CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/98

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER OF SPORT AND RECREATION	Second Appellant
THE DIRECTOR-GENERAL: DEPARTMENT OF SPORT AND RECREATION	Third Appellant
versus	
SOUTH AFRICAN RUGBY FOOTBALL UNION	First Respondent
GAUTENG LIONS RUGBY UNION	Second Respondent
MPUMALANGA RUGBY UNION	Third Respondent
LOUIS LUYT	Fourth Respondent

Heard on : 7,10-13 May 1999

Decided on : 10 September 1999

JUDGMENT

GENERAL INDEX

THE COURT:

A. OVERVIEW AND SUMMARY

(a) Introduction

[1] This case raises important questions of legal principle concerning the basis on which the courts may review the exercise of presidential powers. It also touches on the circumstances in which the President can be called upon to testify in a court of law. Since its commencement in the Transvaal High Court, the case has generated considerable controversy and, at times, acrimony, not only amongst the litigants but also amongst

members of the public. In disposing of the constitutional questions raised, this Court must focus not on the controversies that have arisen, but on the relevant legal and constitutional principles.

[2] At issue is the constitutional validity of two presidential notices that appeared in the *Government Gazette* on 26 September 1997. One announced the appointment of a commission of inquiry, under the chairmanship of Mr Acting Justice Browde, into the administration of rugby in the country.[1] The other declared the provisions of the Commissions Act 8 of 1947 applicable to the commission and promulgated regulations for its operation.[2] The South African Rugby Football Union (SARFU), two of its constituent unions and Dr Luyt, at that time the president of both SARFU and one of the unions, applied on notice of motion to the Transvaal High Court for an order against the President[3] setting aside the two notices. The Minister of Sport and Recreation (the Minister) and the Director-General of the Department of Sport and Recreation (the DG) were also cited, although no relief was sought against them. The matter was heard by De

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1 The President acted under powers conferred on him by s 84(2)(f) of the Constitution. Section 84(2) which, in so far as is relevant, provides:

> "The President is responsible for–
> (f) appointing commissions of inquiry".

2 The President acted in terms of s 1(1)(a) of the Commissions Act, which provides:

> "[w]henever [he] has . . . appointed a commission . . . for the purpose of investigating a matter of public concern, he may . . . declare the provisions of this Act . . . applicable with reference to such commission . . ."

In terms of s 3(1) of the Act the commission then has the same power as a High Court to compel the production of documentary and oral evidence.

3 President Mandela was President from 10 May 1994 until 16 June 1999 when President Mbeki was inaugurated as President.

Villiers J who set the two notices aside with costs and in his reasons, subsequently furnished, made adverse credibility findings against the President, the Minister and the DG. They appealed against that order and a number of ancillary orders. By the time the appeal came to be argued, Dr Luyt and the Gauteng Lions Rugby Union were the only remaining respondents and we shall refer to them as "the respondents" in the course of this judgment.

[3] The appeal was preceded by two preliminary hearings in this Court. The first raised the jurisdictional question whether the case should be heard by the Supreme Court of Appeal or by this Court. We concluded that the central issue in the case was the constitutionality of presidential action and accordingly designated this Court as the appropriate forum to determine the appeal.[4] The second preliminary hearing was necessitated when, shortly before the appeal was due to be argued, Dr Luyt lodged an application in which he contended that he had reason to believe that all the justices of this Court would be biased against him. He sought the recusal of five of the ten justices,[5] stating that he left it to the conscience of each of the five remaining judges to decide what to do. The application was argued over three days. This Court dismissed the application for recusal on the day following the conclusion of argument indicating that it would give

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4 The judgment is reported as *President of the RSA and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC).

5 The vacancy created by the death of Didcott J had not yet been filled.

its reasons later.[6] The hearing of the appeal commenced immediately.

[4] Several days later, while leading counsel for Dr Luyt and the Gauteng Lions Rugby Union was addressing the Court, he announced that his mandate and that of his colleagues had been terminated and they withdrew. No reasons were furnished for their withdrawal. In the result we were deprived of the benefit of their full oral argument and of constructive debate with them. We have however given careful consideration to their written argument[7] and to their oral submissions prior to their withdrawal. We have also scrutinised the Judge's reasons. Our unanimous conclusion is that the judgment is wrong and that the orders should be set aside.

(b) The factual background

[5] The recent history of South African rugby appears from the record and particularly from undisputed aspects of the President's affidavits. Like many other sports in South

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6 Those reasons were handed down on 4 June 1999 and are reported as *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (7) BCLR 725 (CC).

7 Which runs to over 350 pages.

Africa, it has been a history of racial exclusion. One of the results of this racism was that support for South African rugby teams was generally to be found only amongst white people and open hostility to racially exclusive South African teams was felt by many black people. This pattern of exclusion and hostility seemed to have diminished during the Rugby World Cup which was held in South Africa during 1995. President Mandela gave his wholehearted support to the South African side and illustrated this by attending the final game, which South Africa won, wearing the captain's jersey. This event was welcomed by many both as a symbol of the possibility for racial reconciliation in South Africa and as a harbinger of a new racially inclusive ethos in South African rugby.

[6] This auspicious event, however, was followed by an eruption of controversy concerning the management and administration of rugby in South Africa. The national body responsible for the management and administration of rugby is SARFU. It is a private voluntary association whose members are the rugby unions constituted in provinces and regions throughout South Africa. The second respondent, the Gauteng Lions Rugby Union, of which Dr Luyt was the president when this litigation commenced, is a member of SARFU. The controversy related to many issues. Amongst these were allegations that the rugby administrators were doing too little to enhance the inadequate sporting facilities in townships and rural areas and too little to foster the development of rugby players from disadvantaged communities. In October 1996 Mr Brian van Rooyen, a vice-president of the Gauteng Lions Rugby Union, unsuccessfully challenged Dr Luyt

for the presidency of that union. Two months later he handed a dossier to the Department of Sport and Recreation enumerating a list of complaints concerning the administration of rugby in South Africa. The Minister handed the contents of the dossier to Mr Mervyn King, a prominent financier and former judge, for evaluation. Mr King reported that while the dossier contained no proof of misconduct, it contained allegations which warranted further investigation. The Minister, therefore, decided to appoint a task team to undertake that investigation.

[7] A meeting was convened with SARFU on 14 February 1997, at which the Minister's intention was conveyed to SARFU. SARFU's representatives at the meeting indicated that they were unhappy about the appointment of the task team. After an exchange of correspondence between SARFU and the Department, a further meeting was convened for 21 February 1997. Present at that meeting were the Minister, the DG and several departmental officials, as well as Dr Luyt and several SARFU officials. A tape recording of the meeting was made and a transcript of that recording formed part of the record on appeal. At the end of the meeting a press statement was jointly prepared by those present. It stated, amongst other things, that SARFU would be given an opportunity to answer all allegations made against it and that a task team to be chaired by the DG would be appointed by the Minister.[8]

[8] The full text of the press statement is to be found in para 190 below.

[8] The first meeting of the task team[9] with representatives of SARFU was held on 3 April 1997. For several months thereafter the task team enjoyed helpful and extensive co-operation from SARFU and its constituent unions and their office-bearers. However, on 29 July 1997, shortly after auditors assisting in the investigation had called for disclosure of detailed financial and related records of SARFU, Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust, SARFU's attorneys delivered a letter to the DG summarily suspending further co-operation.

[9] This led the Minister to comment to journalists that if SARFU continued to refuse co-operation, he would ask the President to appoint a commission of inquiry. SARFU's executive held a meeting and issued a press statement putting their side of the dispute. The Minister met with the President on 5 August 1997 and related the latter's attitude to the DG, who in turn issued a press statement. In that statement the President was said to have "happily responded" to the Minister that "[a] commission is yours if, in your best judgement, it is opportune". That press statement, dated 7 August 1997, was later to assume decisive importance in the judgment of De Villiers J. The following week the task team met and concluded that the continuation of their investigation was impossible and recommended to the Minister that he apply to the President for the appointment of a commission. On 17 August 1997, the *Sunday Times* reported that the Minister had indicated that he had decided that a commission of inquiry would be appointed and that,

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9 The members of the team were the DG and four persons from the private sector: Mr M King, two practising advocates, Messrs G Marcus SC and G Malindi, and Professor M Katz, a practising attorney.

although he had to obtain the President's consent, that would merely be a "formality". On the same day, *Rapport* reported that the Minister had stated that a commission had already been appointed. These reports arose out of a brief encounter between the Minister and two journalists at a function on 15 August 1997.

[10] The tenor of the media reports gave rise to concern in the mind of one of the members of the task team, Professor Katz, the senior partner in the firm of attorneys advising the Department. He asked Mr Knowles, the member of his firm who was assisting the Department in the preparation of a memorandum to the President in support of the appointment of the commission, to ensure that everything be done properly.

[11] Accordingly, on 12 September 1997 the Minister, accompanied by Professor Katz, Mr Knowles and some departmental officials, met with the President regarding the appointment of the commission. They handed him a 26-page memorandum from the Minister and three supporting files containing a further 725 pages of documentation. This memorandum and its supporting documents was filed as part of the record and came to be called "the Tshwete file". Professor Katz outlined the application for the appointment of a commission and suggested that the President take his time and consult his own legal advisor. The execution by the President and the Deputy President of the formal instruments appointing the commission followed on 22 September 1997.

[12] The immediate response of SARFU and the Gauteng Lions Rugby Union to the appointment of the commission was a letter by their attorneys, dated 29 September 1997, calling for the President's reasons as well as all information and documents which led to the decision. The letter also intimated acceptance in principle of the commission, subject to their being satisfied with the reasons requested. The President answered in a five-page letter, dated 3 October 1997, which explained in great detail how the President viewed his powers, how he had deliberated on the matter and why he had decided to appoint the commission. The letter tendered sight of the Tshwete file and expressed the President's conclusion as follows:

> "10. My consideration of the Minister's memorandum and of the supporting documentation, has led me to conclude that:
>
> 10.1 the sport of rugby football, its welfare and its administration, especially at national level, is overwhelmingly a matter of national and public interest.
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> 10.2. the matters identified in the terms of reference of the commission of inquiry are matters in respect of which there is evident public concern and that concern has emanated from complaints and criticisms by, or controversies involving players, provincial rugby unions, administrators, sponsors, the public, sports writers and other media commentators.
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> 10.3. those public concerns have found expression both:
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> 10.3.1. in the print and electronic media, and
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> 10.3.2 by way of representations to the Minister of Sport and Recreation, or to his Department.
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> 10.4. there is a perception of a lack of transparency regarding decisions taken by SARFU in the conduct of its affairs and by some of its affiliate unions.

10.5. there is a need to address the matters of public concern and to allow for a public process in which issues relating to the public interest, the best interests of the game and its administration can be engaged with in a proper and dignified manner. In particular, a forum is necessary to allow those who are critical of the current administration of rugby to ventilate their criticisms and, equally importantly, for those who have been the subject of such criticism to justify their decisions and practices.

10.6. a commission of inquiry may usefully provide independent advice to SARFU and to government on how best to promote and manage the sport to the benefit of the public which supports the game, the players who actively participate in it, the members of the community who believe they are not provided with adequate access to it, and sponsors who help fund it.

10.7. a commission of inquiry may help lift the cloud of distrust under which the organisation and administration of rugby is alleged to be operating.

10.8. before any inquiry can perform a constructive function, the public must have confidence that it will be conducted thoroughly and impartially. My decision to appoint Acting Judge Browde as Chairperson of the commission will constitute a guarantee that the matter will be conducted independently and impartially.

11. I wish to emphasise that the complaints and criticism directed at the management of rugby in general and SARFU in particular, as contained in the documentation placed before me, were not accepted by me as proof of the existence of the alleged irregularities. They do, however, demonstrate the conflict-ridden environment within which rugby is being administered and emphasise the need for a proper, considered and dispassionate inquiry into whether the best interests of rugby and the public are being served. Although it is conceivable that the inquiry could uncover irregularities, it is not its purpose to pursue a vindictive inquiry into certain individuals. It is to promote a positive and constructive approach that the terms of reference have been framed so as to avoid any reference to specific individuals."

(c) The application

[13] On 20 October 1997 the respondents launched their application. No basis for the joinder of the Minister and the DG was laid in the founding affidavit. A consequent plea of misjoinder was raised in the court below but was dismissed. The point was raised afresh in this Court and is considered below.[10] The founding affidavit, deposed to by Dr Luyt, is conveniently divided into a number of separately captioned chapters and sets out the factual averments considered relevant. Then, under the heading "Legal Grounds", the affidavit identifies and seeks, over some 40 pages, to substantiate the factual and legal bases for the following seven named causes of action against the President:

(1) *Absence of Jurisdictional Prerequisite*

The subject matter of the commission does not constitute a "matter of public concern" as required by the Commissions Act.

(2) *Infringement of Constitutional Rights*

If the Commissions Act sanctions an inquiry into the private affairs of autonomous private bodies such as the respondents, the Act infringes the constitutional rights to freedom, security, equality and privacy entrenched in the Constitution, and is therefore invalid.

(3) *Agreement*

The appointment of the commission constituted a breach by the President, as head of the executive arm of government, of a legally binding agreement between the government and SARFU (and its constituent unions) concluded at the meeting on 21 February 1997.

(4) *Audi Alteram Partem*

In terms of section 33 of the Constitution, SARFU, and its constituent unions, were entitled to procedural fairness and accordingly to make representations to the President before he appointed the commission; alternatively the respondents had a legitimate expectation that they would be afforded such a hearing arising from the agreement of 21 February 1997.

(5) *Failure to Properly Consider The Matter*

The President's decision to appoint the commission was so unreasonable as to be consistent only with a failure on his part properly to apply his mind to the matter. In support of this a number of circumstances were alleged, including bad faith on the part of the Minister, whose decision to appoint the commission the President "had simply rubber-stamped . . . without himself properly applying his mind . . .". In this context the affidavit refers back to an earlier mention of press reports of the press statement of 7 August 1997 to the effect that the President had at that stage indicated to the Minister that a commission was his for the asking.

(6) *Administrative Action Not Justified by Reasons*

The written reasons provided by the President do not justify the appointment, and accordingly fail to comply with section 33(1)(d) of the Constitution.

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[10] See para 233 below.

(7) *Terms of Reference*

The terms of reference of the commission are so vague as to be devoid of meaningful content, and thus give an unrestricted licence to the commission.

[14] Each of the appellants deposed to an answering affidavit. Because of subsequent events, no useful purpose would be served by relating the details of the answering affidavits. Each of the seven causes of action relied upon in the founding affidavit was put in issue. We summarise how the deponents between them, singly and jointly, denied the foundational facts alleged in the founding affidavit. The main affidavit, that of the DG, sets out the government's reasons for wanting the inquiry, gives his version of the running debate between SARFU, the Department and the task team, deals with the various meetings held, denies the conclusion of a legally binding agreement on 21 February 1997 and comments on the correspondence exchanged.[11] The oblique suggestion in the founding affidavit that the media reports on the press statement implied that the appointment had been approved "well before the minister's application for its appointment" is rejected by the DG as "quite unfounded." He adds:

> "Although the minister had from time to time discussed the possibility of such an appointment with the president, the latter did not make any final decision at the time."

The DG also describes as "untrue and not supported by the facts" the allegation in Dr

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[11] The first 40 pages of the DG's 47-page answering affidavit deals with this aspect of the case.

Luyt's founding affidavit that "the President has simply rubber-stamped the Minister's decision." Although, on the face of it, these statements are hearsay in the mouth of the DG, his affidavit is confirmed by both the President and the Minister, in so far as it relates to them.

[15] The President's affidavit expressly confines itself to: (i) the question whether the subject matter of the envisaged inquiry is one of public concern; (ii) his decision to appoint the commission; and (iii) the allegations in the founding affidavit bearing on his conduct and state of mind when deciding on the appointment. The affidavit outlines the President's views regarding the national importance of rugby, making the point that rugby is a national asset and emphasising the role he and it had played in the reconciliation process. The affidavit then deals in some detail with the manner in which the President decided to appoint the commission, and affirms the contents of the letter giving the reasons for his decision.[12] The President's affidavit echoes the DG's description of the rubber-stamping suggestion as "unfounded and untrue".

[16] The Minister's affidavit concentrates on policy issues, including his reasons for asking for the appointment of the commission and, in three concluding pages responding to the alleged causes of action, expressly confines itself to traversing Dr Luyt's contention that personal animosity had motivated the Minister in applying to the President for the

[12] Quoted in para 12 above.

appointment of the commission.

[17] Dr Luyt's replying affidavit on behalf of the respondents is largely argumentative, and therefore impermissible.[13] Dr Luyt accuses the Minister and the DG of having deviously orchestrated and generated media interest in order to create a basis for saying the administration of rugby was a matter of public concern. The Minister is also said to have pressed for the appointment of the commission in the furtherance of the ulterior motive of "getting at" Dr Luyt because he is an Afrikaner. More pertinently relevant to the course the case was thereafter to take, is the change in the thrust of the so-called rubber-stamping attack. Whereas the term "rubber-stamping" is used in the founding affidavit as evidence of the President's gross unreasonableness when he considered the Minister's application for the appointment of the commission, the replying affidavit introduces a subtle yet profound change. Now, for the first time, the verb "abdicate" is used; and it is used ambiguously. On the one hand it is used to characterise the President's mental attitude and conduct vis-à-vis the appointment of the commission, that is, as part of the complaint that the President, by relying too heavily on the Minister, had failed properly to bring his mind to bear on the question:

> "I persist therefore with the allegation that the President had quite clearly abdicated his responsibility to decide himself and left the decision to the Minister, and I further persist that the President had merely rubber-stamped the Minister's decision without properly considering the matter and without properly applying his mind."

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13 See, for example, *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78 I – J.

[18] At the same time, however, referring to the media reports of the press statement of 7 August 1997, the replying affidavit avers that the President thereby "abdicated his responsibility to decide himself and left the decision to the Minister." In another paragraph Dr Luyt says:

> "I also deny that the actual decision was taken by the President and I reiterate my denial that he had considered the matter either properly or at all."

This version of the allegation which introduced the concept of abdication of responsibility was to serve as the springboard for a new emphasis, the one that was to have a pervasive influence on the Judge's thinking. The President is no longer said to have come to a grossly unreasonable conclusion by applying too little – or misdirected – thought to the consideration of the Minister's application; he is said not to have taken the decision at all; the decision, it is said, was taken by the Minister. The substitution of the Minister for the President as the person charged with having taken the offending decision was to have significant consequences.

(d) The course of events in the High Court

[19] The application was treated as one of urgency and was set down for hearing before the Judge during the court recess. The appellants applied to strike out the averments based on the press reports relied upon by the respondents, contending that they were hearsay and irrelevant. After the application to strike out had been launched, the

respondents produced a copy of the press statement of 7 August 1997 which had not previously formed part of the record. The application was settled on the basis that: (a) the press statement of 7 August 1997 was admitted in evidence; (b) certain of the press reports were received in evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988; and (c) the appellants were to file supplementary affidavits to deal with such statements. Supplementary affidavits by the President, the Minister and the DG, filed after the settlement of the striking-out application, specifically denied that there had been any abandonment of power by the President or that he had said, or that the Minister had reported him as having said, words that could be interpreted as an abdication. The President and the Minister also related how the Tshwete file had formed the basis of the President's consideration of the matter in September 1997, while the Minister and the DG tried to explain how the press statement had come to be issued on 7 August 1997. In response to submissions made on behalf of the respondents at the hearing, another supplementary affidavit by the President was filed aimed at defeating a point raised by counsel to the effect that the decision to appoint the commission was invalid because the Deputy President had not been consulted.[14]

[20] After several days of argument, the Judge referred the application for the hearing of oral evidence in terms of Uniform Rule of Court 6(5)(g).[15] The two main provisions of

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14 This argument is dealt with at paras 150 – 153 below.

15 Uniform Rule of Court 6(5)(g) provides:

"Where an application cannot properly be decided on affidavit the court may dismiss the

the order read as follows:

"1. The application is referred for the hearing of oral evidence . . . on the following issues:

1.1 Relating to the terms of the agreement of 21 February 1997 and in particular whether in terms thereof [SARFU] was first to be provided with the allegations against it before it was expected to cooperate.

1.2 Relating to the questions whether or not –

1.2.1 the [President] had made the remarks attributed to him in the press statement of 7 August 1997;

1.2.2 the [Minister] had made the remarks attributed to him in the article in the Sunday Times of 17 August 1997;

1.2.3 such remarks by the [Minister] correctly reflected discussions between him and the [President];

1.2.4 the [President] had rubber stamped the [Minister's] decision and had failed to properly consider the matter himself.

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application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

2. For the purpose of deciding the issues referred to above, [Dr Luyt], Mr Oberholzer,[16] Mr Erasmus[17] and Mr Gerber[18] as well as the [President, the Minister and the DG] are ordered to appear personally to be examined and cross-examined as witnesses."

[21] The correctness of that decision has been challenged on a number of legal grounds. Because of the conclusion we have come to on the totality of the evidence, it is not strictly necessary to consider its validity. However, as there are far-reaching implications in the order directing the President to subject himself to cross-examination on his reasons for exercising a constitutional power vested in him, we will deal briefly below with why we

16 The Chief Executive Officer of SARFU.

17 Member of the Executive Committee of SARFU.

18 Sports editor of *Rapport* newspaper who had written the article that had appeared on 17 August 1997 referred to in para 9 above.

consider that decision to be wrong.[19]

[22] The hearing of oral evidence commenced on 16 February 1997 and lasted for eighteen court days. The following persons gave evidence: Dr Luyt, Mr Oberholzer, Mr Erasmus, Mr Gerber, the DG, Professor Katz, Mr Marcus, Mr Malindi, the Minister and the President. After SARFU and the other applicants closed their case, counsel for the appellants sought the withdrawal of the dispute relating to the terms of the agreement of 21 February 1997 from the referral to evidence, on the basis that no case had been made out by the applicants. This application was refused with costs by the Judge. On 8 March 1998, after the appellants' other witnesses had completed their evidence, the appellants applied for a revocation of the order requiring the President to give evidence. This application was also refused with costs. The President gave evidence on19 and 20 March 1998. His evidence-in-chief takes up half a page of the record and his cross-examination 150 pages. A considerable part of his cross-examination was devoted to the history of rugby in South Africa, the criteria for the appointment of presidential commissions of inquiry, the relative importance of rugby in comparison with corruption, the crime rate, farm murders and other matters. It was, however, never put to the President by the cross-examiner that his evidence concerning the process of deliberation, consideration and

19 See paras 240 – 245 below.

consultation, undertaken by him before he appointed the commission, and which he had described in his affidavits (and which had in material respects been confirmed by Professor Katz's evidence), was false. Indeed, during final argument on the application, counsel for SARFU and the other respondents expressly placed on record that they were not challenging the President's honesty and integrity. The failure to put to the President in cross-examination that his evidence relating to the events of 12 to 26 September 1997 was mendacious, has significant consequences as will be demonstrated later.

[23] On 3 April 1998, at the end of their closing submissions, the appellants applied to re-open their case to lead the evidence of a reporter, Mr Hannes de Wet. This application was refused with costs. On 17 April 1998, the court issued an order reviewing and setting aside the decision of the President to appoint the commission and his decision in terms of the Commissions Act. The President, the Minister and the DG were ordered to pay the respondents'costs including the costs of three counsel. The Judge did not at the time provide reasons for his order. Those reasons were provided later on 7 August 1998 and have been reported, albeit in truncated form.[20]

(e) The judgment of the High Court

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20 *SARFU and Others v President of the RSA and Others* 1998 (10) BCLR 1256 (T).

[24] The judgment of the High Court is prolix, running to 1159 typewritten pages. The Judge concluded that the appointment of the commission and the decision to afford it powers in terms of the Commissions Act were invalid. He based this conclusion on three grounds: first, that the President had irrevocably abdicated his responsibility to exercise these powers to the Minister; secondly, that if he was wrong in his decision regarding abdication, that the President's exercise of the powers was invalid because the respondents were not afforded a hearing by the President prior to his decision to appoint the commission; and thirdly, that in exercising his powers, the President had failed to apply his mind to the relevant issues. The Judge did not find it necessary to consider the other arguments raised by SARFU and the other applicants.

[25] In this judgment, it is neither necessary nor desirable to traverse in detail each of the many points the Judge made in his judgment; rather we identify and analyse particular instances of flawed reasoning and wrong findings of law that are crucial to his conclusion. Nevertheless, the length of the High Court's judgment, the multiplicity and complexity of the factual and legal conclusions it contains, the sweep and gravity of counsel's submissions in this Court and the inherent importance of the case, necessitate our giving more extensive reasons than might otherwise have been the case.

(f) The central fallacies in the judgment

[26] The Judge's reasoning in support of all three grounds referred to in paragraph 24

above is flawed both in law and fact, evidencing a mistaken approach that dictated the manner in which he handled the case and which predestined its outcome. These fallacies will be discussed in greater detail later in this judgment. It is appropriate now merely to identify them and describe their effect on the judgment in the High Court.

[27] At an early stage of the proceedings, the Judge fixed on the press statement of 7 August 1997 and formed the view that, on 5 August 1997, the President may have abdicated his power to appoint a commission in favour of the Minister. This had a material influence on the Judge's reasoning. He took the view, quite wrongly, as will be shown later, that in law an abdication of the kind he thought had taken place was irrevocable. These errors of law and fact were foundational to the order made by him for the President to be subjected to cross-examination, and to his credibility findings against the President.[21]

[28] This "abdication fallacy" pervades the Judge's reasoning. Without it some of the interlocutory rulings are inexplicable and, because of it, the Judge's approach to the evidence of crucial events leading up to the publication of the presidential notices is skewed. Instead of looking at cogent and uncontested evidence as to the conduct of the President and his advisors during September 1997 and gauging its legality in the light of the Constitution, the Judge concentrated on side issues relating to press interviews by

[21] The importance that the abdication theory came to have in his mind is indicated by the fact that some 500 pages of his judgment are devoted to it.

persons other than the President at the beginning of the preceding month, deriving from them the hypothesis that the President had irrevocably abdicated his responsibility.

[29] The second basis for the Judge's conclusion that the exercise of the President's powers was invalid in this case was his finding that the President had failed to afford the respondents a hearing prior to exercising his powers. It is correct that no hearing was afforded to the respondents, but the Judge erred in concluding that such a hearing was necessary as a matter of law. This error was based, first, on a misconception of the nature of the relevant presidential powers and the constraints upon their exercise; and secondly, on his misconstruction of the events of 21 February 1997. The Judge wrongly concluded that at that meeting a contract had been concluded between the government and SARFU in terms of which the government undertook to provide SARFU with all the allegations against it, prior to requiring any co-operation from SARFU and that such a contract was legally binding on the President in the exercise of his powers. That contract, the Judge held, regardless of events which followed, required the President in September 1997 to afford SARFU an opportunity to be heard prior to his appointing the commission of inquiry. He found, in the alternative, that the events of 21 February 1997 had given rise to a legitimate expectation which would also found a right to a hearing. His finding, in relation to legitimate expectation, however, once again focussed on the events of 21 February 1997, not on the events in the period immediately preceding the appointment of

the commission in September 1997. By the time the commission was appointed in September, the events of February 1997 were quite peripheral to determining whether a legitimate expectation had arisen or not. The mistaken focus on the events of 21 February 1997 was a fundamental flaw in the Judge's reasoning in relation to his finding that the President erred in failing to afford SARFU and the other respondents a hearing prior to the appointment of the commission of inquiry. This misdirection had a major bearing on the referral to evidence, as will be described later.[22] The third basis upon which the Judge held the President's actions to be invalid, namely that he had not properly applied his mind to the matter, was also flawed by the Judge's failure to appreciate the proper character of the discretion conferred upon the President as well as by the "abdication fallacy".

(g) The structure of this judgment

[30] The appellants appealed against the whole of the judgment and order made in the court below. They argued that each of the three bases upon which the Judge had concluded that the appointment of the commission was invalid was flawed, that the President's exercise of his powers was quite proper in the circumstances and that the order made by the Judge should therefore be set aside. The respondents, however, argued that

22 At paras 234 – 239 below.

all three bases (outlined in paragraph 24 above) upon which the Judge held the exercise of the Presidential powers to be invalid were correct, save that they did not support the conclusion in respect of the first basis, that the abdication of responsibility was irrevocable. They argued, in addition, that the exercise of the President's powers was invalid on three further grounds: first, that the President had failed to consult the Deputy President as he was required to do prior to exercising the constitutional power to appoint a commission of inquiry; secondly, that the issues to be investigated by the commission did not constitute a matter of public concern and therefore both the appointment of the commission and the decision to make the provisions of the Commissions Act applicable were invalid; and thirdly, that the terms of reference of the commission are so vague as to render the appointment of the commission invalid.

[31] Each of the arguments raised by the respondents is considered in this judgment. In the next part of the judgment, we consider the abdication fallacy, both as a matter of law and of fact. In order to do so, it is necessary to evaluate the testimony of the President and the adverse credibility finding made by the Judge against the President. Thereafter, in the third major section, we analyse the powers conferred upon the President by section 84(2)(f) of the Constitution, and section 1 of the Commissions Act and the constraints upon those powers. In so doing, we deal with the respondents' arguments as to whether the President was obliged to afford SARFU and the other respondents a hearing prior to appointing the commission; the question whether the area of investigation entrusted to the

commission was a matter of public concern; and the question whether the President consulted with the Deputy President in relation to the appointment of the commission. In the fourth major section, we deal with the argument concerning whether the President properly applied his mind to the appointment of the commission and the argument concerning the vagueness of the terms of reference. Finally, there is a section dealing with costs and certain interlocutory and procedural matters: the question of the referral to evidence, including the important constitutional question whether the President should have been required to give evidence; the question of misjoinder; the appeal against certain interlocutory costs orders; the reserved costs of the recusal application; and the costs upon appeal. All the matters dealt with are constitutional matters or matters which are connected with the principal constitutional matter which has to be decided in this case, namely the validity of the President's actions, and for that reason are within the jurisdiction of the Court.[23]

(h) Appellants' arguments concerning bias on the part of the Judge in the High Court

[32] It remains only to mention that in their argument counsel for the appellants contended that the errors of fact and law in the rulings and judgment given by the Judge, and the manner in which he conducted the hearing, created the impression of partisanship which tainted his entire judgment. As we have come to the conclusion that the appeal should be upheld on the record as it stands, we need give no consideration to this issue

[23] Section 167(3)(b) of the Constitution.

and have refrained from doing so. No allegation of actual bias was made by the appellants. They asserted only that a reasonable apprehension of bias existed. In the circumstances, we are not obliged to consider the question, once we have decided that we can decide the case on the record.[24]

(i) Summary of findings in this judgment

[33] The appeal is upheld. In part B of the judgment, in paras 37 – 125 below, we deal with the question of abdication of responsibility.

(a) We hold that the Judge erred in concluding that at the meeting between the President and the Minister of 5 August 1997, the President irrevocably abdicated his responsibility to appoint a commission to the Minister. In our view, the words of the press statement of 7 August 1997 are not sufficient, in themselves, to establish that an abdication took place.

(b) More importantly, even if the words of the press statement warrant such a conclusion, the purported abdication would, as a matter of law, have been invalid and therefore void. It could never, therefore, have been irrevocable.

(c) Accordingly, the Judge's finding that the subsequent evidence relating to

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24 See *S v Rall* 1982 (1) SA 828 (A) at 834B – F; *S v Tyebela* 1989 (2) SA 22 (A) at 29H – 30E and our judgment in the jurisdiction hearing, above n 4 paras 41 – 2.

the President's consideration of the matter between 12 and 26 September 1997 was irrelevant and could have no effect on the determination of the issue was a material misdirection.

(d) We consider all the oral and written evidence relating to the President's consideration of the appointment of a commission of inquiry and conclude that there is no basis for finding that the President abdicated his responsibility. The President's and the Minister's evidence in this regard is corroborated in material respects by the evidence of Professor Katz which was accepted by the High Court.

(e) We consider the grounds upon which the Judge made adverse credibility findings against the President and find them to be wrong and that such findings constitute a material misdirection by him. The respondents argued that the President's testimony concerning his consideration, in the period between 12 and 26 September 1997, of whether a commission should be appointed was false and should be rejected. They argued that the evidence was false on the ground that the consideration of the matter by the President was merely a charade, and alternatively that, despite his evidence to the contrary, he gave no consideration to the matter whatsoever. In our view, there was no basis in the evidence for the imputation of such dishonesty to the President.

(f) In addition, we find that the imputation of perjury in relation to the events of 12 to 26 September 1997 was never put to the President in cross-examination. This failure contravened the principles governing the practice of cross-

examination. A witness is entitled to an opportunity to defend himself or herself against an allegation of mendacity. Such an opportunity was never afforded to the President.

[34] In part C of this judgment, at paras 126 – 222 below, we consider whether SARFU and the other respondents were entitled to a hearing prior to the President deciding to appoint a commission of inquiry.

(a) We conclude that there are two distinct legal decisions under challenge: the decision to appoint a commission of inquiry in terms of the Constitution; and the decision to make the powers of subpoena afforded by the Commissions Act applicable to that commission. We consider whether each of these decisions constitute "administrative action" as contemplated by section 33 of the Constitution.[25]

(b) We hold that in order to determine whether an act or decision constitutes administrative action, it is necessary to consider the function being performed. After a consideration of the nature of the President's power to appoint a commission of inquiry, we conclude that it does not constitute administrative action and that, therefore, the procedural fairness requirement for just administrative action demanded by section 33 of the Constitution is not necessary for the decision to appoint a commission of inquiry.

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[25] Section 33, as it currently reads, is cited in full in para 135 below.

(c) There are, however, other constraints on the exercise of that power. The doctrine of legality applies, as it does to all power exercised in terms of the Constitution. The President must also act in good faith and must not misconstrue the nature of his or her powers. In this case, we conclude that the President acted in accordance with those constraints when he appointed the commission of inquiry in terms of his constitutional powers. We also point out that the commission, upon appointment, must discharge its duties in accordance with the duty to act fairly.

(d) We find that the subject matter to be investigated by the commission constitutes a matter of public concern as required by the Commissions Act. We find that the demands of procedural fairness did not require the respondents to be afforded a hearing prior to the President's decision to confer the Commissions Act powers upon the commission. Accordingly, we do not find it necessary to decide whether the decision to make the provisions of the Commissions Act applicable to the commission constituted administrative action or not.

[35] In part D of the judgment, at paras 223 – 232 below, we reject the respondents' argument that the President failed to apply his mind properly to the appointment of a commission and hold that the terms of reference of the commission were sufficiently certain to determine the ambit of the commission's investigation.

[36] In part E, at paras 233 – 259 below, we hold that:

(a) there was no basis for the joinder of the Minister and the DG;

(b) the Judge misdirected himself when he decided to refer the matter to evidence;

(c) the decision to require the President himself to give evidence was fundamentally flawed; courts should be aware that the President is not in the same position as any other witness; the doctrine of separation of powers requires a court to seek to protect the status, dignity and efficiency of the office of the President and the President should be required to give evidence orally in open court in civil matters relating to the performance of his official duties only in exceptional circumstances.

B. ABDICATION OF RESPONSIBILITY

(a) The approach of the High Court

[37] One of the central findings in the judgment is that concerning what the Judge referred to as "the abdication of responsibility issue". The Judge's line of reasoning is the following: (a) the press statement of 7 August 1997 shows that, on 5 August 1997, at his meeting with the Minister, the President abdicated his responsibility in regard to the appointment of a commission of inquiry to the Minister and the press reports of 17 August 1997 show that the Minister had purported to exercise the President's power by appointing a commission of inquiry; (b) as a matter of law, a decision to appoint a

commission of inquiry is invalid if the President abdicates his responsibility relating to the making of the decision; (c) as a matter of law, the President's abdication was irrevocable; and (d) therefore the events subsequent to the abdication were irrelevant to determine whether the decisions taken by the President were valid.

[38] It is clear that under our new constitutional order the exercise of all public power, including the exercise of the President's powers under section 84(2), is subject to the provisions of the Constitution which is the supreme law. If this is not done, the exercise of the power can be reviewed and set aside by the Court. That is what this Court held in *President of the Republic of South Africa and Another v Hugo*.[26] It is clear also that section 84(2)(f) of the Constitution confers the power to appoint commissions of inquiry upon the President alone. The Commissions Act also confers the power to declare its provisions applicable to a commission of inquiry upon the President alone. The Judge was, therefore, correct in law when he held that, if the President had indeed abdicated either of these powers to another person, that abdication would have been invalid.

[39] What would constitute an "abdication" of the presidential power to appoint a commission of inquiry need not be precisely determined in this judgment. The Judge relied on the discussion of "unlawful abdication of power" in Baxter's *Administrative Law*. Baxter identifies the following three ways in which power can unlawfully be

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[26] 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 13.

abdicated: when an office-bearer unlawfully delegates a power conferred upon him or her; when an office-bearer acts under dictation; and when an office-bearer "passes the buck".[27] The Judge found it unnecessary to decide in which of these three ways the President had abdicated his responsibility. He held simply that if the President had uttered the words reported in the press statement of 7 August 1997, he had unlawfully abdicated his responsibility.[28]

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27 Baxter *Administrative Law* (Juta, 1984) at pp 434 – 444. See also *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117 F – G.

28 At p 1042 of the typescript judgment.

[40] The first category of "abdication" referred to by Baxter occurs where a functionary in whom a power has been vested delegates that power to someone else. Whether such delegation is valid depends upon whether the recipient of the power is lawfully entitled to delegate that power to someone else. There can be no doubt that when the Constitution vests the power to appoint commissions of inquiry in the President, the President may not delegate that authority to a third party. The President himself must exercise the power. Any delegation to a third party would be invalid. The second category referred to by Baxter deals with cases where a functionary vested with a power does not of his or her own accord decide to exercise the power, but does so on the instructions of another. The third category, "passing the buck", contemplates a situation in which the functionary may refer the decision to someone else. However, as Baxter points out, if the final decision is taken by the properly empowered authority, there is no objection to taking the advice of other officials.[29]

[41] When contemplating the exercise of presidential powers, there can be no doubt that it is appropriate and desirable for the President to consult with and take the advice of Ministers and advisors. Indeed, it is clear from the Constitution itself that the exercise of executive authority, in terms of section 85, is a collaborative venture in terms of which the President acts together with the other members of Cabinet. Similarly, where the President acts as head of state, it is not inappropriate for him or her to act upon the advice of the

[29] Above n 27 at 444.

Cabinet and advisors. What is important is that the President should take the final decision.

(b) The "abdication" on 5 August 1997

[42] For the reasons that follow, it is not strictly necessary for purposes of this judgment to consider whether, at the meeting with the Minister on 5 August 1997, the President abdicated his power to appoint a commission to the Minister. The Judge based his conclusion that an abdication had occurred on the text of the press statement, a document which was double hearsay against the President. That document stated that the President had allegedly told the Minister that "[a] commission is yours if, in your best judgement, it is opportune". In our view, it is not possible to construe the words attributed to the President as embodying an intention on the President's part to abdicate the powers conferred upon him by the Constitution, or for that matter, the Commissions Act. Even if it is assumed that the President uttered the words attributed to him in the press statement (and that is the high water mark of the respondents' case) this would not, on its own, evince an intention by the President to abdicate his powers and would not establish even a purported delegation to the Minister by the President of his constitutional power to appoint commissions of inquiry. It is clear from the oral and written evidence that the Minister and the President both knew that the President was the only person with the power to appoint a commission, and that if a commission were to be appointed, the appointment would have to be made by the President himself. The words "[a]

commission is yours if, in your best judgement, it is opportune", whether construed linguistically, contextually or purposefully do not purport to transfer anything to the Minister. At best for the respondents, they may mean that when the President decides whether to appoint a commission he would be guided by the Minister's judgment. We cannot, therefore, accept that the text of the press statement, on its own, can establish that an abdication of responsibility occurred. This finding, however, is not central to our approach to the matter, as we have described before.

[43] In the light of the foregoing, it is clear that, were the President to purport to delegate his or her powers in terms of section 84(2) of the Constitution or section 1 of the Commissions Act to another, that delegation would be invalid. However, it will not constitute an abdication of power, where it is clear that the President, although acting upon advice from advisors or members of the Cabinet, exercised the presidential powers himself or herself. The President is entitled to seek and rely on advice, but must make the final decision.

(c) The key error of law relating to irrevocability

[44] In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. In addition, the Constitution requires decisions by the President which will have legal effect to be in

writing.[30] Section 84(2)(f) does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry, but the method usually employed, as in the present case, is by way of promulgation in the *Government Gazette*. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation.[31] This the Judge failed to do. He erred, not only in treating the press statement as proof of an abdication of authority, but also in holding that the abdication, which he found as a matter of fact to have taken place, was irrevocable.

[45] In *Administrator, Cape v Associated Buildings Ltd,*[32] the Appellate Division had to consider an argument that a power vested by a provincial ordinance in the administrator acting with the consent of the executive committee of the province, had been wrongly

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30 Section 101(1) provides that:
"A decision by the President must be in writing if it –
(a) is taken in terms of legislation; or
(b) has legal consequences."

31 See, for example, *Rajee v Zeerust Town Council* 1938 TPD 283 at 290.

32 1957 (2) SA 317 (A).

delegated to the provincial secretary, and could not thereafter be exercised by the administrator in accordance with the requirements of the Ordinance. It dealt with that argument as follows:

> "In any event, whether there had been an effective delegation or not, there can be no question of the competency of the authority – the Administrator acting with the consent of the Executive Committee – that dealt with the matter on the 14th November, 1955. That was the occasion when the decision was taken which was communicated to the respondent's attorneys by the letter of the 17th November. I do not agree with the statement in the judgment of the Court *a quo* that
>
> > 'having delegated his authority to the Provincial Secretary and the latter official or somebody to whom he had delegated his powers having completed the matter delegated to him, the Administrator could not thereafter handle the matter himself.'
>
> The delegation was obviously not intended to be an irrevocable one or one that would divest the Administrator of the power of acting himself, nor can I conceive of any principle which could have given it that effect."[33]

In that case there had been a purported delegation of power to the provincial secretary prior to the exercise of the power by the administrator. Because the purported delegation was invalid, it could have no legal effect and could not preclude the administrator from subsequently exercising the power conferred upon him. The same holds true in this case. Even if, as a matter of fact, there had been an improper abdication by the President to the Minister on 5 August 1997, such abdication would have had no legal effect. It would have been a nullity, and as such, could never have been irrevocable. Like the

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[33] Id at 323.

administrator in the *Associated Buildings* case, the President would have retained the capacity to exercise the powers conferred upon him by the Constitution and the Commissions Act.

[46] Because the Judge mistakenly took the view that the discussions of 5 and 15 August 1997 constituted the crucial issue in this regard, he focussed his attention on those events and paid scant attention to what happened after that. The Judge accordingly took the view that the President had abdicated his responsibility to the Minister on 5 August 1997. He also found that the Minister had purported to appoint a commission on 15 August 1997. This finding was based on the press reports in the Sunday newspapers of 17 August 1997 and the testimony of Mr Gerber, the journalist who had written one of the reports. These reports were based on an encounter between the Minister and the two journalists on 15 August 1997. This finding is questionable for several reasons: there was a material conflict between the two newspaper reports as to what the Minister had said;[34] the Minister also denied in oral evidence that he had taken a decision to appoint the commission; and it is improbable that the Minister would have purported to appoint a commission, when he knew that it was a power only the President could exercise. However, it is not necessary to deal with this question at all. Even if the Minister had purported to appoint a commission on 15 August 1997, such an act would have been invalid and a nullity.

[47] The factual issue to which the Judge ought to have directed his attention was whether the President gave consideration to the matter during the period 12 September to 26 September 1997, the latter date being the one on which the notice appointing the commission was published in the *Government Gazette*. However, because of his legal conclusion that the alleged abdication was irrevocable, the Judge considered all the evidence subsequent to the abdication to be irrelevant to his determination of the abdication issue. That conclusion of law was incorrect. The true evidential question is whether, in the period immediately before he appointed the commission, the President applied his mind to the appointment of the commission.

(d) The respondents' arguments

[48] Indeed, the respondents correctly did not attempt to argue that the alleged abdication of 5 August 1997 was, in law, irrevocable and, in effect, abandoned the Judge's conclusion in this regard. They accepted that even if this Court could be persuaded that an abdication had taken place on 5 August 1997, they would need to show that the President had persisted in that abdication in the weeks that followed. In the light of the evidence relating to the President's consideration between 12 and 26 September 1997 of

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[34] See para 9 above.

the appointment of the commission which will be considered below, the respondents had the task of persuading the Court not only that an abdication had taken place on 5 August 1997 but also that they had proved one of the following factual alternatives. First, the President gave no consideration to the question whether to appoint a commission during September 1997. Secondly, such consideration as he gave was merely a charade because the President and his advisors thought that an irrevocable abdication had taken place in August. Thirdly, the President wished to persist in the earlier abdication and therefore gave no genuine consideration to the question whether a commission should be appointed or not.

[49] In the light of the foregoing, the question of what exactly happened on 5 August 1997 is, at best, peripheral to the issues that need to be determined in this case. Whether or not there had been a purported abdication of responsibility by the President on that day, the question remains whether in the subsequent weeks the President in fact exercised his powers under the Constitution and the Commissions Act correctly. It is, therefore, unnecessary for this Court to consider the former question in any detail. It is the President's evidence of what happened between 12 and 26 September 1997 that is crucially relevant. None of the other witnesses was able to shed light on those events, save for Professor Katz, the Minister and the DG in relation to the delivery of the Tshwete file on 12 September 1997. For this reason it is necessary, later in this judgment, to consider carefully the Judge's adverse findings relating to the demeanour and credibility

of the President. The evidence provided by the DG and the Minister related primarily to the events between February and August 1997. Although adverse credibility findings were made against them by the Judge, it is not necessary for the purposes of this judgment to consider those findings. Nor is it necessary to consider the challenge made by appellants' counsel to the veracity of the testimony of the respondents' witnesses whom the Judge had found to be truthful and reliable. For the purposes of this judgment, we shall assume in favour of the respondents that these findings made in respect of the Minister, the DG and the respondents' witnesses are correct.

(e) The evidence relating to the events of 12 – 26 September 1997

[50] In his initial answering affidavit, the President states that the decision to appoint the inquiry was his alone. He states that the Tshwete file had been placed before him on 12 September 1997 and that he gave it careful consideration before he decided to appoint the commission. He also states that he took into account his own knowledge of the history and nature of the controversy concerning rugby in making the decision. He states that:

> "It was not a decision lightly taken and I did so only after taking into account all the considerations for and against such an appointment."

In their reply, the respondents deny these averments and assert that the President merely rubber-stamped the decision of the Minister. In a supplementary affidavit filed by the Minister, and confirmed in so far as it related to him by the President, the Minister states

that in order to assist the President in determining whether a commission should be appointed or not, he arranged the preparation of the Tshwete file and that he, together with Professor Katz and Mr King, presented that file to the President on 12 September 1997. In his evidence, which will be discussed below, Professor Katz stated that he had advised the President to consider the matter and seek advice from his legal advisor.

[51] During cross-examination, the President stated that he followed this advice and indeed discussed the Minister's motivation with both Professors Haysom (his legal advisor) and Gerwel (the Director-General in his Office) and that they had come to the conclusion that the Minister had made out a case for the appointment of a commission. That evidence was not challenged during cross-examination and the Judge also accepted that there was consideration of the matter by the President from 12 September 1997 onwards after the Minister's memorandum and the Tshwete file had been handed to him. As indicated above, however, the Judge regarded this as being of no relevance because once the President had "abdicated his responsibility" such consideration "did not and could not cure the impropriety". The Judge further held that:

> "... in any event, even if he had from 12 September onwards read the memorandum and skimmed through the newspaper clippings, it would again be a neutral consideration equally consistent with the applicants' version. Had he earlier abdicated his responsibility and had the Minister taken the effective decision, and had he been warned to go through the motions of looking at it and reading it, it could never have amounted in law to a proper consideration of the matter.
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> Respondents' counsel point out . . . that the President discussed the matter with

> his director-general, Gerwel, and his legal advisor, Haysom, and concluded that the Minister had made a case for the appointment of a commission of inquiry ....
>
> The same consideration . . . apply. Had the President earlier abdicated his responsibility, it could never have amounted in law to a proper consideration of the matter."[35]

[52] There is no basis in the evidence for the comment that the President might have been "warned to go through the motions" of reading the Tshwete report. No such suggestion was put to the President in cross-examination. Moreover, the evidence of the President and the Minister was corroborated in material respects by the testimony of Professor Katz and his evidence is of definitive significance in this regard. It was never challenged or questioned and must be accepted as correct. He said that on 12 September 1997 he attended a meeting with the President, in the company of his partner, Mr Knowles, the Minister and the DG. At this meeting the written motivation, embodied in the Tshwete file, was handed to the President. Professor Katz, at the invitation of the Minister, outlined very briefly its general contents. Thereafter he:

> ". . . suggested to the President that he should take time to consider the matter, that he should seek his own legal advice. I mentioned the name of the Presidential legal adviser, Professor Hasem [sic], and I suggested to the President that it was important that the appropriate procedures should be complied with."

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35 At p 948 – 949 of the typescript judgment.

According to Professor Katz, "the President said that he would do so, that he would be contacting Professor [Haysom] and that he would take his time to evaluate the documentation."

[53] In cross-examination, Professor Katz said that although he had not personally seen any of the newspaper or other media reports concerning what had passed between the President and the Minister on 5 August 1997, he was informed of the contents of the press statement by Mr King and by Mr Knowles. From this he had understood that "the Minister [had] agreed with the President to appoint a commission." Professor Katz testified that he was "concerned" about this intimation on the ground that "if it was accurate, that without full submission, the decision had been taken." It is clear from his evidence that Professor Katz did not know what had happened between the President and the Minister. His concern was that if the reports were correct and carte blanche to appoint a commission had been given to the Minister, a decision might be taken without a proper submission being made to the President. This was the very reason why he attended on the President on 12 September 1997; he wanted to ensure that the matter be dealt with correctly. Professor Katz made it clear during cross-examination that his concern that the matter be dealt with on a procedurally correct basis was a broad concern and not a narrow one limited to the possibility of a review application. Despite several interruptions from the cross-examiner and attempts to limit artificially the import of his evidence to some narrower procedural concern, Professor Katz made it clear that his concerns were of a

broader nature:

> " With respect, Mr Maritz, I was not only concerned about a review. I wanted what was happening in SARFU to be fair and procedurally correct . . . It was my idea to have the task-force in the first place. I was concerned for South African rugby and I wanted the right thing to take place . . . But I am saying , with respect, my lord, [my concern] was not limited [to the possibility of a review]. I wanted it to be fair . . . What must be done, must be fair. It must be fair to SARFU, it must be fair to Dr Luyt, it must be fair to the administration. So it was not simply a question of review – it was a question of fairness."

[54] Professor Katz made it clear that, based on what had been conveyed to him about the media reports, it never entered his mind that this had amounted to an abdication of the President's responsibility in terms of the Constitution and that this had not been suggested to him by anyone. He said that he had spoken to Mr Knowles and said to him that "if the President had, without bringing his mind to bear on the matter . . . agreed to the appointment of a commission, it would have been procedurally a breach" and that it was his function and that of Mr Knowles to ensure that a proper submission would be prepared which would comply with the requirements of legal procedure.

[55] No proper reading of Professor Katz's evidence can warrant the inference that either he or Mr Knowles was of the view that the President had, prior to the meeting of 12 September 1997, "abdicated his responsibility under the Constitution"; least of all that what the President had been reported to have said or done constituted some irrevocable legal act which thereafter precluded the constitutionally proper appointment of the

commission in question. It is clear that the advice given by Professor Katz to the President was quite to the contrary, namely, that the President should consider the matter carefully, that he should take his time about doing this and that he should consult his own legal advisor, Professor Haysom. Implicit in all of this is the opinion that, provided that the correct procedure is followed and that the President considers the matter properly, a commission can properly and lawfully be appointed. Mr Knowles clearly held the same view. He forwarded the draft of the Tshwete file which he had prepared to the Department of Sport and Recreation under cover of a letter dated 10 September 1997, saying it should be finalised and submitted to the President. The letter continues:

> "The President will appreciate, as a consequence of his office and as a man of legal training, that he should consider the documentation and make a deliberated decision as to the appointment and its consequences. We must anticipate that SARFU and its associates will keep more than a watchful eye on the proceedings."

What is more, the President on his own evidence, completely unchallenged in this regard, heeded this advice and consulted both Professor Haysom and his Director-General, Professor Gerwel.

[56] Despite this wholly unchallenged evidence of Professor Katz, which could not properly have been rejected and indeed was not rejected by the High Court, the following conclusion is reached in the judgment:

> "Katz did not, in my view, corroborate the President's version at all. The meeting of 12 September 1997 is completely neutral and as consistent with the applicants' version as

with that of the respondents'."[36]

In our view this is a material misdirection which flows directly from the mistaken legal conclusion concerning the abdication issue, to which reference has already been made. Not only was the legal conclusion in this regard wrong, but there is no evidence, whether direct or inferential, that either Professor Katz or the President, or for that matter anybody in the President's office concerned with the matter, thought that there had been an abdication, irrevocable or otherwise. In these circumstances the evidence of Professor Katz provides material corroboration for the President's evidence. Professor Katz warned the President of the likelihood of a review application and no reason suggests itself why the President would not have followed the advice to take his time, consider the matter carefully and to consult his own legal advisor.

[57] The evidence of Professor Katz and the President that the advice was given and accepted and acted on by the President, who consulted Professors Gerwel and Haysom before taking the final decision to appoint a commission, was a complete answer to the rubber-stamping argument. Respondents' leading counsel, Mr Maritz, appreciated this, and before his brief was terminated he correctly acknowledged this saying that if this evidence were correct it would refute the rubber-stamping argument, though it would not necessarily be destructive of the broader contention that the President had failed to give

36 At p 953 of the typescript judgment.

proper consideration to the matter. That, so he contended, was a separate enquiry which depended on other considerations.

(f) The failure to cross-examine the President on key issues

[58] Mr Maritz persisted, however, in the rubber-stamping argument contending that the President's evidence that he had consulted Professors Gerwel and Haysom, and had considered the Minister's memorandum and the Tshwete file should be rejected. There was no evidence to support Mr Maritz's contention on this issue, nor any apparent reason why the President should have ignored the advice given to him by Professor Katz. Mr Maritz suggested that the President might have been too busy to give consideration to the Tshwete file and to consult with Professors Gerwel and Haysom on it, or he might have thought that there was no purpose in doing so because the abdication was irrevocable, or because he did not wish to undo such abdication.

[59] None of these possibilities was however raised with the President during cross-examination. The suggestions that the President might wrongly have thought that what had occurred on 5 August 1997 was irrevocable, or that he might have been too busy to meet his advisors and consider the Tshwete file, or that he may have decided to persist with an earlier abdication, were not put to the President in cross-examination. Nor was it put to the President that he had not consulted Professors Gerwel and Haysom before taking the final decision to appoint a commission. Mr Maritz contended that there was no

need to do so because it was implicit in the rubber-stamping contention that this did not happen.

[60] The implication of this argument was that the President had ignored the advice given by Professor Katz, had deliberately perjured himself in giving evidence that he accepted and acted on such advice, that the reasons given by him in his letter of 3 October 1997 for his decision to appoint the commission were false, and that he had in fact misled his legal representatives and the court in this regard. That is a grave allegation to make against any witness. It is particularly serious if made against the President of the country.

[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn*[37] and has been adopted and

[37] (1893) 6 The Reports 67 (HL).

consistently followed by our courts.[38]

[62] The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses".[39] It is still current in England[40] and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.[41]

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38 See, for example, *R v M* 1946 AD 1023 at 1028 per Davis AJA, Watermeyer CJ, Greenberg JA and Schreiner JA concurring; *Small v Smith* 1954 (3) SA 434 (SWA) at 438 E – H; *S v Govazela* 1987 (4) SA 297 (O) at 298J – 300B; *S v Van As* 1991 (2) SACR 74 (W) at 109 b – g; *Van Tonder v Killian NO en 'n Ander* 1992 (1) SA 67 (T) at 72I – 73A and, generally, Pretorius *Cross-examination in South African Law* (Butterworths, Durban 1997) and the authorities referred to there.

39 See the speech of Lord Herschell in *Browne v Dunn*, above, at n 37.

40 See *Cross and Tapper on Evidence* 8 ed (Butterworths, London 1995) at 318 – 20 and *R v Fenlan and Neal* (1980) 71 Cr App Rep 307 at 313 – 4.

41 For example, in Canada, see Sopinka, Lederman and Bryant *The Law of Evidence in Canada*, (Butterworths, Toronto and Vancouver 1992) at 876 – 9; *R v Dyck* [1970] 2 CCC 283 (BCCA) at 290 – 2; *Palmer and Palmer v R* [1980] 50 CCC 193 (SCC) at 209 – 10; and *Machado v Berlet* (1987) 32 DLR (4th) 634 (Ontario High Court of Justice) at 637 – 8; and Australia, see *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* 44 ALR 607 (SC (NSW))(1983) at 623 – 34, where there is an extensive and illuminating discussion of the rule.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed,[42] particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings.[43] It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged.[44] This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.[45]

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention

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42 *Allied Pastoral Holdings*, above n 41, at 628.

43 Id at 634.

44 Id at 630.

45 Id.

is otherwise manifest, it is not necessary to cross-examine on the point,[46] or where "a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box."[47]

[65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike. In the case of the President of this country there is an added dimension. Not only are his personal honour and dignity at stake. He, as head of state, is representative of all the people. That being so, the rule needs to be observed scrupulously.

[66] In the instant case, however, none of the exceptions apply; that is to say they do not apply to the most crucial factual issue in the case, namely, whether the evidence of the President (on affidavit and under oath in the witness box) regarding the events which

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46 Above n 37.

47 See the speech of Lord Morris in *Browne v Dunn*, above, n 37.

occurred between 12 and 26 September 1997 was a contrived and dishonest concoction. It is clear beyond doubt that the President could not be honestly mistaken in this account. Either it is true or it is a meretricious deceit. On the respondents' argument and implicit in the reasoning of the High Court, it could be a dishonest sham in one of three ways. First, the events described never took place and have simply been invented by the President. Secondly, the President and those advising him thought that the President had, on 5 August 1997, irrevocably in law abdicated his power to appoint a commission, thought that nothing could be done to rectify this lawfully and staged a charade. Thirdly, the President and those advising him not only thought that an abdication had taken place but intended to persist with it and therefore staged the charade. The charade was one of going through the motions of drawing up a ministerial motivation, consulting on the issue and the President reading the prepared motivation, believing that this would have no legal consequence, but nevertheless physically going through the set piece with some hope of it saving the day. The only other possibility is the one contended for by the appellants, namely, that whatever was said by the President to the Minister on 5 August 1997 had no legal consequence in relation to the exercise by the President of his section 84(2)(f) power, which power he could still validly exercise at any time thereafter, provided he did so constitutionally, and which power he did properly exercise thereafter. The onus was of course on the respondents to prove that the President's evidence on this decisive issue was dishonest in one of the above ways.

[67] In his judgment, the Judge came to the conclusion that:

> "the case of the applicants was fully and fairly put to the President in cross-examination. However, to the extent that any aspect of the applicants' case had not been expressly put to the President, he, to my mind, probably had notice beforehand of any such point."[48]

This must be understood in the light of his finding that the impropriety of the abdication of responsibility on 5 August 1997 could not be cured by a subsequent consideration of the matter, his finding that it could be accepted that the President gave consideration to the matter from 12 September 1997 onwards, and his apparent acceptance of the President's evidence concerning the discussions with Professors Gerwel and Haysom.

[68] It is convenient to deal first with the finding that the President "probably" had prior notice of every point in the respondents' case which had not been expressly put to him. This was based on two grounds only. The first was a single passage in the replying affidavit attested to by Dr Luyt and the second a submission in the present respondents' written argument, in support of the application to the High Court for the issues to be referred to oral evidence. These grounds will be dealt with in turn, and must be considered in the light of the way the case was pleaded.

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48 At p 925 of the typescript judgment.

[69] The legal grounds set out in Dr Luyt's founding affidavit on which the respondents relied in challenging the appointment of the commission, have been identified above.[49] Nowhere was it suggested that the President had not appointed the commission himself. The complaint was that, in appointing the commission, he had not applied his mind properly. In his answering affidavit the President denied the averment that he had not applied his mind properly to the matter, and said that he had given proper consideration to the matter, referring in that context to the information which had been placed before him in the Tshwete file. In the replying affidavit it was asserted in response to this averment that the President had "abdicated his responsibility to decide himself and left the decision to the Minister", and that:

> "The President's insistence that he carefully considered the material placed before him (from 12 September onwards) and that he alone took the decision and his denials that he had merely rubber-stamped the Minister's decision, therefore simply cannot be true."

That assertion was formulated as a conclusion drawn from the allegation that there had earlier been an abdication of responsibility. The allegation that responsibility had been abdicated was in turn based on double hearsay – the press statement that the President had said to the Minister "[a] commission is yours if, in your best judgement, it is opportune," followed by the bald legal conclusion that "[t]he aforegoing statement makes it perfectly

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[49] See para 13 above.

clear that the President abdicated his responsibility to decide himself and left the decision to the Minister."

[70] The submission in the written argument referred to above was to the effect that the President's denial of the rubber-stamping charge and his own version of having taken the decision properly "should be rejected on the papers alone as demonstrably false". What has been said in the preceding paragraphs in regard to the respondents' cause of action at that stage, applies with equal force to this submission. This submission must moreover be read in the context of what respondents' counsel himself understood, and must have intended, it to mean. In final argument before the Judge on the rubber-stamping issue the following is stated by respondents' counsel:

> "it is important at the outset to *clearly state that we do not question the President's integrity or honesty*. The issue of reliability, is however, a different matter . . . [A]t the same time I want to make use of this opportunity *to state quite clearly that we have been accused of having called the President a liar. We have not done that.* We have said, certainly that his evidence is not to be accepted and that we still submit." (emphasis supplied).

[71] Such a submission could never have been made if the respondents' case had been that the President had engaged in a dishonest charade. The Judge correctly held that the above statement did not amount to a formal admission. But this in no way detracts from the fact that this passage is a description, by respondents' leading counsel himself, of what meaning should be attached to any imputation which up to that stage might have been

made against the President. It is also the only reasonable explanation for the failure to dispute the President's evidence relating to his meeting with Professor Katz and the fact that he acted on the advice given to him. That could only have been disputed by a direct challenge to his integrity and honesty. In the light hereof there is simply no factual basis for the conclusion reached by the Judge that the President had prior warning that his honesty and integrity were going to be impugned.

[72] It is finally necessary, on this issue, to deal with the High Court's finding that "the case of the applicants was fully and fairly put to the President in cross-examination." A close reading of the President's cross-examination does not reveal that it was ever suggested or even implied, either that the evidence of the President as to the way in which he considered the appointment of the commission on and after 12 September 1997 was a perjured concoction or, if he had done what he said he did, this was no more than a fraudulent charade. Such a conclusion simply cannot be reached when regard is had to the description given by leading counsel himself as to what the respondents' case was throughout.

[73] Never was it suggested or implied, least of all put in cross-examination, that the President was being untruthful or dishonest. His evidence on affidavit, that the Minister, in the company of two members of the task team, had presented a written memorandum to him, was accepted as was his oral amplification thereof that the two members were

Professor Katz and Mr Knowles. The President was asked by respondents' counsel:

> "Mr President, did Prof. Katz at that time caution you that or express a warning that there would possibly or likely be a court case ?"

The President's affirmative answer was left unchallenged. Under cross-examination the President testified as follows:

> "When I started [read "studied"] that motivation and when I discussed the matter with my own advisors, the director-general, Prof. Jakes Grabe [read "Gerwel"], Prof. Hayson [read "Haysom"], my legal advisor, we decided that the minister had made a case for the appointment of a commission and I, and I alone, supported that commission."

This was also never challenged in any way. Least of all was it suggested that this discussion with his advisors was a concoction. Many aspects of the case raised in the respondents' affidavits were canvassed with the President. What was not canvassed, however, was the case argued before this Court, namely, that the President's evidence as to how he considered the written motivation, discussed it with his advisors and came to the decision to appoint the commission, was a dishonest sham. There is a reason why this case was not put to the President. It simply did not, even at that late stage of the oral evidence, constitute or form any part of the respondents' case. This is clear from the following statement by Mr Maritz during the cross-examination of the President:

> "The question of rubber stamping is not in itself a separate legal cause of action, it is but a facet of the cause of action or the review ground of a failure to properly consider the matter."

[74] A further basis for the Judge's conclusion that the President's honesty had been sufficiently placed in dispute was his acceptance of Mr Maritz's submission that the President during cross-examination complained on a number of occasions that the cross-examiner was improperly or unfairly impugning his honesty and integrity. Those comments were made in relation to the cross-examination of the President on the DG's press statement dealing with the events of 5 August 1997. But one simply cannot conclude, as the Judge did, that because the President (rightly or wrongly) thought his credibility was under attack on this issue, this establishes that it was properly put to the President that he had engaged in a dishonest charade in pretending to consider the Tshwete file. Either the President's honesty in respect of the crucial issue referred to above was challenged by the cross-examiner or it was not. The record shows that it was not. The fact that the President thought, wrongly as it transpired, that his honesty was under attack on quite another issue, cannot as a matter of logic remedy the failure properly to challenge on the crucial issue.

[75] The Judge accordingly misdirected himself in a material respect when he concluded that it was clear to the President when giving evidence that the respondents were impugning his evidence concerning what had been said to him at the meeting of 12 September 1997, and his evidence that he had considered the Tshwete file and consulted with his advisors thereupon. The Judge also misdirected himself when he held that the

President had been given prior notice that his credibility in this regard was to be impugned. This misdirection seriously affects the weight to be attached to the Judge's findings on credibility and demeanour.

[76] It cannot be suggested, nor was it suggested in argument, that the content of the President's evidence on the issue was of "so incredible or romancing a nature" that it rendered specific cross-examination as to dishonesty unnecessary. Under these circumstances it would be manifestly unfair to disbelieve the President when, had it been suggested to him in cross-examination that the events in September 1997 were a dishonest sham, he could have called Professors Haysom and Gerwel to corroborate his version. It was under the circumstances not open to the High Court to disbelieve the President on this issue; particularly when the rejection was based, not on any evidence to the contrary, but on unwarranted inferences from hearsay evidence that the President abdicated his responsibility to the Minister and an unfounded legal conclusion as to the irrevocability of such abdication.

(g) The weight to be attached to the Judge's findings based on demeanour

[77] The Judge made adverse findings concerning the President's credibility as a witness and his demeanour in giving evidence. By demeanour is understood the subjective manner in which a witness testifies orally, as opposed to the objective content of the evidence so given. The trial court sees and hears the witness testifying and is thus

able to evaluate how a witness responds to questions and produces answers. This immediate relationship between witness and trier of fact enables the latter to assess the evidence in the light of the behaviour and conduct of the witness while testifying, whereas the court of appeal is restricted to the written record of the witness's oral testimony.[50]

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50 In *Wigmore on Evidence* 1A §24 note 5 (p 950 (Tillers rev. 1983)) the following is stated:

> "Just as real evidence is a physical fact, demeanor evidence is a physical event, the conduct of the witness in testifying. Both are directly perceived by the trier, and both are accompanied by probative propositions presented by the witness in the form of testimony . . ."

[78] The deference which a court of appeal ought properly to accord credibility findings made by a trial court based directly or indirectly on the demeanour of witnesses who have testified orally before it, is not a matter of easy or simple formulation. The correct approach to this matter, as well as to appeals on fact generally, was enunciated in *R v Dhlumayo and Another*.[51] These prescripts are not rules of law but guidelines.[52] While the guidelines laid down in *Dhlumayo* have been consistently followed by our courts, caution has been expressed by the Supreme Court of Appeal concerning the reliability of demeanour findings, as, for example, in the following passage in *S v Kelly*:[53]

> "In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour - 'that vague and indefinable factor in estimating a witness's credibility' (*per* Horwitz AJ in *R v Lekaota* 1947 (4) SA 258 (O) at 263) - can be most misleading. The hallmark of a truthful witness is not always a

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51 1948 (2) SA 677 (A).

52 *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A) at 740B – C. This was explained as follows in *Dhlumayos*'s case, above n 51, at 695 – 6:

> "It is particularly undesirable to tie the hands of appellate courts by rules which are not loose and flexible - see *Rex v Abel* (1948 (1), SALR 654) and cases therein cited. General lines of conduct may be laid down, but they must be such as will assist and not hamper an appellate court in dealing with the problems which may arise in any particular case in the manner most consistent with the attainment of justice. Any principles which may be laid down are in the main clearly only rules of common sense, and not rules of law. . . . The only legal principles involved are, so far as I know, the fundamental one that an appeal is a rehearing to which the appellant, who has been given leave to appeal or where no leave to appeal is necessary, is entitled as of right and that – in certain circumstances – the incidence of the *onus* may be all-important.
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> . . . .
>
> The principle which has been adopted that an appellate court will not ordinarily interfere with a finding of fact by a trial judge . . . . is no more than a common sense recognition of the essential advantages which the trial judge has had, as a consequence of which the right of the appellate court to come to its own conclusions on matters of fact, free and unrestricted on legal theory, is necessarily in practice limited."

53 1980 (3) SA 301 (AD) at 308B – D, cited with approval in *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979C – F.

> confident and courteous manner or an appearance of frankness and candour. As was stated by Wessels JA in *Estate Kaluza v Braeuer* 1926 AD 243 at 266 more than half a century ago in this Court:
>
> > 'A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.'
>
> On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person."

[79] The advantages which the trial court enjoys should not, therefore, be over-emphasised "lest the appellant's right of appeal becomes illusory."[54] The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities.[55] As indicated above, a finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. The passage from *S v Kelly* above correctly highlights the dangers attendant on such interpretation.[56] A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs

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54 *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648E per Miller AJA. See also, *Germani v Herf and Another* 1975 (4) SA 887 (A) at 903D – E.

55 See, *S v Civa* 1974 (3) SA 844 (T) at 846D – 847A and the authorities there referred to; and the *Dumbarton Oaks* case above n 53 at 979G – I.

56 Para 78 above and n 53.

fundamentally from that of the trier of fact.[57]

[80] As was said in *Dhlumayo*'s case:

> "10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

[57] The recent radical revision of the so-called cautionary rule in sexual assault cases (see *S v J* 1998 (2) SA 984 (SCA)) is a reminder that today's received wisdom regarding human behaviour and the ability of the lay person to correctly interpret it, may tomorrow be discarded as irrational and out of date. It is unnecessary, however, for purposes of this case, to pursue this matter any further.

> 11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter."[58]

[81] If these principles are applied to the present case, very little, if any, weight can be accorded to the findings by the Judge, whether express or implied, which impugned the honesty of the President on the basis of his demeanour. This is so for basically three reasons. First, as pointed out above, the irrevocable abdication finding by the Judge against the President was fundamentally and demonstrably wrong, even assuming that the President had used the words attributed to him in the press statement. It was wrong in law and on the facts; it was a fundamental misdirection that established a false basis for the Judge's inferential reasoning; and it clouded and skewed his assessment of the probabilities and the credibility of the President in relation to virtually all the events subsequent to 5 August 1997. How seriously this flawed the Judge's approach to the President's demeanour and credibility appears from the judgment itself. Immediately before considering the President's demeanour the following finding is recorded:

> "As indicated, the overwhelming probabilities are that the President said to the Minister of [read "on"] 5 August 1997: 'A Commission is yours if, in your best judgement, it is opportune', or words to that effect, *and thereby abdicated his responsibility.*"[59] (emphasis

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58 Above n 51 at 706.

59 At p 769 of the typescript judgment.

supplied).

Seven lines lower down the following is stated:

> "In so far as the President's evidence *on other aspects of the matter is in conflict with the above finding on the probabilities*, I find that such evidence is also not credible".[60](emphasis supplied).

[82] Secondly, the Judge failed to have any regard to the failure by respondents' counsel to cross-examine the President on vital aspects of his evidence relating to the events from 12 September 1997 onwards and accordingly erred in not having any regard to the consequences of such failure. As indicated above,[61] the Judge misdirected himself in coming to the conclusion that the honesty of the President had been properly challenged. Such misdirection further substantially erodes the reliance which can be placed on any demeanour finding adverse to the President.

[83] Thirdly, the Judge avoided an express finding that the President was untruthful and, immediately after the second passage quoted in paragraph 81 above, said:

> "That may again be due to lack of veracity, or unreliability, or a combination of both these factors. However, it is again unnecessary, to my mind, to attempt to determine its cause.
> It is indeed unfortunate to have to come to these conclusions in regard to the credibility

60 Id.

61 At paras 72 – 76 above.

of the President."[62]

[84] Whatever the ordinary meaning of "unreliable" might be, there was no specific finding that the President had been deliberately dishonest and had engaged in the dishonest charade, pretending to consider the Tshwete file and to have regard to the advice given to him by Professors Gerwel and Haysom, then concocting reasons for his decision, and perjuring himself as a witness in order to mislead the court as to what had actually happened. No such finding would have been justified on the evidence and no such finding was made. Nothing short of such a finding would have justified the conclusion that the respondents had discharged the onus that was on them on this issue.

(h) The findings made concerning the President's demeanour

62 At pp 769 – 770 of the typescript judgment.

[85] The President's evidence and the findings made by the Judge concerning his demeanour must be seen in the context of the order that he give evidence and the manner of his cross-examination. We were referred to no case, and we know of none, in which a head of state has been required to give oral evidence in review proceedings to justify a decision taken as part of his or her official duties.[63] The President was ordered – over objections by his counsel – to give evidence in response to a double hearsay statement which was inadmissible against him. He honoured the order, came to court at considerable inconvenience to himself, and was cross-examined for more than a day.

[86] In evaluating the President's evidence the Judge failed to appreciate the implications of the extraordinary order he made requiring the President to give evidence, the sensitivities it engendered and the political subtext it gave to the case which involved not only the litigants and their legal representatives, but also the Judge as the judicial officer in control of the proceedings. The political atmosphere was introduced by the averment that the President had rubber-stamped the Minister's decision, the demand that he subject himself to cross-examination, a suggestion that the government was interfering in sport in much the same manner as had been the case under apartheid, and contentions in Dr Luyt's founding affidavit that the Minister's representations to the President were

63 See the further discussion of this in paras 240 – 245 below.

motivated by an ulterior purpose, including "resentment of the fact that rugby is controlled by whites and mostly Afrikaners and not by the government"; and resentment of the fact that he and SARFU had "not been prepared to meekly and tamely tolerate government interference with and intervention in the affairs of SARFU" and resentment of "SARFU's refusal to effectively hand over control of rugby, its assets and management to the government."

[87] The Judge commented adversely on the President's evidence, finding that he had failed or refused to answer a number of questions, had used the court as a podium for political rhetoric, had suggested which of the witnesses should be believed, had queried rulings by the court, had insulted the cross-examiner, had been argumentative and had attempted to intimidate the cross-examiner into refraining from questioning him on matters relating to credibility, and had made defamatory remarks concerning Dr Luyt. The passages in the record cited in support of these findings are, however, not really findings as to demeanour, but more in the nature of general criticisms of the President's evidence.

[88] It is correct, however, that the President was at times argumentative, and that he also made disparaging comments concerning the cross-examiner. The President's attitude, however, needs to be understood in the context of the case described above and does not provide the basis for a finding that the President was a dishonest or untruthful

witness. The Judge says that an impression was created that the President was attempting to deter the cross-examiner from cross-examining him on matters relating to credibility. The President was obviously deeply offended that his evidence concerning what he had said to the Minister was being disputed. It is clear from various passages in his evidence that he felt humiliated by the cross-examination and considered the attack upon his credibility in relation to the events of 5 August 1997 to be a personal affront which affected not only himself personally, but also the people of the country whose representative he was. He also clearly thought that his being summoned to court as a witness to be cross-examined on his affidavit, and his denial of the averment that he had rubber-stamped the Minister's decision, revealed a lack of respect for him as President, by the Judge, the respondents and their legal representatives. His feelings are revealed in a brief comment which he made to the cross-examiner:

> "To question the statement made by the President of the country made under oath, is an experience that is new. I do not know and I say this again with respect, I do not know if under the previous order a thing of this nature would have happened."

[89] Examples given by the Judge of "unbridled defamation" of Dr Luyt were the following:

> "Let me say, judge, I never imagined that Dr Luyt would be so insensitive, so disrespectful, so ungrateful as to say of the President of this country that when I gave my affidavit and signed it under oath, I was telling lies . . . I never imagined that he would do a thing like that. [As appears from para 74 above, the President was referring to the fact that the respondents were challenging his evidence in relation to the events of 5 August

> 1997.] There must be something why [Dr Luyt] is resisting an investigation to find out what is going on in Sarfu and people who know, they say he was alright, he was prepared to work with the task team, when they limited their investigation to Sarfu, but once they decided to probe into the financial affairs of the organisation, Dr Luyt saw red. It was like a red cloth in front of a bull and I think Dr Luyt in his founding affidavit is giving a message which he does not want us to know. He is saying I have something to hide and I might add just to round up this matter, that in December . . . he telephoned me to say he want[ed] to see me and because of my respect for him, notwithstanding the tight programme I have, I said he should come immediately. His request was that I should withdraw this commission. I spoke to him earnestly as my collaborator, I said Louis, do not ask for that because the message that you will be sending, you will be saying I have something to fear, I do not want . . . the transparency about the affairs of Sarfu, don't do that. He has done that notwithstanding the advice I gave to him. Dr Luyt projected in that founding affidavit is somebody totally different from the one I knew and I just wondered to myself what has gone wrong with Dr Luyt? What has he done to the affairs of Sarfu? Only if he has got something which is irregular, which puts him on a lower moral ladder, could he challenge, could he refuse that there should be a probe because if he knows that he has done nothing wrong, he would welcome a commission . . . so that we can rescue rugby from this unhealthy environment."

And

> "I have told you that Dr Luyt had cooperated with the task team and until the team wanted to investigate his financial affairs, that was when he invented this theory [that there would be no investigation until the allegations had been put to him] which contradicts his own conduct . . ."

That there was a meeting between the President and Dr Luyt at which Dr Luyt asked the President to withdraw the commission and that the President responded in the manner described by him in his evidence was not disputed.

[90] The President's attitude to Dr Luyt must be understood in the context of his evidence when he was asked at the beginning of his cross-examination about the role-players who participated in bringing about unification in rugby. He said:

> "Then there is Dr Luyt . . . we were collaborators, we were partners. It was in the course of our trying to normalise rugby as a national sport, that I came to earn high regard for him. I still have that high regard for him. There are of course very serious allegations which have been made, but my approach towards him is determined by my experience when I worked closely with him and I will not give credence to the allegations that are being made. I hope that subject to what the judge will decide in this case, I hope that [a] commission will have the opportunity to sit down, to probe these allegations and if that commission decides that there is no substance in these allegations, I will be one of the happiest men in this country because that will then free rugby from the said [read "sad"] paralysing atmosphere environment [sic] in which it has been plunged today. I will be very happy, but at the same time, judge, if that commission decides that there is substance to this allegation, then I cannot allow personal relationships, however strong they are, to override the national interest. Those who are found to be responsible for doing things which have put rugby in disrepute, if those allegations are substantiated, they must pay the price, but until then all the officials with whom I have worked, I have the highest regard for them.
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> . . . .
>
> I am aware that he did play [a] role which at that time could be played only by people who are independent, fearless and committed [to] the principle of non-racialism.
>
> . . . .
>
> [T]he question of promoting non-racialism rugby and of turning it to a national asset which we all now support, is the result of a [collective] effort as I have pointed out and in that context Dr Luyt has played a critical role."

[91] There is no doubt that the President was concerned about Dr Luyt's turnabout when the request was made for financial information and that, rightly or wrongly, he

suspected that this might mean that credence should be given to the allegations that were being made. He was also hurt and surprised that Dr Luyt had challenged the statement in his affidavit that he had not abrogated his responsibility to the Minister. The President's evidence reflects this suspicion and hurt, but does not justify the adverse comment made by the Judge nor is it justified on a reading of his evidence as a whole.

[92] On the rare occasion that the President was asked by the Judge to answer questions he did so. The only time he demurred was when he believed (wrongly as it turned out) that the ruling had been given as a result of a misrepresentation by counsel of what his evidence had been. This occurred towards the end of his evidence and at a time when he was obviously very angry at the way he had been cross-examined. The President's intervention may have been inappropriate and was shown to be incorrect. It does not, however, have any bearing on his integrity.

[93] In view of the material misdirections which taint the entire judgment, no purpose would be served by adding to an already long judgment by analysing the various passages from the record cited by the Judge. In our view these passages, read in the context of the President's evidence as a whole, do not reflect adversely on the President's integrity or credibility as a witness. The cross-examination addressed to him was repetitive, argumentative and at times speculative. The President was justifiably irritated and angered by the circumstances in which he had been ordered to court and by the manner in

which he was cross-examined. The passages cited by the Judge reflect in the main such anger and irritation and have no bearing on credibility.

[94] The Judge said:

> "The court is very conscious of the fact that the President is no longer a young man, that he has suffered much and that it must have been a particularly traumatic and humiliating experience to have been compelled to testify under circumstances where he perceived his veracity to be doubted."[64]

He seems to have lost sight of these considerations, and to have made his findings without due regard to the circumstances personal to the President. In testing the President's powers of recollection, his familiarity with detail and the consistency of his testimony, insufficient regard seems to have been given to the demands of his office, the number of disparate matters he is called upon to deal with daily, the sheer mass of documentation that must pass through his hands every day, and the reliance he is inevitably forced to place, in the execution of all his duties, on his office staff in general, and on his Director-General and his personal legal advisor in particular – matters to which the President referred on more than one occasion during his evidence. The entire context in which the President is compelled to discharge his duties and in which he was compelled to testify

64 At p 772 of the typescript judgment.

was all but ignored by the court in its evaluation of the President's demeanour as a witness and his general credibility.

[95] The President's evidence under cross-examination certainly shows that he was, at times, impatient, imperious, hurt, angry and even insulting. None of these reactions, however, taken individually or cumulatively, warrants the inference that the President's testimony on the crucial issue, that is whether he himself had considered the question whether a commission should be appointed or not in the period between 12 and 26 September 1997, was untruthful or unreliable, particularly not when evaluated, as it ought to have been, in the context to which we have referred.

(*i) Reasons given for the credibility finding against the President*

[96] The Judge devoted 25 pages of his judgment to considerations which in his view had a direct bearing on the credibility of the President's evidence.[65] He identified 13 grounds which, in his view, cumulatively suggested that the President's evidence was not to be believed. These grounds relate, in the main, to the following matters:

(a) the meeting between the Minister and the President on 5 August 1997;

(b) when he became aware of the press reports of 7 August 1997 and his failure to repudiate them immediately;

(c) the question of how long it took the President to peruse the Tshwete file and

65 At pp 791 – 816 of the typescript judgment.

how thoroughly he perused it; and

(d) the question of when and by whom the terms of reference for the commission were prepared.

The contradictions identified are either not contradictions at all or are so insubstantial or unsubstantiated, as fairly to be categorised as make-weights. A significant number of the alleged contradictions relate to events in August 1997, rather than events during the period 12 – 26 September 1997 which, as we have explained above, is the crucial period. Neither alone nor cumulatively, do the contradictions identified by the Judge justify a conclusion that the President's evidence as to his role in the matter, and more specifically as to what happened between 12 and 26 September 1997, should be rejected.

[97] Before considering the period 12 – 26 September 1997, we shall examine two of the main criticisms in the judgment relating to the events of August 1997. The first of these relates to the way the President dealt with cross-examination on whether he instructed the Minister to provide a motivation if he sought the appointment of a commission, or whether he gave him a choice to do so. The conclusion reached by the Judge was:

"The different versions put forward both in the further supplementary affidavit and in the course of the evidence referred to above, are so contradictory that the credibility of the President's evidence in dealing with this meeting of 5 August 1997 must be subject to

serious doubt".[66]

This conclusion is unjustified. It is clear from a reading of the evidence that confusion arose as to whether there was a choice or an instruction in relation to two separate issues; the decision to apply for a commission, and the need to accompany such an application with a written motivation. The President's clear evidence is that the Minister retained a choice as to whether to apply to the President to seek the appointment of a commission. However if he chose to make such an application, the President instructed him to accompany such application with a written motivation. That this was the President's attitude was made clear when this issue was raised with him for the first time:

> "Mr President, did you at that time when you had this discussion with the minister, did you instruct him to prepare a motivation or did you give him the choice? ─
> I will not put labels [into] what I said and Mr Maritz can conclude for himself. [A]ll that I said, give me a memorandum and what I was saying, without remembering the words, was that if you want a commission you must give me that memorandum, but I cannot remember the exact words I uttered.
>
> The point that is of importance, as we see it, is whether you gave the minister a choice? ─ Well that is obvious. The minister always had a choice whether to apply for a commission or not. That is his right, but as far as I am concerned I am the only person who must take a decision whether a commission should be established and I took that decision, and I cannot say whether my statement to him was an instruction or a request. That was my instruction, prepare a motivation, concrete and formal."

66 At p 794 of the typescript judgment.

During the repetitive cross-examination the two distinct issues (the choice to apply for a commission, and the instruction to accompany any such application with a written motivation) were intertwined and, as the next segment of the President's evidence demonstrates, the cross-examination became confusing.

> "Yes, but the way you put it now sounds like an instruction. — You can conclude what you like, Mr Maritz, but that is what I said. The task of putting labels is yours not mine.
>
> But if the President of the country tells me prepare a motivation then I would certainly view that as an instruction and I would do it. — Well that is what you say. I do not know what difference it would have made whether it was an instruction or request because the minister has the choice. I can give him an instruction and he can refuse because the choice is his whether to apply for the setting up of a commission and I indicated to him my thought when he approached me.
>
> And if [he] did not apply then obviously there would not [have been] a commission? — Well, I do not think so. I do not think I would have taken a decision, although it is in my power, but my practice has been that I must be guided by the minister in that department whether I should set up a commission or not."

[98] This confusion persisted as the cross-examination continued. Later the cross-examiner put to the President a passage in the Minister's affidavit that the President "encouraged me to apply for the appointment of a commission of inquiry if I deemed it appropriate." The President was asked whether he had said this to the Minister. The President expressed his irritation at the continuation of this questioning saying that if the Minister dealt with this issue in his affidavit, that was his own affair, but:

> "All that I remember, to my recollection, is that I said I understand your position, give me a motivation. You say this phrase 'if I deem it appropriate'. Now to me, it is unreasonable . . . It is unreasonable for me to have said it because when the man comes to me, a minister comes to me to say Mr President I want you to appoint a commission, it is because he deems it appropriate. Why would I say you apply for the appointment of a commission of enquiry if I deemed it appropriate. That is his own conception. I think that phrase is completely redundant. I do not know how I could have said a think [read "thing"] like that, but that is his affair. This is not my statement, it is his statement and you have had an opportunity of cross-examining the minister on this question, I suppose."

[99] The cross-examiner then put to the President that in his supplementary affidavit he had in fact confirmed the Minister's affidavit as being correct "in so far as it describes the events to which I was a party." The President answered that he agreed with the general purport of what the Minister had said, but "not necessarily with the exact words that he has [used]." When the question was repeated more than once the same answer was given with more than some irritation. The cross-examiner then said "[l]et me perhaps in all fairness, Mr President, explain to you the relevance." He then explained to the President that both the Minister and the DG had expressed confidence that if a commission were applied for it would be granted and went on to say:

> "Why I am putting all of that is it simply means that on the minister's affidavit, which you confirmed in January of this year as being correct, the minister had the choice and he was given the discretion to decide whether there was going to be a commission by applying, or whether there was not going to be a commission by not applying. That is

the relevance of it."

[100] There was then an objection to this line of cross-examination and, after the objection had been overruled, the cross-examiner reverted to the issue and put to the President that in effect what was being confirmed was "you gave the minister the choice, therefore the discretion, to decide whether to apply or not to apply?" To that the answer was "that is not true". The next question was:

> "But if you say that is not true, this is what is written here in the affidavit. What do you mean if you say it is not true? — It is not true that I gave him a choice that if he wanted to establish a commission he can do so. That is not true."

The cross-examination continued in this vein and the President objected. The Judge asked the President to bear with Mr Maritz and to bear with the court and said:

> "Mr Maritz, please keep your questions as concise as possible and do please try and avoid any repetition where you are traversing things which the President has already dealt with, but Mr President . . .".

The President then intervened to say "I respect what the court says." The question was raised again and the President's explanation was:

> "There may be differences. Those who are concerned with minute details may see differences, but I looked at this matter from the point of view that I never gave him that discretion as far as the appointment of a commission. The appointment of a commission I have said right now, time without number, that is my task and my task alone, and I exercised that task. So I am not going to be caught out by him putting this question in this form now and then the same question in a different form."

[101] The Judge further held that it could be inferred from Professor Katz's evidence that the Tshwete file was prepared as a result of his advice, and not as a result of an instruction by the President to the Minister to prepare a motivation. This, however, was not raised directly with the President in cross-examination. What the President was emphasising in his evidence was that it was he and not the Minister who would have to appoint the commission, and that he never surrendered that power to the Minister; that the Minister always had a choice as to whether he wished to ask the President to appoint a commission, but if he chose to approach the President to do so, the President required him to prepare a written motivation. Properly understood, this entire line of cross-examination amounted to no more than a confusing semantic quibble which can have no bearing on the credibility of the President. In our view, there is no material inconsistency in the President's version in this regard, there is merely an apparent confusion arising from the way in which questions were put. It cannot contribute in any material way to an adverse credibility finding against the President.

[102] The second major ground for criticism of the President's evidence in relation to the events of 5 August 1997 related to the President's failure in his answering affidavit to deal with the press reports of his meeting with the Minister on 5 August 1997, which had been mentioned in the founding affidavit. His explanation that he left it to his lawyers to decide what to do was described as an explanation which "cannot be regarded as

satisfactory and credible". The appellants did not address the press reports in their affidavits but launched an application to strike them out as being hearsay and irrelevant. That application was subsequently settled on the following basis. First, the DG's press statement (a copy of which had been obtained by the respondents subsequent to the launching of their application) would be admitted in evidence. Secondly, it was agreed that the press reports of the discussion between the Minister and the *Sunday Times* reporter published in the *Sunday Times* of 17 August 1997, an interview with the Minister published in the *Mail & Guardian* of 31 October 1997, and a report of the statement by the Minister published in *The Star* of 7 November 1997, were admissible in terms of the Law of Evidence Amendment Act 45 of 1988. Thirdly, the appellants would be allowed to file affidavits dealing with such evidence. The various press reports had been annexed to the respondents' replying affidavit. Fourthly, "the remaining annexures subject to attack in the . . . application to strike out, may not be used as evidence of the truth of their contents". The appellants, including the President, then submitted affidavits denying that the President had made the comment attributed to him in the DG's press statement of 7 August 1997.

[103] Despite this, the judgment holds that the failure to deal with the comment in the answering affidavit constituted an implied admission that the President had made such a comment, and that the President's explanation for his failure to have entered such a denial in his answering affidavit was unsatisfactory. In an affidavit lodged by the President on

27 January 1998 opposing an application for further discovery, he said:

> "The respondents' legal advisers consulted with me in the course of preparation of my answer in the main application. They raised with me at the time, the news reports referred to . . . I made it quite clear to them that those reports were inaccurate and that I had not made the statements attributed to me. They advised me however that it was not necessary for me specifically to deal with those reports as they constituted inadmissible fifth hand hearsay evidence."

The President repeated this in the supplementary affidavits lodged in the main application on 29 January 1998, after the striking out application had been settled. He repeated this in his oral evidence saying in cross-examination:

> "I told my lawyers about what I am saying now, I left it to them to decide what they should put in the affidavit. They are experts. I did my duty to them by telling them my own side of the story in full, but I am not responsible for what they put in the pleadings."

[104] The Judge rejected this explanation holding "[h]e did not deny it, to my mind, because there was nothing to deny",[67] and going on to say:

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67 At p 717 of the typescript judgment.

"It is inconceivable that a seemingly complete defence, such as ultimately put forward by respondents in this regard, would not have been raised in the answering affidavits, especially when regard is had to the fact that in motion proceedings applicants as a general rule can only succeed if a case is made out on the respondents' version." [68]

[68] At p 720 of the typescript judgment.

[105] We are unable to agree with this reasoning which in our view is clearly fallacious. The averment, that the President had made the comment, was based on double hearsay which prima facie was inadmissible in evidence against him. If it was inadmissible, no regard could be had to it whether the President objected to the evidence or not.[69] The President's explanation of the failure to deal with the averment in the answering affidavit is entirely consistent with the way his legal representatives conducted the case. This is what they contended in their argument in the High Court and what they repeated in their argument before this Court. There was substance in their argument. In terms of the settlement, the press statement could not be used as proof of the words attributed to the President. Although the DG's press statement (which was not on the papers when the application to strike out was launched) was admitted as evidence, counsel for respondents conceded in argument in the High Court that it was not admissible in evidence against the President as proof of the words attributed to him. The Judge did not agree with this concession, but nonetheless accepted in favour of the President that the press statement was not admissible against him.[70] In the result, therefore, the position taken by the appellants' legal advisors that the press cuttings were hearsay, and not admissible against the President as proof of the statements attributed to him, proved to be correct.

[106] Counsel for the respondents contended in their written argument that there is no

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69 *Langham and Another, NNO v Milne, NO and Others* 1961 (1) SA 811 (N) at 817 A – F, and the cases there cited.

70 At p 900 of the typescript judgment.

provision in motion proceedings for averments in a founding affidavit to be struck out prior to the lodging of an answering affidavit, and that the practice is therefore to deal with such averments in the affidavits. The failure of the President to do so in the present case, therefore, justified the finding in the judgment. There is no substance in this contention. If litigants elect not to deal in their answering affidavits with evidence they consider to be inadmissible against them, they run the risk that such evidence will stand unanswered if their objection fails. But if their objection succeeds, their failure to deal in an answering affidavit with inadmissible evidence, cannot make such evidence admissible against them, nor can it form the basis of an adverse credibility finding against the litigant who so chooses.

[107] Despite this, in dealing with the attitude taken by the appellants to the press statement, the Judge says in another part of his judgment:

> "The conduct of the respondents in this regard demonstrates, in my view, that they did not have a defence to the press statement. They did not deny it in their answering affidavit. They did not deal with it. They did not advance the explanation. They did not do so in the supplementary affidavits filed by the second and third respondents. They resorted to a striking-out application. They opposed the applicants' application in terms of section 32.
>
> In my view, only after the respondents realised that their position was becoming intolerable and [indefensible], did they in the course of affidavits then filed for the first time on the second day of the hearing, deal with the press statement, admit that such press statement was issued and that it did contain the quotation relied upon by the applicants. For the very first time did the respondents raise the bizarre explanation that

the DG, with the tacit approval of the Minister, went on a frolic of his own."[71]

[108] It is implicit in these findings that the President's legal advisors had been told that the President admitted the comment and that they therefore did not enter a denial of the statement, but sought instead to strike out the averment. It is also implicit in the finding that when it was appreciated that the "position had become [indefensible]", the President's legal advisors were subsequently party to the filing of perjured affidavits by him, well knowing that the affidavits were false and that the explanation given in them for not having dealt with the averment in the answering affidavit was not true.

[109] It was never suggested to the President that this is what happened. Although he was cross-examined as to why the statement had not been dealt with in his answering affidavit, the line of cross-examination was that, in the absence of such a denial it was reasonable for SARFU to assume that such a statement had been made, and that in the interest of openness and transparency the President ought to have insisted on the matter being dealt with in the first set of affidavits. The fact that he had received advice to the contrary and acted on it was never disputed. The finding made by the Judge in this regard imputes dishonesty, not only to the President, but also to his legal advisors. It is a

[71] At p 722 of the typescript judgment.

startling finding, for which no basis is to be found in the evidence, nor on the probabilities. It must be rejected. In our view, the President's version is both probable and supported by the evidence. It provides no basis at all for an adverse credibility finding.

[110] We now turn to the credibility findings relating to the events of 12 – 26 September. As stated above, these fall into two categories; those relating to how long the President took to peruse the Tshwete file and how carefully he perused it; and those relating to the preparation of the terms of reference. Both these issues have a bearing on the crucial factual question as to whether the President considered the appointment of the commission himself prior to making his decision in September 1997.

[111] In paragraph 5 of the written reasons the President said:

> "I took a period of over a week to peruse the materials placed before me and to consider whether the appointment was warranted. The decision to appoint the commission was a decision that I alone took."

And in his affidavit:

> "I carefully considered the material placed before me and all the background information at my disposal before I took the decision to appoint a commission of inquiry."

The Judge contrasted these statements with the President's oral evidence in which he said:

> "I read the memo but there was a large number of annexures and a large number of

> newspaper clippings, some in bold type, some in small print and some illegible and I just skimmed through them . . . ".[72]

It was not suggested to him during his cross-examination that his answer was inconsistent with the letter or with the affidavit which he had made. Despite this, the Judge found:

> "Two completely different versions were thus put forward – the one version in the written reasons and in the answering affidavit – that he carefully and seriously considered all of the annexures and it took him an extensive period of time in doing that. The other version in the course of cross-examination that he only read the Minister's memorandum and for the rest he skimmed through the annexures, which version is completely irreconcilable with the initial version put forward."[73]

[112] The conclusion that there was a contradiction in the President's evidence in this regard is incorrect. Neither the letter nor the affidavit stated that the President had considered "all" the annexures, or that he had spent a considerable time in doing so. What he said was that he had carefully considered the material placed before him and had taken

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72 The President was being cross-examined at the time as to whether he had seen the press reports of the statement issued by the DG on 7 August 1997 and it was in this context that he was asked the question and gave the answer.

73 At pp 799 – 800 of the typescript judgment.

a period of over a week to consider whether the appointment was warranted. The Tshwete file contain more than 700 pages of annexed documents, a large number of which were newspaper clippings. It was not necessary for the President to have perused each and every annexure. The greatest criticism in this regard that can be levelled at the President's evidence related to the fact that when he was cross-examined in March 1998 he could not recall in any detail the circumstances set out in the annexures to the memorandum relating to the events of February to August 1997 and SARFU's version of the interaction between the Department and SARFU during this period. The reason for his inability to recall was not probed in cross-examination and it remains unclear whether the President was unfamiliar with those events at the time that he decided to appoint the commission, or whether he had forgotten the details when he came to be cross-examined, nearly six months later. In the absence of cross-examination in this regard, no conclusions of fact can be drawn on this issue and certainly no adverse credibility findings can be made.

[113] In their argument counsel for Dr Luyt suggested that there was also an inconsistency between the evidence and the statement in the written reasons that the President "took a period of over a week to peruse the materials placed before [him] and to consider whether the appointment was warranted". A similar comment is made in the judgment, where it is said that the fact that the draft terms of reference were sent to Mr Browde on 18 September 1997, six days (as opposed to "more than a week") after the

President received the Tshwete file was a "manifest anomaly" that was not explained by the President.[74] It is clear that the discrepancy between the two versions does not amount to a "manifest anomaly". Nor was the President asked to explain this "manifest anomaly", which is really of no consequence and clearly cannot found an adverse credibility finding.

[114] The Judge also saw several contradictions in the President's evidence relating to the preparation of the terms of reference. The first concerned who had been responsible for the preparation of the terms of reference. According to the judgment:

> "The picture conveyed by the supplementary affidavit is that the terms of reference were prepared by [the] President's office in consultation with him and that the Minister or his department had no part in the formulation thereof."[75]

while the evidence showed that:

> "there was substantial involvement by others, such as attorney Knowles, the DG, the Department of Justice and Browde . . . [and that] the President himself was not involved in the process of affecting amendments or finalising the terms of reference and that it was therefore not done in consultation with him as conveyed in the supplementary affidavits aforesaid. "[76]

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74 At p 801 of the typescript judgment.

75 At p 804 of the typescript judgment.

76 At p 805 of the typescript judgment.

[115] Once again, the alleged contradiction was not put to the President. In any event, although drafts were apparently sent to the DG and Mr Browde, there was no evidence that they played any part in the actual formulation of the terms of reference. The statement in the President's affidavit that "[m]y office prepared the terms of reference of the commission in consultation with me", is not inconsistent with his evidence on this issue. The evidence shows that there was a discussion between the President and Professor Haysom concerning the terms of reference and that the final draft was settled by the latter in the light of this discussion.

[116] The documentary evidence is also not inconsistent with the President's affidavit. Included in the Tshwete file is a letter from the Department of Sport and Recreation to the Department of Justice dated 29 August 1997 enclosing what are described as "terms of reference for the Commission of Inquiry". The enclosed document does no more than identify four main areas of investigation and bears little relationship to the terms of reference promulgated by the President. Mr Knowles also prepared a draft for this purpose which was sent to the DG on 5 September 1997, acknowledged by the latter with approval on 8 September 1997 and on the same day sent to the Department of Justice for its consideration. The drafts were still under consideration by the Department of Justice when the Tshwete file was compiled and the Minister's memorandum in that file accordingly stated that "[t]he proposed terms of reference will be contained in a

supplemented Schedule 1 hereto". That was not done, but at some stage (there is no evidence as to when this happened) Professor Haysom obtained a copy of the draft which had been submitted to the Department of Justice. A statement in the judgment that the President's office would probably have been involved shortly after 8 September 1997, and that Professor Haysom would have commenced work on the terms of reference substantially prior to 18 September 1997 is pure speculation. The President was not asked when Professor Haysom became involved for the first time, and no suggestion was made in cross-examination that Professor Haysom had been involved in drafting the terms of reference before the Tshwete file was submitted to the President. In the light of these facts, it is our view that there is no material inconsistency in the President's evidence in this regard. It is clear from the evidence that it was the President's legal advisor, Professor Haysom, who took responsibility for preparing the draft terms of reference. It cannot be said that there is a clear discrepancy in the evidence sufficient to warrant an adverse credibility finding against the President.

[117] The second issue relating to the terms of reference concerns the question of when the terms of reference were prepared. The judgment refers to a statement in the President's written reasons for his decision in which it was said "[q]uite properly [the formal executive instruments establishing the commission] were only prepared once I had decided to appoint the commission", and finds that "[o]n the probabilities it would not have made sense to formulate the terms of reference before the principle of appointing the

commission had been decided upon."[77] Later in the judgment the Judge returns to this issue, saying:

> "The point of significance is, however, that Haysom was already involved with the terms of reference as early as the beginning of September 1997 and at a time well before the President had even received the Minister's submission. This is completely inconsistent with the President's version in his written reasons . . . This anomaly was not explained or cleared up by the respondents through evidence. It is, however, clear that both versions cannot be correct."[78] (emphasis in original).

[118] However, there was no evidence to show that Professor Haysom was involved before 12 September 1997 when the Tshwete file was given to the President. According to the President, Professor Haysom discussed the Department of Justice draft with him, indicating that he disapproved of portions of it. The President agreed with him and in the light of this discussion Professor Haysom made material changes to the draft. This was after the Tshwete file had been received. On 18 September 1997 Professor Haysom forwarded his draft to the Department of Justice, inviting proposed amendments. Only minor changes were subsequently made to the draft – there is no evidence as to who made these changes – and the formal notice appointing the commission was then prepared for signature by the President and the Deputy President. The formal instruments were signed

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77 At p 629 of the typescript judgment.

78 At pp 803 – 4 of the typescript judgment.

by them on 22 September 1997. The President's affidavit is consistent with this evidence and provides no basis for an adverse credibility finding.

[119] The last major issue raised in the judgment relates to the President's failure to provide any documents to show when Mr Browde was approached for the first time. The judgment states that on the probabilities the names of the possible commissioners would have been sent to the President's office under cover of a letter "probably with some comment or some résumé dealing with each of the respective commissioners."[79] The judgment also states that "the alleged absence of any documentation relating to the approach to and appointment of Browde is questionable"[80] and suggests that Professor Haysom should have been called to clear up these uncertainties. An adverse inference is drawn against the appellants for their failure to have done this. The conclusion that is then reached is:

> "[I]t is clear that Browde was approached and appointed after the decision had been taken to appoint the commission. On the evidence . . . this could not have been as a result of the President's decision. The approach to and the appointment of Browde must, therefore, have been as a result of an earlier decision, which on the evidence and on all the probabilities, could only have been that of the Minister. This conclusion is entirely

79 At p 704 of the typescript judgment.

80 At p 703 of the typescript judgment.

> consistent with the conclusion and inference flowing from the fact that the terms of reference were already in the process of finalisation by 18 September 1997."[81]

[120] We are unable to agree with this reasoning. None of these propositions was put to the President during his evidence. It was not suggested to him that the Minister had appointed Mr Browde, it ignores the President's own evidence that there had been a discussion between him and Professor Haysom as to who the commissioner should be, and that they had agreed that it should be Mr Browde. It was not suggested to the President that a decision to appoint Mr Browde was made prior to his discussion with Professor Haysom, or that such appointment was made by the Minister prior to the President having decided to appoint a commission. Nor was such a suggestion put to the Minister when he gave evidence.

[121] The President's evidence on this issue in cross-examination was as follows:

> "Can you tell his lordship at this stage who approached the commissioner? — I think it was Prof. Fink Haysom. He had discussed the matter with me and he suggested that between the two names that were placed before me, Mr Browde was preferable because the other person had previously been involved in rugby and it was necessary to have somebody independent and he then suggested the name of Acting Judge Browde. That is my recollection.

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81 At p 702 of the typescript judgment.

> I understand that Prof. Haysom then approached Adv Browde. — I think that is right.
>
> Do you know whether any letter was written to him to appoint him or to ask him whether he would be prepared to accept the appointment? — I am not sure what exactly was done but I know that he was contacted by Prof. Haysom.
>
> Would that have been at the stage after you had decided to appoint the commission? — Oh yes. I mean it could not have been before."

According to the President the final decision as to who the commissioner should be would have been taken by his office in consultation with the Department of Justice.

[122] Mr Browde was available to both parties, and if the respondents' case was that he was approached by the Minister and appointed prior to a decision taken by the President, he could have been called by the respondents to provide the relevant documents and to say that this is what happened. Because of the assumption made by the Judge, it was put to counsel that a number of members of this Court have been approached in the past to act as commissioners, that such approaches have always been telephonic and that no résumé has ever been requested. In our view, therefore, the adverse credibility finding made by the Judge in relation to the failure by the appellants to produce documents relating to the selection of a commissioner had no basis.

[123] As stated in paragraph 66 above, the respondents could only succeed in their submissions relating to the abdication of responsibility on one of three alternative bases. First, the President did not consider the question of the appointment of the commission at

all in the two weeks preceding the appointment of the commission on 26 September 1997 which would mean that all his evidence in this regard was a mendacious fabrication. Secondly, although he did consider the appointment of a commission, he did so merely as a charade either because he thought he had irrevocably abdicated his power to the Minister during August 1997. Thirdly, having abdicated his power to the Minister, he was determined not to consider the matter at all. Therefore, the question central to this part of the case was whether the President's evidence concerning what he did in September 1997 was deliberately dishonest, either on the basis that it was a complete fabrication, or on the basis that his conduct constituted a charade, and whether the letter written shortly after that in which detailed reasons were given for his decision, was false. The Judge failed to address these issues pertinently. We have already pointed to the fact that the President's evidence on crucial issues concerning the advice given to him by Professor Katz and how he responded to it, is consistent with the probabilities, and with Professor Katz's evidence; that there is no evidence to contradict it, and that it was never suggested to the President that such evidence was given dishonestly.

[124] An inference of dishonesty cannot be drawn from the statements referred to by the Judge as being contradictory, most of which were not canvassed with the President in his evidence, and in our view display, at best for the respondents, discrepancies of little moment and of no relevance to the crucial issues in this case. We agree with the well-

known comment by Mr Justice Nicholas in an article in the *South African Law Journal*:[82]

> "Where [a witness] has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that, in common with the rest of mankind, the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief."

[125] All that need be added to what has already been said, is that the criticisms of the President's evidence provide no justification for rejecting his evidence concerning his discussion with Professor Katz, and what happened thereafter, as being false, or otherwise incorrect. In the circumstances, the finding that the President had abdicated his responsibility and merely "rubber-stamped" a decision by the Minister was clearly wrong.

C. CONSTRAINTS UPON THE PRESIDENT'S POWERS RELATING TO COMMISSIONS

[126] In this section of the judgment we consider the constraints upon the President's powers relating to commissions. This is necessitated by the respondents' argument that

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82 102 (1985) at 32. See also his judgment in *S v Oosthuizen* 1982 (3) SA 571 (T) at 575E – 577C.

the President was obliged to afford them a hearing before appointing the commission. We first outline the approach of the High Court. Thereafter we identify the two distinct powers in question: the power to appoint a commission in terms of section 84(2)(f) of the Constitution, and the power to extend the Commissions Act to the commission in terms of section 1 of the Commissions Act. Each of these powers is considered separately.

[127] In order to examine the constraints upon the exercise of the section 84(2)(f) power we consider the manner in which the Constitution regulates public power, and, in particular, administrative action as contemplated by section 33 of the Constitution as it currently reads. We conclude that an exercise of the section 84(2)(f) power does not constitute administrative action and that accordingly the requirements of procedural fairness demanded by section 33 are not applicable to the exercise of that power. We then identify the constraints upon the exercise of power under section 84(2)(f), including the requirement that the Deputy President be consulted prior to its exercise, and conclude that those constraints were complied with by the President in this case. We also consider two other arguments relating to the exercise of such power. The one suggested that the requirement that a commission be investigating a "matter of public concern" was a condition precedent to the appointment of the commission. The other was that the power could have been, and was, fettered by a contract entered into between the Minister and the respondents.

[128] We then turn to analyse the power conferred upon the President by section 1 of the Commissions Act. We consider, but find it unnecessary to decide, whether the exercise of that power constitutes administrative action or not. We then address the question whether the jurisdictional fact that is stipulated in the Commissions Act, requiring the subject matter of the commission's investigation to constitute a "matter of public concern", has been met in this case and we conclude that it has. We then consider respondents' arguments that the President was required to afford the respondents a hearing prior to exercising his powers in terms of the Commissions Act and conclude that, once the commission is charged with the investigation of a "matter of public concern", procedural fairness as contemplated by section 33 of the Constitution does not require a hearing prior to the exercise of those powers. We also conclude that the respondents have not established a legitimate expectation of a hearing and that the reasons given by the President justified his decision to exercise the Commissions Act powers.

(a) Approach of the Judge in the High Court

[129] The Judge held that the President was obliged to provide SARFU with an opportunity to make representations to him before deciding to appoint a commission of inquiry. As the President had failed to do this, he held that the President had acted procedurally unfairly. This conclusion was based on his primary finding that the appointment of the commission of inquiry in this case would prejudice those investigated and that therefore the President had a duty to afford them an opportunity to be heard prior

to the appointment of the commission. The conclusion was also based on the secondary finding that SARFU had existing rights arising from the conclusion of a contract at the meeting of 21 February 1997 which would be impaired by the appointment of a commission of inquiry. He also held that even if SARFU had no existing rights which were affected by the appointment of the commission, it had a legitimate expectation of procedural fairness. The respondents relied upon the reasoning of the Judge in their written argument.

[130] Appellants' leading counsel, Mr Trengove, argued in both courts that in considering the question of procedural fairness, it is necessary to separate the following events: the appointment of the commission in terms of section 84(2)(f) of the Constitution; the proclamation under the Commissions Act vesting the commission with powers listed in that Act, notably powers of subpoena; and the procedures followed by the commission in the execution of its task and the commission's report. The Judge rejected this argument on the ground that once the first step has been taken, that is the appointment of a commission, the remaining steps follow as a matter of course.

[131] But that is wrong. It does not follow that, once a commission of inquiry has been appointed, the commission will automatically be vested with powers under the Commissions Act. Indeed, it is only competent to vest such powers in a commission if

the commission is investigating a matter of public concern.[83] There is no similar limitation on the power to appoint commissions in terms of section 84(2)(f). Accordingly a commission may be appointed to investigate a matter which is not of public concern, and to which the provisions of the Commissions Act do not apply. Equally, the President may decide not to make the provisions of the Commissions Act applicable even to a commission of inquiry investigating a matter of public concern. The question of procedural fairness needs to be considered in relation to three different acts, each of which involves the exercise of a specific power or powers: the President's decision to appoint a commission in terms of the power conferred upon him by section 84(2)(f); the President's decision to make the provisions of the Commissions Act applicable; and the exercise of the commission's powers by the commission itself. The third question does not arise in this case as the commission has not commenced its work. If it ever does, considerations of procedural fairness may well arise at that stage as the Supreme Court of Appeal has recently held.[84] The first two issues are relevant in the current proceedings. Although they are technically separate legal acts, they are, of course, closely related.

(b) The regulation of public power by the Constitution

[132] The exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the legislature, the executive and the judiciary

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83 Section 1(1) of the Commissions Act.

84 See *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A); 1997 (4) BCLR 531 (A).

which determines who may exercise power in particular spheres.[85] An overarching bill of rights regulates and controls the exercise of public power,[86] and specific provisions of the Constitution regulate and control the exercise of particular powers.

[133] Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which,

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85 *Executive Council of the Western Cape Legislature and Otheres v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877(CC).

86 Section 8(2) of the Bill of Rights provides that its provisions also bind natural and juristic persons, if and to the extent that they are applicable, "taking into account the nature of the right and the nature of any duty imposed by the right". The Bill of Rights therefore bears on the exercise of "private power", an issue which does not arise in the present case.

amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.

[134] The constitutional goal is supported by a range of provisions in the Constitution. First, in the Bill of Rights there is the right of access to information[87] and the right to just administrative action.[88] Both these provisions require national legislation to be enacted by 3 February 2000 to give effect to these rights.[89] Pending the enactment of that legislation, the provisions of the interim Constitution apply.[90] Secondly, all the provisions

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87 Section 32(1) of the Constitution, which entrenches the right of access to information, provides that:

> "Everyone has the right of access to
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights."

Item 23 of schedule 6 to the Constitution provides that the legislation must be enacted within three years of the date on which the Constitution came into force. The Constitution came into force on 4 February 1997.

88 Section 33 of the Constitution.

89 See s 32(2) and s 33(3) of the Constitution respectively.

90 Constitution of the Republic of South Africa, Act 200 of 1993. See item 23 of schedule 6 to the 1996 Constitution which provides as follows:

> "(1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.
>
> (2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted —
>
> (a) section 32(1) must be regarded to read as follows:
>
> . . . ;
>
> (b) section 33(1) and (2) must be regarded to read as follows:
>
> 'Every person has the right to —
>
> (a) lawful administrative action where any of their rights or interests is

of the Bill of Rights are binding upon the executive and all organs of state.[91] The Bill of Rights, therefore, imposes considerable substantive obligations upon the administration. Thirdly, chapter 10 of the Constitution, entitled "Public Administration" sets out the values and principles that must govern public administration[92] and states that these principles apply to administration in every sphere of government, organs of state and public enterprises.[93] This chapter also establishes a Public Service Commission to

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affected or threatened;
(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.' "

The deemed provision is identical to s 24 of the interim Constitution.

91 Section 7(2) and 8(1) of the Constitution.

92 Section 195(1) provides that:

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation."

93 Section 195(2). "[O]rgan of state" is defined in section 239 as:

"(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution —
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

promote the values of public administration. Fourthly, chapter 9 of the Constitution establishes the office of the Public Protector whose primary task is to investigate and report on conduct in the public administration which is alleged to be improper.[94] Fifthly, the Constitution establishes the office of the Auditor-General whose responsibility it is to audit and report on the financial affairs of national and provincial state departments and administrations as well as municipalities.[95]

(c) Section 33 of the Constitution

[135] Section 33 fits neatly into this constitutional framework. As it is currently deemed

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(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer."

94 Section 182(1)(a) and (b) of the Constitution.

95 Section 188(1)(a) and (c) of the Constitution.

to read,[96] it provides:

> "Every person has the right to —
>
> (a) lawful administrative action where any of their rights or interests is affected or threatened;
>
> (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
>
> (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
>
> (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

[96] See n 90 above.

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles.[97] The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content.

[136] The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades. The question that arises in this case is what is included within the concept of "administrative action" as it is employed in section 33.

[137] Although the question, whether the appointment of the commission in terms of

97 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 28 – 42.

section 84(2)(f) of the Constitution is administrative action as contemplated in section 33, does not seem to have been expressly considered in his judgment, the Judge appears to have assumed that it was and that the President was accordingly constrained by its provisions. In our view that assumption cannot be made, and it is necessary to consider carefully whether or not the appointment of a commission in terms of section 84(2)(f) constitutes "administrative action" as contemplated by section 33. Once that question has been answered, it will then be possible to consider what constraints were imposed upon the exercise, by the President, of the power conferred on him by section 84(2)(f).

(d) Functions and duties of the executive

[138] The administration is that part of government which is primarily concerned with the implementation of legislation. In the national sphere, ensuring that the administration implements legislation is one of the responsibilities of the President and Cabinet. Their responsibilities are set out in section 85(2) of the Constitution, which provides that:

> "The President exercises the executive authority, together with the other members of the Cabinet, by —
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> (c) co-ordinating the functions of state departments and administrations;
>
> (d) preparing and initiating legislation; and
>
> (e) performing any other executive function provided for in the Constitution or in national legislation."

Provincial premiers and the members of their executive councils bear similar responsibilities in relation to provincial government. Section 125(2) of the Constitution provides that:

> "The Premier exercises the executive authority, together with the other members of the Executive Council, by ─
>
> (a) implementing provincial legislation in the province;
>
> (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
>
> (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
>
> (d) developing and implementing provincial policy;
>
> (e) co-ordinating the functions of the provincial administration and its departments;
>
> (f) preparing and initiating provincial legislation; and
>
> (g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament."

[139] It can be seen from these provisions that members of the executive in the national and provincial spheres have a range of responsibilities: for preparing and initiating legislation;[98] for developing policy;[99] for co-ordination of government departments;[100] for

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98 See sections 85(2)(d) and 125(2)(f) of the Constitution.

99 See sections 85(2)(b) and 125(2)(d) of the Constitution.

100 See sections 85(2)(c) and 125(2)(e) of the Constitution.

implementing legislation[101] and for implementing policy.[102] A similar range of responsibilities is conferred upon the executive councils of municipalities.[103] One of the tasks of the national and provincial executives (and municipal executives) is therefore to ensure that legislation and policy are implemented. The process of implementation is generally carried out by the public service. Members of the executive, of course, have other functions as well, such as the development of policy and the initiation and preparation of legislation, which are not directly concerned with administration.

(e) The meaning of "administrative action"

101 See sections 85(2)(a) and 125(a),(b) and (c) of the Constitution.

102 See sections 85(2)(b) and 125(2)(d) of the Constitution.

103 See section 156 of the Constitution.

[140] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,*[104] this Court held that "administrative action" as contemplated in section 33 does not include within its ambit, legislative decisions taken by a deliberative and elected legislative body established by the Constitution. Such action, we held, was not action of the public administration, but action of a constitutionally empowered legislature. Similarly, in *Nel v Le Roux NO and Others*,[105] the Court held that a summary sentencing procedure was judicial, not administrative, action and therefore it did not fall within the ambit of the administrative justice clause. However, in the present case, we are concerned not with the acts of a legislature, nor with judicial acts, but with acts of the President in terms of section 84 of the Constitution. The question is whether the exercise of the power conferred upon the President by section 84(2)(f) constitutes "administrative action".

[141] In section 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or

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104 Above n 97.

105 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 24.

not. It may well be, as contemplated in *Fedsure*,[106] that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks.[107] The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

106 Above n 97 para 41.

107 There may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers. That, however, is not an issue we need consider here.

[142] As we have seen, one of the constitutional responsibilities of the President and cabinet members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of section 33. Cabinet members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of section 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute "administrative action" as contemplated by section 33,[108] but not all acts by such members will do so.

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108 See, for example, *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor.[109] So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.[110] While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.

(f) Section 84(2) of the Constitution

[144] Under our Constitution, the President is both head of state and head of the national

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109 *Panel on Take-overs and Mergers, Ex parte Datafin PLC. and Another* [1987] QB 815 (CA) at 847; *Makhasa v Minister of Law & Order*, *Lebowa Government* 1988 (3) SA 701 (A) at 720-721; *Fedsure*, above n 97 paras 30 – 39.

110 See the discussion of review of "prerogative" decisions in *President of the Republic of South Africa and Another v Hugo*, above n 26 paras 16 – 28.

executive. Section 84(2) of the Constitution provides that the President is responsible for:

> "(a) assenting to and signing Bills;
> (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
> (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
> (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
> (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
> (f) appointing commissions of inquiry;
> (g) calling a national referendum in terms of an Act of Parliament;
> (h) receiving and recognising foreign diplomatic and consular representatives;
> (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
> (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
> (k) conferring honours."

In *President of the Republic of South Africa and Another v Hugo,*[111] this Court held that the powers conferred upon the President by section 82(1) of the interim Constitution, which are similar to those conferred by section 84(2) of the 1996 Constitution, were powers which historically originated from the royal prerogative and were enjoyed by the head of state. In neither the interim Constitution nor the 1996 Constitution, however, is there any reference to the prerogative. The powers conferred are limited to those expressly listed. They are conferred upon the President as head of state, rather than as head of the national executive. This conclusion is suggested not only by the historical

[111] Id at paras 6 – 8.

antecedents of these powers, but also by the provision in section 84(2)(e) which empowers the President to make appointments required by the Constitution or legislation other than those appointments he must make as head of the national executive. The clear implication is that those appointments made under section 84(2) are made as head of state.

[145] All of the powers conferred by section 84(2) are original constitutional powers. They are concerned with matters entrusted to the head of state, subject in some cases and only for the initial transitional period, to an obligation to consult with the Deputy President.[112] None of them is concerned with the implementation of legislation in any sphere of government. The exercise of some of the powers is strictly controlled by the express provisions of the Constitution. For example, the responsibility conferred by subsections 84(2)(a) – (c) concerning the assenting to and signature of Bills is regulated by section 79 of the Constitution which provides as follows:

> "(1) The President must either assent to and sign a Bill passed in terms of this Chapter or,

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112 Item 9(2) of schedule 6 to the Constitution provides that until 30 April 1999 s 84 is deemed to contain a further subclause, subsection (3) which reads as follows:

> "The President must consult the Executive Deputy Presidents —
> (a) in the development and execution of the policies of the national government;
> (b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;
> (c) in the assignment of functions to the Executive Deputy Presidents;
> (d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;
> (e) before appointing commissions of inquiry;
> (f) before calling a referendum; and
> (g) before pardoning or reprieving offenders."

See the equivalent provisions in s 82(2) of the interim Constitution. These provisions were included in the Constitution as part of the scheme of a government of national unity which the interim Constitution required to be established for five years after the first democratic elections had been held.

if the President has any reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if —

(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or

(b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either —

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it."

These are very specifically controlled constitutional responsibilities directly related to the legislative process and the constitutional relationship between the executive, the legislature and the courts. In exercising these responsibilities, the President is clearly not performing administrative acts within the meaning of section 33. Section 84(2)(d) and (e) which refer to the President's power to summon extraordinary sittings of Parliament and his responsibility for making appointments required by the Constitution are similarly narrow constitutional responsibilities which are not related to the administration of legislation but to the execution of provisions of the Constitution.

[146] The remaining section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the

Constitution. Their scope is narrow: the conferral of honours; the appointment of ambassadors; the reception and recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of inquiry and the pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no further action by the government: the conferral of honours, the appointment of ambassadors or the reception of foreign diplomats, for example. It is readily apparent that these responsibilities could not suitably be subjected to section 33. In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations.[113] The President is bound neither to accept the commission's factual findings nor is he or she bound to follow its recommendations.[114]

[147] A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action

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113 See *Bell v Van Rensburg NO* 1971 (3) SA 693 (C) at 705 F; *S v Mulder* 1980 (1) SA 113 (T) at 120 E.

114 *Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others* 1948 (3) SA 409 (A) at 455; *S v Mulder*, above n 113 at 120 E – F.

within the meaning of section 33. It should, however, be emphasised again, that this conclusion relates to the appointment of the commission of inquiry only. The conduct of the commission, particularly one endowed with powers of compulsion, is a different matter.

[148] It does not follow, of course, that because the President's conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under section 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed;[115] until 30 April 1999, the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality[116] and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.[117] These are significant constraints upon the exercise of the President's power. They arise from provisions of the Constitution other than the administrative justice clause. In the past, under the doctrine of parliamentary supremacy, the major source of constraint upon the exercise of public power lay in administrative law, which was developed to embrace

115 Above n 30.

116 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,* above n 97 paras 56 – 8.

117 See *Hugo*'s case, above n 26 paras 6 – 8.

the exercise of public power in fields which, strictly speaking, might not have constituted administration. Now, under our new constitutional order, the constraints are to be found throughout the Constitution, including the right, and corresponding obligation, that there be just administrative action.

[149] In Part B of this judgment titled "Abdication of Responsibility", the question whether the President exercised the section 84(2)(f) power in this case personally, is fully considered. It is clear from the reasons given there, that in appointing the commission, the President did act personally, in good faith and without misconstruing the nature of his powers.

(g) Consultation with the Deputy President

[150] The respondents argued, in relation to the exercise of the President's section 84(2)(f) power, that the President had failed to consult with the Deputy President as the Constitution required him to do.[118] This contention was not expressly pleaded by the respondents in their founding affidavit and was raised only in argument in the court below and the Judge held it was unnecessary to deal with it.[119] The appellants contended that the respondents were not entitled to rely upon it. Although the ordinary rule in motion

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118 This requirement was imposed by item 9(2) of schedule 6 read with Annexure B thereto.

119 At p 1151 of the typescript judgment.

proceedings is that an applicant must stand or fall by its founding affidavit,[120] for the reasons that follow we do not intend to dismiss the argument on that basis, but on the basis that the absence of consultation has not been established by the respondents. Indeed the uncontradicted evidence shows that the Deputy President was consulted by the President.

[151] When, in argument, the respondents raised the question of the President's failure to consult with the Deputy President, a supplementary affidavit was filed by the President in which he denied the absence of consultation and stated that the Deputy President was asked and did concur in the appointment of the commission. The President points out that the Deputy President's signature appears on the written decision to appoint the commission. The President's statement in his supplementary affidavit was not directly contradicted in either oral or written evidence.

120 See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 – 6; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327.

[152] However, the respondents argued that the concurrence and signature of the Deputy President were not sufficient to meet the requirement of consultation imposed by the Constitution and that there should have been evidence that the Deputy President was consulted fully on the matter. That argument cannot be accepted. The requirement that there be consultation with the Deputy President is set out in section 84(3)(e). This section is included in Annexure B to schedule 6 of the Constitution, which contains special provisions pertaining to the "Government of National Unity in the national sphere" which were to remain in place until 30 April 1999.[121] During that period, the Constitution entitled all political parties which achieved more than 10 per cent of the national vote to participate in Cabinet on a proportional basis and entitled those parties which achieved more than 20 per cent of the national vote to designate a Deputy President.

[153] Section 84(3) then gave the Deputy President the right to be consulted on various matters including the President's proposal to appoint a commission of inquiry in terms of section 84(2)(f). As it happened, when the decision in this case was taken to appoint the commission of inquiry, the only minority party to have achieved 20 per cent of the national vote had, of its own volition, withdrawn from the government of national unity. The purpose of the section 84(3) consultation requirement was clearly to afford the

121 Item 9(2) read with Annexure B of schedule 6.

Deputy President (and in particular a Deputy President from a minority political party) an opportunity to object or propose variations to the President's proposal. If, upon consultation, the Deputy President objected, a full discussion and consultation would be required. However, should the Deputy President, upon being consulted, not object, but concur with the proposed course of conduct, lengthier consultation would be futile. The details of the consultation between the President and the Deputy President, which in any event would be irrelevant, do not appear from the papers. If the Deputy President is consulted and concurs that a commission of inquiry should be appointed, as happened in this case, further consultation would have been pointless. To consult in general means to inquire as to someone's views in regard to a proposed course of action. A consultation in this sense can range from a protracted and deliberate exchange of views to obtaining a swift signification of consent. If the views of the person consulted concur with the action proposed, further consultation is obviously redundant. It is obvious that the present case is an instance of the latter. The constitutional purpose underlying the requirement of consultation was met.

(h) Applicability of the requirement of public concern to the appointment of commissions in terms of section 84(2)(f)

[154] Before leaving the question of the appointment of a commission in terms of section 84(2)(f), it is necessary to deal with a further argument raised by the respondents. They argued that, because the President, when he appointed the commission, intended to make

the provisions of the Commissions Act applicable to it, the appointment of the commission itself was also subject to the requirements of the Commissions Act. In particular, it was argued that the matter for investigation by the commission had to be a "matter of public concern". The appellants correctly contended that the conditions for making the provisions of the Commissions Act applicable to a commission of inquiry are not applicable to the appointment of a commission by the President in terms of section 84(2)(f) of the Constitution.

[155] The appointment of a commission of inquiry in terms of the Constitution is a separate legal act distinct from that which vests the powers contained in the Commissions Act in a commission of inquiry. Moreover, the source of the President's power to appoint a commission is not the Commissions Act itself, it is a constitutional power. This was the case under previous constitutions as well.[122] What is more, under our current Constitution, Parliament is not entitled to restrict the constitutional power of the President. The two acts, therefore, arise from different sources and are subject to different regulation. Section 84(2)(f) states merely that the "President is responsible for appointing commissions of inquiry". This provision does not limit that power to commissions of inquiry into matters of public concern. Whether or not the commission in this case is one which was mandated to investigate a matter of public or private interest is thus irrelevant

122 *Bell v Van Rensburg, NO*, above n 113, at 705 – 6. *Minister of the Interior v Belcher and Others,* above n 114; *Garment Workers' Union v Schoeman, NO and others* 1949 (2) SA 455 (A) at 463; *S v Mulder,* above n 113.

to the question whether the appointment of the commission was valid.

[156] In summary, section 84(2)(f) is a special constitutional power conferred on the President as head of state. The exercise of this power does not constitute administrative action as contemplated in section 33 of the Constitution. The exercise of this responsibility is nevertheless constrained by the Constitution in a variety of ways. In this case, however, the respondents failed to establish that the President did not act in accordance with those constraints when he appointed the commission of inquiry.

(i) Contractual constraints upon the exercise of the President's power to appoint a commission under section 84(2)(f) of the Constitution

[157] In their founding affidavit, the respondents averred that at the meeting between the Minister, the DG and Dr Luyt and others on 21 February 1997, a contract was concluded in which the respondents agreed to permit an investigation into the affairs of rugby by an independent task team on the condition that the Minister and the DG first provide the respondents with a list of the allegations made against the respondents which the Minister and the DG wished to have investigated. They went on to aver that one of the effects of this contract was to preclude the President from exercising the powers conferred upon him by the Constitution and the Commissions Act. The terms of the 21 February 1997 agreement were disputed by the appellants and will be dealt with later. For the moment it is sufficient to say that the Judge held that the President was not precluded by the 21

February 1997 agreement from appointing a commission of inquiry.

[158] His reason for that finding were as follows:

> "The agreement between SARFU and the Government of 21 February was obviously not intended to fetter the President's power to appoint a commission. The parties clearly did not envisage that the agreement would in any way prevent the President from exercising his discretion to appoint a commission. It is obvious that the parties regarded the agreement as being compatible with the existence of the President's power to appoint a commission. If the public interest subsequently demanded the exercise of the President's power to appoint a commission, the parties obviously intended that the President would be entitled to override the agreement, thereby effectively terminating it."[123]

123 At pp 1100 – 1101 of the typescript judgment.

[159] In this Court the respondents did not suggest that the President was precluded by the agreement of 21 February 1997 from appointing the commission. We need say no more on this issue than that the Minister has no power to prevent the exercise of or to limit powers vested in the President personally. He could therefore not enter into an agreement which would have the effect of preventing the President from exercising powers vested in him personally, or indeed which would limit the President's powers in any way.[124] It is not, as the Judge suggested, that the President has the power to terminate such an agreement; such an agreement is not and cannot be binding on him. It follows from our conclusion that the act of the President in appointing a commission under section 84(2)(f) of the Constitution does not constitute administrative action, that the "audi principle"[125] has no application to such appointment, whatever the source may be from which the obligation to observe it might otherwise arise.

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124 *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR) at 339B-340C.

125 This is a shorthand phrase referring to the *audi alteram partem* principle (the right to be given a hearing before a decision is made) and it was first adopted by Corbett CJ in *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 762F – 763J.

[160] The respondents' argument on the disputed 21 February 1997 agreement was confined in this Court to a contention that the agreement entitled them to a hearing before the President decided to make the powers under the Commissions Act applicable to the commission. We deal with the dispute concerning the agreement of 21 February 1997 and the implications of the agreement later when we consider whether the "audi principle" relied upon by the respondents can be invoked in the circumstances of the present case. We will, however, do so only in relation to the President's exercise of power in making the provisions of the Commissions Act applicable to a commission, because, as we have said, the principle can have no application to the President's power to appoint a commission.

(j) Proclamation under the Commissions Act

[161] The next issue to be considered is the nature of the power conferred upon the President by the Commissions Act. Here again, the first question to be answered is whether the exercise of the power to proclaim the Commissions Act applicable to a commission of inquiry constitutes "administrative action" as contemplated by section 33 of the Constitution.

[162] The Commissions Act provides that once a commission has been appointed, the President may confer upon that commission the power to summon and examine witnesses, to administer oaths and affirmations and to call for the production of books, documents

and objects.[126] Failure to comply with a subpoena issued by a commission is a punishable offence.[127] If these powers are not conferred, the commission will have no powers beyond those enjoyed by any individual or state agency conducting an investigation.[128] The Commissions Act may only be made applicable to a commission of inquiry if it is investigating a matter of public concern. [129] The respondents argued that the subject matter of the current commission was not a matter of public concern. This argument is considered later in this judgment.[130]

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126 Section 3(1) of the Commissions Act, 1947 provides that:

> "For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects."

127 Section 6 of the Commissions Act.

128 See, for example, *S v Mulder*, above, at n 113, at 121 C.

129 Section 1(1) of the Commissions Act, 1947.

130 See below, paras 169-183.

[163] Making the Commissions Act applicable to a commission of inquiry therefore ensures that a commission can call witnesses and obtain the production of documents and objects on pain of punishment. Nevertheless, a commission remains an investigative body whose primary responsibility is to report to the President upon its findings.[131] A commission is generally not entitled or empowered to take any action as a result of its findings.

[164] In the hearing before this Court, the respondents submitted that the President's decision to make the Commissions Act applicable was an administrative act which attracted the constraints imposed by section 33. The appellants pointed out that this was not an issue raised in the founding affidavit and that the respondents were therefore not entitled to rely upon it. The founding affidavit does indeed not separate the issue of the appointment of the commission in terms of the Constitution from the issue of the decision to make the Commissions Act applicable to it. The affidavit merely states that the decision to appoint the commission was an administrative act which fell within the ambit of section 33. This argument conflated the question of the appointment of the commission with the decision to vest powers of subpoena in it. We propose nevertheless to deal with the argument on its merits.

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131 *S v Mulder*, above n 113, at 120 F – G.

[165] The first question to be considered is whether the decision to make the Commissions Act applicable constitutes administrative action. The power to make the Commissions Act applicable to commissions is one conferred by legislation, not by the Constitution. It is not part of the constitutional power granted to the head of state to appoint commissions of inquiry. It may be exercised only when a commission of inquiry has been appointed to investigate a matter of public concern. The legislation permits the President to give important and, potentially invasive, powers to a commission in order to assist the commission to carry out its tasks effectively. The source of the power suggests that its exercise does constitute administrative action.

[166] There are indications to the contrary however. It is true that the power to give commissions powers of subpoena where the commissions are investigating matters of public concern is a power conferred by the legislature upon the President. Nonetheless, it is a power closely related to the exercise of the power of the head of state to appoint a commission, and to ensure that it is able to do its task effectively. There is substance in an argument that the power is so closely related to the constitutional power to appoint a commission that it should be characterised as part of the policy decision rather than administrative action.

[167] In their written argument, the respondents relied on the finding made in the

judgment that the decision to appoint a commission and to vest it with powers under the Commissions Act infringed their rights under section 33(b) to "procedurally fair administrative action". Because of the importance attached to this finding by the respondents we will assume in their favour that a decision vesting a commission with powers under the Commissions Act constitutes administrative action for the purposes of section 33. In doing so we will have regard to the fact that in the present case it was never contemplated that the commission would not be vested with such powers.

[168] Section 33 (as it is currently deemed to read) requires administrative action which affects or threatens *rights or interests* to be lawful; action which threatens or affects *rights or legitimate expectations* to be procedurally fair; reasons to be given where administrative action affects *rights or interests*; and administrative action to be justifiable in relation to the reasons given where *rights* are affected or threatened. The interests of the respondents are affected by the proclamation making the Commissions Act applicable. They may be obliged to give evidence and produce documents which they otherwise would not have been obliged to do. Section 33(1) therefore required that the vesting of powers under the Commissions Act should be lawful. The main challenge raised by the respondents in that regard was that the jurisdictional fact applicable to the exercise of the Commissions Act power was absent. They argued that the subject matter of the commission of inquiry was not a matter of public concern.[132] Because the doctrine of

[132] The leading authority on "jurisdictional facts" in our law remains *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C).

legality requires the provisions of the Commissions Act to be complied with, this issue would have to be considered whether section 33 were applicable or not. We consider this question below,[133] and later we deal with the finding made by the Judge that the decision was unlawful because it was taken contrary to the dictates of natural justice.[134]

(k) Matter of public concern

[169] The respondents argued that the subject matter of the commission of inquiry in this case, is not one of public concern for two reasons. First, that the terms of reference[135] are so vague that it cannot be concluded that they refer to matters of public concern. The vagueness of the terms of reference is a separate cause of action and is dealt with in detail

133 See paras 169 – 183.

134 See paras 184 – 222.

135 The terms of reference are quoted in para 227.

below.[136] Subject to that discussion, the terms of reference mandate an inquiry aimed at financial and related matters, and administrative and related matters, which concern the management and development of rugby by SARFU and its affiliate unions.

[170] Secondly, they submitted that the matters embraced by the terms of reference do not constitute matters of public concern, because the public at large and the rugby-viewing public in particular, have no legitimate interest in the internal management of financial, administrative and related matters by SARFU and its affiliates.

136 See paras 227 – 232.

[171] In determining whether the subject matter of the commission's investigation is indeed a "matter of public concern", the test to be applied is an objective one.[137] The legally relevant question is not whether the President thought that the subject matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion.[138] In this context, the Constitution requires that the notion of "public concern" be interpreted so as to promote the spirit, purport and objects of the Bill of Rights[139] and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern.

[172] The respondents argue that SARFU and its affiliates are autonomous private associations, and that the Commissions Act should not be interpreted in a manner which

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137 *Garment Workers' Union v Schoeman NO,* above n 122, at 463; *Erasmus and Others NNO v SA Associated Newspapers Ltd and Others* 1979 (3) SA 447 (W) at 449 – 450; *Bell v Van Rensburg NO,* above n 113; *S v Mulder*, above n 113 at 121.

138 *Garment Workers' Union v Schoeman, N.O. and others,* above n 122 at 464.

139 Section 39(2) of the Constitution. Such an approach would prevent the improper abuse of commissions to suppress dissent as happened in the past.

would render them the subjects of an investigation by a commission of inquiry. Although it is true that very often the management and financial affairs of an autonomous private association will not be matters of public concern, it is not correct that they may never be. The use of the adjective "public" in the phrase "matter of public concern" does not mean that only public organisations or state institutions may be the subjects of a commission of inquiry vested with Commissions Act powers. "Public" in this context qualifies "concern". The question is whether the subject of investigation by the commission is a matter of concern to the public. It follows that the Commissions Act can apply to a commission inquiring into the internal management of private autonomous organisations, provided that those affairs are indeed matters of public concern. This was accepted by the Judge, "if the circumstances warrant it" for purposes of his judgment only.[140]

[173] To hold otherwise would be to hold that the President could never appoint a commission of inquiry into the affairs and conduct of any private entity, even if such affairs were to constitute matters of grave public concern. There are many private institutions which, for historical or practical reasons, are privately controlled, although their activities manifestly affect members of the public and give rise to considerable public interest and, at times, public concern.

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140 At p 1132 of typescript judgment.

[174] The Oxford English Dictionary defines the term "concern" as "anxiety or worry; or matter of interest or importance to one". The first meaning given is the meaning of "worry or anxiety". The second meaning is a matter of interest or importance. In our view, public concern as it is used in the Commissions Act should be interpreted in a way which involves both the notion of "anxiety" and "interest". A matter of public concern is therefore not a matter in which the public merely has an interest, it is a matter about which the public is also concerned. "Public concern" in this context is therefore a more restricted notion than that of public interest.

[175] The term refers to *public* concern. The use of "public" to qualify concern makes it clear therefore that the concern must not be a private or undisclosed concern of the President. It must be a concern of members of the public and which is widely shared. The word "public" needs to be construed in its context and with common sense.[141] It would be quite inappropriate to require the concern to be one shared by every single member of the South African public, for that would be to create a condition that could, arguably, never be met. However, the concern must be one shared by a significant

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141 *Argus Printing and Publishing Co. Ltd. v Darby's Artware (Pty.) Ltd. And Others* 1952 (2) SA 1 (C) at 8H citing, with approval, *Jennings v Stephens* 1936 (1) All ER 409 (CA) in which Lord Wright said:

> "'The public' is a term of uncertain import: it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of [the] country."

See also *Clinical Centre (Pty.) Ltd. v Holdgates Motor Co. (Pty.) Ltd.* 1948 (4) SA 480 (W) at 488 where Roper J held that:

> "In my view a scheme is 'in the public interest' if it is to the general interest of the community that it should be carried out, even if it directly benefits only a section or class

segment or portion of the public.

[176] The requirement that a commission should be investigating a matter of "public concern" before the provisions of the Commissions Act may be vested in it is therefore a significant limitation on the President's power to vest commissions with powers of coercion. It is an objective check, justiciable by the courts. Coercive powers of subpoena are generally reserved for courts. It is quite appropriate that, where the President is given the power to extend them to a commission investigating a matter, he or she may do so only where, viewed objectively, the matter to be investigated by the commission is one of public concern.

[177] In his judgment, the Judge did not directly address the question whether the investigation to be undertaken by the commission in this case was "a matter of public concern" or not. However, in that section of his judgment dealing with the question of procedural fairness, he referred, with approval, to the Royal Commission on Tribunals of Inquiry, 1966, chaired by Lord Salmon. In its report, the Commission stated that:

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or portion of the community."

> "The exceptional inquisitorial powers conferred upon a Tribunal of Inquiry under the Act of 1921 necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against him. This may cause distress and injury to reputation. For these reasons, we are strongly of the opinion that the inquisitorial machinery set up under the Act of 1921 should never be used for matters of local or minor public importance but always be confined to matters of vital public importance concerning which there is something . . . of a nation-wide crisis of confidence. In such cases we consider that no other method of investigation would be adequate."[142]

[178] This statement should be read in the light of the specific provisions of the relevant English legislation. Section 1(1) of the British Tribunals of Inquiry (Evidence) Act of 1921 (the Act of 1921) provides that commissions may be vested with powers of subpoena if the subject matter for investigation is a "specific matter of vital public importance." The Royal Commission on Tribunals of Inquiry, instituted to investigate the proper functioning of the Act of 1921, suggested that the term "matter of vital public importance" be interpreted narrowly.

[179] It must be emphasised, however, that the statutory provision which governs the exercise of the power in South Africa is not the same as that applicable in England. It would be quite improper to adopt the English statutory standard as our law because it further restricts the field of inquiry to a matter of "vital" public importance. The test

142 At para 27 of the Report. The Report was also referred to by Baker AJ in *Bell v Van Rensburg NO,* above n 113 at 710 – 1.

established by our statute remains that the commission be investigating a "matter of public concern".

[180] We turn now to an application of the above principles to the facts. In their answering affidavits, the President and the Minister set out the history of the game of rugby in South Africa. They note that the game of rugby is a national sport and that, like other sports in South Africa, the playing of rugby was deeply affected by apartheid law and policy. Black South Africans were prevented from representing South Africa in the national team and few facilities were provided for the playing of rugby in those areas in which black people were required to live. The policy of apartheid attracted international condemnation and protest and resulted in many foreign teams refusing to play against the South African team. The conflict-ridden nature of sport in South Africa and, in particular, the racist manner in which national sports were managed and funded in the past, is a legacy which has direct implications for the conduct of sport today. The evidence shows that there was indeed concern expressed in both rugby circles and the media on various matters of importance which affected the image of rugby and its potential for promoting national reconciliation.

[181] The respondents did not dispute the fact that the game of rugby is a matter of great public interest. They disputed, however, that there was any legitimate interest in the internal affairs, financial and others, of SARFU and its affiliates on the ground that they

were private institutions. There can be no doubt that the administration and management of the game of rugby may be a matter of great public concern. A New Zealand case, *Finnigan v New Zealand Rugby Football Union Inc,*[143] illustrates how intense such concern may become. It concerned a highly controversial proposed tour of South Africa by the New Zealand rugby team in 1985. Finnigan, a member of a rugby union club, sought to challenge the decision by the New Zealand Rugby Football Union to undertake the tour. The Court of Appeal held that he did have standing to do so on the basis that:

> "While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far . . . We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn."[144]

The High Court subsequently granted an interim injunction restraining the departure of

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143 [1985] 2 NZLR 175 (CA).

144 Id at 179.

the team until the action had been determined.[145]

[182] The respondents accept that SARFU and its affiliates are responsible for managing rugby in South Africa and are the formal structures through which rugby is controlled and administered, but seek to argue that their financial and administrative arrangements fall outside the sphere of public concern. We cannot accept that such a distinction should be drawn. SARFU and its constituent unions may be governed by private law and it may be that their funds are earned in activities governed by private law, but the determination of the appropriate branch of law under which such activities are governed does not mean that such activities and the funds which they generate cannot be matters of public concern. Much of SARFU's income derives from ticket sales, broadcasting contracts, hiring fees for stadiums and sponsorship contracts, all of which directly concern the public. What is more, much of SARFU's expenditure relates to the development of rugby in schools and elsewhere, and in providing facilities for the playing of rugby, again matters which directly engage the public, particularly in relation to steps taken to address past discrimination. It follows that the public at large has a legitimate concern in the manner in which SARFU and its constituent unions manage the financial aspects of the game of rugby, and make it accessible to those wishing to participate in the game as well as those

145 *Finnigan v New Zealand Rugby Football Union Inc (No 2)* [1985] 2 NZLR 181 (High Court).

wishing to watch games at stadiums or on television or to listen to them on the radio.

[183] Moreover, any inquiry into the management of rugby in this country necessarily entails an inquiry into the affairs of SARFU and its affiliates, since they are entrusted with every aspect of the game's management. However, the terms of reference focus the commission's inquiry on the financial, administrative and related matters concerning the management of rugby for the purpose of determining whether rugby is being administered in the best interests of the public and the rugby-supporting public; the best interests of the game of rugby, its development and promotion amongst all South Africans; and the principles of fair, open, honest and sound management. The investigation is therefore limited to these purposes. We have no doubt that those affairs of SARFU and its affiliates are a matter of public concern, within the meaning of the Commissions Act. The respondents' arguments that this requirement of the Commissions Act was not met must therefore fail.

(l) Procedural fairness — section 33(b)

[184] The respondents contended that the proclamation should be set aside because the President failed to observe the audi principle. The applicability of the audi principle was asserted on two grounds, both of which were upheld by the Judge. First, it was contended that the decision to make the powers under the Commissions Act applicable to the commission interfered with the respondents' constitutional rights to freedom and privacy,

and with their rights under the agreement of 21 February 1997. Secondly, it was contended that the respondents had, if not a right, at least a legitimate expectation of such a hearing arising out of the terms of the agreement of 21 February 1997. Finally, they submitted that they would be prejudiced by the President's decision to confer the Commissions Act powers upon the commission and that they were, accordingly, entitled to a hearing. We shall deal with each of these submissions in turn.

(m) Constitutional rights to privacy and freedom

[185] A person who is served with a subpoena is required to give evidence and to produce documents in relation to the terms of reference of the commission to the satisfaction of the commission. In this regard, such an individual or organisation is in the same position as any witness called before a criminal or civil court. In *Bernstein and Others v Bester and Others NNO*[146], Ackermann J said the following:

> "The use of subpoenas to require witnesses to attend courts, to produce documents and where necessary to give evidence is essential to the functioning of the court system. It is no doubt possible for the rule governing the issuing of subpoenas to be misused. The courts have the power to set aside subpoenas which have been issued for an improper purpose, or which are vexatious in other respects, but in its practical application that power is limited, and the possibility of the process of the court being abused in particular cases cannot be excluded.
>
> The fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse does not mean that the power should, for this reason, be characterised as infringing section 11(1) of the Constitution. The law does not

146 1996 (2) SA 751 (CC);1996 (4) BCLR 449 (CC).

sanction such abuse; it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena. Absent such proof it is the duty of persons who are subpoenaed to co-operate with the courts, and to attend court for the purpose of giving evidence or producing documents when required to do so. The fact that the present case is concerned with enquiries under ss 417 and 418 of the Companies Act, and not with a trial, does not affect the characterisation of the obligation to honour a subpoena to attend the enquiry. It is a civic obligation recognised in all open and democratic societies and not an invasion of freedom."[147]

147 Id at paras 51 – 52. See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC); *Nel v Le Roux NO and Others*, above n 105.

[186] A more difficult question is raised by the issue of privacy. In *Bernstein's* case, Ackermann J held that the obligation to be physically present at an investigation itself did not constitute a breach of privacy.[148] The obligation to produce documents or answer questions, however, could, in certain circumstances, constitute an invasion of privacy. He held that even if on a proper construction of the challenged provisions they could be interpreted to require a witness to answer questions or produce books or documents in breach of that person's right to privacy, such breach would be justifiable as long as the answers to be given or documents to be produced were relevant to the objects of the enquiry and achievement of its purposes. He held:

> "The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the company and the creditors' and contributors' financial interests in the recovery of company assets must be weighed against this, peripheral, infringement of the right not to be subjected to seizure of private possessions. Seen in this light, I have no doubt that ss 417(3) and 418 (2) constitute a legitimate limitation of the right to personal privacy in terms of s 33 of the [interim] Constitution." [149]

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148 Above n 146, para 58.

149 Id para 90.

In our view, similar considerations apply to the provisions of the Commissions Act. It may be that a witness before the commission may be asked questions or required to produce documents which will limit his or her right to privacy. However, in any particular case, the questions put and the documents sought must be relevant to the scope of the commission's investigation and that investigation must be a matter of public concern. If the questions asked or documents sought are relevant to such an investigation, then in all probability an invasion of privacy will be permissible. The requirement that the commission be investigating a matter of public concern coupled with the requirement that any questions be relevant to its terms of reference will ensure that witnesses' privacy rights will not be improperly infringed. In so deciding, we assume, as we must, that the commission will act properly and lawfully in exercising its powers and that it will construe its powers in the light of the spirit, purport and objects of the Bill of Rights.[150] In our view, therefore, the respondents have not shown that they were entitled to invoke the audi principle in this case on the basis that their rights to privacy had been affected or threatened by the President making the provisions of the Commissions Act applicable to the commission he had appointed.

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150 See *Bernstein and Others v Bester and Others NNO*, above n 146 paras 60 – 3; *Nel v Le Roux NO and Others* , above n 105 paras 7 – 9.

(n) The agreement of 21 February 1997

[187] In the High Court the Judge held that the contract relied upon by the respondents had indeed been concluded. It was, he held, a term of that contract that the respondents would co-operate with the task team only after the allegations had been provided to them. Further it was a tacit term of that contract that the Minister would not approach the President to request the appointment of a commission of inquiry while the contract was in force. The Judge also held that if he was incorrect in finding that a contract had been entered into between the Minister, the DG and the respondents, in any event the meeting of 21 February 1997 had given rise to a legitimate expectation that no commission of inquiry would be held without the respondents being afforded an opportunity to make representations to the President. Counsel for the respondents supported these findings. We shall, however, for the reasons mentioned in paragraphs 159 – 160 above, consider these arguments only in so far as they can bear on the President's act in making the provisions under the Commissions Act applicable to the commission.

[188] The appellants counter this argument. First, they contend that the finding by the Judge that a contract was entered into on 21 February 1997 is mistaken. They argue that no such contract was entered into between the Minister and the respondents; that the product of the meeting of the 21 February 1997 was a working arrangement; that it was not a term of the working arrangement that allegations against the respondents would be put to them prior to their undertaking to co-operate with the investigation; and that no

tacit term constraining the appointment of a commission of inquiry existed. They further contend that, even if there was such a term, the Minister was not competent to constrain the exercise of the President's constitutional discretion in such a fashion.

[189] Two disputes exist, therefore, concerning the meeting of 21 February 1997: the first is whether those present at the meeting entered into an agreement which had the effect of a legally binding contract to regulate future conduct in such a way as to preclude the Minister from approaching the President and requesting him to appoint such an inquiry. The second question relates to the terms of the agreement (be it binding or non-binding) in relation to the procedure to be followed. The first dispute concerning the legal character of the arrangement of 21 February 1997 was not referred to oral evidence by the Judge,[151] but the second dispute was.

[190] It was common cause between the parties that there was a meeting on 21 February 1997 attended by, amongst others, the Minister, the DG and Dr Luyt. At the conclusion of the meeting the following press statement was issued by the Minister:

> "The Minister of Sport and Recreation, Min Tshwete, his Director General, Mr Tyamzashe and his delegation met with a SARFU delegation led by its President Dr Louis Luyt.
>
> It was agreed that SARFU should be given the opportunity to answer to all allegations

151 See para 20 above.

made against them by Van Rooyen and others.

The Minister will appoint a team under the leadership of Mr Tyamzashe.

Mr Tyamzashe will be able to make use of any expertise he may believe necessary in order to authenticate the answers given by SARFU. It was further agreed that no members of other sporting codes will form part of this team.

It is SARFU's intention to apply to the Supreme Court on an urgent basis for the release of the Van Rooyen document. The Minister conceded that SARFU could proceed."

It was initially the respondents' case that this press statement recorded an agreement which was a legally binding contract between SARFU and its constituent unions on the one hand and the government represented by the Minister and the DG on the other. They averred that the contract bound the government, including the President. Later, however, they took up the attitude that nothing turned on this and that the right to a hearing existed whether the agreement was binding or not.

[191] The appellants denied that the product of the meeting of 21 February 1997 was a binding contract. The DG stated in his answering affidavit that a working arrangement had been adopted in terms of which SARFU had promised co-operation with a task team to be appointed by the Minister to investigate the administration of rugby, and said:

"Dr Luyt's suggestion that a binding contract was made at the meeting, is quite incorrect. We did no more than to discuss and agree upon a broad working arrangement acceptable to both sides as a basis for co-operation. This arrangement was never intended to be a contract in law. Neither the minister nor the department considered the appointment of

> the task team, its mandate and its manner of investigation, to be matters for negotiation and agreement and would not have entered into any contract fettering their executive discretion to act in the public interest."

[192] The circumstances in which the agreement of 21 February 1997 was entered into were as follows. The Minister, whose executive responsibilities included matters relating to sport, was concerned with the way in which rugby was being administered. He was entitled to ask the President to appoint a commission to enquire into these concerns. Instead of doing that, he sought SARFU's co-operation to resolve the problems by interaction between SARFU and a task team of independent persons of standing. He knew that the power to appoint a commission vested in the President. He could not limit that power or prevent the President from exercising it. In fact, if he attempted to do so, any agreement made by him would not be binding on the President. The probabilities strongly favour the Minister's contention that when the agreement to appoint a task team was reached neither party intended to bring about a contractual relationship which would constrain either the President's or the Minister's responsibility to discharge their duties in a manner which they considered appropriate.[152] What was of concern to them was to establish an acceptable procedure for the functioning of the task team, and this is what is reflected in the press statement. The subsequent conduct of the parties to which we refer

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152 Compare *Dikolong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A).

in more detail later[153] is entirely consistent with this, and inconsistent with the existence of a legally binding agreement that the task team would investigate only SARFU's responses to specific allegations made by Mr van Rooyen or others. At a meeting with SARFU on 3 April 1997, the task team identified areas of concern that would be the subject of their investigation. The team commenced its investigations immediately after this had been done and SARFU co-operated with it for more than four months without any specific allegations having been put to it other than the areas of concern identified at the meeting of 3 April 1997. It was only on 29 July 1997 when auditors appointed by the task team were attempting to secure access to certain financial books and records that SARFU withdrew its co-operation.

153 Paras 205 – 210 below.

[193] As stated above, the question whether the agreement of 21 February 1997 constituted a legally binding contract was not referred to evidence. The fact that the respondents did not seek to have this issue referred to evidence, despite the clear denial on the papers by the appellants, is consistent with their attitude in argument in the High Court that it was not essential to their case that the agreement was legally binding. Accordingly, the ordinary principles established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[154] ought to apply so that the dispute between the parties should have been determined on the basis of the appellants' evidence on this issue. However, in his judgment, despite the fact that the respondents never sought the referral of the issue to evidence, and the clear denial on the papers by the appellants, the Judge found the agreement of 21 February 1997 to have been a legally binding contract. In reaching this conclusion, he relied on inferences drawn from the oral evidence. He held that the ordinary rule established in *Plascon-Evans* did not apply, and that he was entitled to have regard to the oral evidence because the issue upon which the matter had been referred to evidence, relating as it did to the terms of the agreement as opposed to its status, was so closely related to the question of its status that it was permissible for him to do so. The second basis upon which the Judge held that he was not bound by the ordinary rule[155] was that the appellants' evidence denying that they had acted with the intention of being

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154 1984 (3) SA 623 (A) at 634-5.

155 At p 466 of the typescript judgment.

contractually bound was so far-fetched as to justify the court rejecting it on the papers.[156] He gives no reason for this conclusion.

[194] In our view, there is nothing far-fetched at all in the appellants' assertion that the agreement entered into on 21 February 1997 was not entered into with the intention of it being legally binding. The DG states in his answering affidavit that the Minister would not have fettered his executive discretion in this manner. There is no reason to doubt this statement. Indeed, the Judge himself held:

> "The agreement in the instant case would, in my view, not have prevented the Minister from approaching the President to appoint a commission if the public interest subsequently demanded that a commission should be appointed. The agreement was, therefore, compatible with the President's power to appoint a commission of inquiry, and with the Minister's power to approach the president for the appointment of a commission."[157]

In other parts of his judgment the Judge also accepted that it would not have been legally possible for the parties to the agreement to fetter the President's discretion to appoint a

156 An exception recognised in *Plascon-Evans*, above n 154 at 635C.

157 At p 473 of the typescript judgment.

commission and he finds that they never intended to do so.[158]

[195] The appellants' version is supported, in our view, by the text of the press statement which nowhere suggests that a legally binding contract had been entered into by the government and SARFU and by the absence of detailed provisions one would have expected to find if a legally binding contract had been contemplated. In our view, therefore, the status of the contract should have been resolved on the basis of accepting the correctness of the version in the appellants' affidavits as the *Plascon-Evans* rule requires. The result would have been a finding that there was no legally binding contract.

[196] In any event, it is our view that the Judge's finding on the oral and written evidence is also unjustified. This Court is in as good a position as the Judge to make a determination on this. The proceedings at the meeting of 21 February 1997 were transcribed and a copy of that transcript formed part of the appeal record. The Judge based his conclusion on an assessment of the probabilities based on the following key factual findings: (a) in the absence of SARFU's co-operation, the task team appointed by

158 The contract would not, as indicated, have fettered "their executive discretion to act in the public interest"; see, for example, p 482 of the typescript judgment.

the Minister would not have been lawfully entitled to gain access to SARFU's records; (b) when the Minister announced the appointment of the task team on 14 February 1997 he was not aware of this; (c) he became aware of it only on 17 February 1997 when SARFU's attorneys wrote to the Minister stating that SARFU was not obliged to co-operate with the task team but that "as a gesture of goodwill . . . they will deal with the issues raised with you and your department provided that the dossier and other documents in your possession are made available to our clients together with a list of issues; (d) the DG replied on 18 February 1997 to propose a meeting between SARFU and the Department on 21 February 1997 at which "[t]he issue of the proposed task force shall also be addressed,"also stating that "[i]n the interest of rugby as a whole and the national interest it projects, the Department feels strongly that your clients accept this offer of the Department to negotiate the issue at stake at the meeting referred to above"; (e) the events at the meeting of 21 February 1997; and (f) the press statement issued thereafter which is set out at paragraph 190 of this judgment. The Judge speculated that the Minister had obtained legal advice between 17 and 21 February 1997, knew of his error at the time of the later meeting and was accordingly under pressure to save the situation by securing SARFU's agreement at that meeting to the appointment of the task team. There was no evidence to support this supposition, which was not put to the Minister in cross-examination. The finding that on 14 February 1997 the Minister was not aware that a task team would have no legal powers of subpoena and would require co-operation from SARFU cannot be accepted. It was common cause that the Minister informed the SARFU

representatives at the time that he expected SARFU to co-operate with the task team, and that if co-operation was not forthcoming he would be obliged to ask the President to appoint a commission of inquiry. He repeated this to the press at an interview held immediately after the meeting of 17 February 1997, identifying the areas of concern to him, namely, "the administration of rugby, the development programme, the status of professionalism, the ownership of stadiums and the television rights relating to rugby". This threat would have been unnecessary if the Minister was under the mistaken impression that the task team had powers of coercion. Moreover, according to the answering affidavits, the DG and the Minister both knew at the time of these discussions that the task team would have no powers of compulsion and this was not disputed in cross-examination or in the oral evidence. In reaching this finding, the Judge therefore erred.

[197] In the judgment, it is repeatedly stated that the parties must have intended to enter into a binding contract because without such a contract the proposed task team would not have been able to function. This was summed up as follows:

> "Seen from the side of the Minister and the DG, it was, therefore, imperative for them to obtain SARFU's consent in order to legally appoint a task team that had authority in law to conduct the investigation."[159] (emphasis in the original)

159 At p 480 of the typescript judgment.

This misses the point. The fact that SARFU's consent was necessary did not mean that the Minister had to agree to fetter his discretion to ask for a commission if that turned out to be the appropriate course to follow. This the Judge seems to accept for he held specifically that the contract "would not . . . have fettered their executive discretion to act in the public interest". The finding made by the Judge amounts, however, to a finding that the Minister agreed to forego the right to ask for a commission of inquiry in exchange for an undertaking that there would be a limited investigation into specific allegations only, well knowing that he was not in a position to make such agreement, and could do no more than identify the areas of concern which had in fact largely been spelt out by him already at the press conference. There is no apparent reason why the Minister should have intended to do this. Both parties knew that the choice was between a private investigation by a task team or, failing that, a request to the President to appoint a commission. The Minister made this perfectly clear both at the meeting of 17 February 1997 and at the press conference that followed.

[198] Although there is some uncertainty as to the precise ambit of the principle that a public authority cannot, by contract, fetter the exercise of its own discretion,[160] there is

160 The Appellate Division has held estoppel may not be used, in public law, to give legal effect to ultra vires conduct of an official that would otherwise be a nullity. See *Strydom v Die Land- en Landboubank van Suid- Afrika* 1972 (1) SA 801 (A) at 815G – 816 B, 817 D. See for academic commentary on the place of estoppel in public law: Baxter *Administrative Law,* above n 27, at 419 – 424; Cockrell "Can you Paradigm? – Another Perspective on the Public Law/Private Law Divide" 1993 *Acta Juridica* 227 at 236 – 8; and S Arrowsmith "Judicial Review and the contractual powers of public authorities" (1990) 106 *Law Quarterly Review* 277.

little doubt that a public authority cannot enter into a contract which is wholly incompatible with the discretion conferred upon it. More conclusively, one member of the Cabinet cannot of his or her own accord enter into a contract with a third party which would preclude or constrain the President from exercising powers conferred upon him or her directly by the Constitution. For example, a contract between the Minister of Foreign Affairs and an individual in terms of which the Minister undertook to ensure that such person would be appointed ambassador to a particular country could not fetter, in any way, the discretion conferred upon by the President in terms of section 84(2)(i) of the Constitution, or indeed the discretion of the Minister to recommend somebody else for that post. Nor could it give rise to a demand that the appointment be set aside because the person concerned had not been afforded a hearing by the President before the appointment was made.

[199] Any arrangement made by the Minister with SARFU concerning the task team's investigation could, as a matter of law, have been no more than an undertaking by the Minister to discharge his executive powers in a particular way. If that proved not to be a satisfactory arrangement, the undertaking could not fetter the Minister's power to pursue a different course and request the President to appoint a commission and certainly not that of the President to appoint a commission whether requested to do so by the Minister or not.[161] The arrangement broke down when SARFU withdrew its co-operation because

161 "This promise had it been given by an individual, might well have been binding and enforceable. Given by the Minister it was no more than an undertaking to

certain conditions were not met, and the task team felt they could not continue their work in the absence of such co-operation.

[200] There is accordingly no merit in the respondents' submission that because their rights were infringed by the President's decision to appoint the commission of inquiry and

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> discharge his administrative duties in regard to building in a way which would remove their grievances. I cannot regard the Minister's 'agreement' as anything more than a promise to meet their objection by exercising his discretionary administrative powers in a particular way. This promise cannot fetter his right, if circumstances connected with his administration require it, to exercise his discretion in some other way. If aggrieved the Board has a political, not a judicial remedy."

Per Murray C.J. in *Waterfalls Town Management Board v Minister of Housing,* above n 124, at 342E-F. See also *Dikolong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid,* above n 152, at 21G-J; *Rapholo v State President and Others* 1993 (1) SA 680 (T); *Findlay v Secretary for State for the Home Dept.* [1985] AC 318 at 337 – 338; *Hughes v Dept of Health and Social Security* [1985] AC 776 at 778; *R v Secretary of State, ex parte Hargreaves* [1997] 1 All ER 397(CA) at 408 – 411.

vest it with powers under the Commissions Act, the audi principle was applicable.

(o) Legitimate expectation

[201] The respondents argued that even if a binding contract had not been entered into on 21 February 1997, they, nevertheless, had a legitimate expectation that gave rise to an obligation of procedural fairness in relation to the vesting of the powers of the Commissions Act in the commission. Their legitimate expectation, they argued, arose from the terms of the agreement of 21 February 1997. The respondents argued that the terms of the agreement were that SARFU would co-operate with the task team on condition that the allegations against SARFU would first be provided to SARFU by the Department, that SARFU would then be given an opportunity to respond to those allegations, and that the task team would then verify SARFU's responses. The respondents argued further that this procedure had not been followed; that they had never been given a clear list of allegations against SARFU; and that although they withdrew from co-operation with the task team because of the failure to follow this agreement, they were willing to resume co-operation if and when such allegations were communicated to them. The agreement, they contended, gave rise to a legitimate expectation that the undertaking to furnish those allegations would not be terminated, and powers of coercion would not be vested in a commission, before the President had afforded them a hearing.

[202] According to the appellants, this was not the agreed procedure. They stated that

the agreement of 21 February 1997 was that a task team would be appointed to investigate the administration of rugby; that SARFU would co-operate with that task team by providing them with the necessary documents and information; and that SARFU would be given an opportunity to respond to any allegations that emerged from the task team's investigation. They contended that when SARFU withdrew its co-operation in July 1997, and the task team decided that it was unable to continue its enquiries, the Minister had no option but to request the President to appoint a commission of inquiry.

[203] In the alternative to his finding that there had been a contract entered into on 21 February 1997, the Judge held that if only a working arrangement had been established, it nonetheless gave rise to a legitimate expectation in terms of which the President was obliged to give SARFU a hearing prior to his decision to appoint a commission and vest it with powers in terms of the Commissions Act. This conclusion was based on the finding that the terms of the working arrangement of 21 February 1997 included a provision that SARFU would first be provided with allegations before it would be required to co-operate with the task team.

[204] The terms of the agreement constituted one of the two issues referred to oral evidence. Extensive and contradictory evidence was given by five witnesses on this matter. It seems to us, however, that the question whether SARFU had a legitimate expectation which gave rise to a duty on the President to afford them an opportunity to be

heard, is a factual question in respect of which the agreement of 21 February 1997 is, at best, only peripherally relevant. Although the conduct of the parties subsequent to 21 February 1997 provides strong support for the appellants' version of the agreement, it is not necessary for us to decide what the terms of the working arrangement of 21 February 1997 were. Seven months elapsed from that date till the appointment of the commission. To determine whether a legitimate expectation existed in September 1997, it is the events of those seven months and particularly the period immediately preceding the vesting of the Commissions Act powers in the commission which is crucial, not the events of the meeting of 21 February 1997. It is our view that the Judge erred in focussing solely on the meeting of 21 February 1997.

[205] Those events, as the affidavits reveal, were generally not in dispute and they were not referred to oral evidence. After the meeting of 21 February 1997, SARFU launched the application contemplated by the press statement to obtain a copy of the Van Rooyen dossier. This it obtained on 4 March 1997. In early March 1997, the task team was established and SARFU was notified of this. After an exchange of correspondence between SARFU and the DG, a meeting of the members of the task team and SARFU representatives, including Dr Luyt and Mr Oberholzer, was held on 3 April 1997. At that meeting, the SARFU representatives were told of the various areas of investigation to be undertaken by the task team. These included the following: administration; development programmes; representivity; media; and ownership of stadiums. This was accepted.

Following that meeting, an agreed press statement was issued which read as follows:

> "The Task Team, which has been appointed by the Minister of Sport and Recreation to inquire into Rugby in South Africa has commenced its work. It wishes to emphasize [sic] that in the course of its work it will be inter-acting with as many as possible of the role players in Rugby including SARFU. A meeting took place yesterday afternoon between members of the Task Team and representatives of SARFU for the purpose of enabling the Task Team to outline to SARFU the objectives of the Task Team and the procedures which it proposes to follow. The Task Team will also employ consultants to assist it in its work.
>
> The scope of the inquiry can be summarised in the broad areas of administration; development programmes; representivity as well as media and ownership of stadia. The Task Team assured SARFU that they would be objective and fair in their assessment and that SARFU would be offered every opportunity to respond to all issues raised. The Task Team adds that no sinister inference is to be drawn or any presumption made and that witch-hunting was not amongst its objectives.
>
> SARFU assured the Task Team that they should count on SARFU's cooperation and support as well as that of its affiliates, in a gesture of goodwill with a view to advancing the well-being of and resolving any concern that may exist in rugby."

On 4 May 1997 the task team published a notice inviting public comments to be forwarded to it before 31 May 1997. On 13 May 1997, Mr Oberholzer forwarded a copy of this notice to all provincial unions with the following letter:

> "Recently the Department of Sport & Recreation placed an advertisement nationally, inviting all persons who wished to make representations on the well-being of rugby in South Africa, whether written or oral, to submit these to the address mentioned [in] their advertisement (*see attached copy*), on or before 31 May 1997.

> Please be aware, that as Provincial Unions you are entitled to submit any representations you might wish to the Task Team in respect of any problems you might be experiencing which do not involve SARFU.
>
> I trust that . . . you will avail yourselves of the opportunity offered to you by the Sports Ministry."

[206] Between 3 April 1997 and the end of July 1997, the task team undertook its investigations. Meetings were held between one or more members of the task team and Mr Oberholzer, various development officers of SARFU, as well as provincial union officials. Copies of the constitutions of SARFU and its affiliates were provided to the task team. The task team sought access to copies of contracts between SARFU and players, and between SARFU and Newscorp concerning television rights for the Super-12 rugby series. Dr Luyt responded to this request in the following manner:

> "Thank you for your letter dated 4 July 1997.
>
> We have co-operated with your Task Team and reiterate that we will do so in future.
>
> However,
> 2.1 We cannot comply with this request [for contracts between players and SARFU] because of the confidentiality of the agreements save to state that a blank copy of an agreement can be made available.
>
> 2.2 I will have to seek the acquiescence of Newscorp, the New Zealand and Australian Rugby Unions to allow you to have sight of the Newscorp contract. That I undertake to request immediately and on an urgent basis.
> . . . .
> If the parties to the other SARFU sponsorships agree to your having sight of their

> agreements, the agreements will be available at my office for your perusal. We will let you know telephonically once we have the sponsors' permission in order to arrange a suitable date for us to meet at Ellis Park to conclude this matter. We assure you we will seek their permission on an urgent basis.
>
> Please be assured of our co-operation at all times."

On 17 July 1997, Dr Luyt wrote to the task team informing them that permission had been obtained for the task team to have sight of the relevant contracts.

[207] On the same day, auditors who were assisting the task team wrote to Mr Oberholzer requesting access to a list of documents relating to SARFU, Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust, including financial statements for 1989 – 1996; management accounts for the same period; minutes of meetings and annual general meetings for the period; and copies of sponsorship agreements. SARFU's general manager for administration and finances, Mr Bloom, responded on behalf of SARFU, observing that Dr Luyt would need to be approached in respect of the Transvaal Rugby Sports Trust and Ellis Park Stadium (Pty) Ltd. Mr Bloom confirmed that the documents sought by the auditors were available for inspection, although he reasserted that confidentiality must be maintained by the auditors in relation to the sponsorship agreements, the Newscorp agreement and players' agreements as had been requested by Dr Luyt on 17 July 1997. Mr Bloom also suggested that a meeting should be held between members of the task team and SARFU to facilitate disclosure of the documents. The auditors responded to this letter and a meeting was arranged for the week of 4 to 8

August 1997.

[208] The auditors also wrote to the provincial unions requesting access to similar documentation and arranged meetings with thirteen of the fourteen unions, all of whom promised co-operation. However on 24 July 1997, a letter was sent to the DG by a Mr Kruger on behalf of SARFU objecting to the firm of auditors that had been appointed to assist the task team on the ground that one of the partners of this firm had previously supported Mr Brian van Rooyen. The letter stated:

> ". . . we do not believe that the firm is objective, we are suspicious that the firm is not impartial or that there is bias, or the likelihood of bias in the exercise by the firm of its functions. We accordingly submit that it is not competent or proper for the firm to act as your consultant in the investigation . . .".

This letter was followed on 29 July 1997 by a letter from Rooth and Wessels, a firm of attorneys acting on behalf of SARFU, Gauteng Lions Rugby Union, Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust. The letter withdrew all co-operation from the task team in the following terms:

> "Until our client has been advised of every allegation and by whom and when so made, which the Task Team wishes to investigate, and until our client has had an opportunity of considering these and of deciding on the extent of its co-operation given the particular allegations, our client will not afford the Task Team any further access to any further information."

At a meeting of SARFU's executive committee on 5 August 1997, Mr Oberholzer and Dr

Luyt, somewhat inexplicably on their present version, explained the withdrawal of co-operation on the basis that the task team was not observing the agreement of 3 April 1997.

[209] At its meeting on 15 August 1997, the task team concluded that it could not proceed with its investigation in the light of the suspension of co-operation by SARFU. They recommended to the Minister that he apply to the President for the appointment of a commission of inquiry to be vested with powers in terms of the Commissions Act. SARFU was notified of the task team's attitude by a letter sent on the same day which informed them that the processes for the appointment of a commission of inquiry, to be vested with Commissions Act powers, were to be set in motion. Thereafter, a submission was prepared for the President making out a case for the appointment of a commission of inquiry. SARFU's attorneys responded to the Department's letter of 15 August 1997 on 26 August 1997. The 13-page letter does not allege that SARFU had any expectation, legitimate or otherwise, of being heard by the President before he made his decision to appoint the commission.

[210] Although they had been informed on 15 August 1997 that the task team and the Department intended to approach the President and request the appointment of a commission, the respondents took no steps to approach the President to seek an opportunity to be heard or to place information before him. They would have had ample time to do this as more than a month elapsed before the appointment of the commission

was announced on 26 September 1997. Once the commission had been appointed, SARFU wrote to the President requesting his reasons for the appointment of the commission. In that letter they did not assert that they had enjoyed an expectation, which had been breached, that they would be given an opportunity to be heard prior to the President's decision. Indeed, the letter stated that:

> "We wish to record that our clients have in principle accepted the appointment of the Commission subject to them being satisfied with the reasons and information furnished to them as requested above. Furthermore, it is to be appreciated that the terms of reference of the Commission must be sufficiently explicit so as to enable our clients to understand the extent and ambit of the allegations to be investigated. It also goes without saying that the terms of reference must be Constitutional."

[211] The question then is whether, on the facts outlined above, which were not in material dispute between the parties, the respondents have established any legitimate expectation, that the President would not, in conflict with any undertaking which might have been given by the Minister, make the provisions of the Commissions Act applicable to the commission, without first affording the respondents an opportunity of being heard. They did not assert such an expectation in the correspondence addressed to the Department on 26 August 1997, after they had been informed that the Department considered the appointment of a commission to be its only option. Nor did they assert such an expectation in their letter to the President on 29 September 1997 when they sought his reasons.

[212] In *Administrator, Transvaal and Others v Traub and Others*,[162] Corbett CJ considered the concept of "legitimate expectation" and its development in English law. In considering what conduct would give rise to a legitimate expectation, he cited the speech of Lord Fraser of Tullybelton in *Council of Civil Service Unions and Others v Minister for the Civil Service*:

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from *the existence of a regular practice which the claimant can reasonably expect to continue*." (emphasis supplied by Corbett CJ)[163]

In the present case, there is no suggestion that the legitimate expectation arose from a regular practice of the President. The respondents' case is that *an express promise* was given by a public authority. They seek to prove that such a promise was given on 21 February 1997 and that it was binding on the President. There was no evidence that such a promise was made expressly. The respondents were driven to place reliance on inferences sought to be drawn from what took place at the meeting of 21 February 1997 which imply that the Minister intended to fetter his own discretion to apply for a

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162 Above n 125 at 756I.

163 [1985] AC 374 (HL) at 401 B-C.

commission and also to commit the President to hearing SARFU before taking a decision to appoint a commission. Such inferences are at variance with the probabilities. Moreover, whatever may have been the understanding at the meeting of 21 February 1997, it was overtaken by subsequent events as we have described. It is noteworthy that SARFU and its affiliates did not seek to rely on any promise when tendering co-operation between April and July 1997, nor did their lawyers suggest in their letters of 26 August and 29 September 1997 that a legitimate expectation of a hearing existed.

[213] It is clear that the meeting of 21 February 1997 was to establish a working arrangement for the investigation of rugby which would avoid the necessity for the appointment of a commission of inquiry. This was a preliminary meeting. Subsequent to it, a task team was set up and commenced an investigation. It identified areas of concern to be investigated. Between April and July 1997, SARFU and its affiliates willingly and unconditionally co-operated with and assisted the task team's investigations. No condition was apparently placed on that co-operation which was unstintingly provided by officials of SARFU (including Mr Oberholzer and Dr Luyt, as has been described above) and its affiliates in relation to the wide-ranging investigation initiated by the task team. It had always been clear to SARFU and its affiliates that if co-operation was not forthcoming, the task team could not function, and the only alternative for the sports ministry would be to apply to the President for a commission of inquiry. This was stated expressly on more than one occasion in the correspondence. It appears to us that

whatever the working arrangement might have been in February 1997, it evolved during the following seven months into one in which it was accepted that the task team would investigate the areas of concern identified by it at its meeting with SARFU on 3 April 1997. The press statement issued after the meeting of 3 April 1997 stated that SARFU undertook to co-operate with the task team "in a gesture of goodwill with a view to advancing the well-being of and resolving any concern that may exist in rugby". That goodwill was demonstrated by Mr Oberholzer's letter to affiliates on 13 May 1997 and by the subsequent co-operation by the affiliates and SARFU with the task team's investigations. No conditions arising from the agreement at the meeting of 21 February 1997 were referred to during this period at all. SARFU appears to have decided that co-operation in the interests of rugby was the wise and expedient course.

[214] The Judge held that the President terminated the agreement when he appointed the commission, and although he had the right to do so, it was a right which in fairness ought only to have been exercised by him after hearing SARFU. The agreement, however, was never binding on the President, and it was never put to the President in evidence that he had terminated it. It had in fact been terminated more than a month before the President took his decision, when SARFU withdrew its co-operation and the decision was taken by the Minister to apply for a commission. Whether that is seen as the termination of the working arrangement or as the exercise by the Minister of his right to withdraw from the agreement, and to apply for a commission, is of no moment. The Minister clearly did not

have to give SARFU a hearing before taking that decision. At most, SARFU was entitled to notice of the decision and that was given to them approximately four weeks before the application for the commission was lodged with the President.

[215] The withdrawal of co-operation on 29 July 1997 was sudden and complete. The withdrawal was in conflict with the spirit of co-operation which had been demonstrated between April and July 1997. It coincided with requests by auditors for detailed financial and management information from SARFU, as well as Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust. The reason given was the breach of an agreement in April 1997 that allegations would first be given to SARFU. If this were the real reason, it is not clear why co-operation and disclosure of documentation without the allegations having been given had previously been unstintingly provided. In fact, the appellants sought to cross-examine the respondents' witnesses and to lead the evidence of members of the task team to establish that the task team had specifically indicated that it would undertake the investigations only if no conditions were attached to its doing so. The Judge excluded this evidence holding that this was not an issue referred to evidence, that the appellants had denied that there was a binding agreement in February 1997 and had not contended that the agreement was varied in April 1997. We need not consider the correctness of that ruling, as the conduct of the parties between 3 April and 29 July 1997 is sufficient to refute the existence of a legitimate expectation as relied on by the respondents. It must have been overwhelmingly clear to SARFU when it chose to

withdraw its co-operation that it would leave the ministry with no alternative but to seek the appointment of a commission of inquiry. In our view, in the light of the events between April and July 1997, SARFU had no legitimate expectation to a hearing by the President before he decided to confer powers under the Commissions Act upon the commission he had appointed to investigate rugby.

[216] Indeed, any such expectation could not in the circumstances of this case have been considered to be legitimate, giving rise to a right to be heard by the President. The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a "legitimate expectation of a hearing" exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances. It is for this reason that the English courts have preferred the concept of "legitimate expectation" to that of "reasonable expectation". In *Council of Civil Service*

Unions and Others v Minister for the Civil Service,[164] Lord Diplock explained that "legitimate" should be used rather than "reasonable":

164 Above n 163 at 408 – 9.

> ". . . in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences."[165]

We therefore conclude that the respondents had no legitimate expectation that the President would afford them a hearing prior to his deciding to confer the Commissions Act powers upon the commission he had appointed.

(p) Prejudice and the duty to act fairly

[217] One last question needs to be considered in relation to the respondents' submission that they had a right to be heard. The Judge placed considerable reliance on the decision of the Supreme Court of Appeal in the *Du Preez* case,[166] holding that the requirements of natural justice oblige a functionary to act fairly whenever a decision which is likely to prejudice another is taken by such a person. Purporting to apply that principle, the Judge held that in the circumstances of the present case, where the decision would cause

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165 Id. See also the speeches of Lord Fraser of Tullybelton at 401 and Lord Roskill at 415 both preferring the phrase "legitimate expectation" to "reasonable expectation". See also the judgment of Sopinka J in the Canadian Supreme Court, *Old St Boniface Residents Association v Winnipeg (City)* (1990) 75 DLR (4th) 385 at 414d in which he held that "[t]he principle developed in these cases [interpreting the term 'legitimate expectation'] is simply an extension of the rules of natural justice and procedural fairness." See also *Reference re Canada Assistance Plan (BC)* (1991) 83 DLR (4th) 297 at 319 – 320.

166 Above n 84.

prejudice to SARFU, fairness demanded that SARFU be heard by the President before he took the decision.

[218] *Du Preez*'s case was entirely different from the present one. There the issue was whether persons who were to be implicated as persons who had committed gross human rights violations by the evidence given at the Truth and Reconciliation Commission should be given adequate notice thereof so that they could appear before the commission in order to dispute the evidence and, if necessary, to rebut it immediately.

[219] The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. *Du Preez*'s case is no authority for such a proposition, nor is it authority for the proposition that whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case.[167] For instance, in *Du Preez*'s case, the calling of the evidence was likely to cause severe prejudice to the persons implicated thereby. It was precisely for that reason that the commission was required to give notice to them. Yet, it could hardly have

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167 See, for example, *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*, above n 108 para 39 and cases cited there.

been suggested that the commission would not have been entitled to take the decision to call the witnesses without first hearing such persons.

[220] The power to appoint a commission of inquiry is a tool to assist the executive in the task of government. The executive is not obliged to accept either the factual findings or the recommendations of a commission. The commission's report may be acted upon or not, as the President and his executive considers fit. Once a decision has been taken to appoint a commission and the subject matter of the commission's investigation constitutes a matter of public concern, it is difficult to contemplate a situation in which any person could say that though the commission has been lawfully appointed, and though it is to deal with matters of public concern, the decision to extend the Commissions Act powers to it must be subject to an opportunity to be heard. To impose an obligation to hear affected parties prior to conferring powers under the Commissions Act upon a commission may well unnecessarily hamper the executive in performing the tasks of government. What is more, the vesting of such powers in a commission does not, in itself, infringe rights. Subsequent conduct by the commission is constrained by the duty to act fairly.[168] The rights of witnesses before a commission are therefore protected. A commission can only be vested with powers of subpoena if it is investigating a matter of public concern. Whether it is such an investigation or not is an objective question justiciable before the courts.

[221] In the circumstances of the present case, which have been sufficiently described above, SARFU could have had no legitimate expectation which could have given rise to a right to be heard by the President before he decided to confer the Commissions Act powers upon the commission.

(q) Reasons for the President's decision

[222] The respondents also argued that the reasons given by the President did not justify his decision to make the provisions of the Commissions Act applicable to the commission in breach of section 33 of the Constitution. It is not necessary to decide whether the Constitution obliges the President to give reasons when he exercises the Commissions Act power or whether the Constitution empowers a judge to determine whether the exercise of the power is justifiable in terms of the reasons given. The President chose to give reasons in his letter of 3 October 1997, a significant portion of which is set out in paragraph12 above. It is clear from the President's reasons that they justify his decision to exercise the powers conferred upon by the Commissions Act. Nothing further need be said, therefore, in relation to this challenge.

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168 See *Du Preez and Another v Truth and Reconciliation Commission,* above n 84 at 233B-C.

D. REMAINING CHALLENGES TO THE VALIDITY OF THE PRESIDENTIAL ACTS

[223] Two challenges raised by the respondents remain to be dealt with: the challenge relating to the question whether the President failed to apply his mind properly to the question whether a commission should be appointed and the challenge relating to the terms of reference. Both will be dealt with in this section of the judgment.

(a) Failure to apply his mind — irrelevant considerations and gross unreasonableness

[224] The respondents argued in the alternative that, if the President had not abdicated his responsibility, he had in any event failed to apply his mind properly to the exercise of his discretion in terms of section 84(2)(f). In this regard, they relied on the well-known dictum of Corbett JA in *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another*:[169]

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see *National Transport Commission and another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735 F – G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895 B – C; *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14 F – G). Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide*

169 1988 (3) SA 132 (A) at 152 A – E.

> or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."

In their written argument, the respondents argued that the President's oral evidence disclosed that he had failed to apply his mind to the matter and, in particular, that he had taken into account irrelevant considerations and ignored relevant ones. There are two reasons why this contention cannot be accepted. First, the exercise of the President's constitutional power to appoint a commission of inquiry is not directly governed by the principle in the *Johannesburg Stock Exchange* case. The constraints on that power are determined by the Constitution and have been fully considered in paragraph 148 above. We have held that those constraints were not breached by the President when he appointed the commission in this case.

[225] Secondly, even if the principle in *Johannesburg Stock Exchange* were applicable, it has not been established by the respondents that the President acted arbitrarily, capriciously, in bad faith, in furtherance of an ulterior or improper purpose or that he misconceived the nature of his discretion when he appointed the commission or when he conferred the Commissions Act powers upon it. The requirement of the Commissions Act, that the matter be one of public concern, has been objectively met.

[226] The Judge upheld the respondents' argument finding that the President's evidence showed that he had failed to apply his mind to the matter properly, in that he had taken irrelevant factors into account and had failed to consider relevant factors. He also held that the President had acted grossly unreasonably. The basis for the conclusion that the President had not applied his mind properly was the Judge's finding that the Minister had entered into a contract, alternatively a working arrangement, with SARFU in terms of which SARFU was to be given the complaints against it before it was under any obligation to co-operate; that the President did not take this into account, and that if he had done so, he would not have appointed the commission. The Judge concluded, therefore, that the President's decision was therefore both wrong and grossly unreasonable. This finding was, as a matter of fact, fundamentally flawed. It was also flawed as a matter of law. The Judge erred in applying these principles to the exercise of the power conferred by section 84(2)(f) of the Constitution. In the latter case, there are no jurisdictional facts on which the exercise of power is dependent. In relation to the Commissions Act powers, we have made it clear that the jurisdictional fact, namely, that the subject matter of the commission's area of investigation constitutes a matter of public concern, was established. The evidence also makes it clear that the President had specifically considered those jurisdictional facts before exercising the power conferred upon him by the Commissions Act. The respondents' contention in this regard must accordingly be rejected.

(b) Terms of reference

[227] The commission's terms of reference, as promulgated, read as follows:

> "To inquire into and report upon the financial, administrative and related matters concerning the management of Rugby Union Football in South Africa by the South African Rugby Football Union (SARFU) and its affiliate unions with a view to establishing whether such matters are being handled in a way that is consonant with –
>
> (a) the best interests of the public and the rugby supporting public in particular;
> (b) the best interests of the game of rugby football, its development and its promotion amongst all South Africans including those in underprivileged areas; and
> (c) the principles of fair, open, honest and sound management;
>
> and more in particular –
>
> (i) the governance and functioning of SARFU including SARFU's relationship with the provincial unions; and
> (ii) the handling of or present practices in regard to the development programs in rugby, professionalism in rugby, intervention by administrators in team management and team selection, the adequacy of the process of integration in rugby and its administrative structures, the employment and promotion of personnel, the awarding of contracts especially those contracts relating to media coverage of rugby, payment of commissions and the award of any other benefits or privileges, sponsorships and the ownership and management of stadia or other facilities."

The respondents argued that the terms of reference were so vague that the ambit of the inquiry could not be determined with reasonable certainty. This was a cause of action set out in their founding affidavit and argued in the court below. However, the Judge found it unnecessary to deal specifically with the question of the vagueness of the terms of

reference in the light of his other findings.

[228] In this Court, the respondents argued that the impermissible vagueness of the terms of reference had two results: first, that it was impossible to determine whether the commission was charged with the investigation of a matter of public concern and that therefore the vesting of the subpoena powers in terms of the Commissions Act could not be valid; and secondly, that the appointment of the commission itself was null and void. The appellants argued that the terms of reference define the scope of the inquiry with reasonable certainty and that it is clear from them that the commission is engaged upon an investigation of a matter of public concern.

[229] Terms of reference constitute a mandate for the commissioner which he or she uses as a guide to determine the scope of his or her investigation. Consequently, the question to be answered is whether objectively the terms of reference are reasonably comprehensible to the commissioner and affected parties so as to determine the nature and ambit of the commission's mandate with reasonable certainty. If a witness is required to answer a question which is not related to the terms of reference, he or she will not be obliged to answer such question.[170] In determining, in a criminal case, whether a witness may be convicted of refusing to answer questions in terms of the criminal offence created by sections 3 and 6 of the Commissions Act, courts will take a narrow view of the terms

[170] See *S v Mulder*, above n 113 at 122 C – D.

of reference.[171]

[230] There can be no doubt in this case that the terms of reference do determine the ambit of the commission's task sufficiently. The terms of reference first identify the overall subject matter to be investigated by the commission. That subject matter is stated to be "the financial, administrative and related matters concerning the management of Rugby Union Football in South Africa" by SARFU and its affiliates. Thereafter, paragraphs (i) and (ii) of the terms of reference identify certain issues specifically for investigation. Those issues are: (a) the governance and functioning of SARFU including its relationship with the provincial unions; (b) development programmes in rugby; (c) professionalism in rugby; (d) intervention by administrators in team management and team selection; (e) the adequacy of the process of integration in rugby; (f) the employment and promotion of personnel; (g) the awarding of contracts, especially those contracts relating to media coverage of rugby; (h) the payment of commissions and the award of any other benefits, privileges or sponsorships; and (i) the ownership and management of stadiums or other facilities. The scope of the inquiry is clearly broad, but it is not indeterminate.

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171 Id at 122D.

[231] Moreover, the terms of reference require that the investigation generally, and the specific issues in particular, are to be investigated for the purpose of establishing whether such matters are being handled in a way that is consonant with: (a) the best interests of the public and the rugby-supporting public in particular; (b) the best interests of the game of rugby football, its development and its promotion among all South Africans including those in under-privileged areas; and (c) the principles of fair, open, honest and sound management. No investigation of the subject areas identified in the terms of reference may take place unless related to one of these three purposes. These purposes are clearly matters of public concern. It is clear therefore that the terms of reference permit investigation into the affairs of SARFU and its affiliates only to the extent that the investigation is connected with a matter of public concern and we cannot accept the respondents' contention to the contrary. Nor can we accept that the terms of reference are vague and incapable of determining the proper ambit of the commission's investigation.

[232] The ultimate conclusion which we unanimously reach is that there is no basis in fact or in law on which the judgment and the order of the High Court can be sustained. It remains to deal only with certain interlocutory and procedural issues, as well as the question of costs.

E. REMAINING PROCEDURAL AND INTERLOCUTORY MATTERS AND COSTS

(a) Misjoinder

[233] As explained above, the appellants argued that the joinder of the Minister and the DG was incorrect. Because of the introduction of the Minister and the DG to the ranks of the parties, the real issues between the correct parties (as crystallised by the founding and answering affidavits) became blurred. On the face of it, there was no basis in any of the seven causes of action advanced to join the Minister and the DG as parties to the application. No substantive relief was sought against them. However involved they may have been in the proceedings and however much was at stake for them politically or administratively, they did not have an interest that in law could justify their joinder. The case cited by the Judge,[172] *Amalgamated Engineering Union v Minister of Labour*,[173] as authority for the joinder of the additional two parties, does not support his conclusion. That case requires joinder where the outcome of a case may affect any direct and substantial interest of that person. In this case, no direct and substantial interest of the Minister or the DG could have been affected by its outcome. The case for setting aside the decision to appoint the commission (and to give it the powers afforded by the Commissions Act) was rightly directed at the President alone; and it matters not whether he had acted as head of state or as the head of the executive branch of government in

172 At p 1155 of the typescript judgment.

173 1949 (3) SA 637 (A) at 659.

making the impugned decision. In either instance he was the sole repository of the power alleged to have been unlawfully exercised and any order made in relation to his exercise of such power would affect him alone. Neither the Minister nor the DG had any "legal interest in the subject-matter of the action . . . which could be prejudicially affected by the judgment".[174] Such interest as they might have had was indirect and of a political, and not legal, nature. The issues became blurred, however, with the addition of parties who did not belong there. The result was that extra-curial statements by the DG and the Minister were introduced without a proper foundation having been laid for their admissibility against the President. These statements were relied on, first, in casting doubt on the President's evidence on affidavit, and then in cross-examining him. They were inadmissible against him and, were it not for the misjoinder, would probably not have formed part of the papers. Those statements appear to have been an important part of the Judge's reasoning in deciding to refer the matter to evidence. In our view, therefore, the appellants were correct in arguing that there had been a misjoinder and the Judge was incorrect in dismissing that argument. However, in the light of the decision to which we have come in relation to the appeal, nothing now turns on this misdirection.

(b) Referral to oral evidence

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174 See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 167 H.

[234] We have held, with due regard to all the evidence adduced pursuant to the order referring the matter to oral evidence, that the respondents have not made out a case for any of the relief which they seek.[175] It is therefore not strictly necessary to consider whether the Judge was correct in making the referral order.[176] The appellants, however, specifically challenged the correctness of that order and that of certain interlocutory orders carrying awards of costs in favour of the respondents. We are of the view that determining whether the order referring the matter to oral evidence was correctly made would assist in deciding whether the disputed interlocutory costs orders should stand. There is another aspect of the order of the Judge that merits careful consideration at this stage, namely, the order compelling the President to subject himself to cross-examination at the hearing of the oral evidence. Such an order is, to say the least, unusual and has far-reaching implications, particularly because of its impact on the question of separation of powers and the comity between different arms of the state. The circumstances which must be taken into account before an order of this kind can be made will therefore be briefly considered later.

[235] It is trite that an application will be referred for oral evidence only if there is a genuine dispute of fact, the resolution of which is material to the determination of the case. The terms of the referral order in this case required evidence on two issues. The

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175 At para 232 above.

176 The relevant terms of that order are set out in para 20 above.

first related to a term of the alleged agreement of 21 February 1997; the second to the "abdication of responsibility" issue. Each of these will be dealt with in turn.

[236] The first part of the order related in particular to whether the terms of the agreement of 21 February 1997 required SARFU to be provided with the allegations against it before it was expected to co-operate. As stated above, the question of the legal status of the agreement of 21 February 1997 was not referred to oral evidence.[177] There was a dispute on the papers as to precisely what the terms of the arrangement reached on 21 February 1997 were. The respondents averred that it was agreed that all the allegations against SARFU were to be furnished to it before it would be obliged to co-operate; the affidavits of the appellants were to the effect that co-operation by SARFU was not conditional upon the allegations being provided beforehand, but that the allegations were to be furnished "in due course". The respondents sought to establish that all the allegations against SARFU were to be furnished before SARFU was obliged to co-operate, that all the allegations were not provided, that SARFU withheld its co-operation on this account and that the existence of the arrangement or agreement gave rise to a legitimate expectation on the part of SARFU that it would be given a hearing by the President before the latter appointed any commission of inquiry to investigate the affairs of SARFU.[178] As the Judge saw it :

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177 See para 189 above.

178 The contentions of the parties are summarized in paras 201 – 202 above.

". . . the dispute concerning the terms of agreement of 21 February 1997 was central to the dispute between the parties and the matter could not with justice and fairness to the parties be properly decided without the court having the benefit of hearing and seeing the deponents to the affidavits in the witness-box."[179]

179 At p 42 of the typescript judgment.

[237] We have held that: (a) the agreement of 21 February 1997 is, at best, only peripherally relevant to the material factual question as to whether SARFU had a legitimate expectation of procedural fairness which gave rise to a presidential duty to afford it an opportunity to be heard; (b) a decision on the precise terms of the working arrangement of 21 February 1997 is unnecessary; and (c) it is the events of the seven months between February and September 1997 and particularly those immediately preceding the appointment of the commission which are crucial.[180] We have furthermore concluded that, in the light of the events between April and July 1997, SARFU did not have any legitimate expectation which, under the circumstances, would oblige the President, as a matter of procedural fairness, to afford it a hearing before he decided to make the provisions of the Commissions Act applicable to the commission he had appointed.[181] It follows that the Judge erred in focusing solely on the meeting of 21 February 1997, and that it was this incorrect focus which resulted in this issue being referred to oral evidence. In our view, there was no basis for referring this issue to evidence as the events of the period April to September 1997 were set out in considerable

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180 See para 204 above.

181 See paras 215 – 216 above.

detail in the affidavits and were not materially in dispute.

[238] As far as the "abdication of responsibility" issue is concerned, the matter was referred to oral evidence on the issues "relating to whether or not" the President had made the remarks to the Minister attributed to him in the press statement of 7 August 1997 that "[a] Commission is yours if, in your best judgement it is opportune"; whether or not the Minister had made the remarks attributed to him in an article in the *Sunday Times* of 17 August 1997; whether or not such remarks by the Minister correctly reflected the discussions between himself and the President; and whether or not the President had rubber-stamped the Minister's decision and had failed to properly consider the matter himself. Before the matter was referred to oral evidence, the statement attributed to the President in the press statement of 7 August 1997, together with certain alleged statements of the Minister reported in the *Sunday Times* and *Rapport* of 17 August 1997, were the only foundation for the respondents' contention that the President had not taken the decision to appoint the commission but that it had been taken by the Minister. In their affidavits, the President and the Minister denied that the President had made the statement attributed to him in the press statement of 7 August 1997, and the Minister denied that he had appointed the commission (and emphasised that he had no power to do so). The President stated that it was he who had taken the decision to appoint the commission for the reasons contained in his letter to the respondents dated 3 October 1997.[182] It was in

[182] An excerpt from this letter is contained in para 12 above.

these circumstances that the Judge, relying on cases such as *Moosa Brothers and Sons (Pty) Ltd v Rajah*[183] and *Khumalo v Director-General of Co-operation and Development and Others*[184], said:

> "It appeared to me that on a conspectus of all the papers before me at that stage [at which the matter was referred for the hearing of oral evidence] there were reasonable grounds for doubting the correctness of the respondents' averments in their further supplementary affidavits."[185]

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183 1975 (4) SA 87 (D) at 93 E - H.

184 1991 (1) SA 158 (A) at 167 G – J.

185 At p 122 of the typescript judgment.

[239] It is difficult to see how the accuracy or veracity of the press statement issued by the department press officer on 7 August 1997 could have formed the basis for a referral to oral evidence. On the application papers, the only issue between the President and the respondents in relation to the abdication of responsibility issue was whether the President himself had decided to appoint the commission on 22 September 1997. The judgment was built on the hypothesis that the statement in question was made by the President to the Minister on 5 August 1997, and on the finding that if this was said, it amounted to an abdication of responsibility which was irrevocable and rendered everything that happened thereafter unlawful. We have held that even if it is assumed that the press statement correctly reflected what was said by the President to the Minister on 5 August 1997, this would not constitute an abdication by the President of his constitutional power to appoint a commission of inquiry[186] nor would it constitute an irrevocable abdication of his responsibility.[187] It follows that the statement attributed to the President in the departmental press statement, even if correct, could cast no doubt on the President's statements in his affidavits to the effect that he alone had taken the decision to appoint the commission after a careful and thorough consideration of the matter during September 1997. It seems clear that the decision to refer the matter for the hearing of oral evidence on this issue was profoundly affected by the Judge's incorrect conclusion that the contested statement by the President to the Minister amounted to an irrevocable

186 See paras 42 – 43 above.

187 See paras 44 – 45 above.

abdication of responsibility by the President. The order for referral in this regard, based as it was on this incorrect conclusion, was itself clearly wrong.

(c) Order compelling the President to give evidence

[240] This conclusion does not, however, end the enquiry in relation to the correctness of the order of referral made by the Judge. It was a term of the Judge's order that the President himself give oral evidence. There was no special order concerning the circumstances in, and the place at which, the President was to testify. The effect of the order of the Judge was therefore that the President was ordered to (and did) testify in open court. We have already held that the circumstances of this case did not warrant any issue being referred to evidence. The question that remains to be considered is whether the order was correct in so far as it required the President to give evidence in a civil matter in relation to the performance of his official duties. This is a question of considerable constitutional significance going to the heart of the separation of powers under our Constitution. It is also relevant to another aspect of this appeal concerning the correctness of the Judge's dismissal of appellants' application for an order revoking the order in terms of which the President was compelled to testify.

[241] The appellants, relying on the law of several foreign jurisdictions, submitted that the order requiring the President to testify was wrong in law. They submitted that the doctrine of the separation of powers requires that the President not be treated as if he or

she were any other witness. They pointed to the important constitutional role of the President as head of state and head of the national executive and submitted that the separation of powers required the courts to be astute to protect the dignity and status of the office of the President under the Constitution as well as the efficiency of that office.

[242] A review of the law of foreign jurisdictions fails to reveal a case in which a head of state has been compelled to give oral evidence before a court in relation to the performance of official duties.[188] Even where a head of state may be called as a witness, special arrangements are often provided for the way in which the evidence is given.[189]

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188 For jurisprudence, see *US v Burr* 25 Fed Cas 30 (1807*); US v Nixon* 418 US 683 (1974); *Clinton v Jones* 137 L Ed 2d 945 (US SC)*; Sankey v Whitlam and Others* (1979) 142 CLR 1 (HCA). For academic consideration, see for example, the following: de Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5 ed (Sweet & Maxwell, London 1995) at 205; Rotunda and Nowak *Treatise on Constitutional Law* 2 ed Vol 1 (West Publishing Co, St. Paul 1992) at 571 – 582; Tribe *American Constitutional Law* 2 ed (Foundation Press Inc., New York 1988) at 275 – 285; Freund "The Supreme Court 1973 Term Foreword: On Presidential Privilege" 88 (1974) *Harvard Law Review* 13 at 31. See also the following note.

189 In Germany, for example, in terms of the Codes regulating Civil Procedure and Criminal Procedure the state president need not attend court in person; instead he gives his testimony in his residence (*Zivilprozeßordnung* sections 219(2) and 375(2)*; Strafprozeßordnung* section 49). He may also refuse to

There is no doubt that courts are obliged to ensure that the status, dignity and efficiency of the office of the President is protected. At the same time, however, the administration of justice cannot and should not be impeded by a court's desire to ensure that the dignity of the President is safeguarded.

[243] We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases,

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give evidence if it would be detrimental to the well-being of the Federal Republic or a German state (*Zivilprozeßordnung* section 376(4)*; Strafprozeßordnung* section 54(3)). Some academic writers say this discretion is not justiciable (see, for example, Hartmann in Baumbach, Lauterbach, Albers and Hartmann *Zivilprozeßordnung* (Beck, München 1997) 55 Aufl section 376 at para 11; Kleinknecht, Meyer-Goβner *Strafprozeßordnung* (Beck, München, 1995) 42 Aufl section 54 at para 31).

sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.

[244] The Judge says that he earnestly considered whether the President ought to be ordered to subject himself to cross-examination in the light of his constitutional status. But nowhere in the judgment is there any indication of the factors which were taken into account by him in giving the matter that consideration. Moreover, there is nothing on the papers or in the evidence from which we can conclude that the administration of justice would have been injured in any way if the President had not been ordered to submit himself to cross-examination but, instead, the decision to do so or not had been left to him. In the circumstances, we conclude that the Judge erred in making that order.

[245] Even when exceptional circumstances require the President to give evidence, the special dignity and status of the President together with his busy schedule and the importance of his work must be taken into account. In a private suit involving the President of, the United States of America, the Supreme Court held in *Clinton v Jones*:[190]

> "We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so."

190 Above n 188 at 959.

Later, Stevens J said :

> "Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery."[191]

We are of the view that in all cases in which a President is called upon to testify, respect for the office, the need to preserve the dignity and status of that office and an understanding of the implications of his busy schedule must be sensitively and carefully considered.

(d) Miscellaneous interlocutory orders

[191] Id at 968-969.

[246] The appellants appeal against orders of costs made against them consequent upon their lack of success at the end of each of four interlocutory applications which were made during the hearing of oral evidence. The first was an application for the withdrawal of the dispute relating to the terms of the agreement of 21 February 1997 from the referral to evidence; the second was an application for revocation of the order that the President appear personally to be examined and cross-examined; the third was an application for production of certain documents in respect of which the applicants had claimed privilege;[192] and the fourth was an application, after all the oral evidence had been led, seeking leave to lead the evidence of an additional witness, a journalist, Mr de Wet. The first three applications were inextricably linked to the order of referral which we have held was wrongly made. In the absence of the incorrect referral order, none of the applications would have been made and none of the costs orders would have arisen. The fact that the orders arose from the incorrect referral order may be sufficient on its own to justify setting aside the orders. Further consideration of the three interlocutory applications, however, provides additional reasons for setting aside the orders in the first three interlocutory applications. We will, therefore, deal briefly with each of the interlocutory applications.

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192 The judgment on this application is reported as *South African Rugby Football Union and Others v President of the Republic of South Africa and Others* 1998 (4) SA 296 (T).

[247] In order to determine which party should bear the costs for these applications, the approach in *Fripp v Gibbon and Co*[193] is helpful. In that case, De Villiers JP held the following:

> " I agree that as a rule it is fair and just that the costs should follow the event, whether of claim or counterclaim. But I cannot agree with the view that the unsuccessful party should bear the burden of all the costs simply on the ground that in the final result he is the unsuccessful party. To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, prove to have been unnecessarily or ineffectively incurred should, as a rule, be borne by the party responsible for such costs."

The question to be considered in relation to each interlocutory costs order, therefore, is whether the interlocutory application which gave rise to the costs order had been successful or effective.

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193 1913 AD 354 at 361.

[248] The first two costs orders are concerned with interlocutory applications concerning the referral to evidence. It is a well-established principle in our law that a referral to evidence constitutes a ruling, not an order, by a judge.[194] As such, it is open to the court to withdraw that ruling and order that it is unnecessary to hear the oral evidence.[195] We have held that the referral to evidence was clearly wrong and constituted a misdirection by the Judge. The appellants were, therefore, entitled to make an interlocutory application to the Judge seeking a reconsideration of the referral to evidence. Moreover, they were entitled to seek the revocation of the order requiring the President to give evidence, particularly given the extraordinary and sensitive character of such an order.[196] Such interlocutory applications, therefore, though unsuccessful in the court below should in fact have succeeded for the reasons we have given earlier in this judgment. In the circumstances, therefore, the applications were in fact successful and effective. They were properly launched and should have succeeded. In the circumstances, it is just and equitable that the costs orders made against the appellant should be set aside and that the respondents, who should not have opposed these applications in the High Court, be ordered to pay the costs.

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194 *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262 J – 263 D and cases therein cited.

195 Id at 263 G – H.

196 See paras 240 – 245 above.

[249] The third application relates to the production of certain documents in respect of which the appellants claimed attorney and client privilege. The respondents placed the claim in issue and brought an application for the Judge himself to inspect them in order to rule on it. The application was opposed by the applicants. The Judge ruled in favour of the respondents and the documents were produced for his inspection. Having read them, the Judge ruled that the privilege had indeed been properly claimed. However, he nevertheless ordered the appellants to pay the costs of the interlocutory application. The appellants challenged the costs order made against them for opposing the application for the production of documents. In our view, they should succeed. The inspection of the documents by the Judge formed part of the application in which the appellants' claim of privilege was challenged. It was pursuant thereto that the Judge decided himself to inspect the documents.[197] His decision that the documents were privileged justified the appellants opposition to the respondents' claim for their production. The Judge erred in separating the appellants' objection to produce the documents for his inspection from the application in respect of which it formed a part. It is just and equitable that a litigant who has opposed an application to produce documents for inspection on a ground that subsequently turns out to be correct should not be required to pay the costs of the interlocutory application which, in the final result, has been successfully opposed.[198] For

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197 That the Judge had such power appears from the decision of the Full Bench of the Transvaal Provincial Division in *Lenz Township (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T).

198 A similar order was upheld on appeal in the *Lenz Township* case, above n 197.

the above reasons, all three of these costs orders must be set aside and replaced with an order requiring the respondents to pay those costs.

[250] The fourth interlocutory application was made after all the oral evidence had been led and sought leave to call an additional witness, a journalist, Mr de Wet. It falls to be dealt with on a different footing. The appellants sought to call Mr de Wet in order to elicit evidence that Dr Luyt had told Mr de Wet that he (Dr Luyt) did not wish to impugn the integrity of the President and had not wanted him to be cross-examined. The argument was that the statement made by Dr Luyt to Mr de Wet would found a special order of costs against Dr Luyt. We fail to see how this could have been so. The cross-examination of the President had been completed by the time that the application was made. The order that the President submit himself for cross-examination had been made at the instance of the respondents' counsel and Dr Luyt must have been aware of this. As we see it, the most favourable inference for the appellants that could properly be drawn from the circumstance that the statement was made by Dr Luyt to Mr de Wet (if indeed such a statement was made) would be that Dr Luyt had acquiesced in the cross-examination of the President, but had said to a courtroom newspaper reporter that he did not wish the President to be cross-examined. This could not have been the basis for any special costs award. In the circumstances, the refusal of this application and the consequent order for costs were correct and should stand.

(e) Costs of appeal

[251] Mr Trengove asked for the costs of the appeal to be awarded to the appellants on the attorney and client scale. Three grounds were relied upon for such an order. He referred first to the recusal application launched by Dr Luyt shortly before the appeal was due to be heard. That application was unprecedented. It attacked the integrity of every member of this Court, contrasting their integrity and courage (perceived to be flawed) with that of the Judge (who was said to have shown remarkable courage in giving the judgment that he did). The implication of these allegations is referred to by this Court in its judgment on the recusal application. It was:

> ". . . that the ten members of this Court had created the impression that they had already decided to uphold the appeal of the President at a time when the record had not been filed and before argument on behalf of any of the parties had been heard. Having so decided, the further consequence of this impression was that they made interlocutory rulings aimed at upholding the President's appeal. The suggestion that a court, without having seen the record or heard argument, would engineer its interlocutory rulings to favour a decision it had already taken, is extraordinary and contemptuous."[199]

[252] Secondly, counsel for the respondents during their argument on appeal contended, notwithstanding their attitude in the High Court that the honesty of the President was not being challenged, that the evidence of the President in relation to the events of 12 to 26 September 1997 was a fabrication. We have dealt with this fully in our judgment.[200] The

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199 Above n 6 para 54.

200 At paras 48 – 125 above.

implication of this argument is that the President deliberately attempted to mislead the Court in two respects: first, by pretending to have applied his mind to the question whether to appoint the commission when in fact he had not done so; and secondly, by affirming in his evidence the reasons for the decision in the letter of 3 October 1997, when in fact he had not given consideration to the matter himself.

[253] Thirdly, on the fourth day of the appeal, when senior counsel for the respondents was being questioned about the propriety of raising such a contention for which there was no foundation in the evidence, his brief was terminated, and he and the respondents' other legal representatives withdrew from the appeal. No explanation was offered for this.

[254] As could be expected, the attack on the integrity of this Court and the abrupt termination of counsel's mandate attracted considerable media attention. Mr Trengove contended that these factors, taken together, suggest that there was a calculated attempt on the part of Dr Luyt to question the independence and integrity of this Court, and to create an impression that the judgment of the High Court was indeed correct, so that if this appeal succeeded, the implied reason for that success would not be that the judgment of the High Court was wrong, but that this Court was biased against the respondents.

[255] There is much to be said in favour of this contention. The tactics adopted by Dr Luyt bear the hallmark of spin-doctoring by a respondent who, knowing that the appeal

might succeed, lays the ground to discredit the Court with the object of undermining a decision which might go against him. The appellants might succeed, but it would be a pyrrhic victory, secured by a dishonest President from a compliant Court.

[256] Although there is substance in Mr Trengove's argument, we have come to the conclusion that an order for attorney and client costs is not warranted in the particular circumstances of this case. The respondents were defending a judgment they obtained in the High Court which included adverse findings of credibility made against the President. Although we have held that the judgment was wrong, a litigant ought not to be penalised for seeking to defend a judgment. It is true that scandalous allegations were made in the recusal application. But those allegations were made against the members of this Court, and the injury done was to the Court and not to the appellants. If we were satisfied that there was indeed a calculated policy to prosecute the appeal in a manner designed to discredit the judgment of this Court and to undermine a decision it might give in favour of the appellants, we would have ordered costs to be paid on the attorney and client scale. We have concluded, however, though not without some hesitation, that there is insufficient evidence to permit us to draw such an inference with the certainty required for the making of such an order.

[257] The appellants, having lost the case in the High Court, were obliged to note and prosecute an appeal. To do that they had to prepare the record and written argument and

address oral argument to this Court in support of their submissions that the judgment was wrong. These costs had to be incurred irrespective of the manner in which the appeal was conducted by the respondents. In the circumstances we have come to the conclusion that this is not a case in which an order for attorney and client costs should be made.

[258] In our judgment on the recusal application we referred to an application made by the respondents for a postponement of the hearing of the appeal which had originally been set down for hearing in March 1999. When the postponement was granted we reserved the question of the wasted costs and made an order that the respondents' attorneys would be required to show cause why the wasted costs should not be paid by them de bonis propriis. We have heard no argument on this issue. We were told by Mr Trengove that the wasted costs are minimal. In the circumstances no good purpose would be served by calling for argument on the question of the reserved costs. The wasted costs of the postponement (if any) should be treated as part of the costs of the appeal to which the appellants, as the successful litigants, are entitled.

(f) Costs of the recusal application

[259] When we made the order dismissing the application for recusal we reserved the question of costs. Although scandalous allegations were made in that application, we have decided, for the reasons given in paragraphs 256 and 257 above, not to order that the costs of the application be paid on the scale as between attorney and client. Dr Luyt must,

however, pay all the costs occasioned by that application, including the costs of counsel for the appellants who were obliged to be in court whilst the application was being heard.

F. ORDER

[260] The following order is made:

1. The appeal is upheld.
2. The order of the High Court made on 17 April 1998 as well as the costs orders made in the interlocutory applications, other than the costs order made in respect of the application to call Mr de Wet as a witness, are set aside and for the orders so set aside the following order is substituted:
   (a) The application is dismissed with costs, such costs to include the costs of two counsel;
   (b) The costs order referred to in (a) above is to include the costs orders of the interlocutory applications, other than the application to call Mr de Wet as a witness.
3. The costs of the application for recusal are to be paid by the fourth respondent, such costs to include the costs of three counsel.
4. The costs of the appeal are to be paid by the second and fourth respondents

jointly and severally and are to include the costs of three counsel.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J.

THE COURT

For the appellants:	W Trengove SC, A Bham and M Chaskalson instructed by the State Attorney, Pretoria.
For the respondents:	MC Maritz SC, M Helberg SC and JG Cilliers instructed by Rooth and Wessels.