REPORTABLE

Case No 5/2001

In the matter between:

THE SPECIAL INVESTIGATING UNIT Applicant

and

ANTHIMOOLAN NADASEN Respondent

Coram: VIVIER ADCJ, HARMS, MARAIS, SCHUTZ and CAMERON JJA

Heard: 17 SEPTEMBER 2001

Delivered: 28 SEPTEMBER 2001

Subject: Special Investigating Units and Special Tribunals Act 74 of 1996 and Proclamation R24 of 14 March 1997: interpretation; area of jurisdiction.

JUDGMENT

HARMS JA/

HARMS JA:

[1] Corruption and fraud, for some years now, have been matters of serious public concern. This is evidenced by a number of recent enactments, the use of special task forces and the appointment of commissions of inquiry. Statutes that spring to mind include the Investigation of Serious Economic Offences Act 117 of 1991, the Corruption Act 94 of 1992 and the Special Investigating Units and Special Tribunals Act 74 of 1996. The latter is the subject of this judgment and references hereinafter to "the Act" are references to it.

[2] As appears from the long title, the object of the Act is to provide for the establishment of (a) 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 (b) special tribunals to adjudicate upon civil matters emanating from these investigations. One such unit was established together with its related tribunal by way of presidential Proclamation R24 of 14 March 1997. Because the head of this Unit was a judge, the Proclamation was later found to be inconsistent with the provisions of the Constitution but the declaration of its invalidity was suspended for one year as from 28 November 2000 (*South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC)). This order of the Constitutional Court does not affect the present judgment.

[3] Consequent upon the Unit's investigation into the affairs of the Durban Metropolitan Council (Durban North and Central Council) in relation to the misappropriation of funds and the irregular receipt of payments in respect of the hiring of equipment, the Unit instituted proceedings in the Special Tribunal against the respondent ("Nadasen") and a co-defendant, claiming payment of some R555 000,00. One claim amounting to R351 805,20 succeeded and judgment was entered against the two defendants jointly and severally. Nadasen appealed to the Full Court of the Natal Provincial Division but the second defendant's executrix (he having since died) did not take part in the appeal.

[4] Shortly before the hearing of the appeal before the Full Court, Nadasen filed a special plea based upon an unreported judgment of Pickard JP. The Unit did not object and was prepared to argue the appeal on that basis. In another turn of events, the case was eventually argued by agreement on yet other bases: (a) did the Unit have jurisdiction to investigate the conduct of the affairs of a KwaZulu-Natal local authority and sue the defendants on its behalf and (b) did the Tribunal have jurisdiction to entertain the action? The Court *a quo* (per Hugo J, Nicholson J and Msimang AJ concurring) upheld the appeal on these new grounds and the present appeal is with the special leave of this Court.

[5] A unit such as the appellant is similar to a commission of inquiry. It is as well to be reminded, in the words of Corbett JA in *S v Naudé* 1975 (1) SA 681 (A) 704 B-E, of the invasive nature of commissions, how they can easily make important inroads upon basic rights of individuals and that it is important that an exercise of powers by a non-judicial tribunal should be strictly in accordance with the statutory or other authority whereby they are created. The introductory part of s 4(1) of the Act emphasises the point. This accords with the approach of the Constitutional Court (*South African Association of Personal Injury Lawyers v Heath and Others supra* par 52). Appellant's reliance upon a "liberal" construction (meaning in the context of the argument "executive-minded") is therefore misplaced. A tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly (cf *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) 613F-J).

[6] Since the promulgation of Proclamation R24, a series of proclamations have been issued extending the terms of reference of the Unit and Tribunal. It is common cause that these later proclamations are not relevant in determining whether the Unit and the Tribunal had jurisdiction in the matter now before us, simply because they came after the institution of the proceedings mentioned on 29 August 1997. Cf *Naude en Andere v Heatlie en Andere; Naude en Andere v Worcester-Oos Hoofbesproeiingsraad en Andere* 2001 (2) SA 815 (SCA) 820I – 821A. In order to

place Proclamation R24 in context, it is necessary to have regard to the scheme of the Act.

[7] Section 2 empowers the President to establish special investigating units and special tribunals. It reads:

> "(1) The President may, whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2) by proclamation in the Gazette-
>
> (a) (i) establish a Special Investigating Unit in order to investigate the matter concerned; or
>
> (ii) refer the matter to an existing Special Investigating Unit for investigation; and
>
> (b) establish one or more Special Tribunals to adjudicate upon justiciable civil disputes emanating from any investigation of any particular Special Investigating Unit:
>
> Provided that if any matter referred to in subsection (2) falls within the exclusive competence of a province, the President shall exercise such powers only after consultation with or at the request of the Premier of the province concerned.
>
> (2) The President may exercise the powers under subsection (1) on the grounds of any alleged-
>
> (a) serious maladministration in connection with the affairs of any State institution;
>
> (b) improper or unlawful conduct by employees of any State institution;
>
> (c) unlawful appropriation or expenditure of public money or property;
>
> (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;

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

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

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

(3) The proclamation referred to in subsection (1) must set out the terms of reference of the Special Investigating Unit, and such particulars regarding the establishment of the Special Investigating Unit or the Special Tribunal as the President may deem necessary.

(4) The President may at any time amend a proclamation issued by him or her in terms of subsection (1)."

The concept of "state institution" as used in the Act is wide and is defined in s 1 as follows:

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

[8] It is convenient next to quote s 14(1), which deals with the conversion of existing commissions of inquiry into units and tribunals under the Act:

"(1) The President may, in respect of any Commission of Inquiry-

(a) appointed by him or her prior to the commencement of this Act; or

(b) appointed by any other executive authority prior to the commencement of this Act, upon the request of such executive authority,

and if the objects of such Commission can in his or her opinion better be achieved by a Special Investigating Unit and a Special Tribunal, by proclamation in the Gazette dissolve

> such Commission and establish a Special Investigating Unit and a Special Tribunal in its place in terms of this Act: Provided that the provisions of section 2 (3) and (4) shall apply with the necessary changes in respect of the proclamation referred to in subsection (1): Provided further that . . .. "

[9] Three points need to be made at this juncture. First, although the President is entitled to establish a unit to investigate not only matters of national but also of local concern, the Act respects the autonomy granted by the Constitution to provinces. To act under s 14(1), where a commission was appointed by the executive of a province, the President must have the request of such executive as a condition precedent; if any matter falls within the exclusive competence of a province, the President may only exercise the powers under s 2(1) "after consultation with or at the request of the Premier of the province concerned." Second, there is no antipathy between s 2(1) and s 14(1) as suggested by the Court *a quo*, because a unit and tribunal established pursuant to s 14(1) are established "in terms of this Act", i. e., s 2(1). Section 14(1) does not contain its own establishment provision; it merely circumscribes when and how a unit and its appended tribunal can replace an existing commission. The terms of reference of a unit appointed pursuant to s 14(1) need therefore not be co-extensive with that of the displaced commission. Finally, s 2(1) envisages the appointment of any number of units but does not entitle the President to appoint a roving unit or substitute police force with an unbounded mandate to investigate possible corruption wherever it may exist. The President must deem it necessary to appoint a unit "on

account of any of the grounds" mentioned in s 2(2); moreover, he is required to identify the "matter" falling within one or more of those grounds (cf *South African Association of Personal Injury Lawyers v Heath and Others supra* par 61). The degree of particularity required does not arise in the present case.

[10] Reverting to the scheme of the Act, a unit must investigate the matter referred to it, collect relevant evidence and may then institute proceedings in the tribunal against the parties concerned for the recovery of what is due to the particular state institution (ss 4(1)(a) and (b); 5(5) and 5(7)). The tribunal consists of a judge and has in general terms the powers of a high court in relation to matters falling within the terms of reference (ss 7,8 and 9). Appeals lie against a judgment of a tribunal to the Full Court or to this Court (s 8(7)).

[11] Proclamation R24 was issued pursuant to s 14(1). A commission had been appointed by the Premier of the Eastern Cape on 14 June 1995 under the chairmanship of a judge to investigate fraud and corruption in the government of the Eastern Cape and its constituent parts (my summation). The Premier requested the transformation of the Commission into a unit, and the President granted the request. The claim against the defendant arose, as mentioned, from matters affecting a local authority from KwaZulu-Natal. The issue ultimate in this appeal is whether, as a question of interpretation, the Proclamation extends to matters within the exclusive competence of that province.

[12] It is unfortunately necessary to quote the Proclamation in full:

1. Under section 14 (1) of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996), and upon the request of the executive authority of the Eastern Cape, and because I am of the opinion that the objects of the Commission of Inquiry into Matters relating to State Property in the Province of the Eastern Cape established by Eastern Cape Provincial Notice No 10 of 1995, can better be achieved by a Special Investigating Unit and a Special Tribunal, I hereby dissolve the said Commission and establish a Special Investigating Unit and a Special Tribunal in its place.
2. Under section 3 (1) of the said Act, I hereby appoint Mr Justice Willem Hendrik Heath as head of the Special Investigating Unit.
3. Under section 7 (2) of the said Act, I hereby, after consultation with the Chief Justice, appoint Mr Justice Gerhardus Petrus Christiaan Kotzé as Tribunal President.
4. The terms of reference of the Special Investigating Unit are
    (1) to examine and report to me on
        (a) any acquisitive act, transaction, measure or practise, pending or concluded, having a bearing on State or public property or public money which belongs to or vests in a State institution or which, at any time prior to 27 April 1994, belonged to or vested in any former State or territory that now forms part of the Republic and which public property or public money, were it not for such acquisitive act, transaction, measure or practice, could have belonged to, or vested in, or could have been liable to be allotted to a State institution;
        (b) any interest in, or in respect of, any property contemplated in subparagraph (a);

(c) any person, establishment, institution or society in or by which public property or public money contemplated in subparagraph (a) may be accumulated or may have been used; and

(d) any real or personal right to property contemplated in subparagraph (a) or to the fruits of such propery that have accrued or will accrue to any person, establishment, institution or society other than a State institution;

(2) to inquire into, consider and report to me on matters contemplated in subparagraph (1) which have taken place between 26 October 1976 and the date on which the Special Investigating Unit is dissolved; and

(3) to inquire into, consider and report to me on any matter contemplated in section 2 (2) of the said Act, which is incidental to the matters referred to in subparagraphs (1) and (2) and which is revealed by any of the investigations of the Special Investigating Unit, and the generality of this subparagraph is not limited by subparagraphs (1) and (2).

5. The seat of the Special Investigating Unit is King William's Town.

6. Subject to section 9 (2) (b) of the said Act, the seat of the Special Tribunal is King William's Town or any other place that the Tribunal President may designate as such.

[13] Counsel for the appellant relied heavily upon the wording of par 4(1)(a) and argued that it, in terms, exhibits an intention to appoint the Unit to examine any act, without any territorial limitation, falling within the definition. He readily conceded that there is nothing else in the Proclamation favouring this interpretation and invited us to apply a purposive construction to the Act and the Proclamation. No doubt, the object or purpose of the Act is to investigate allegations of corruption and fraud and to

reclaim ill-gotten gains speedily by the use of specialist bodies. The Proclamation evinces the same underlying purpose. But that does not assist in answering the question whether its purpose was to form one unit to tackle and solve the whole country's problems or whether its purpose was to appoint a unit for the Eastern Cape only. One enters here the area of "impermissible speculation as to the purpose of legislation" (per Marais JA in a somewhat different setting in *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) 870C).

[14] Like any writing, par 4(1) must be read in context and, unlike an Agatha Christie novel, it usually pays to commence at the beginning. Paragraph 1 makes it clear that the President, at the behest of the Executive of the Eastern Cape, intended to act under s 14(1). The object of s 14(1) is to dissolve an existing commission and to establish a unit and tribunal "in its place". The reader is also informed that the President formed an opinion, as both ss 14(1) and 2(1) require him to do. His opinion was that the Unit and the Tribunal could better achieve the objects of the Commission he was about to dissolve. That Commission, I repeat, was concerned with issues relating to old and new second and third tier governmental structures within the area of the Eastern Cape.

[15] Significant also is what the President did not state. He did not state that he was acting after consultation with all the provincial premiers, a necessary jurisdictional requirement for the countrywide extension of the Unit's powers to matters falling

within the exclusive competence of provinces (s 2(1) proviso). I accept that it may not be a requirement for the validity of a proclamation for the President to recite the jurisdictional facts necessary for the exercise of his powers and that the maxim *omnia praesumuntur rite esse acta* might, in such a case, apply. However, where he has chosen to recite some jurisdictional facts, as he also did in relation to the appointment of the President of the Tribunal in par 3, it has to be concluded as a matter of interpretation that he was not randomly selective in doing so and that he did not arbitrarily omit others that did in fact exist. (*Nigel Town Council v Ah Yat* 1950 (2) SA 182 (T) 187; *Attorney-General, Transvaal v Manelis* 1964 (3) SA 720 (T) 725H – 726H.) *Manelis*, relying also on *Cape Coast Exploration Ltd v Scholtz and Another* 1933 AD 56 84, pointed out that the presumption arises only where the circumstances of the particular case add some element of probability, something lacking in this instance. If the President did not consult all the premiers, it could not have been his intention to issue a proclamation which would, countrywide, encompass matter falling within the exclusive jurisdiction of the provinces.

[16] Turning then to par 4(1) of the Proclamation, it differs materially in its description of territorial application from the repealed Eastern Cape proclamation. The latter was concerned with the affairs of "the (present) government of the Province of the Eastern Cape" and, in relation to matters prior to 27 April 1994, "any of the now defunct states or the provincial authority which exercised control and administration over the territory which now constitutes the Province of the Eastern Cape". Paragraph

4(1), on the other hand, omits any reference to the Eastern Cape and, seen in isolation, encompasses also provincial matters of the country as a whole.

[17] Read in the light of the constitutional recognition of the autonomy of provinces, the scheme of the Act, the genesis of this Proclamation, the use of the phrase "in its place" (in this context, in the place of the provincial Commission) as well as the recital of jurisdictional facts in par 1 and the omission of any reference to the other provincial premiers, I am satisfied that the wider interpretation cannot be justified. An overbroad proclamation may, in any event, be liable to attack on that ground alone. The President's stated intention was to act under the proviso of s 2(2) in relation to the provincial matters of the Eastern Cape and it appears to me to be wrong to give a more extensive interpretation to the Proclamation to include the affairs of the other provinces. It follows that the Unit did not have the necessary standing to sue the defendants and that the Tribunal did not have jurisdiction to hear the case.

[18] The result may appear to be unsatisfactory but we know that Proclamation R24 was amended shortly after the proceedings against the defendants had been instituted. Proclamation R72 of 11 November 1997 substituted par 4 of R24, limited the activities of the Unit to the Eastern Cape and specified the matters to be investigated. Only after the judgment of the Special Tribunal was a presidential proclamation (R70 of 15 July 1998) issued at the behest of the Premier of KwaZulu-Natal, covering the subject matter of this case. Neither proclamation has an effect on the outcome of this

appeal. The same applies to an affidavit, filed after the hearing of the appeal, by the former head of the Unit in purported response to a question raised by a member of this Court. It is, obviously, inadmissible in relation to the sole issue before us, namely the meaning of the Proclamation. However, its ostensible object was to establish the fulfilment of the condition precedent set by s 2(1), viz. the prior consultation with or the request of all the provincial premiers for the establishment of a unit to investigate the matters listed in the Proclamation in their respective provinces. This it failed to do. Instead of coming to grips with the issue, the affidavit consists of generalities and surmise based largely upon hearsay. Also, it would be unfair to allow the introduction of a novel factual issue at this late stage of the proceedings.

[19] The appeal is dismissed with costs.

L T C HARMS
JUDGE OF APPEAL

AGREE:

VIVIER ADCJ
SCHUTZ JA
CAMERON JA

MARAIS JA:

[1] In the view I take of this matter it would not be right to express any opinion on the merits of the decision of the Court *a quo* that the Special Investigating Unit had no *locus standi* to institute the claims which it did and the Special Tribunal no jurisdiction to entertain the claims. I regret that I am unable to reconcile myself to the extraordinary procedure in which the Court *a quo* acquiesced and which, if upheld, could result in injustice to the second defendant whose executrix was entitled to be given an opportunity of being heard, but was neither heard nor given any notice of what was afoot.

[2] The contentions permitted to be raised for the first time in the appeal to the Court *a* quo were not even foreshadowed in the belated Special Plea. There was no allegation made in it that the matters investigated fell within the exclusive competence of the province of KwaZulu-Natal and that the Proclamation did not extend to encompass such matters. The grounds upon which the Special Plea rested were that the notice instituting the proceedings was bad because the President had not in terms conferred authority to sue upon the Special Investigative Unit and that, in the absence of a cession of rights to it, the Unit could not sue on behalf of the institution which had allegedly suffered damage.

[3] However, those grounds were not even considered by the Court *a quo*. Instead, the court noted in its judgment that "the appellant started off by addressing us on the question of whether the Special Investigating Unit had the jurisdiction to investigate matters in [KwaZulu-Natal] and whether the Tribunal in consequence had jurisdiction to hear such matters". It then proceeded to decide the question. This despite the fact that a decision upholding the contention would render void the judgments given in respect of second defendant.

[4] The second defendant had a judgment against him on one claim and a judgment in his favour on another. He acquiesced in those judgments and did not appeal. Neither did appellant cross-appeal. The outcome of his co-defendant's appeal could not affect the judgments given in respect of him as long as no question of the Special Tribunal's jurisdiction arose. Far from any such question having arisen, jurisdiction of the Tribunal had been expressly admitted in the pleadings at the trial. If any such contention was to be raised the second defendant's executrix would have a direct and substantial interest in the matter and would require, at the very least,

to be notified (if not joined), and would be entitled to be heard if she so desired. See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649 and 659.

[5] What happened before the Court *a quo* was, however unintended, an affront to one of the most fundamental tenets of natural justice. *Audi alteram partem*. After the conclusion of the trial, and after the delivery of judgment, the trial was in effect re-opened at the instance of a defendant in the absence of, and without notice to, a co-defendant who had a judgment in his favour, to enable the very jurisdiction of the tribunal to be challenged. It was a challenge which, if successful, would render void both the judgment for and the judgment against the absent co-defendant. And even if it could be argued that the decision would not bind his executrix if she were to be sued in the civil courts and she attempted to raise a plea of *res judicata*, she would have to establish at least that the tribunal did have jurisdiction. She would be faced with a decision to the contrary by a full court by which any single judge in KwaZulu-Natal would be bound - a decision given (and this would be the most bitter pill of all) in a case in which the deceased was actually one of the parties and therefore entitled to be heard. Had the issue been raised at the trial as it should have been, he would have had such an opportunity but he was given none simply because his co-defendant belatedly raised the issue on appeal and no one took account of his executrix's obvious interest in the matter.

[6] It is no answer to say that there could conceivably be other persons in other cases who might also find themselves hit by a finding that the Special Tribunal had no jurisdiction and that they could not all be expected to be notified or joined. That does not excuse a failure to give notice to or to join a co-defendant in the self-same case where it is clear that the co-defendant has a direct and substantial interest in the resolution of the point raised on appeal for the first time.

[7] If the Court *a quo* was minded to allow the issue to be ventilated on appeal the least it should have done was to insist upon notice being given to second defendant's executrix to enable her to decide whether she wished to be heard. It is idle to speculate whether she would or would not have made use of the opportunity. There is no way of knowing. I consider the proceedings before the Court *a quo* to have been irregular and productive of potential injustice. I do not see how its decision can be allowed to stand while second defendant's executrix's interest continues to be ignored.

[8] Strict orthodoxy would necessitate allowing the appeal, setting aside the judgment of the Court *a quo*, remitting the appeal for rehearing before a different panel of judges and ordering that, if the proposed attack upon the tribunal's jurisdiction is to be persisted in, or any other ground of appeal raised which, if successful, would or might vitiate the judgments given in respect of the second defendant, notice thereof be given to second defendant's executrix, and she be joined and heard if she so desires.

[9] However, there have already been substantial costs incurred and the matter is before this Court. It has been argued and if the executrix of the second defendant were to be joined, but elected to take no part in the debate, much time and money will have been wasted. I would therefore make an order along the lines of that made by this Court in the *Amalgamated Engineering* case, *supra*, at 663. I would also order that a copy of this judgment be served on second defendant's executrix.

_____

R M MARAIS
JUDGE OF APPEAL