Section 6 also provides that the NSPCA may institute or defend legal proceedings relating to its broader functions.[13]

[4] The first respondent is the Minister of Agriculture, Forestry and Fisheries. She does not oppose the confirmation of the order of invalidity but has filed written submissions. The second respondent is the Deputy Director-General: Court Services, Department of Justice and Constitutional Development. The third respondent is the Minister of Justice and Constitutional Development. Both the second and the third respondents do not oppose the confirmation of the order. They also did not participate in the proceedings in the High Court.

[5] The Licensed Animal Trainers Association (LATA) was joined as an intervening party. LATA is an association not for gain that consists of previously licensed animal trainers in the animal trainers industry. The industry relates to the training or exhibiting of any animal, or using dogs for safeguarding. The order granted in the High Court has a direct effect on various persons and entities that

[9] Section 3(c) of the SPCA Act.

[10] Id section 3(e).

[11] Id.

[12] Id section 3(f).

[13] Id section 6(2)(e).

require licences in terms of the Act. Those persons and entities whose rights were affected by the order therefore formed LATA with the intention of approaching this Court jointly as an association to represent the business and legal interests of South African animal trainers. LATA also did not participate in the High Court proceedings.

[6] The Commercial Producers Association (CPA) was admitted as the first amicus curiae (friend of the court). The South African Association of Stills Producers (SAASP) was admitted as the second amicus curiae. Neither amicus participated in the proceedings in the High Court. The CPA is an association of commercial film producers established to represent the business and legal interests of the commercial production industry in South Africa which relates to the production of marketing or advertising campaigns for use on television or in cinema theatres. SAASP is an organisation not for gain, established to represent the business and legal interests of the stills production industry in South Africa. This industry relates to the production of marketing or advertising campaigns for use in print media.

Statutory background

[7] Sections 2 and 3 of the Act read as follows:

> "**Magistrate may issue licence for exhibiting and training of performing animals and for use of dogs for safeguarding**
>
> 2 Any person intending to exhibit or train for exhibition any animal, or who uses a dog for safeguarding, may apply in writing in the prescribed form to the magistrate of the district in which such person resides, performs or carries on business, for a licence to do so, who shall grant the same: Provided that—
>
> (a) the magistrate is satisfied that such person is a fit and proper person;

(b) such licence shall be granted for a calendar year and expire on the thirty-first December in every year;

(c) the magistrate may, if in his opinion there is good and sufficient reason, refuse to renew such licence; and

(d) the Minister may by regulation prescribe the form of an application for a licence and the form of the licence, the conditions subject to which such licence shall be held, and the fee which shall be paid for such licence and for the renewal thereof.

Certificate in respect of licensed animals

3(1) The holder of a licence referred to in section 2 shall not exhibit or train any animal or cause it to be exhibited or trained for exhibition or use any dog for safeguarding unless he is in possession of a certificate authorising such exhibition, training or use of all animals in respect of which such licence is held.

(2) The certificate referred to in subsection (1) shall be issued by the magistrate in the prescribed form after submission to him of the prescribed information by the licenceholder.

(3) Upon such certificate shall be specified the form of training, exhibition and use, as the case may be, of the animal or animals in respect of which it is issued.

(4) It shall be competent for a magistrate upon the application of the holder of a certificate to amend such certificate by either—

(a) deleting therefrom animals which are no longer in the possession or custody of the holder; or

(b) adding other animals which have since the issue or renewal of the licence come into the possession or custody of the holder; or

(c) modifying the form of training, exhibition or use specified thereon,

and for such amendment no charge shall be made."

[8] In regulations issued under sections 2(d) and 7 of the Act it is provided in regulation 2(2) that an application for the granting or renewal of a licence shall be accompanied by—

> "(a) a report from the district commissioner of the police district in which the applicant resides regarding applicant's fitness to be a licensee; and
>
> (b) R50 in the case of an application for the granting of a licence and R30 in the case of an application for the renewal of a licence: Provided that the applicant shall be entitled to the repayment of half of the fee if the application is refused."

Regulation 2(3) provides that the Magistrate may—

> "before considering an application for the granting or renewal of a licence, request all available information regarding the applicant from the records of a local animal welfare organisation and such other information as he may require from any such organisation regarding the type of animal concerned in order to decide whether to grant the licence applied for."

Regulation 2(5) reads: "The magistrate shall issue to the applicant a licence in the form of schedule 2, together with a certificate in the form of schedule 3."

High Court

[9] The applicant brought an application in the High Court in which it challenged the constitutionality of sections 2 and 3 of the Act in so far as they require a Magistrate to decide applications for, and, issue, animal training and exhibition licences for which provision is made in sections 2 and 3. The main ground upon which the applicant contended that these sections were unconstitutional was that they offend against the doctrine of the separation of powers under the Constitution. This contention was based on the submission that the issuing of such licences is an administrative function that should be performed by the Executive and not by the

Judiciary and yet sections 2 and 3 require a member of the Judiciary (that is a Magistrate) to perform that function.

[10] The applicant's case was not based on any specific features of the licensing function conferred upon a Magistrate. The applicant also complained that Magistrates do not have any special knowledge about animals in order to make correct decisions about the issuing of animal training and exhibition licences. It suggested that its personnel had such knowledge and that they should be entrusted with the power to issue licences in terms of sections 2 and 3. However, at the hearing before this Court, the applicant's counsel indicated that the applicant had retreated from this position.

[11] The High Court upheld the applicant's contention and made the following order:

> "46.1. Sections 2 and 3 of [the] Performing Animals Protection Act 24 of 1935 are hereby declared constitutionally invalid insofar as they relate to Magistrates.
> 46.2. The declaration of constitutional invalidity referred to in 46.1 above has no effect until it is confirmed by the Constitutional Court.
> 46.3. The First Respondent is hereby given six months within which to correct or cure the defect of constitutional invalidity in sections 2 and 3 from date of confirmation by the Constitutional Court.
> 46.4. Pending confirmation and curing of the defect, it is ordered as follows:
> 46.4.1. A committee shall be appointed to exercise the licensing function as set out in the impugned provisions.
> 46.4.2 This committee shall be comprised of two representatives appointed by the Applicant, two representatives appointed by the First Respondent and a representative appointed by the South African Veterinary Council.

46.4.3. A review procedure shall lie against the decisions of the committee to a retired judge, who shall be appointed by the First Respondent.

46.5. The First Respondent is hereby ordered to pay wasted costs caused by the postponements on the 18 October 2012 and 1 November 2012 and such costs to be on the opposed motion scale."

The basis upon which the High Court made the order of constitutional invalidity was simply that the function of issuing animal training and exhibition licences in sections 2 and 3 was an administrative function and, for that reason, should not be performed by a member of the Judiciary because it offends against the doctrine of the separation of powers.[14]

In this Court

[12] As I have said, the question for determination is whether the requirement in sections 2 and 3 of the Act that a Magistrate decide applications and issue animal training and exhibition licences is inconsistent with the doctrine of the separation of powers. The applicant contends that it is, whereas the intervening party contends that it is not. The amici contend that the impugned provisions are consistent with the Constitution. However, they submit that, if this Court confirms the order of invalidity, it should not make any order that would involve the applicant in the issuing of these licences pending the curing of the deficiency in the Act by Parliament.

[14] *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others* [2012] ZAGPPHC 329 (High Court judgment) at para 27.

[13] In seeking to answer the question under consideration, it must be recalled that:

(a) there is no universal model of separation of powers and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute;[15]

(b) because of the different systems of checks and balances that exist in countries such as the United States of America, France, the Netherlands and Germany, for example, the relationship between the different branches of government and the power or influence that one branch of government has over the others differs from one country to another;[16]

(c) the separation of powers doctrine is not a fixed or rigid constitutional doctrine but it is given expression in many different forms and made subject to checks and balances of many kinds;

(d) our Constitution does not provide for a total separation of powers among the Legislature, the Executive and the Judiciary; and

(e) although judicial officers may, from time to time, carry out administrative tasks "[t]here may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers."[17]

[15] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification case*) at para 108.

[16] Id.

[17] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) at para 141 fn 107.

[14] In *De Lange v Smuts NO and Others*[18] this Court found that statutory provisions giving a non-judicial officer in a liquidation inquiry the statutory power to commit an unco-operative witness to prison infringed the separation of powers and was, therefore, inconsistent with the Constitution and, thus, invalid. After reiterating the statement made in the *First Certification case* that there is no universal model of separation of powers, 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."[19]

In regard to the matter before the Court he went on to say:

> "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."[20]

It is clear from this quotation that in *De Lange* the performance by a non-judicial officer of a function falling within the "very heartland of the judicial power", was found to infringe the separation of powers.

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[18] [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

[19] Id at para 60.

[20] Id at para 61.

[15] Whereas *De Lange* dealt with the case of a statutory provision which gave power to a non-judicial officer to perform a judicial function that was found to lie at the very heartland of judicial power, *South African Association of Personal Injury Lawyers v Heath and Others*[21] dealt with the case of a statutory provision which empowered a Judge of the High Court, as head of a Special Investigating Unit (SIU), to perform what were clearly non-judicial functions. Section 3(1) of the Special Investigating Units and Special Tribunals Act[22] (Tribunals Act) provided that the President had to appoint a Judge or an Acting Judge of a High Court as head of an SIU. This was a full-time position. The head of an SIU in turn appointed the staff of the SIU. The purpose of the Tribunals Act was—

> "[t]o provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units".[23]

[16] The SIU had extensive powers including powers to investigate allegations of corruption, maladministration, and unlawful or improper conduct damaging to State institutions, the power to summon and interrogate persons and to conduct searches for evidence that could be relevant to its investigations and to institute civil proceedings in respect of allegations contemplated in section 2(2) of the Tribunals Act.

[21] [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) (*Heath*).

[22] 74 of 1996.

[23] Preamble to the Tribunals Act.

Allegations contemplated in section 2(2) included allegations of "serious maladministration in connection with the affairs of any State institution", "intentional or negligent loss of public money or damage to public property", and "unlawful appropriation or expenditure of public money or property."[24] The SIU also had power to require any person appearing before it to produce books, documents or objects, could question anyone under oath, could enter and search premises in accordance with the provisions of the Tribunals Act and, for that purpose, could "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". As head of the SIU the Judge had to determine how each of the investigations was to be conducted. For purposes of the State Liability Act[25] the head of the SIU was equated to a Cabinet Minister.[26]

[17] The Court in *Heath* pointed out that "[t]he 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."[27] This Court said further:

[24] Section 2(2)(a), (c) and (e) of the Tribunals Act.

[25] 20 of 1957.

[26] Section 13(2) of the Tribunals Act.

[27] *Heath* above n 21 at para 26.

> "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."[28]

[18] In dealing with counsel's submission that the principle of the separation of powers is not necessarily compromised whenever a Judge is required to perform non-judicial functions, the Court pointed out that the performance by a Judge of functions incompatible with judicial office would not be permissible.[29] It said that this statement was consistent with the statement it made in *SARFU* that "judicial officers may, from time to time, carry out administrative tasks" but "[t]here may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers."[30]

[19] In *Heath* counsel for the applicant referred the Court to American and Australian cases which the Court said were consistent with the approach that the performance by a Judge of functions incompatible with judicial office would not be permissible.[31] The Court pointed out that in those American and Australian cases no precise criteria were set out for establishing whether or not a particular assignment was permissible. It said that in both countries the courts "determine this in the light of relevant considerations referred to in the judgments."[32]

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[28] Id at para 25.

[29] Id at para 27.

[30] Id. See also *SARFU* above n 17 at para 141.

[31] *Heath* above n 21 at para 28.

[32] Id.

[20] In *Heath* this Court accepted a certain non-exhaustive list of factors relevant to a consideration whether under our Constitution it is permissible to assign a non-judicial function to a Judge.[33] These factors were whether the non-judicial function:

> "(a) is more usual or appropriate to another branch of government;
> (b) is subject to executive control or direction;
> (c) requires the Judge to exercise a discretion and make decisions on the grounds of policy rather than law;
> (d) creates the risk of judicial entanglement in matters of political controversy;
> (e) involves the Judge in the process of law enforcement;
> (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."[34] (Footnotes omitted.)

The Court added another factor[35] from Blackmun J's summary of the American jurisprudence in *Mistretta v United States,*[36] namely, that:

> "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."[37]

[21] Referring to the above factors, this Court pointed out in *Heath* that these considerations seemed relevant "to the way our law of separation of powers should be developed."[38] It pointed out that counsel did not dispute their relevance but submitted that they must be given "a weight appropriate to the nature of the function that the

[33] Id at para 29.

[34] Id.

[35] Id.

[36] *Mistretta v United States* 488 US 361 (1988).

[37] At para 388.

[38] *Heath* above n 21 at para 30.

Judge is required to perform and the need for that function to be performed by a person of undoubted independence and integrity."[39] This Court made it clear that—

> "[i]t 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 [above] 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 judgment 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 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 judgment is one that it must make itself."[40]

This Court also pointed out that—

> "[t]he 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'."[41] (Footnote omitted.)

[39] Id at para 30.

[40] Id at para 31.

[41] Id at para 35.

[22] In *Heath* reference was also made to provisions of the Constitution which provide for the performance of non-judicial functions by members of the Judiciary.[42] These include the functions performed by the Chief Justice in presiding over the election of the President of the Republic by Parliament.[43] The Chief Justice also presides over the election of the Speaker of the National Assembly.[44] Judges designated by the Chief Justice also swear in Premiers and Members of the Executive Council or cause them to affirm.[45] This Court said that a Judge is appointed to perform these functions to ensure that they are carried out impartially and strictly in accordance with constitutional requirements and this is not inconsistent with the role of the Judiciary in a democratic society.[46]

[23] The Court also referred to section 178 of the Constitution which provides for Judges to serve on the Judicial Service Commission (JSC) the majority of whose members are not judicial officers. This Court pointed out that the JSC has an important role to play in the appointment of Judges to the various courts and may also give advice to the government on matters relating to the administration of justice. This Court then said: "The functions of the Judicial Service Commission are not inconsistent with the role of the Judiciary in a democratic society."[47] The Court continued:

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[42] Id at para 32.

[43] Section 86(2) of the Constitution.

[44] Id section 111(2).

[45] Id sections 95 and 135 read with Schedule 2.

[46] *Heath* above n 21 at para 32.

[47] Id.

> "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."[48]

[24] Furthermore, this Court referred to the question of Judges presiding over commissions of inquiry or sanctioning the issuing of search warrants and said that—

> "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 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."[49] (Footnote omitted.)

[25] Applying the considerations discussed above to the facts of the case in *Heath*, this Court said that, although it accepted that the head of the SIU should be a person of integrity, Judges were not the only persons with that attribute.[50] It pointed out that "[t]he 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

[48] Id.

[49] Id at para 34.

[50] Id at para 38.

inconsistent with judicial functions as ordinarily understood in South Africa."[51] The Court pointed out that those functions included not only the undertaking of "intrusive investigations, but also litigation on behalf of the State to recover losses that it has suffered as a result of corrupt or other unlawful practices."[52] It said that Judges who perform functions such as presiding over a commission of inquiry or sanctioning search warrants may also become involved in litigation but that, said the Court, is an unwanted though possibly unavoidable incident of the discharge of what are essentially judicial functions.[53] It pointed out that litigation on behalf of the State was an essential part of the work of the SIU.[54]

[26] The Court held that, by their very nature, the functions that a Judge who headed the SIU had to perform all related to the recovery of money for the State and were partisan.[55] The Court also pointed out that Judge Heath had not performed his work as a Judge of the High Court for three years. The Court held that functions that the head of the SIU was required to perform were far removed from "the central mission of the Judiciary."[56] Ultimately, the Court found that the appointment of a Judge to occupy the position of head of the SIU was inconsistent with the separation of powers. The statutory provisions which required the President to appoint a Judge or Acting Judge as head of the SIU were found to be inconsistent with the Constitution and invalid. It

[51] Id.

[52] Id at para 39.

[53] Id.

[54] Id.

[55] Id at para 40.

[56] Id at para 45.

seems to me that the functions which the Tribunals Act assigned to a Judge as head of the SIU could also be said to fall "within the very heartland" of executive power just like the function of committing an unco-operative witness to prison was found to fall "within the very heartland of the judicial power" in *De Lange*.[57]

[27] In *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*[58] one of the issues that this Court had to decide was whether section 14(2) of the 1993 Magistrates Act[59] was consistent with judicial independence. Section 14(2) reads as follows:

> "The Minister may, after consultation with the [Magistrates Commission], make regulations conferring on or assigning to magistrates administrative powers and duties which do not affect the judicial independence of magistrates, including regulations empowering the Minister, after consultation with the [Magistrates Commission], to confer or assign administrative powers and duties of a general nature on or to magistrates."

It was contended that section 14(2) was inconsistent with judicial independence. The basis upon which this contention was made was that the power to make the regulations to which section 14(2) refers was vested in the Minister of Justice and Constitutional Development.

[28] In *Van Rooyen* this Court dealt with the historical background to Magistrates' Courts with regard to their independence from the executive and in

[57] Above n 18 at para 61.

[58] [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*).

[59] 90 of 1993.

particular with regard to their performance of administrative functions unrelated to the core functions of courts, namely, the adjudication of disputes. After referring to the fact that in the Orange Free State and Transvaal, Magistrates' Courts replaced the landdrost's court as the principal inferior tribunal in 1902, Chaskalson CJ pointed out two primary characteristics that he said different Magistrates' Courts shared. He identified one of these as being "the fact that magistrates were part of the civil service, performing both judicial and administrative functions."[60] He also pointed out that, although section 14(2) of the 1993 Magistrates Act confers power on the Minister of Justice and Constitutional Development to assign at least some administrative functions to Magistrates through regulations after consultation with the Magistrates Commission, that Act "constituted a decisive shift from past practice in that it set out mechanisms for the appointment, discipline and removal of Magistrates instead of, as was the case previously, regarding magistrates as public servants to whom the Public Service Act applied."[61]

[29] This Court also said:

> "As this history makes clear, there has always been a distinction between the higher Courts and the lower courts. At the time of the *Harris* case magistrates were still part of the public service as they had been since that office was first created in South Africa. Unlike Judges, who have never had such duties, magistrates had extensive administrative responsibilities, particularly in rural areas, where they discharged important functions for the government."[62] (Footnote omitted.)

[60] *Van Rooyen* above n 58 at para 76.

[61] Id at para 79.

[62] Id at para 84.

[30] It went on to say:

> "During the past decade there has been a greater acceptance of the need to break the links that existed between government and magistrates. The Magistrates Act passed in 1993 removed magistrates from the public service, gave them greater protection against impeachment than they previously had, and established the Magistrates Commission to ensure that appointments, promotions, transfers and disciplinary action were carried out without favour or prejudice. But magistrates continued to perform administrative duties, and had less institutional security than Judges did."[63]

[31] This Court rejected the challenge to section 14(2) in so far as it was based on the mere fact that the power to make regulations vested in the Minister of Justice and Constitutional Development. However, it made some important remarks regarding the separation of powers and the assignment of administrative duties or powers to Magistrates. It said:

> "Section 14(2) makes provision for the assignment of administrative duties and functions to magistrates. Ideally, magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers. To require them to do so may make them answerable to the Executive and, if that happens, the separation of powers that should exist between the Executive and Judiciary would be blurred.
>
> I have previously drawn attention to the fact that there are certain statutes that confer administrative powers and duties on magistrates. In effect, section 14(2) empowers the Minister to make regulations which would add to those administrative powers and duties.
>
> This Court has previously had occasion to draw attention to the difficulties confronting government in attempting to carry out its constitutional mandate to transform our society, to the extensive demands made upon it in relation to basic

[63] Id at para 85.

> needs such as housing, health, education and social welfare and to the need to make prudent use of scarce resources. There may be reasons why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, and is not at present inconsistent with the evolving process of securing institutional independence at all levels of the court system."[64] (Footnotes omitted.)

[32] This Court then pointed out that—

> "[t]he question whether administrative duties unrelated to their judicial functions can properly be assigned to magistrates was not the basis on which the constitutionality of section 14(2) was challenged."[65]

The present matter raises precisely the issue whether the assignment to a Magistrate, by the Act, of the administrative function of issuing animal training and exhibition licences is consistent with the separation of powers envisaged in our Constitution.

[33] Counsel for the intervening party submitted that sections 2 and 3 of the Act do not infringe the separation of powers. He emphasised that the mere performance of an administrative function by a member of the Judiciary did not offend the separation of powers. He referred to the factors listed in *Heath*[66] and submitted that, when regard is had to those factors, it could not be said that the performance of the functions under consideration in the present case by a Magistrate offended the separation of powers. However, when asked from the Bench during the hearing what justification there was for sections 2 and 3 to assign what is clearly an administrative function to a member

[64] Id at paras 231-3.

[65] Id at para 234.

[66] *Heath* above n 21 at para 29.

of the Judiciary as opposed to assigning it to a non-judicial officer, counsel was unable to advance any justification. Although section 170 of the Constitution provides that Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, a provision of an Act of Parliament that assigns the functions which, if performed by a Magistrate, would offend the separation of powers would be inconsistent with the Constitution and invalid. The issuing of licences can hardly be described as deciding a matter as a court of law.

[34] Although in *Heath* this Court accepted the factors listed therein as relevant to determining the permissibility of the assignment of non-judicial functions to a Judge, a few points need to be borne in mind. Firstly, the list is not exhaustive. Secondly, the Court was dealing with a clear case where a statutory provision required a Judge to perform non-judicial functions which fell within the very heartland of executive power. Furthermore, this Court's judgment in *Heath* must be read as a whole. This Court said in *Heath* that the list of factors set out therein "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.*"[67] (My emphasis.) Two paragraphs after the Court had listed the factors, it said:

> "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

[67] *Heath* above n 21 at para 30.

> institution of the Judiciary, or materially breach the line that has to be kept between the Judiciary and the other branches of government in order to maintain the independence of the Judiciary."[68] (Emphasis added.)

[35] In *Van Rooyen* this Court made, among others, the point that:

> "Ideally, magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers. To require them to do so may make them answerable to the Executive and, if that happens, the separation of powers that should exist between the Executive and Judiciary would be blurred."[69] (Footnote omitted.)

[36] In the light of the above it seems to me that, in dealing with the separation of powers and the performance by Magistrates of administrative functions unrelated to their judicial functions, the following factors must be borne in mind:

(a) Although both Judges and Magistrates are members of the Judiciary, there are differences between them which may make it justifiable for a Magistrate to perform certain administrative functions but unjustifiable for a Judge to perform the same function.[70]

(b) Although, as this Court said in *Van Rooyen*, "[i]deally, magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers",[71] there may be cases where the

[68] Id at para 31.

[69] *Van Rooyen* above n 58 at para 231.

[70] In this regard I point out that in *Van Rooyen* this Court made a similar distinction between Judges and Magistrates in regard to judicial independence. It said that the need for judicial independence is greater in regard to Judges than in regard to Magistrates in view of the fact that Judges' responsibilities include adjudicating the constitutional validity of Acts of Parliament and the conduct of the President and Magistrates have no jurisdiction in regard to such matters (*Van Rooyen* above n 58 at paras 20-8).

[71] *Van Rooyen* above n 58 at para 231.

performance of *certain* administrative functions by Magistrates, for example in rural areas, may be justifiable and will not offend the separation of powers.

(c) What will offend the separation of powers is the performance by a Magistrate of administrative duties unrelated to his or her judicial functions in circumstances where there is no justification for that non-judicial function to be performed by a Magistrate in that, for example, it can be performed by a non-judicial officer, eg an officer or official in the public service, without much difficulty. However, the performance by a Magistrate of a non-judicial function unrelated to his or her core functions where that can be justified does not offend the separation of powers.

[37] What then is the appropriate approach to the determination of whether the performance by a member of the Judiciary of non-judicial functions offends the separation of powers envisaged in our Constitution? It seems to me that an appropriate approach that we should adopt in this regard must be one that takes into account various considerations. Although it must be based upon an acceptance of the reality that our model of the separation of powers is not one that requires a complete or total separation and that it permits the performance of some non-judicial functions by the Judiciary, it must be an approach that promotes rather than dilutes the principle of separation of powers and the independence of the Judiciary. In other words, while the approach we adopt should enhance and promote the separation of powers, it must

at the same time be based upon an acceptance that there will always be some administrative functions that members of the Judiciary will perform from time to time without infringing the doctrine of the separation of powers. How do we do this?

[38] Obviously, the performance by the Judiciary of administrative functions which the Constitution sanctions does not offend the separation of powers. Furthermore, it also seems to me that the performance of certain administrative functions by the Judiciary that are closely connected with the core function of the Judiciary does not offend the doctrine of the separation of powers. In the light of this I am of the view that an appropriate approach to the determination of whether the performance of a function by a member of the Judiciary offends the separation of powers would involve the following questions:

(a) Whether the function complained of is a non-judicial function. If it is a judicial function, that is the end of the inquiry as there can be no concern. If it is a non-judicial function, the inquiry proceeds to (b) below.

(b) Whether the performance of the non-judicial function by a member of the Judiciary is expressly provided for in the Constitution. If it is, that is the end of the inquiry as there can be no infringement of the separation of powers. If it is not, the inquiry proceeds to (c) below.

(c) Whether the non-judicial function is closely connected with the core function of the Judiciary. If it is, then the doctrine of the separation of powers is not offended. If it is not, the inquiry proceeds to (d) below.

(d) Whether there is any compelling reason why a non-judicial function which is not closely connected with the core function of the Judiciary should be performed by a member of the Judiciary and not by the Executive or a person appointed by the Executive for that purpose. If there is, the separation of powers is not offended. If there is not, the separation of powers is offended and the relevant statutory provision, or, the performance of such a function by a member of the Judiciary, is inconsistent with the Constitution and must be declared unconstitutional.

[39] In this case the answer to question (a) is in the affirmative. This answer requires that we proceed to the second question. The answer to question (b) is in the negative and then we must move to question (c). The answers to questions (c) and (d) are in the negative. Question (d) seeks to establish whether there is any compelling reason why the function should be performed by a member of the Judiciary and not by the Executive or some other person appointed by the Executive. In this case none was advanced and I cannot think of any. I do not see why, if, for example, a non-judicial body or officer can be given the power to issue casino or liquor licences, a judicial officer such as a Magistrate should be assigned the function of issuing animal training and exhibition licences. If we were to hold that it accords with this country's model of separation of powers for a statutory provision to require a member of the Judiciary to issue animal training and exhibition licences and that does not offend the separation of powers, where will the requirement for the performance of administrative functions

by Magistrates stop? Accordingly, the performance of this function by a Magistrate offends the separation of powers and is, therefore, inconsistent with the Constitution.

[40] In the light of the above I conclude that the provisions of sections 2 and 3 of the Act are inconsistent with the Constitution and are, therefore, invalid to the extent that they require a Magistrate to decide applications for, and, issue, animal training and exhibition licences. The order of constitutional invalidity of sections 2 and 3 of the Act made by the High Court was contained in paragraph 46.1 of the judgment of the High Court. The order in paragraph 46.3 sought to give the first respondent time to cure the defect. I think that the Court a quo may have meant to refer to Parliament and not to the first respondent. This order was unjustified as the order of constitutional invalidity could not come into operation prior to confirmation by this Court. The orders contained in paragraphs 46.4.1 to 46.4.3 do not appear to me to have been justified or to have had a proper basis. However, even though the High Court should not have made those orders, it will not be necessary to set them aside in this judgment because, upon the handing down of this judgment, their operation comes to an end in any event since they were meant to govern the position pending the judgment of this Court. I do not think that I should interfere with the order of wasted costs contained in paragraph 46.5 of the judgment of the High Court.

Remedy

[41] As to the remedy, it seems to me that the proper course of action would be to suspend the declaration of invalidity for a period of 18 months to give Parliament the

opportunity of curing the deficiency in sections 2 and 3 of the Act. The suspension of the order of invalidity means that until the expiry of the period of suspension of the order or until Parliament cures the deficiency, whichever occurs first, sections 2 and 3 of the Act will continue to operate.

Costs

[42] It seems to me that no order as to costs should be made in this matter.

Order

[43] In the result the following order is made:

1. The order of the North Gauteng High Court, Pretoria in paragraph 46.1 of the judgment declaring sections 2 and 3 of the Performing Animals Protection Act 24 of 1935, as amended, to be constitutionally invalid in so far as they relate to the requirement that a Magistrate decide applications for, and, issue, the licences referred to therein is confirmed.
2. The declaration of the order of invalidity is suspended for a period of eighteen (18) months from the date of the handing down of this judgment to enable Parliament to cure the constitutional defect in sections 2 and 3 of the Performing Animals Protection Act 24 of 1935 as amended.
3. There is no order as to costs.

For the Applicant:	Advocate K Hopkins and Advocate D van Zyl instructed by Marston & Taljaard.
For the First Respondent:	Advocate G C Muller SC and Advocate M S Mangolele instructed by the State Attorney.
For the Intervening Party:	Advocate M G Roberts SC and Advocate C G van der Walt instructed by J. Leslie Smith & Co.
For the First and Second Amicus Curiae:	Advocate A J Dickson SC and Advocate E Roberts instructed by J. Leslie Smith & Co.