**DE LANGE v SMUTS AND OTHERS**

**CCT 26/97**

Explanatory note

*The following explanation is given purely to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

This matter concerns the constitutional validity of a subsection of the Insolvency Act which provides that if a person summoned to appear before a meeting of creditors should refuse to be sworn by the presiding officer at the meeting, fail to produce any book or document which he or she was required to produce, or refuse to answer a question lawfully asked, the presiding officer may commit that person to prison. According to another section of the Act such a meeting of creditors can be presided over by a magistrate, a Master or an officer in the public service designated by the Master of the High Court or a magistrate. Mr. de Lange claimed that this state of affairs violates his constitutional right not to be detained without trial.

Judge Ackermann wrote the majority judgment in this case. Judges Chaskalson, Langa and Madala concurred in his judgment, whereas Judge Sachs concurred in the order proposed but for separate reasons. Judges Didcott, Mokgoro and O' Regan wrote separate dissenting judgments. Judge Kriegler concurred in Judge Didcott's judgment.

In his majority judgment Judge Ackermann held that the subsection concerned is unconstitutional only to the extent that it authorises a presiding officer who is not a magistrate to issue a warrant committing an examinee at a creditors' meeting to prison.

The right to freedom and security of the person, Judge Ackermann stated, has a substantive as well as a procedural aspect. With respect to the substantive aspect, Judge Ackermann found that the only issue was whether there was just cause for the power to commit to prison under the subsection. He concluded that the power to commit recalcitrant witnesses at insolvency hearings served an important public objective, namely, to ensure that insolvents and other persons who are in a position to give important information relating to an insolvency do not evade supplying it. This important objective constitutes just cause for the deprivation of freedom under these circumstances. All the judges agreed with Judge Ackermann's view in this regard.

With respect to the attack based on the fair procedure aspect of the right to freedom, Judge Ackermann noted that in several foreign countries surveyed government personnel other than judicial officers were not permitted to commit to prison a reluctant witness in an insolvency proceeding. Judge Ackermann concluded that because non-judicial government officers lack the independence of the judiciary, non-judicial officers cannot commit an uncooperative witness to prison. However, magistrates who commit uncooperative witnesses in aid of an insolvency inquiry do so in a judicial and not an administrative capacity. Accordingly, committal by a magistrate presiding at creditors' meetings is constitutionally permissible.

Judge Sachs agreed with Judge Ackermann's majority judgment, but on separate grounds. He evaluated the constitutionality of the subsection within the context of separation of powers rather than that of freedom rights. He then applied the principle that only judicial officers should have the power to punish misconduct or penalise recalcitrance by means of imprisonment, and concluded that the subsection contravenes the principle of separation of powers as contemplated by the Constitution because it entrusts authority to order incarceration to persons who are not judicial officers. Judge Sachs consequently agrees with Judge Ackermann's distinction, which allows magistrates to order committal to prison and denies that power to non-judicial government officials.

Judge Didcott disagreed with the finding that the subsection would be invalid where it allowed a presiding officer who is not a magistrate to issue a warrant of committal. He rejected the idea that officers other than magistrates will be less independent or impartial in upholding the rule of law. In any case there is always the opportunity for an aggrieved party to approach the High Court and thus involve the judiciary. Judge Didcott argued that the words "detention without trial" had to be interpreted in its specific historical context and that it bears no resemblance to committal to prison under the circumstances of this case.

Judge Mokgoro disagreed in part with Justice Ackermann's majority judgment. In her view the matter was not about whether the person presiding was a magistrate or not, nor whether the decision to incarcerate is made in a court or some other forum. Instead, the subsection as a whole infringed the right not to be deprived of freedom arbitrarily or without just cause. She acknowledged the legitimate purpose of the committal procedure but objected to the absence of adequate safeguards to protect personal liberty. Judge Mokgoro therefore concluded that the entire subsection was unconstitutional, not least because there are less restrictive means available to achieve the purpose.

Judge O'Regan, also partially disagreeing with the majority, asserted that the right to freedom and security of the person is infringed even when imprisonment of a recalcitrant witness at a creditors meeting is ordered by a magistrate. She said that a magistrate presiding at a creditors' meeting is not acting in his or her judicial capacity but rather fulfills an administrative or quasi-judicial function. The powers of coercive imprisonment are seldom conferred on administrative or quasi-judicial bodies, even where those bodies are exercising functions similar to those of courts of law. Coercive imprisonment is a deprivation of physical freedom requiring thorough procedural safeguards of the type ordinarily followed in courts of law. It also demands impartiality and independence not only of the presiding officer but of the institution exercising those powers. Judge O'Regan went on to say that the provision cannot be justified and is therefore unconstitutional.

*Thursday, 28 May 1998*

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Premier, Western Cape v President of the Republic of South Africa and another**
**Case CCT 26/98**

**Decided on 29 March 1999**

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**Media Summary**

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*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 involves an application to the Constitutional Court by the Premier of the Western Cape to have certain provisions of the Public Service Act, as introduced by the Public Service Amendment Act of 1998, declared unconstitutional and invalid. This was on the basis that the provisions infringed the executive authority of the provinces and detracted from provincial autonomy. The provisions were part of a legislative scheme designed to restructure the public service.

Under the old scheme, the public service was divided into departments at the national level and into provincial administrations at the provincial level. Departments under provincial administrations did not have the same status as national departments. Administrative responsibility for a provincial administration, including all its departments, vested in the head of the provincial administration, the Director-General (DG).

Under the new scheme, a head of a provincial department is accorded the same broad functions and responsibilities as the head of a national department. Provincial departmental heads are no longer accountable to the provincial DG, but to the member of the Executive Council (the MEC) under whose portfolio the department falls. The provincial DG becomes Secretary to the Executive Council of the province, and is responsible for the administration of the Office of the Premier, as well as the co-ordination of intergovernmental and intragovernmental co-operation. A Premier may request the President to establish or abolish provincial departments. The President can only refuse a request if he or she is satisfied that it is inconsistent with the Constitution or the Public Service Act. The Minister of Public Service and Administration is authorised, after consultation with the relevant MEC, to transfer functions to and from provincial administrations and departments on the one hand, and national departments and other bodies, on the other.

The Western Cape government argued that the amendments infringed the executive authority of the province and interfered with its provincial autonomy by encroaching on the functional and institutional integrity of the province. The national government denied this and argued that the Constitution vested the power to structure the public service with Parliament, not with the provinces.

In a unanimous judgment, the Court found that the Constitution expressly requires national legislation to structure the public service. The structure prescribed by the Public Service Amendment Act of 1998 did not infringe the executive authority of provincial Premiers, nor did it encroach upon the functional or institutional integrity of the provinces.

The Western Cape government has not been deprived of any power vested in it under the Constitution or the Western Cape Constitution. The Premier of the province has the power to appoint the members of the executive council, to determine what departments should be established within the provincial government and to allocate functions to departments. The provincial government appoints functionaries to the provincial administration of the public service and gives instructions necessary to ensure that provincial governmental policy is implemented. The right of the Premier and Executive Council to coordinate the functions of the provincial administration and its departments has been preserved. Political direction and executive responsibility for the functions of provincial governments remain firmly in the hands of the Premier and Executive Council.

The new scheme is rational and cannot be said to be inconsistent with the structure of government contemplated by the Constitution. It requires the public service to be organised in a particular way, making provision for proper reporting between the public service and the executive sphere of government, and ensuring that the heads of departments, including the DG, have clear responsibilities both in relation to the administration of their own offices and in reporting to the executive sphere of government.

The Court, however, found that in one respect the Public Service Amendment Act conferred a power on the national Minister that was inconsistent with the Constitution. The national Minister is empowered to transfer functions from a provincial administration or a provincial department to a national department or other body, or from a national body to a provincial body, after consultation with the MEC concerned. The Court concluded that this permitted the Minister to order the transfers of functions against the wishes of the provincial government. The Court held that this power was inconsistent with the Constitution to the extent that it empowered the Minister to make such transfers without the consent of the Premier.

The balance of the Western Cape government's claims were dismissed. No order was made as to costs.

The judgment of the Court was delivered by Chaskalson P and was concurred in by the other members of the Court.

**In re National Education Policy Bill 1995**

**Case CCT 46/95**

Explanatory Note

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

The Speaker of the National Assembly, acting in terms of s 98 of the Constitution, referred a dispute concerning the constitutionality of the National Education Policy Bill 83 of 1995 to the Constitutional Court for adjudication. The Court found that the Bill was not unconstitutional.

The Bill provides for the determination of national education policy by the Minister, requiring this to be done in terms of the Constitution, taking into account the competence of the provincial legislatures and the relevant provisions of provincial legislation relating to education. The Bill requires the Minister to consult with the Council of Education Ministers (which includes the Members of provincial Executive Councils responsible for education) and other bodies before formulating national education policy. The minister is also required to consult the Council before introducing legislation on education to Parliament. In terms of the Bill, national education policy must be published in a policy instrument, and provision is made for monitoring and evaluating education throughout the Republic.

The main challenge to the Bill was based on the argument that it required the provinces to amend their legislation to conform to national education policy, and thereby empowered the Minister to impose national education policy on the provinces. The Court rejected this contention and held that the Bill neither imposed an obligation on the provinces to follow national education policy nor empowered the Minister to require the provinces to adopt national policy nor to amend their own legislation to conform with national policy.

The Court held that provinces must comply with national standards which have been formulated in accordance with the Constitution and lawfully made applicable to them. The effect of the Bill was to give the provinces an opportunity of addressing situations where the standards of education provision, delivery and performance did not comply with national standards or the Constitution. The Bill further suggests remedial action that should be taken, even when the national standards have been formulated but have not yet been made the subject of legislation. The Bill thereby prevented the national government from acting unilaterally, without allowing the provinces this opportunity.

A further challenge to the Bill was that it required Members of Executive Councils and their administrations to participate in structures, provide information and promote a national policy. This challenge was rejected. The Court held that the only reasonable way in which concurrent powers could be exercised was through consultation with and co-operation between the national executive and the provincial executives. It could not be said to be contrary to the Constitution for Parliament to enact legislation which was based on the assumption that the provinces would offer the necessary co-operation. Consultation was



necessary to enable the national government to obtain the information it needed to take decisions falling within its power, to avoid conflicting legislative provisions and to rationalise legislation which fell within concurrent lawmaking powers, and to enable provincial and national governments to formulate their plans for the future.

The Court analysed the relationship between the powers of the provincial legislatures and the powers of Parliament. Provincial legislatures have the power to make laws for their provinces in respect of any matter set out in Schedule 6 to the Constitution, which includes education. This power has to be exercised concurrently with the Parliament, which has the power to make laws for the whole of the Republic. If there is a conflict between a provincial law and an Act of Parliament, the Constitution provides for the resolution of that conflict by giving priority either to Acts of Parliament or to provincial laws, depending on the circumstances. If there is such a conflict, the provisions of the law which are given priority must be enforced in all respects. The other law is not invalidated and, for as long as that inconsistency endures, it is inoperative and ineffective only to the extent of the inconsistency but must be implemented in all other respects. The Court held that provincial legislatures do not have any exclusive powers under the Constitution. The Court therefore rejected the contention advanced by the MEC for Education of KwaZulu-Natal that as long as a province is capable of regulating a Schedule 6 matter effectively it has the right to do so.

The judgment of the Court was delivered by Chaskalson P and was concurred in by the other members of the Court.

**AUGUST AND ANOTHER v THE ELECTORAL COMMISSION AND OTHERS**

**CCT 8/99**

Explanatory Note

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

This case concerned the voting rights of awaiting trial and sentenced prisoners. The Constitutional Court upheld an appeal against a judgment of Els J in the Transvaal High Court which in effect had held that the Electoral Commission (IEC) had no obligation to ensure that prisoners could register and vote in the coming general elections.

The judgment stated that in the first democratic elections held five years ago, Parliament had determined that all prisoners could vote, except for those convicted of murder, aggravated robbery and rape. The 1996 Constitution declared that South Africa was founded on universal adult suffrage and a national common voters' roll. The Constitution also guaranteed that every adult citizen had the right to vote in elections for any legislative body. While Parliament had disqualified certain classes of prisoners from voting in the 1994 elections, it had not sought in any way to do so since the coming into operation of the 1996 Constitution. Neither the IEC nor the Court had the power to disenfranchise prisoners. Only Parliament could do that, and Parliament had not done so. The result was that prisoners retained their constitutional right to vote, and the IEC was obliged to make all reasonable arrangements to enable them to do so.

The judgment pointed out that more than a third of persons in prison were awaiting-trial and that of these, thousands were locked up simply because they could not afford to pay low amounts of bail and small fines. These were not serious offenders. It also emphasized that Parliament was not prevented from disenfranchising certain categories of prisoners, for example, those convicted of serious offences. Examples were given of open and democratic societies that disqualified all or some classes of sentenced prisoners from voting, though none appeared to dis-enfranchise awaiting-trial prisoners.

The judgment gave guidance to the IEC as to how the phrase "ordinarily resident" in the Electoral Act of 1998 should be interpreted regarding prisoners, and expressed confidence that practical solutions would be found to deal with the practical problems involved, just as they would be for patients in hospital and diplomats abroad.

With the support of the Legal Resources Centre the prisoners had been trying in vain since the Electoral Act of 1998 was promulgated, to get on to the voters roll. The cut-off date for registration had now passed and they had been effectively dis-enfranchised. The IEC was accordingly ordered to make all reasonable arrangements to enable prisoners eligible for the vote, to register as voters and to vote. This order only applied to persons who were prisoners during each and every period of registration between November 1998 and March 1999. The IEC was required, by 16 April 1999, to serve on the applicants, the Minister of Home Affairs and the Minister of Correctional Services, an affidavit setting out the manner in which it would comply with the order. The IEC was ordered to pay costs.

The judgment of Sachs J was agreed to by all the judges who sat in the matter.

1 April 1999

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Minister of Home Affairs v NICRO and Others**

**Case CCT 03/04**

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MEDIA SUMMARY

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*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.*

The Constitutional Court today upholds an application by the National Institute for Crime Prevention and the Re-Integration of Offenders (Nicro) and two convicted prisoners serving sentences of imprisonment, for an order declaring certain provisions of the Electoral Act to be inconsistent with the Constitution and invalid. The provisions deprive prisoners serving a sentence of imprisonment without the option of a fine of the right to register and vote in the upcoming elections.

Chaskalson CJ, writing for the majority (Langa DCJ; Mokgoro J; Mosenekc J; O'Regan J; Sachs J; Skweyiya J; Van der Westhuizen J and Yacoob J), highlights the fact that, given the history of disenfranchisement in our country, the right to vote occupies a special place in our democracy. Any limitation of this right must be supported by clear and convincing reasons. If the government seeks to disenfranchise a group of its citizens it must place sufficient information before the Court demonstrating what purpose the disenfranchisement is intended to serve and to evaluate the policy considerations on which such decision was based.

The Minister of Home Affairs advanced cost and logistical constraints as the rationale for limiting the right to vote of prisoners serving sentences of imprisonment without the option of a fine. This contention is, however, not supported on the facts. Arrangements for registering voters have been made at all prisons in order to accommodate awaiting trial prisoners and those serving sentences because they have not paid the fines imposed on them. Mobile voting stations are to be provided on election day for these prisoners to vote. Thus the majority holds that there was nothing to suggest that expanding these arrangements to include prisoners sentenced to imprisonment without the option of a fine would in fact place an undue burden on the resources of the Electoral Commission.

It was also argued on behalf of the Minister that making special provision for convicted prisoners to vote would, in the context of the alarming level of crime in this country, send an incorrect message to the public that the government is "soft" on crime. The majority holds that a fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights.

In addition, the majority notes that no information was provided about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions.

Moreover, the provisions as formulated appear to disenfranchise prisoners whose convictions and sentences are under appeal. Another relevant factor is the fact that the Electoral Act prohibits all prisoners sentenced to imprisonment without the option of a fine from voting, while the Constitution permits a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine to stand for election. No explanation is given, and none is apparent, as to why a person who qualifies to be a candidate should be disqualified from voting.

The majority orders the Electoral Commission to ensure that all prisoners, who are entitled to vote, following the declaration of invalidity of the various sections of the Electoral Act, are afforded a reasonable opportunity to register as voters for, and to vote in, the forthcoming general election in April 2004. The Minister is ordered to pay the costs of the application including the costs of two counsel.

In a dissenting judgment, Ngcobo J finds that, although an important right in our Constitution, the right to vote is not absolute and can be limited if that limitation is proportionate. He holds that the government has an ascertainable policy behind the limitation, namely the wish to reinforce its zero-tolerance policy against crime and to promote a culture of observance of civic duties and obligations among citizens of the state. The limitation of the right is temporary because it only applies whilst prisoners are serving their sentence. For these reasons, the judgment finds the limitation legitimate and allows it to stand.

However, Ngcobo J further finds that the Electoral Act should have made a distinction between prisoners who had been finally sentenced, and those who were awaiting the outcome of an appeal. The latter could still have their convictions overturned and it was therefore unjustifiable to deprive them of their right to vote. To this extent alone, he finds the provisions unconstitutional. He remedies this by reading an exclusion of prisoners awaiting the outcome of an appeal into the relevant sections of the Electoral Act, and thereby allowing them to vote.

In another dissenting judgment, Madala J holds that the temporary suspension of some prisoners' right to vote is a justifiable limitation of their constitutional right. The government has a multi-pronged policy that should be viewed holistically. Its aim is to develop a caring and responsible society and to maintain the integrity of the voting process. Making special arrangements for prisoners sentenced without the option of a fine to vote is not in line with this scheme.

The temporary removal of the right is in keeping with the objective of balancing individual rights with the values of society. It is anomalous to afford the right and responsibility of voting to persons who have no respect for the law. Furthermore, many democratic societies limit the right to vote. It is for the government to choose where the line is drawn. Madala J therefore rules that although the right to vote is infringed, the limitation is reasonable and justifiable in an open democratic society based on dignity, equality and freedom.

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill**

**Case CCT 12/99**

**Decided on 11 November 1999**

## 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.*

1 The Constitutional Court has given its first decision in a case involving a Bill passed by Parliament but referred to it by the President of the Republic of South Africa for a decision on its constitutionality. The case is also the Court's first decision on the question of exclusive provincial powers.

2 President Mandela in March 1999 referred the Liquor Bill [B 131B-98], passed by Parliament in November 1998, to the Constitutional Court to decide on its constitutionality. In doing this, the President for the first time invoked his power under s 79 of the Constitution to refer a Bill to the Court if he has "reservations" about its constitutionality. In this case, the President expressed "reservations about the constitutionality of the Bill to the extent that the Bill deals with the registration for the manufacture, wholesale distribution and retail sale of liquor", thereby intruding on the provincial legislatures' exclusive powers regarding liquor licences. In terms of Schedule 5A of the Constitution the provinces have exclusive legislative powers in regard "liquor licences".

3 The President of the Constitutional Court issued directions inviting interested political parties and organs of state to make representations concerning the constitutionality of the Bill. The Western Cape Provincial Government and the Minister of Trade and Industry responded and appeared before the Court.

4 The Minister of Trade and Industry contended that the Bill was not a liquor licensing measure because the matters it regulated fell within the national legislature's competence and its provisions dealing with liquor licensing were incidental to its pursuit of national competencies. The Minister contended that even if the Bill encroached on the provinces' exclusive powers this was justified in terms of s 44(2). This provision allows the national government to "intervene" into the area of exclusive provincial legislative competence when this is necessary for certain purposes, which include the maintenance of "economic unity".

5 In a unanimous judgement, Cameron AJ held that the Liquor Bill was unconstitutional in that the national government had not succeeded in justifying the Bill's intervention in the field of retail liquor sales, nor in the case of micro-manufacturers of liquor, whose operations are essentially provincial. Cameron AJ held that insofar as it can be said that "liquor licences" in Schedule 5A applies to all liquor licences, the national government had made out a case justifying its intervention in creating a national system of registration for manufacturers and wholesale distributors of liquor and in prohibiting cross-holdings between the three tiers in the liquor trade.

6 The judgment considers the exclusive provincial legislative competencies against the background of the Constitution's distribution of governmental power. This is located in the national, provincial and local spheres, which are distinctive and interrelated and subject to the principle of cooperative governance. The provinces are accorded power primarily in regard to matters which may appropriately be regulated within each province, though subject to override by the national government in terms of s 44(2).

7 The provinces' exclusive legislative competence in regard "liquor licences" must be interpreted against the backdrop of the national government's concurrent power to regulate "trade" and "industrial promotion". The Court held that "liquor licences"is narrower than liquor trade and that national government has the power to regulate liquor trade other than liquor licensing.

8 The Court held that in a case of overlap between the concurrent powers and exclusive powers of provinces it may be necessary to establish the substance of the legislation. Cameron AJ concluded that the substance of the Liquor Bill is directed at three objectives: (a) the prohibition on cross-holdings between the three tiers involved in the liquor trade, namely, producers, distributors and retailers; (b) the establishment of uniform conditions, in a single system, for the national registration of liquor manufacturers and distributors; and, in a further attempt at establishing national uniformity within the liquor trade; (c) the prescription of detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

9 The Court held that the Bill's prohibition of cross-holdings falls within the national legislature's competence to regulate trade. The national system of registration for producers and wholesalers may well also fall within the national legislature's competence to regulate trade, since the provinces' exclusive power in relation "liquor licences" was not in the first instance intended to encompass manufacturing and distribution of liquor since these activities are inter-provincial and international. The Court held that in any event national government had succeeded in showing that if the exclusive provincial competence regarding "liquor licences" extends to production and distribution, its interest in maintaining economic unity authorises it to intervene in these areas under s 44(2). However the Court concluded that the Minister failed to show that the national interest required uniform national legislation prescribing detailed mechanisms to provincial legislatures for the establishment of retail licensing mechanisms.

10 The Western Cape Provincial government also raised a point about the parliamentary procedure according to which the Bill was adopted. This the Court rejected as having no merit.

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS CCT 16/98**

Explanatory Note

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

In April last year the Transvaal High Court set aside the appointment of a presidential commission of inquiry into the affairs of the South African Rugby Football Union (SARFU). The President appealed against that decision and on 2 December 1998 this Court ruled that it had to hear the appeal. Three court days before the appeal was due to be heard, Dr Louis Luyt, a former president of SARFU and one of the parties in the case, filed a recusal application. Although his allegations implicated each of the judges of the Court, he directed the application at five judges only, stating that he "left it to the conscience"of the others to decide what to do. Having heard full argument, the Court on 7 May 1999 unanimously dismissed the application, stating that it would furnish its reasons for doing so later. Today the Court furnished those reasons in a written judgment.

Dr Luyt did not allege that any of the judges were actually biased, but founded the application on what he alleged was a reasonable apprehension on his part that Chaskalson P, Langa DP and Kriegler, Sachs and Yacoob JJ, would be biased in favour of President Mandela and against him. He relied on a number of allegations for that perception. They included this Court's decision that it was the appropriate court to hear the appeal; an allegation that the judges had been appointed by the President and would therefore be "grateful" to him for their appointments and unable to judge this case impartially; an alleged relationship which the families of Chaskalson P and the President shared; and the political association that some members of the Court had had with the African National Congress at a time prior to their appointment as judges. Dr Luyt accepted that whatever their association had been, such members had severed all ties with the ANC prior to or on appointment to this Court.

A number of allegations relied on by Dr Luyt in his application were not correct and were not relied on after the judges responded in a written statement read at the inception of the hearing. During argument the application against Kriegler J was withdrawn. Other complaints by Dr Luyt were founded on what turned out to be an incorrect understanding of the procedures in terms of which judges are appointed to the bench.

The allegations made by Dr Luyt were considered by all of the judges. In doing so they applied the test for perceived bias, namely whether a reasonable and informed litigant in the position of Dr Luyt would reasonably apprehend that the judges concerned would not decide the case impartially. The Court stated that judicial officers are under a duty to withdraw from cases if there is a reasonable apprehension that they will not decide the case impartially. However, if there are no good grounds for such apprehension, judicial officers are under a duty to adjudicate cases before them. This is the approach adopted in many democracies and in this regard the Court referred to decisions of the South African Supreme Court of Appeal, and the highest courts of Australia, Canada, the United Kingdom and the United States of America. After a full and detailed consideration of the allegations and complaints of Dr Luyt and the submissions of counsel, the Court decided unanimously that a reasonable litigant with knowledge of the true facts, would not apprehend that any of the members of this Court would not act impartially in this matter.

There was in fact no close personal or family relationship between Chaskalson P and the President, nor was there any such relationship between the President and any other member of the Court. The Court pointed out that in most democracies, including our own, many judicial officers engage in political activity prior to their appointment to the bench and, after appointment, may have to decide cases with political implications. It has also never been suggested that judicial officers do not have political preferences or views on law and society. In South Africa, especially after its transition to democracy, it would be surprising if many candidates for appointment as judicial officers had not been active in or publicly sympathetic towards the liberation struggle. Prior political associations alone have never been regarded as a reason for recusal unless the subject matter of the litigation in question arises from such association or activities. Judicial officers are required to terminate such association on appointment to the bench.

Dr Luyt also alleged that because of the public criticism of De Villiers J in the aftermath of his handling of the matter in the High Court, the judges of the Constitutional Court would be afraid to act impartially in this matter. In dismissing this argument, the Court deplored the tendency for decisions of our courts, with which there was disagreement, to be attacked by impugning the integrity of judicial officers rather than by examining the reasons for their judgments. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome is no justification for recklessly attacking the integrity of judicial officers.

Under our new constitutional order judicial officers are now drawn from all sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn form a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judges are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". To this end they must resist all manner of pressure, regardless of where it comes from. This is a constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

4 June 1999

**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.

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and another**

**Case CCT 15/99**

**Decided on 15 October 1999**

## 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.*

1. As part of the process of restructuring local government in South Africa, Parliament passed the Local Government: Municipal Structures Act. The Act became law in December 1998 but only came into operation on 1 February 1999. The provinces of KwaZulu-Natal and the Western Cape approached the Court alleging that the Structures Act as a whole, and certain sections of the Act in particular, violated Chapter 7 of the Constitution which deals with local government. They sought permission to come to the Court directly. Because the matter was of considerable national importance, and the issues confined to legal arguments rather than factual disputes, and in view of the fact that local government elections are scheduled for November 2000, the provinces were granted direct access. The two cases were heard together because the issues raised in them overlapped substantially. In a judgment concurred in by the majority of the justices of the Court, Ngcobo J held that the Structures Act is not unconstitutional, but that five of the sections of the Act are inconsistent with the Constitution and are accordingly invalid.
2. Chapter 7 of the Constitution divides powers and functions relating to the structure and control of local government between different organs of state. All the justices were agreed that the national level of government has no powers in respect of such matters other than those allocated to it by Chapter 7. The differences between them related to how the provisions of the Constitution dealing with the allocation of such powers should be construed.
3. The Constitution empowers the national level of government to establish criteria for determining whether an area should have a metropolitan council. These criteria are prescribed by the Structures Act, sections 4 and 5 of which allow the national Minister for Provincial and Local Government to apply the criteria in order to declare areas as metropolitan areas, and to fix nodal points within those areas around which the boundaries must be drawn. The provinces had argued that the declaration of metropolitan areas is a provincial power being incidental to the power to establish municipalities. All the justices were in agreement that this argument should be rejected. The majority held, however, that the application of the criteria formed part of the function of boundary determination which the Constitution vests in the Demarcation Board, and not the national or provincial levels of government, and that sections 4 and 5 were unconstitutional for this reason.
4. In a dissenting judgment concurred in by Mokgoro J and Cameron AJ, O'Regan J held that sections 4 and 5 are constitutional. O'Regan J found that the Constitution does not specify who may apply the criteria to determine which areas must have metropolitan municipalities. National legislation could, therefore, deal with this matter as envisaged by section 164 of the Constitution, and the Minister could accordingly be entrusted with the task. The Demarcation Board's constitutional role is limited to drawing boundaries.
5. The provinces also attacked section 6 of the Act, which allows the Minister, on the recommendation of the Demarcation Board, to declare an area a district management area. They argued that such an area is a fourth category of municipality and is inconsistent with the Constitution, which makes provision for only three categories of municipalities. All the justices of the Court rejected this argument, holding that a district management area is part of a district municipality and not a separate municipality. The majority held that the establishment of district management areas impacts on the boundaries of municipalities and is accordingly a function to be performed by the Demarcation Board. The majority therefore held that section 6(2) was unconstitutional insofar as it attempted to give the Minister a discretion whether to accept the recommendations of the Demarcation Board. This declaration of invalidity was suspended for a period of one year, to enable Parliament to amend the defect. The Court ordered, however, that until the defect is corrected, the Minister is obliged to give effect to a recommendation of the Demarcation Board that a particular area be declared a district management area.
6. In relation to section 6, O'Regan J held that while the Minister's refusal to declare a district management area may well require the Demarcation Board to reconsider the boundaries it has drawn, the Act implies that in this case the matter must return to the Demarcation Board. As long as the Minister does not usurp the function of drawing boundaries, there can be no constitutional complaint because the Minister refuses to declare a district management area.
7. The other major challenge by the provinces was directed at the manner in which the types of municipality are defined in the Structures Act. The typology adopted in the Act links the types of municipality with an internal structure, for example a mayoral system or a collective executive system. The provinces argued that by linking the type of municipality with its governing structure, the Act infringes the Constitution which gives municipalities autonomy to choose their own structures. All the justices of the Court were in agreement that the Constitution permits national government to regulate municipal structures in this way.
8. Section 13(2) of the Act allows the Minister to issue guidelines which the provinces are obliged to take into account when choosing their types. While noting that the issue was at first glance a trivial one, all the justices of the Court agreed that it is important to protect the allocation of powers envisaged in the Constitution, and declared section 13 to be invalid because it impinges upon the power given by the Constitution to the provinces to decide upon the types of municipality to be established in the province.
9. Section 24(1) of the Act empowers the Minister to fix the term of office of municipal councils. All the justices were agreed that the Constitution requires this to be done by Parliament itself and, therefore, that the delegation of the power to the Minister is inconsistent with the Constitution.

10. The constitutionality of various other sections of the Act was also challenged by the provinces. These challenges were rejected by all the justices on the grounds that the disputed provisions fall within the powers conferred on the national level of government by the Constitution.

11. In the result, the Court unanimously declared sections 13 and 24(1) of the Act to be invalid. Sections 4, 5, and 6(2) of the Act were also declared by the majority to be invalid. The declaration of invalidity of section 6(2) was suspended for a year. The Court did not make any order as to costs.