



REPUBLIC OF SOUTH AFRICA

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Reportable
Case Number : 89 / 07

In the matter between

WILMOT MANDLA CHAGI & 29 OTHERS

APPELLANTS

and

SPECIAL INVESTIGATING UNIT

RESPONDENT

Coram : NAVSA, BRAND, JAFTA, PONNAN et COMBRINCK JJA

Date of hearing : 9 NOVEMBER 2007

Date of delivery : 29 NOVEMBER 2007

SUMMARY

Special Investigating Units established in terms of Act 74 of 1996 - separate juristic entities – liability for the wrongful acts of the one does not devolve upon the other.

Neutral citation: This judgment may be referred to as :
Chagi v Special Investigating Unit [2007] SCA 159 (RSA)

J U D G M E N T

PONNAN JA

[1] On 14 June 1995, the Premier of the Eastern Cape acting pursuant to the provisions of the Interim Constitution, established a commission under the chairmanship of Justice Willem Heath, to investigate fraud and corruption in the government of the Eastern Cape and its constituent parts.¹ On 20 November 1996, the Special Investigating Units and Special Tribunals Act 74 of 1996 ('the Act') was promulgated. According to the long title of the Act, its purpose is:

'To 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 the Special Investigating Units; and to provide for matters incidental thereto.'

[2] Section 2(1) of the Act empowered the President to establish a Special Investigating Unit ('SIU') for the purposes of investigating allegations of serious maladministration or unlawful or improper conduct on any of the grounds specified in s 2(2) of the Act. Section 14(1) of the Act provides:

'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:...

[3] On 14 March 1997 and at the request of the Premier of the Eastern Cape, the President, acting in terms of s 14(1) of the Act and by virtue of Proclamation R24 of 1997,² dissolved the Heath Commission and established in its place a Special Investigating Unit ('the first SIU') to be headed, in accordance with s 3(1) of the Act, by Justice Heath, as well as a Special Tribunal ('ST') with Justice GPC Kotze as the Tribunal President.

¹ Appointment of Commission of Inquiry into Matters Relating to State Property and other Property, EC, PN10, PG72, 14 June 1995.

² Published in Regulation Gazette 5884, Government Gazette 17854.

[4] On 11 November 1997 and in terms of s 2(4) of the Act, the President, by Proclamation R72 of 1997,³ amended Proclamation R24 by expanding upon the terms of reference of the first SIU. On 30 June 1998 and in terms of Proclamation R66 of 1998,⁴ the President referred certain specified matters appertaining to the former Transkei Agricultural Corporation ('Tracor'), for investigation by the first SIU and, if needs be, for adjudication emanating from such investigation, to the ST.

[5] On 28 November 2000, the Constitutional Court declared s 3(1) of the Act as well as Proclamation R24 of 1997 to be inconsistent with the Constitution and invalid but suspended its declaration of invalidity for a period of 1 year.⁵ The Act was subsequently amended with effect from 31 July 2001 by the Special Investigating Units and Special Tribunals Amendment Act 2 of 2001 to bring it into line with the judgment of the Constitutional Court. By Proclamation R118 of 2001,⁶ the President repealed Proclamation R24 and established a new Special Investigating Unit ('the second SIU') with William Andrew Hofmeyr as its head.

[6] Paragraph 6 of Proclamation R118 of 2001 provides:

'The Special Investigating Unit established under paragraph 2 of this Proclamation [the second SIU] shall continue to investigate all the matters which were referred to the Special Investigating Unit established by Proclamation No. R24 of 14 March 1997 [the first SIU], including those matters referred to it by the said Proclamation and the Proclamations mentioned in the Schedule. Any reference in paragraph 3 of the Proclamations set out in the Schedule to "Proclamation No. R24 of 14 March 1997", must be interpreted as a reference to this proclamation.'

Amongst the Proclamations referred to in the Schedule, is Proclamation R66 of 1998, which authorised the investigation into the affairs of Tracor.

[7] Tracor was wound up during 1998. On 15 August 2001, the 30 appellants in this matter, who were then unemployed but who previously jointly constituted the management of Tracor, issued summons out of the Grahamstown High Court against defendants described as the Special Investigating Unit established in terms of Proclamation R66 of 1998 (the first defendant) and the MEC for the Department of

³ Published in Regulation Gazette 6046, Government Gazette 18431.

⁴ Published in Regulation Gazette 6223, Government Gazette 19030.

⁵ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC).

⁶ Published in Regulation Gazette 7128, Government Gazette 22531.

Agriculture and Land Affairs (Eastern Cape) (the second defendant).⁷ The summons comprised four claims, only two of which, namely A and C, are relevant for present purposes.

[8] Paraphrased these claims read:

CLAIM A:

- (a) During August 1998, the plaintiffs had held banking accounts at various banking institutions;
- (b) On or about 25 August 1998 and in court papers in proceedings instituted by the first and second defendants against the plaintiffs before the ST in East London, the first and second defendants stated to the management and staff of the aforementioned banking institutions of and concerning the plaintiffs that the plaintiffs had:
 - (i) stolen and fraudulently misappropriated a sum of R3.3 million from Tracor; and
 - (ii) utilised Tracor funds without its permission to settle outstanding balances owed by them to financial institutions in respect of motor vehicles in their possession held under various motor vehicle schemes obtaining at Tracor.
- (c) The founding papers in the aforesaid proceedings together with the temporary interdict were served upon all of the aforementioned banking institutions and a statement to the foregoing effect was later published in the Daily Dispatch newspaper.
- (d) The aforementioned statements by the first and second defendant were:
 - (i) wrongful and defamatory of the plaintiffs;
 - (ii) made with the intention to defame the plaintiffs and to injure them in their dignity and reputation; and
 - (iii) understood by the management and staff at the aforementioned banking institutions to mean that the plaintiffs were bad and disreputable managers, corrupt and dishonest individuals and are thieves and frauds.
- (e) As a result of the aforesaid defamation, the plaintiffs have been damaged in their dignity and reputation and each suffered damages in the estimated sum of R400 000 for which the first defendant is liable.

CLAIM C:

- (a) On or about 21 August 1999, the first and second defendants wrongfully, unlawfully, maliciously and intentionally set the law in motion against the plaintiffs by levelling false accusations against them in an application for an interdict *pendente lite* before the ST in East London.
- (b) When launching the aforesaid application the defendants had no reasonable and probable cause for doing so, nor did they have any reasonable belief in the truth of the information given to them.

⁷ A third defendant who was also cited in the summons but whose particulars are not presently relevant has been omitted.

- (c) As a result of the grant of the temporary interdict, the plaintiffs' bank accounts were frozen and the plaintiffs were deprived of access to their funds.
- (d) During on or about March 2000, the first and second defendants withdrew the action that had been instituted against the plaintiffs which resulted in the aforesaid interdict also falling away.
- (e) The plaintiffs incurred legal costs in defending the aforesaid application and action.
- (f) As a result of the freezing of their bank accounts, the plaintiffs suffered an impairment of their dignity.
- (g) The aforementioned conduct by the first and second defendants was degrading, insulting, injurious and humiliating to the plaintiffs.
- (h) The aforesaid conduct by the said defendants was wrongful and perpetrated with *animo iniuriandi*.
- (i) As a result of the defendants' aforesaid conduct, the plaintiffs suffered damages in the sum of R150 000 each for the impairment of their dignity and the amount of R5 000 each in respect of attorney and client costs.

[9] The plaintiffs' claim was met with the following special plea:

- (1) First defendant pleads that it was established on 25 July 2001 by virtue of the provisions of Proclamation R118 of 2001 (the new unit).
- (3) A Special Investigating Unit had been established in terms of Proclamation R24 of 1997 ... (the old unit).
- (3) The plaintiffs' complaints and claims all relate to the period August 1998 to March 2000 and are all therefore directed against the old unit.
- (4) The old unit was abolished in terms of the provisions of paragraph 1 of Proclamation R118 and therefore no longer exists.
- (6) The first defendant pleads that it was established as a completely new unit in terms of the provisions of Proclamation R118, and that it took over no rights, powers, obligations, or liabilities of the old unit, other than the powers set out in paragraph 6 of Proclamation R118. The first defendant therefore has no jurisdiction to deal with the matters in issue in the plaintiffs' claims, and therefore has no *locus standi* to be sued herein.
- (7) In the premises plaintiffs have no claim against the first defendant and their claims against the first defendant should be dismissed with costs.'

[10] Dambuza AJ upheld the special plea and dismissed both claims. The plaintiffs appeal with leave of this Court. The sole issue for determination in this appeal is whether liability for the plaintiffs' claims has devolved upon the second SIU, ('the respondent'). For the reasons that follow the conclusion reached by the court below on this aspect of the case cannot be faulted.

[11] A unit such as the respondent is similar to a commission of inquiry and, like a commission, is constrained by the boundaries set by the Act and its founding proclamation.⁸ Proclamation R118 of 2001 provides, neither expressly nor by necessary implication, for the rights and obligations of the first SIU to devolve upon the second SIU, the respondent. That Proclamation served a dual purpose. First, it dissolved the first SIU; and, second, it established the respondent. Those purposes could likewise have been achieved by the promulgation, with an intervening time-lapse between them, of two separate proclamations, the first, dissolving the first SIU and the second establishing the respondent. Had that happened it could not, without more, have been suggested that the respondent was the *de jure* successor in title of the first SIU, and thus liable for any wrongful act perpetrated by it. That a single proclamation achieved both ends did not create a legal *nexus* between the two units where none otherwise existed.

[12] Moreover, it was permissible for the President, if he deemed it necessary, to establish more than one SIU. That, theoretically at any rate, is what the Act authorised. And each, according to s 13 of the Act, was to be a separate juristic person. Had that occurred, liability for the wrongful acts of the one would not have devolved upon any of the others. So too in this case, for by parity of reasoning, the consequence of the original actor's (the first SIU's) unlawful conduct could not, absent any legal nexus, be imputed to the respondent.

[13] Finally, if the intention had been for liability of the first SIU to devolve upon the second, that could have been simply and briefly stated by the Legislature. That would obviously have been a clearer and more effective, indeed an easier, method of expression than the implication inherent in mere silence.⁹ After all, it must be accepted that the Act and the Proclamation has dealt exhaustively with the subject matter. To accede to the argument urged upon us on behalf of the appellants would defeat the purpose of those enactments.

⁸ *S v Naudé* 1975 (1) SA 681 (A) at 704B-E; *Special Investigating Unit v Nadasen* 2002 (1) SA 605 (SCA) para 5.

⁹ Per Howie J in *Muller v Chairman, Ministers' Council, House of Representatives* 1992 (2) SA 508 (C) at 524E.

[14] It should perhaps be added that the appellants were not without remedy. They could have brought the relevant department of National Government before court by citing the responsible political head of that department in a representative capacity. In this case that would have been the Minister of Justice. That is what s 2 of the State Liability Act 20 of 1957 provides.¹⁰ Approached thus, the mishap encountered here may well have been avoided.

[15] It follows that the appeal must fail. In the result the appeal is dismissed with costs.

V M PONNAN
JUDGE OF APPEAL

CONCUR:

NAVSA JA
BRAND JA
JAFTA JA
COMBRINCK AJA

¹⁰ *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA) para 5.