

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**South African Association of Personal Injury Lawyers v President of the RSA and
another**

Case CCT 27/00

Decided on 28 November 2000

Media Summary

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This case concerns the constitutional validity of provisions governing the functioning of the Special Investigating Unit (SIU) headed by Mr Justice Heath, which was set up to investigate serious malpractices and maladministration within state institutions and in connection with state assets and public money. First, it deals with the validity of the appointment of a judge or acting judge to head the Unit. Secondly, it deals with the validity of the President's referral to the SIU for investigation of an allegation concerning a failure by attorneys acting for road accident victims claiming from the Road Accident Fund to pay over to such persons the full amount due in settlement of their claims after deduction of reasonable costs. The appellant had unsuccessfully challenged the provisions in the Transvaal High Court.

The validity of the appointment of a judge to head the Special Investigating Unit

In an unanimous decision by Chaskalson P, the Court held that the appointment of a judge to head the SIU violated the separation of powers required by the Constitution. The Court stressed the importance of the separation of the judiciary from the other branches of government and the need for courts to be and to be seen to be independent of the legislature and the executive so that they can discharge their duty of ensuring that the limits to the exercise of public power are not transgressed. This separation of powers prevents the legislature and the executive from requiring judges to perform non-judicial functions that are incompatible with judicial office and which are not appropriate to the central mission of the judiciary, and prohibits judges from undertaking such functions.

The Special Investigating Units and Special Tribunals Act (the Act) requires the head of the SIU to direct and be responsible for intrusive investigations. The matters to be investigated are determined by the President and not by the unit itself, and involve questioning persons, searching premises, gathering evidence and instituting court actions for the recovery of losses alleged to have been suffered by the state. These are executive and not judicial functions, which under our constitutional scheme are ordinarily performed by the police, the prosecuting authorities and the state attorney and not by judges. Moreover, the Act contemplates that the head of the unit be appointed

indefinitely. The responsibilities imposed on the head of the unit demand full time attention.

The functions that a judge is required to perform under the Act are of a nature incompatible with the independence of the judiciary and judicial office. The provision of the Act that requires a judge or acting judge to be appointed as head of the Unit, and the appointment by the President of Mr Justice Heath to this position were accordingly held to be unconstitutional and invalid. However, to ensure an orderly transfer of the leadership of the SIU, the court suspended these declarations of invalidity for a period of one year.

The validity of the referral for investigation of allegations concerning overcharging by attorneys in payment of RAF compensation

The Court also had to consider the validity of the President's referral of this matter for investigation by the SIU. The appellants argued that the referral did not fall within the criteria set by the Act for a valid referral of an allegation for investigation by the SIU, and that it was accordingly invalid. The Court referred to the requirement of the Constitution that all legislation be interpreted to promote the spirit, purport and objects of the Bill of Rights. The investigations that the SIU carries out are intrusive and invade the privacy of the persons investigated. The criteria for referring allegations to the Special Investigating Unit must be construed with regard to the right to privacy entrenched in the Bill of Rights and the primary purpose of the Act, which is to enable the state to recover money it has lost as a result of unlawful or corrupt action by its employees or other persons.

Two subsections were relied on by the President to justify the referral. First, that the allegation related to the "unlawful appropriation or expenditure of public money or property." However, the allegations referred to the SIU did not relate to the administration of a state institution but to the reasonableness of charges made by attorneys for their services and to their possible "over-reaching" of their clients. Once the RAF has paid compensation to an attorney, as agent for the claimant, the money is money of the client and not public money. The referral thus did not fall within the scope of this subsection.

The second subsection relates to "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." The Court held that the allegation referred to the Unit was 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. The subsection contemplates the conduct of a particular person not an aggregation of conduct, persons and harm.

The Court emphasised the intrusive nature of the powers of the unit, the need to interpret the Act in such a way that ensures that rights are not unreasonably infringed and the absence of specific allegations against any individuals. The allegation in question required the SIU to undertake a fishing expedition to establish whether there had been malpractices by individual attorneys.

However, the allegations reveal serious concern about the handling of RAF claims which, if true, call for urgent attention. It is important - both for clients and for the legal profession - that structures are in place so that clients who are over-reached by attorneys have effective channels for obtaining redress.

The order of invalidity in relation to the presidential proclamation referring the allegation concerning attorneys takes effect immediately.