TOTO v SPECIAL INVESTIGATING UNIT AND OTHERS 2001 (1) SA 673 (E)

Citation	2001 (1) SA 673 (E)
Case No	CA 75/98
Court	Eastern Cape Division
Judge	Leach J, van Rooyen AJ and Smuts AJ
Heard	November 8, 1999
Judgment	March 2, 2000
Counsel	N J Mullins for the appellant. G W Visagie for the first respondent. T Deva Pillay SC for the second and third respondents.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Advocate - Rights and duties - Duties - Duty to Judiciary to ensure efficient and fair administration of justice - Legal practitioner obliged to act with utmost good faith towards Court - Legal practitioner who is aware of judgment material to issues before Court thus under duty to inform Court of such judgment, even if judgment against case he or she presenting - Failure to do so a gross breach of duty. C

Special investigating unit - Special Investigating Unit established by President in terms of Proc R24 of 1997 under s 14(1) of Special Investigating Units and Special Tribunals Act 74 of 1996 - Authority of - Special Investigating Unit a creature of statute - Unable to confer upon itself function not possessed in law - Although Act conferring authority upon Special Investigating Units to institute civil D proceedings in Special Tribunals arising out of Units' investigations, no such authority conferred upon Unit established by Proc R24 of 1997 - Such Unit thus unable to confer upon itself authority to agree with parties concerned to bring proceedings before Special Tribunal to determine one of party's rights to property. E

Special investigating unit - Special Investigating Unit established by President in terms of Proc R24 of 1997 under s 14(1) of Special Investigating Units and Special Tribunals Act 74 of 1996 - Special Tribunal established in terms of Special Investigating Units and Special Tribunals Act 74 of 1996 - Section 8(2) conferring jurisdiction upon Special Tribunal to adjudicate civil disputes brought before it by Special Investigating Unit - Such jurisdiction conferred only where F Special Investigating Unit having necessary authority to bring such proceedings - Where terms of reference of Special Investigating Unit established in terms of Proc R24 of 1997 not conferring authority to institute civil proceedings in Special Tribunal, agreement by parties to such proceedings being brought not conferring on Special Tribunal G jurisdiction to adjudicate such matter.

Headnote : Kopnota

A legal representative who appears in Court is not merely an agent of his or her client, but has a duty towards the Judiciary to ensure the efficient and fair administration of justice. The Court should always be able to accept and act on the assurance of a legal H representative in any

matter it hears and, in order to deserve such trust, legal representatives must act with the utmost good faith towards the Court. The proper administration of justice could not easily survive if legal representatives were not scrupulous in their dealings with the Court. As a result it has long been regarded as a legal representative's duty to inform the Court of a judgment which is material to the issues before the Court and of which he or she is I aware, even if such judgment is against the case he or she is presenting. If the judgment is against the case being presented it could be sought either to argue that it was wrongly decided or to distinguish it. For a legal representative to be aware of a judgment adverse to his or her case and not bring it to the attention of the Court is a gross breach of duty. (At 683A/B - F.) J

In June 1995 the Premier of the Eastern Cape Province established what A became known as the Heath Commission to enquire into matters relating, *inter alia*, to State property in the province. Pursuant to its mandate the Commission enquired into the appellant's acquisition of land from the former Ciskei government. Before the Commission had completed its enquiry it was dissolved. The first respondent Special Investigating Unit, under the leadership of the same Judge who B had chaired the Heath Commission, and a Special Tribunal were established by the President in terms of Proc R24 of 1997, published in *Government Gazette* 17854 of 14 March 1997, under s 14(1) of the Special Investigating Units and Special Tribunals Act 74 of 1996. It was agreed between the first respondent, the appellant and the State that the first respondent would commence proceedings against the appellant *de novo* before the Special Tribunal. C At the conclusion of proceedings the Special Tribunal set aside the sale of certain portions of the property by the appellant.

In an appeal the Full Bench decision in *Konyn and Others v Special Investigating Unit* 1999 (1) SA 1001 (Tk) was accepted as correct. It was to the effect that, although the Act made provision for a Special Investigating Unit to institute proceedings in a Special D Tribunal, the terms of reference of the first respondent as set forth in para 4 of Proc R24 of 1997 did not authorise it to institute proceedings arising out of its investigations and, therefore, that it had no authority to institute such proceedings. It was argued for the first respondent, however, that, notwithstanding the lack of authority, the proceedings before the Special Tribunal had been valid because the parties had agreed that it should decide their dispute. E

Held, that as a creature of statute the first respondent could not confer upon itself a function which in law it did not possess. It could not therefore have conferred upon itself authority to agree with the appellant that it would bring proceedings before the Special Tribunal to determine the appellant's rights in the property at issue. Since Proc R24 had not conferred authority on the first F respondent to bring proceedings before the Special Tribunal, it had had no *locus standi* to do so. (At 685A - C.)

Held, further, that, while s 8(2) of the Act conferred jurisdiction on a Special Tribunal to adjudicate upon a civil dispute brought before it by a Special Investigating Unit arising out of the latter's investigations, that section had to be construed as conferring jurisdiction on a Special Tribunal only where the Special G Investigating Unit had the necessary authority to bring such proceedings. Where, as in this instance, the Special Investigating Unit had no such authority, the Special Tribunal, as a creature of statute, could not confer upon itself a function which in law it did not possess, namely to decide a dispute brought before it by a party who was not in law authorised to bring such proceedings, nor could the parties by their agreement have bestowed such jurisdiction upon it. The H Special Tribunal accordingly had had no authority to adjudicate the claim brought by the first respondent. (At 685C - F.)

Cases Considered

Annotations:

Reported cases

Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd en Andere 1974 (1) SA 414 (NC): I referred to

Coetzee v Impala Motors (Edms) Bpk 1962 (3) SA 539 (T): referred to

Cape Law Society v Vorster 1949 (3) SA 421 (C): dictum at 425 applied

Ex parte Swain 1973 (2) SA 427 (N): applied

Hunt h/a Realty 1 Elk Estates v Dermann [1997] 4 B All SA 665 (T): referred to J

Konyn and Others v Special Investigating Unit 1999 (1) SA 1001 (Tk): applied A

Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A): dictum at 751F applied

Pienaar v Pienaar en Andere 2000 (1) SA 231 (O): referred to B

S v Absalom 1989 (3) SA 154 (A): applied

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A): referred to

Schoeman v Thompson 1927 WLD 282: referred to

Society of Advocates of Natal and Another v Merret 1997 (4) SA 374 (N): referred to

Stafford v Special Investigating Unit 1999 (2) SA 130 (E) ([1998] 4 B All SA 543): referred to. C

Statutes Considered

Statutes

The Special Investigating Units and Special Tribunals Act 74 of 1996, s 8(2): see *Juta's Statutes of South Africa 1999* vol 3 at 2-238.

Case Information

Appeal from the decision of a Special Tribunal. The facts appear from the judgment of Leach J. D

N J Mullins for the appellant.

G W Visagie for the first respondent.

T Deva Pillay SC for the second and third respondents.

Cur adv vult.

Postea (March 2). E

Judgment

Leach J: Henry Brooks Adams once remarked that chaos often breeds life but, in this instance, it has bred this judgment. As is readily apparent from what is set out below, the history of this matter is a litany of errors, mistakes and confusion commencing with irresponsible administrative bungling on the part of F high-ranking civil servants, progressing through a hearing before a special tribunal and extending to the proceedings before this Court.

At issue is the sale of certain State farm land to the appellant. The first respondent is a Special Investigating Unit established by the President under the Special Investigating Units and Special Tribunals G Act 74 of 1996 (the Act) by Proc R24, 1997 in *Government Gazette* 17854 of 14 March 1997. The provincial government of the Eastern Cape is cited as the second respondent, while the Government of the Republic of South Africa is cited as the third respondent. I should mention that the record on appeal, including the notice of appeal, reflected the first respondent as being the H Special Tribunal which was also established by the President by Proc R24, 1997 (and which I shall refer to as the Special Tribunal). This was a clear error and, at the commencement of the proceedings before this Court and with the agreement of all the parties, an order was granted substituting the Special Investigating Unit as first I respondent and amending the appeal record accordingly. The appeal was then argued as if the Special Investigating Unit had been the first respondent throughout.

The respondents contend that under the laws of Ciskei the power to sell State land had vested in the Chairman of the Council of State and that, as the latter had only approved the sale of certain portions of the J

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land purchased by the appellant, a farm loosely described as 'farm 568, Ndevana', the sale of the remaining portions is invalid. A However the appellant's contention throughout has been that the Chairman of the Council of State had in fact approved the sale of the whole farm which he acquired. This dispute resulted in proceedings before the Special Tribunal as more fully set out below. The Special Tribunal resolved the issue in favour of the respondents and B granted an order setting aside the sale of four portions of the farm and directing the Registrar of Deeds to amend his records to reflect that those portions of the farm vest in the State. It is against that decision that the appellant now appeals to this Court under s 8(7) of the Act. C

The relevant background history of the matter is as follows. As appears from two maps, exhibits A and B of the record, the farm 568 Indevana was made up of eight portions of land, namely portions 1 to 7 of the farm, with the eighth portion being referred to as 'the remainder of farm 568'. It is common cause that portion 2 of the farm was not sold to the appellant and the dispute between the parties therefore centres around the remaining portions. Portions 3, 6 and 7 of D the farm were managed by the Ciskei Agricultural Corporation (referred to in evidence as 'Ulimocor') and used for agricultural purposes. Portions 4 and 5 as well as the portion described as being 'the remainder of farm 568' were, however, not controlled by Ulimocor but were planted to timber and were administered by the forestry section of E the Ciskeian Department of Agriculture and Forestry.

It became the policy of the government of Ciskei to encourage the development of private enterprise by selling State agricultural property to private individuals. In terms of this policy and in order to make land available to farmers who had the potential to succeed, it was decided to lease State farm land to potential purchasers whose F performance as farmers could then be evaluated before deciding whether they should be sold land. Under this program, the appellant leased portions 3, 6 and 7 of the farm from Ulimocor for a period of three years. However, in 1993, before the three-year lease period had expired, the government decided to abolish the pre-condition of a lease G agreement before any sale of State land could be effected and the appellant accordingly sought to purchase the land he had been hiring.

As the farm was State land, the decision to sell it vested in the Chairman of the Council of State acting on the advice of the Council of State (the Ciskeian equivalent of a Cabinet) - see s 34 of the Republic of Ciskei Constitution Decree 45 of 1990. A draft proposal for H submission to the Chairman and to the Council of State was therefore prepared. It reflected as its subject 'the sale of farm 568 portions 3, 6 and 7 of Indevana B' to the appellant. Attached thereto was a written recommendation submitted for consideration. It was at this stage of proceedings that substantial confusion first raised its head. I The written recommendation sought approval for the sale to the appellant of 'the farm 568', and not merely the three portions of the farm mentioned in the proposal itself. Moreover, attached to the recommendation was a schedule containing details and valuations of the land and its improvements which also reflected the land as being 'portions 3, 6 and 7 of farm 568'. The J

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schedule also recorded the total area of the land to be 490 hectares and that the farm and its A improvements were valued at R180 691,50 made up as follows:

'Farm evaluation

(a) Arable: 180 Ha \@ 750/Ha B

(b) Grazing: 310 LSU: 51 \@ 240/LSU	R135 000,00
(c) Fencing 8,7 km \@ 950	R8 265,00
(d) (i) Housing main:	R15 000,00
(ii) Housing staff: Nil	
(e) Handling facilities: Nil	
(f) Surveying costs:	R6 000,00 C
(g) Fittings - eg water pump: Nil	
Subtotal:	R164 265,00
VAT:	R1 642,50
TOTAL:	R180 691,50'

The schedule was, however, incorrect as the total area of portions 3, 6 and 7 of farm 568 is 313 hectares and not 490 hectares as D reflected therein. Furthermore, the arithmetic reflected in the evaluation quoted above is obviously flawed. Although no value is given under item *(a)*, the value of R135 000 reflected under item *(b)* as being the value of the grazing is in fact clearly the value to be ascribed in item *(a)*, viz the E product of 180 hectares at R750 per hectare. Not only should the sum of R135 000 therefore have been shown in respect of item *(a)* rather than item *(b)*, but the total valuation accordingly makes no allowance in respect of the value to be ascribed to the 310 hectares of grazing in item *(b)*. If I understand the abbreviated entry in item *(b)* correctly, the 310 hectares of grazing can support 51 large stock units and the value of grazing is F the product of 51 large stock units at R240 per unit, ie the sum of R12 240. If that is so, the sub-total of R164 265 is incorrect and should have been R12 240 higher, ie R176 505. However, even if my assumption as to the calculation of the value to be ascribed to the grazing is wrong, it is clear that the valuation of the farm excluded any allowance for the value of 310 hectares of grazing and G that the figure reflected in the schedule was therefore wrong. And in any event, the VAT of R1 642,50 reflected in the schedule when added to the sub-total of R164 265 gives a total of R165 907,50 and not the figure of R180 691,50. This latter difference is probably due to a typograhical error as the VAT could never have been the figure reflected in the schedule and probably should have been R16 426,50 H (10% of the sub-total) which, if added to the sub-total of R164 265, would give the total of R180 691,50 reflected in the schedule. The typographical error in respect of VAT, beyond evidencing the type of careless errors which were made in this case, does therefore not appear to be material. I

In any event, the proposal, the recommendation and the attached schedule were placed before the Council of State. On 12 February 1993, notwithstanding the obvious errors in respect of items *(a)* and *(b)* as well as the VAT set out in the schedule, the proposal to sell the farm for

R180 691,50 was approved and signed by the chairman of the Council as Resolution 17/93. J

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Pursuant to this decision a written deed of sale was in May 1993 A prepared and signed both by the appellant and the Ciskeian Government. This deed records that the appellant purchased portions 1, 3, 6 and 7 of farm 568, being 313, 2902 hectares in extent, at a purchase price of R180 691,50. How and in what circumstances reference to portion 1 of the farm came to be included in the deed of sale is unknown. Portion 1 B was neither under the control of Ulimocor nor of the Ciskeian Department of Forestry. It had not been used by the appellant (who had merely hired portions 3, 6 and 7 of the farm from Ulimocor) and had not been referred to in the documentation placed before the Ciskeian Council of State for approval. Fortunately it is unnecessary to resolve C this further confusion.

What is of importance is that at some stage, after having signed the deed of sale, the appellant complained that it referred only to 313,2902 hectares of land whereas the Council of State's Resolution 17/93 referred to land totaling 490 hectares in extent. This he said was unfair as the price had been determined by reference to the larger area of land. This complaint eventually led to a recommendation that D further land be transferred to him to make up the difference between the extent of the land mentioned in the deed of sale and that reflected in Resolution 17/93. Consequently, on 23 August 1993 the Director of Land Administration forwarded a memorandum to the Ciskeian Minister of Internal Affairs and Land Tenure in which he stated: E

> 'Ciskei Agricultural Corporation selected Mr T Toto (the appellant) as a suitable farmer to purchase farm 568 portions 3, 6 and 7. The total extent of the farm as determined by CAC was 490 hectares and the value was R180 691,50. The price was determined on the basis that the farm is 490 hectares in extent, surveyed and fenced. F
>
> The title deed reflected that the extent of the farm in terms of the farm portions 3, 6 and 7 totalled 313,2902 hectares, which is 176,7095 hectares less than the farm sold to Mr T Toto. . . . (T)his descrapancy (*sic*) requires urgent attention as it reflects the neglegency (*sic*) on the part of Ciskei Agricultural Corporation and unfairness to the applicant. The price of the farm amounting to R180 691,50 is equivalent to the extent of the farm which is 490 hectares not 313,2902 hectares.' G

The memorandum went on to provide details of the sizes of portions 1, 3, 4, 5, 6, 7 and the remainder of farm 568 (which totals 499,9396 hectares) before making the recommendation that all those portions be sold at the already agreed purchased price of R180 691,50 so that 'the error made by CAC' could be overcome. H

This recommendation received the approval of the Deputy Director-General of the department and, in turn, seems to have been approved by the Minister of Internal Affairs and Land Tenure. I interpose that the Minister ultimately testified that he had agreed to the recommendation in principle only, a somewhat unconvincing statement I seeing that at the foot of the document he specifically marked it as having been 'approved' and appended his signature. Be that as it may, the recommendation was not placed before the Council of State nor approved by that body (although I should mention that it is the appellant's case that such approval was in any event unnecessary as the sale of the entire farm, and J

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not merely portions 3, 6 and 7 thereof, had already been approved by Resolution 17/93 on 12 A February 1993).

Following the Minister's approval being given, the Director-General of the Department of Internal Affairs and Land Tenure wrote to the magistrate at Zwelitsha, informing him that 'ministerial approval' had been obtained for the sale of portions 1, 3, 4, 5 and 7 and the remainder of farm 568 to the appellant at a price of R180 691,50 and B requesting him to attend to the process of concluding a written deed of sale with the appellant. This led to a second deed of sale being drawn up in such terms and signed in October 1993. Pursuant to this agreement, portions 1, 3, 4, 5, 6, 7 and the remainder of farm 568 were then transferred to the appellant, who paid

merely the price of C R180 691,50, viz the price the respondents contend had been agreed for only portions 3, 6 and 7 of the farm.

Of course the Ciskeian authorities had overlooked the fact that much of the additional area which the government had agreed to transfer to supplement portions 3, 6 and 7 referred to in the original deed of sale D was land that had been planted to forests and was worth a great deal more than the value of R750 per hectare upon which the purchase price reflected in Resolution 17/93 had been premised (the evidence being to the effect that upon maturity the plantations would be worth in the vicinity of R1,4 million and the purchase price of R180 691,50 therefore bore no resemblance whatsoever to the true value of the E property reflected in the October 1993 deed of sale). The eventual outcome of all of this confusion is that the appellant came to be the registered owner of property formerly registered in the name of the State by paying subsequently less than the true worth of the property reflected in the October 1993 deed of sale. F

On 14 June 1995 the Premier of the Eastern Cape Province, acting under the provisions of s 147(1)*(d)* of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993), established what soon became known as 'the Heath Commission' under the chairmanship of Mr Justice Heath in order to enquire, *inter alia*, into matters relating to State property G in the province. Under Proc 15 of 1995 (also dated 14 June 1995) the Premier declared the provisions of various Acts to apply to the Heath Commission, to which various powers were also extended by way of regulation. In particular, these regulations provided that if the Heath Commission should find that any acquisitive act, transaction, measure or practice referred to in its terms of reference (which, if the H respondents' contentions are correct, would include the appellant's acquisition of those portions of the farm 568 not authorised by Resolution 17/93) had been unlawful, irregular or unapproved or otherwise tainted, or incompatible with the ordinary course of business or trade, or *contra bonos mores* or contrary to the public policy, as the case may be, it could nullify or declare invalid or set I aside such act, transaction, measure or practice and that any such finding would 'have the effect' of a judgment given in a civil matter by a Provincial Division of the Supreme Court of South Africa - see *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) at 133I ([1998] 4 B All SA 543 (E) at 546).

Not surprisingly, the appellant's acquisition of farm 568 came to the J

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attention of the Heath Commission and in December 1995 it gave the A appellant written notice of an inquiry into the sale of the farm to consider whether (i) there had been proper consensus regarding the transaction, (ii) whether the sale was not contrary to public policy or public interest and therefore void, (iii) whether the policy applicable to the sale of State land had been followed and (iv) whether the sale should be set aside or declared void. B

Pursuant thereto, an inquiry before the Heath Commission commenced on 6 May 1996. The appellant was represented by an attorney in those proceedings, while Adv *Pillay SC*, who appeared on behalf of the second and third respondents in this appeal, appeared to represent the interests of the State. Advocate *Visagie*, who C appeared before this Court on behalf of the first respondent, led the evidence on behalf of the commission. On 10 May 1996, after evidence had been led for several days, the inquiry was postponed until 29 July 1996. For reasons which were not explained and do not appear on the record, the inquiry appears not to have recommended that day but was left in limbo. Ultimately it appears to have been overtaken D by events as, on 20 November 1996, the Special Investigating Units and Special Tribunals Act 74 of 1996 was promulgated, its purpose being stated in the long title to be as follows:

> 'To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State E institutions, State assets and public money as well as any conduct which may seriously harm the interest of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigations Units; and to provide for matters incidental thereto.'

In terms of s 14(1) of this Act, if of the opinion that the objects of a commission of inquiry can

better be achieved by a Special Investigating Unit and Special Tribunal, the Presidency is empowered to dissolve such commission and to establish a Special Investigating Unit and a Special Tribunal in its place. On 12 March 1997, acting in terms of this section, the President dissolved the Heath Commission and established, in its place, the first respondent under Mr Justice Heath and the Special Tribunal with Mr Justice G P C Kotzé as Tribunal President - see Proc R24, 1997 published in *Regulation Gazette* 5884, *Government Gazette* 17854 of 14 March 1997.

As is apparent from all of this, the Heath Commission was dissolved before it had completed its inquiry relating to the appellant's acquisition of the farm in question. In terms of the proviso to s 14(1) of the Act, if the interested parties had consented thereto, the inquiry could have been continued and concluded as if the Heath Commission had not been dissolved. The parties *in casu* did not avail themselves of these provisions as, so we were informed from the Bar, the Heath Commission had obtained an opinion that its power to make a finding having an effect of a judgment given in a civil matter by a Provincial Division of the Supreme Court of South Africa was *ultra vires* and unenforceable and there were a number of applications pending in which this point had been taken. The first respondent accordingly regarded the continuation of the proceedings before the Heath Commission as likely to be a

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fruitless exercise and it therefore decided to commence *de novo* before the Special Tribunal. And so it came about that the chairperson of a commission of inquiry which had heard evidence relating to the appellant's acquisition of the farm came to be the head of a body, the first respondent, which brought civil proceedings against the appellant arising out of that evidence. The arbiter had turned into claimant: a somewhat startling state of affairs.

Be that as it may, a representative of the first respondent proceeded to meet with both the appellant's attorney and the legal representative of the State. Between the three of them it was agreed that as the first respondent had decided to institute proceedings in the Special Tribunal arising out of the appellant's purchase of the farm, the matter should be heard in that forum and that a transcript of the evidence led before the Heath Commission would be handed in by consent (this procedure seemingly being designed to avoid the necessity of recalling witnesses who had earlier testified).

Armed with this agreement, Mr *Visagie* wrote to the Tribunal President informing him of the agreement, expressing the hope that the arrangement met with his approval and recording that the matter could proceed on 27 October 1997 (a Monday) with the rest of the week being available to finalise the case. These arrangements apparently met with the approval of the Tribunal President and a hearing in the Special Tribunal subsequently commenced before Claassen AJ. Precisely when it did so is not clear. The record reflects the matter as having commenced before the Special Tribunal on 10 December 1997 but that is obviously incorrect as judgment was in fact delivered on that date and, after evidence was led, the record further records the learned Acting Judge having postponed the case to Thursday 30 October 1997 for argument. From this I feel one can reasonably deduce that the hearing before the Special Tribunal probably did commence on 27 October 1997.

In any event, at the outset of those proceedings the parties recorded the terms of their agreement. I must immediately remark that I find the agreement that the Special Tribunal would be requested to decide the case on the evidence placed before another forum to be startling. How the tribunal could be expected to make findings of fact by having regard to a transcript of the evidence of witnesses who had not testified before it is really beyond me. Questions of credibility and findings in regard to disputed facts had to be resolved, and a judicial officer faced with that task can hardly do justice by relying almost exclusively upon the hearsay evidence of witnesses whose testimony had been led in another forum. Even more surprising is the fact that both the Tribunal President and Claassen AJ acceded to the parties' request and allowed the proposed procedure to be followed. Fortunately, for the reasons set out below, this matter ultimately does not have to be decided on any factual findings made by the Special Tribunal and

it is I therefore unnecessary to comment further on the issue.

Once the transcript of the proceedings before the Heath Commission had been handed in, the respondents proceeded to lead further, but fairly limited, evidence, whereupon the appellant declined to testify and closed his case without calling any witnesses. As I have already mentioned, the J

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matter was then argued on 30 October 1997. Before argument, at the request of Claassen AJ, a written statement was handed A in by Mr *Visagie* in which, for the first time, the relief sought was set out as follows:

> '1. The transactions in terms of which portions 1, 3, 4, 5, 6, 7 and the remainder are farm 568, Ndakana was sold by the State to Mr Temba Toto must be set aside and/or declared void and ownership of the said property must again vest in the State; alternatively the sale of portions 1, 4 and 5 and the remainder of farm 568, Ndakana by the State to Mr Temba Toto must be set aside and/or declared void and ownership B of the said property must again vest in the State.
>
> 2. The Registrar of Deeds must be informed to amend its records to C reflect that the said property vests in the State.'

During the course of the proceedings before the Heath Commission, the appellant's attorney had taken a copy of Resolution 17/93 which reflected as its subject 'Sale of farm number 568' and altered it to read 'Sale of farm number 568 portion 3, 6 and 7 of Ndakana B . . .' and used this altered copy in cross-examination. I do not D fully understand why he did this but it had the almost inevitable result of causing confusion rather than the clarity that he hopefully intended to achieve. It certainly confused the learned Acting Judge in the Special Tribunal as he was brought under the mistaken impression that the copy of the resolution as amended by the appellant's attorney E was in fact a copy of the original resolution. As a result, in his judgment which was delivered on 10 December 1997 he misdirected himself by finding that Resolution 17/93 had reflected portions 3, 6 and 7 of farm 568 as its subject and, relying thereon, found that the Council of State had only agreed to sell those portions of the farm. He therefore granted the alternative relief set out in para 1 of the F written statement of relief and issued the following order:

> 'The purported sale of portion 1, 4, 5 and the remainder of portion 1 of farm Ndakana by the State to (the appellant) is hereby set aside and declared void and ownership of the property must vest in the State (*sic*).
>
> . . .
>
> The Registrar of Deeds is directed, empowered and authorised to amend the records to reflect that the said properties vest in the State.' G

It is against this order that the appellant now approaches this Court. In the notice of appeal, the appellant limited himself solely to attacking the Special Tribunal's decision that the chairman of the Council of State had merely authorised the sale of portions 3, 6 and 7 of the farm. Mr *Mullins*, who appeared on behalf of the H appellant before this Court, similarly limited himself to that issue in his original heads of argument and at the outset of his argument, although he was quick to alter his stance and seek to throw his net wider when it became apparent that we had a number of difficulties that none of the parties had appreciated until the hearing before this I Court. There are, however, a number of issues which render it unnecessary to consider the correctness of the learned Acting Judge's finding that the chairman of the Council of State had authorised the sale of only certain of the portions of the property reflected in the October 1993 deed of sale. But before dealing therewith, it is unfortunately necessary to mention an issue which should never have arisen. J

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As is apparent from what is set out below, the judgment of the Full A Bench of the Transkei High Court, reported as *Konyn and Others v Special Investigating Unit* 1999 (1) SA 1001 (Tk), is pertinently relevant to the result of this appeal. It is trite that it is the duty of a litigating party's

legal representative to inform the court of any matter which is material to the issues before court and of which he is aware - see, for example, *Schoeman v Thompson* 1927 WLD 282 B at 283. This Court should always be able to accept and act on the assurance of a legal representative in any matter it hears and, in order to deserve this trust, legal representatives must act with the utmost good faith towards the Court - compare *Ex parte Swain* 1973 (2) SA 427 (N) at 434. A legal representative who appears in court is not a mere agent for his client, but has a duty towards the C Judiciary to ensure the efficient and fair administration of justice - see the remarks of De Villiers JP in *Cape Law Society v Vorster* 1949 (3) SA 421 (C) at 425. As was observed by James JP in *Swain's* case *supra* in a passage since followed, *inter alia* in *Society of Advocates of Natal and Another v Merret* 1997 (4) SA 374 (N) at 383 and *Pienaar* D *v Pienaar en Andere* 2000 (1) SA 231 (O) at 237, the proper administration of justice could not easily survive if the professions were not scrupulous of their dealings with the Court. As a result of this, it has long been regarded as a practitioner's duty to inform the Court of a judgment within his knowledge material to the issues, even if such judgment is against the case which he is presenting: in which E latter event he can then seek either to argue that it was wrongly decided or to attempt to distinguish it from the case being heard. For a practitioner to be aware of a judgment adverse to his case and not bring it to the attention of the Court amounts, in my view, to a gross breach of this duty.

In casu Mr *Visagie*, who as I have mentioned appears for the first respondent in these proceedings, was the F counsel who appeared in *Konyn's* case. He was therefore aware of the decision but did not bring it to this Court's attention. When taxed with his failure to do so, he argued initially (as I understood him) that there was no obligation on his part to do so because, so he alleged, *Konyn's* case was distinguishable from the present as here the parties had agreed to the procedure by G which their dispute came to be before the Special Tribunal which had there not been the case. The simple answer to that is, of course, that it was not for him to draw the distinction and to reach the conclusion that the case was therefore not relevant: instead it was for this Court to decide the relevance or otherwise of the decision once he had drawn it to its attention. H

Fortunately the decision came to our attention without the assistance of counsel. An initial issue which flows therefrom is the Court's finding that the first respondent lacked the power and authority to institute legal proceedings in the Special Tribunal. I

As I have mentioned, the President established the first respondent by Proc R24 of 1997 of 14 March 1997, its terms of reference as required by s 2(3) of Act 74 of 1996 being set out by him in para 4 thereof as follows:

> '4. The terms of reference of the Special Investigating Unit are -
>
> (1) to examine and report to me on - J

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> *(a)* any acquisitive act, transaction, measure or practise, pending or concluded, having a bearing on State or public A property or public money which belongs to or vests in a State institution or which, at any time prior to 27 April 1994, belonged to or vested in any former State or territory that now forms part of the Republic and which public property or public money, were it not for such acquisitive act, transaction, measure or practice, could have belonged to, or vested in, or could have been liable to be alloted to a State institution; B
>
> *(b)* any interest in, or in respect of, any property contemplated in subpara *(a)*;
>
> *(c)* any person, establishment, institution or society in or by which public property or public money contemplated in subpara *(a)* may be accumulated or may have been used; and
>
> *(d)* any real or personal right to property contemplated in subpara *(a)* or to the fruits of such property that have C accrued or will accrue to any person, establishment, institution or society other than a State institution;
>
> (2) to inquire into, consider and report to me on matters contemplated in subpara (1) which have taken place between 26 October 1976 and the date on which the Special Investigating Unit is dissolved; and
>
> (3) to inquire into, consider and report to me on any matter contemplated in s 2(2) of the said Act,

> which is incidental to the matters referred to in subpara (1) and (2) and which is revealed by any of the investigations of the Special Investigating Unit, and the generality of this subparagraph is not limited by subparas (1) and (2).'

It is quite clear from this that the first respondent was required to investigate, examine, enquire into and to report to the President on certain issues. Accordingly, notwithstanding the provisions of s 5(5) of Act 74 of 1996, which are to the effect that a Special Investigating Unit may institute civil proceedings in a Special Tribunal if it has obtained evidence 'substantiating any allegation contemplated in s 2(2) of the Act', the Court in *Konyn's* case (in particular at 1011F - 1015F) held that the President had clearly decided not to authorise the institution of proceedings by the first respondent arising out of its investigations and that the first respondent therefore had no authority to institute such legal proceedings. Counsel for the respondents accepted the correctness of this finding and it is accordingly unnecessary to repeat the reasoning of the Court in regard thereto. Suffice it to say that in my view the decision was correct.

At the time the proceedings in the present matter commenced before the Special Tribunal, and when the agreement to place the record of the testimony at the Heath Commission before it was reached, the terms of reference of the first respondent were those set out in Proc R24 of 1997 quoted above, viz the same terms of reference dealt with by the Court in the *Konyn* case. Counsel therefore accepted that although the first respondent had been given authority to investigate the appellant's acquisition of the farm, it had not enjoyed the necessary authority to institute proceedings before the Special Tribunal in respect thereof. However, notwithstanding such lack of authority, counsel for the first respondent submitted that the proceedings before the Special Tribunal were still valid as the parties had agreed it should decide their dispute. In my opinion, for the reasons set out below, there is no merit in this argument.

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As I have said, the functions of the first respondent as defined in Proc R24 of 1997 were to investigate, enquire into and report to the President on various matters and, as a creature of statute, it could not confer upon itself a function which it did not in law possess - *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 751F. The first respondent therefore could not confer upon itself authority to agree with the appellant that it would bring proceedings before the Special Tribunal to determine the appellant's rights in the property he had purchased. Accordingly, in my view, as the provisions of Proc R24 did not confer authority upon the first respondent to bring proceedings before the Special Tribunal, it had no *locus standi* to launch those proceedings.

Similarly, it seems to me, the Special Tribunal lacked the necessary jurisdiction to adjudicate upon the first respondent's claim. Under s 8(2) of the Act it had jurisdiction to adjudicate upon a civil dispute brought before it by the first respondent emanating from the latter's investigations. But, in my view, the section must be construed as extending authority to the Special Tribunal to adjudicate upon a civil dispute brought before it by the first respondent only where the latter has the necessary authority to bring such proceedings. Where, as is here the case, the first respondent has no such authority, I do not see how the Special Tribunal can be said to have had the necessary jurisdiction. As a creature of statute it, too, could not perform a function which it did not in law possess, viz to decide a dispute brought before it by a party who was in law not authorised to bring such proceedings, and the parties by their agreement could not bestow such jurisdiction upon it. In my view the Special Tribunal therefore had no authority to adjudicate upon the claim brought by the first respondent.

A further procedural difficulty flows from the decision in the *Konyn* case. In Government Notice R420 of 14 March 1997 the Minister of Justice, acting under s 11 of the Act, made various regulations, presumably in order to promote the efficiency of the first respondent and the Special Tribunal. Regulation 7 thereof reads as follows:

> '7(1) Whenever the Special Investigating Unit decides to institute civil proceedings or to cause such proceedings to be instituted in a Special Tribunal, the Special Investigating Unit must notify any interested party of its decision.

(2) The notice contemplated in subreg (1) must state clearly -

(a) the issues on which the proceedings are instituted;

(b) the relief to be applied for;

(c) an invitation to the interested party to file with the Special Tribunal any issues he or she would like to raise [and] H any relief he or she would like to apply for; and

(d) that the interested party is entitled to legal representation.'

On 6 June 1997 in General Notice 894 of 1997 published in *Government Gazette* 18054, the Tribunal President acting under s 9 of the Act made various rules to regulate the conduct of the I proceedings in the Special Tribunal. Rule 3 therefore provided a procedure whereby relief can be sought and obtained by notice of motion supported by affidavit (a procedure which clearly was not followed *in casu*). Rule 8 then went on to provide that any interested party who had received a notice in terms of reg 7 should (i) notify the first respondent and the secretary to the J

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Special Tribunal of his or her intention to defend or to be joined as a party to the A proceedings before the Special Tribunal and (ii) provide a brief summary of the issues which he or she may wish to contest or raise in the Special Tribunal.

In the letter addressed to the Tribunal President seeking his approval of the parties' arrangement that the record of the Heath Commission be placed before the Special Tribunal, Mr *Visagie* B stated:

> 'It was further agreed that, should this be acceptable to the Special Tribunal, the parties would not require ''pleadings'' such as a reg 7 notice, a reg 7(2)*(c)* notice of opposition or notice of set-down. The parties were of the view that, should this be acceptable to the Special Tribunal, the notices, minutes of pre-trial conference and further particulars that preceded the hearing before the C Heath Commission would suffice.'

The parties were therefore agreed that the documents before the Heath Commission would be regarded as being a reg 7 notice by which, as I understand the rules, civil proceedings were to be commenced. The difficulty that I have is that in *Konyn's* case *supra* at 1016 - 19 the Court concluded *(a)* that D the regulations in Government Notice R40 which, in terms of s 11 of the Act could only be made by the Minister after consultation with the heads of the Special Tribunal and the first respondent, were *ultra vires* and of no force and effect as no such consultation had been held before they were promulgated and *(b)* that the Rules of the Special Tribunal published in E General Notice 894 of 1997, insofar as they dealt with the institution of civil proceedings other than by way of application (application proceedings being dealt with in Rule 3 of the rules) were so vague as to preclude the right to a fair trial and therefore offended the provisions of s 34 of the Constitution of the Republic of South Africa Act 108 of 1996. I find myself in respectful agreement with these F findings, which the respondents also accepted as being correct.

The *Konyn* judgment was delivered on 19 March 1998. Presumably as a result thereof, the Tribunal President withdrew those Rules on 9 April 1998 and replaced them with fresh rules (see General Notice 505 of 1998 published in *Government Gazette* G 18805). Whether these fresh rules provide for a fair hearing or whether they still offend the provisions of s 34 of the Constitution may be a matter of some dispute, but that is a debate which does not have to be resolved for present purposes. Interestingly enough, as far as I have been able to ascertain, the Minister of Justice does not appear to have promulgated regulations to replace those set out in Government Notice H R40 of 1997, a failure the effects of which are unnecessary to consider herein. However, as Rule 5 of the fresh rules prescribe that any civil action in the Special Tribunal shall be commenced by the issue of the notice envisaged in reg 7(1), and as there do not appear to have been any valid regulations since those rules were made, it may well be that I all civil actions purportedly brought under those rules are invalid.

In any event, as things stood at the time of the proceedings before the Special Tribunal *in casu*, by reasons of the invalidity of the regulations in Government Notice R40, 1997 and the Rules of the Special Tribunal published in General Notice 894 of 1997 relating to the institution of J

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civil proceedings, there was no valid procedure available by which civil proceedings could have been instituted in the A Special Tribunal save, possibly, by way of an application brought under Rule 3 (and, as I have already mentioned, the proceedings *in casu* were clearly not brought under that Rule). Moreover, the fact that the parties had agreed that 'pleadings' would not be required and that, in effect, the documents filed before the Heath Commission B would be deemed to be a reg 7 notice commencing proceedings is also of no assistance. As reg 7 was invalid, treating another document as if it was a notice under that invalid regulation amounted to a meaningless exercise.

For the reasons set out above, I am therefore of the view that the first respondent had no authority to bring proceedings against the C appellant and that the Special Tribunal had no jurisdiction to adjudicate upon the dispute as it purported to do so. The first respondent's lack of authority and the Special Tribunal's lack of jurisdiction were raised for the first time by this Court during the course of the hearing and, at the request of the parties, counsel were afforded the opportunity to file written argument in regard thereto as D well as in respect of a number of other issues which the parties had not considered. The appellant seized the opportunity to rely upon the questions of lack of authority and jurisdiction but, although counsel for the respondents filed terse written argument, they both declined to deal with these issues and one can only assume that they E had no answer thereto. In the light of the first respondent's lack of standing and the Special Tribunal's lack of jurisdiction, the proceedings before the Special Tribunal and its order must be regarded as being of no force and effect.

I would mention that even if the Special Tribunal had been entitled to grant an order, I would not have hesitated to set its order aside even if authority had not been given for the sale of all the property F reflected in the deed of sale of October 1993. As I have mentioned, the learned Acting Judge did not set aside the sale itself, merely the sale of certain portions of the land reflected in such deed. In doing so, he treated the sale of those portions as if they were severable from the remainder of the contract. Clearly they were not as it was the G intention of the parties to the contract that the appellant would buy the various portions reflected in the deed as a single parcel of land for which he agreed to pay a single purchase price. The sale of the various portions set out in the deed therefore cannot be regarded as separate transactions which are severable from each other - cf *Hunt h/a Realty 1 Elk Estates v Dermann* [1997] 4 B All SA H 665 (T). Accordingly, even if the sale of the entire property reflected in the deed had not been authorised, it was not competent to ask the Court to excise from the agreement that which was bad, to retain what was good and to provide a legal and enforceable contract even though it was not what the parties had in mind - see *Sasfin (Pty) Ltd v* I *Beukes* 1989 (1) SA 1 (A) at 16. In essence, however, that is what the order of the learned Acting Judge purported to do. The effect of his order was to create a contract of sale in the same terms as the original sale concluded in May 1993 (a sale of portions 3, 6 and 7 of the farm at a price of R180 691,50) which the parties thereto had agreed was invalid due to the mutual and common mistake under which they had suffered J

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relating to the size of the property which, in turn, vitiated the purchase price upon which they had agreed. Accordingly, A even if the requisite approval for the sale of all the land reflected in the October 1993 deed had not been given, the appropriate order would have been to set aside the sale and not merely to have pruned it as the learned Acting Judge attempted to do. B

A further point of interest is whether the Special Tribunal had the power to set aside the October 1993 deed of sale, either wholly or in part, without restitution of the purchase price being tendered. It is a well-known principle of our law that, where a contract is set aside, whether by agreement or at the instance of one of the parties, the parties thereto are obliged to restore what they have received C thereunder - see, for example, *Coetzee v Impala Motors (Edms) Bpk* 1962 (3) SA 539 (T) at 541E - G. That being so, the appellant could only have been ordered

to restore the disputed land to the State once repayment of the purchase price had been tendered - see, for example, *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd en Andere* 1974 (1) SA 414 (NC). *In casu*, no tender of repayment of the purchase price or any portion thereof was made by any of the respondents. Indeed, Mr *Visagie* conceded during argument that the first respondent had no power to tender restitution and, that being so, one must question whether the first respondent can ever successfully institute civil proceedings against another party seeking cancellation of a contract where restitution has to be made. However, in the light of this Court's decision on the questions of standing and jurisdiction, this issue does not have to be decided in this judgment.

I may also mention another issue that was debated in the hearing before us, namely whether the proceedings were irregular in that neither the Registrar of Deeds, who was directed to take certain steps, nor the Ciskei Agricultural Bank, which holds a bond over the property, were parties either to the agreement submitting the matter to the Special Tribunal or to the proceedings that followed and no notice of those proceedings appears to have been given to either of them. Leave was also granted to the parties to file written argument in regard to this aspect of the case. As I understand the written argument forwarded to this Court by Mr *Pillay*, he concedes that the proceedings were irregular for this reason. Beyond stating that it was clear that the bondholder and Registrar of Deeds were not parties to the agreement under which the matter came before the Special Tribunal, Mr *Visagie* found himself unable to advance any argument on behalf of the first respondent as to why their non-participation did not render the proceedings irregular. *Prima facie* it seems to me that the proceedings may well have been irregular by reason of the non-participation of the Registrar of Deeds and the bondholder but, interesting though the question might be, I do not think it is necessary to consider it further in this judgment.

The underlying difficulty in this matter is that first respondent had no authority to institute the proceedings against the appellant and the Special Tribunal lacked jurisdiction to adjudicate thereon. That being

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so, the proceedings before the Special Tribunal must be regarded as being invalid and of no force and effect. This conclusion raises what should be done with the matter.

The correct procedure appears to be that adopted in *S v Absalom* 1989 (3) SA 154 (A). In that matter a Full Court of a Provincial Division had purported to exercise appellate jurisdiction over a matter in which it had no such jurisdiction and overruled a judgment dismissing an application for condonation for the late noting of an appeal. The Full Court then granted leave to appeal to the Appellate Division (as it was then known), which Court held that the Full Court had lacked jurisdiction to hear the appeal and that its judgment was therefore a nullity and could simply be ignored. In delivering the judgment of the Court, E M Grosskopf JA concluded (at 166C - D):

> 'Ooreenkomstig die bronne wat ek hierbo aangehaal het is dit egter nie nodig dat 'n bevel, wat nietig is weens gebrek aan regsbevoegdheid, formeel tersyde gestel hoef te word nie. Die nietigheid van so 'n bevel kan desnoods deur 'n verklarende bevel bevestig word.'

As the Full Court had lacked jurisdiction and its judgment was a nullity, the Appellate Division therefore held that it, in turn, did not have jurisdiction to hear and decide an appeal from the Full Court and struck the matter from its roll. On a similar basis of reasoning, it seems to me that this appeal should also be struck from the roll as the Special Tribunal had no jurisdiction and its order was a nullity.

There remains the question of costs. The appellant clearly misconstrued his remedy. Instead of appealing as he purported to do, he should have sought a declaratory order. On the other hand, the respondents attempted to support the unsupportable. There therefore seems to be no reason to order any party to pay the costs of another.

The appeal is therefore struck from the roll.

Van Rooyen AJ and Smuts AJ concurred.

Appellant's Attorneys: *Netteltons*. Second and Third Respondents' Attorneys: *B Sandi & Co*.

A