IN THE HIGH COURT OF SOUTH AFRICA

(TRANSKEI DIVISION) **CASE NO. 774/2005**

In the matter between :

ESTHER CRISH **APPLICANT**

And

THE COMMISSIONER – SMALL CLAIMS COURT – BUTTERWORTH **First Respondent**

NIKIWE RULASHE **Second Respondent**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Third Respondent**

JUDGMENT

PETSE, J:

[1] Once upon a time Allan Brooks said that confusion sometimes breeds life. In this application confusion has bred something of a different kind to life which is this judgment.

IN THE HIGH COURT OF SOUTH AFRICA

[2] At the heart of the dispute in this case is the constitutionality of the provisions of ss 7(2) and 45 of the Small Claims Court Act 61 of 1984 ("the SCCA").

THE PARTIES :

[3] The applicant in this case is Esther Chrish who describes herself in the founding affidavit as an adult female of 338 Msobomvu Township, Butterworth.

[4] The first respondent is the Commissioner of the Small Claims Court – Butterworth.

[5] The second respondent is Nikiwe Rulashe an adult female of 33 Ibika Township, Butterworth.

[6] The third respondent is the Minister of Justice and Constitutional Development ("the Department") cited in these proceedings in her official capacity as the Political Head of the Department.

THE CHRONOL IGICAL BACKGROUND :

[7] The first respondent instituted legal proceedings on 20 January 2005 against the applicant in the Small Claims Court Butterworth in which she claimed payment of the sum of R6 800.00 representing arrear rental due to her by the applicant in respect of a knitting machine that she allegedly hired by her to the applicant.

[8] The matter ultimately came up for trial on 17 May 2005 when judgment was entered against the applicant in the sum claimed. When the applicant sought to appeal against this judgment she was advised by her attorneys in the first place that the judgment was, in terms of sec 45 of the SCCA, final and therefore not appeallable. In the second place she

was advised that the only remedy open to her would be to take the matter on review in terms of sec 46 of the SCCA on the sole ground that the Small Claims Court lacked the requisite jurisdiction to entertain the claim. It turned out that sec 46 of the SCCA offered cold comfort to the applicant for sec 46 of the SCCA provides no remedy to her because the Small Claims Court had the requisite jurisdiction.

[9] Consequently the applicant launched these proceedings and sought as her principal relief an order rescinding and setting aside the judgment granted in favour of the second respondent in the Small Claims Court.

[10] Pursuant to an order granted by this Court on 22 September 2005 in terms of which the applicant was granted leave to amend her notice of motion the applicant filed an amended notice of motion on 18 October 2005 in terms whereof she sought relief in the following terms :

> "1. Rescinding and setting aside the judgment granted by the first respondent on 14 July 2005 in favour of the second respondent.
>
> 2. Directing the first respondent to refer the suit between the applicant and the second respondent for hearing afresh by the District Civil Court of Butterworth.
>
> 3. Directing the third respondent to consider amending the provisions of sections 7(2) and 45 of the Small Claims Court Act 61 of 1984 as amended to confirm (sic) with the Constitution Act 108 of 1996."

[11] In her supplementary founding affidavit filed of record on 18 May 2005 the applicant assailed the constitutional validity of ss 7(2) and 45 of

the SCCA on the following grounds and I quote from paras 6.1, 6.2 and 6.3 of her supplementary founding affidavit.

> "6.1 That, at the hearing before the first respondent, she was advised that the provisions of sec 7(2) of the said Act do not permit that she may be legally represented at the proceedings before the said first respondent. Consequently, she was not legally represented even though it had been her wish to be legally represented.
>
> 6.2 That, the said denial of legal representation had prejudiced her in that she was not able to cross-examine the second respondent and challenge her evidence technically hence she was in the end ordered to pay the second respondent money she believes she was claiming from her wrongfully and unlawfully.
>
> 6.3 That, the provisions of sec 45 of the said Act do not allow an appeal from the decision of the first respondent. The said provision has prejudiced her in that instead of her noting an appeal against the finding of the first respondent, she has to file an application for review which is too much costly than an appeal.

In a review she has to file a lot of papers, serve a lot people through the Sheriffs who would also charge her for their services".

[12] In amplification of the aforegoing averments the applicant goes further to contend that :

12.1 "I submit that, although an application of this nature relates to me, it is also of great interest to all the citizens of this country who have or will in future suffer in the same manner as myself, that this Honourable Court should examine the constitutionality of the said sections of the Act.

12.2 I further submit that, it shall be in the interest of justice that, whilst the third respondent will be attending to the said section of the Act, this Honourable Court should direct that the matter between the second respondent and myself, in the interest of finality, be referred for

hearing afresh by the District Court of Butterworth in terms of the Magistrate's Court Act where it (sic) will be able to be legally represented as I so wish."

[13] Yet again and pursuant to an order of this Court granted on 23 March 2006 at the instance of the applicant the applicant was granted leave to file a further supplementary affidavit "so as to make allegation 'that the provisions of sections 7(2) (as amended) have subjected her to unfairness and prejudiced her rights to equal application of the law, as enshrined by section 9 of Constitution Act 108 of 1996' ". Indeed the applicant filed such further supplementary affidavit on 11 April 2006 regurgitating the terms of the order of 23 March 2006.

[14] Only the third respondent is opposing the application and has to that end filed a somewhat lengthy but helpful answering affidavit resisting the grant of the relief sought by the applicant. The first and second respondents have not opposed the application and have as a matter of fact chosen to remain supine.

THE ISSUES :

[15] It was common cause when the matter was argued before me that what had emerged from the process of metamorphosis that the applicant's case had undergone which gave rise to the confusion alluded to in the opening paragraph of this judgment was that the dispute between the

applicant on the one hand and the third respondent on the other hinged exclusively on the constitutional validity of ss 7(2) and 45 of the SCCA. As will have been discerned from the summary of the applicant's averments contained in her three sets of founding affidavits the case made out therein is not only of a narrow campass but also a crisp one.

[16] The essence of the third respondent's case as lucidly articulated in the answering affidavit deposed to by Theresia Bezuidenhout ("Bezuidenhout") is briefly that the limitation imposed by ss 7(2) and 45 of SCCA is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.

[17] It is perhaps timely at this juncture to mention that the SCCA was assented to on 19 April 1984 and came into operation on 24 August 1985. The short preamble to the SCCA states that it is 'to provide for courts for the adjudication of small civil claims and for matters connected therewith'. The passing of the SCCA was preceded by the establishment of a five member Commission of Inquiry ("the Commission") under the chairmanship of Mr Justice G.G. Hoexter which was constituted by the government of the day to enquire into and advise the government on the desirability or otherwise of establishing a Small Claims Court. The Commission finalised its work and report in May 1982 and made a wide range of and far-reaching recommendations in favour of the establishment of the Small Claims Court. Because I find it convenient to do so I shall take the liberty to quote liberally from the Commission's Report that is annexed to the answering affidavit deposed to by Bezuidenhout on behalf of the third respondent.

[18] Before I delve into the content of the Commission's Report I, however, consider it opportune at this stage to make reference to the provisions of ss 7(2) and 45 of the SCCA which reads thus :

> " 7.1 ..... .
>
> 7.2 A party to an action shall appear in person before the court and, subject to the provisions of subsection (4)

shall not be represented by any person during the proceedings.

7.3 ……..…… .

7.4 ……...…… .

Sec 45 :

A judgment or order of a court shall be final and no appeal shall lie from it."

[19] For the sake of completeness I consider it necessary to make reference also to ss 3(1); 16; 26 and 27 of the SCCA. These sections respectively read as follows :

" **sec 3**

(1) Subject to the provisions of subsection (2), a court shall not be a court of record;

(2) ……..... .
(3) …….. .
(4) …….. .

Sec 16

"16 **Matters beyond jurisdiction**

A court shall have no jurisdiction in matters –

(a) in which the dissolution of any marriage, or of a customary union as defined in section 35 of the Black Administration Act, 1927 (Act 38 of 1927), is sought;

(b) concerning the validity or interpretation of a will or other testamentary ;

(c) concerning the status of a person in respect of his mental capacity;

(d) in which is sought specific performance without an alternative claim for payment of damages, except in the case of –

(i) the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;

(ii) the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette determined for the purposes of this section;

(e) in which is sought a decree of perpetual silence;

(f) in which is sought damages in respect of –

(i) defamation;

ii) malicious prosecution;

iii) wrongful imprisonment;

iv) wrongful arrest;

v) seduction;

vi) breach of promise to marry;

(g) in which an interdict is sought."

"26 **Procedure**

(1) Subject to the provisions of this Chapter, the rules of the law of evidence shall not apply in respect of the

proceedings to a court, and a court may ascertain any relevant fact in such manner as it may deem fit.

(2) Evidence to prove or disprove any fact in issue, may be submitted in writing or orally.

(3) A party shall not question or cross-examine any other party to the proceedings in question or a witness called by the latter party, but the presiding commissioner shall proceed inquisitorially to ascertain the relevant facts, and to that end he may question any party or witness at any stage of the proceedings: Provided that the commissioner may in his discretion permit any party to put a question to any other party or any witness."

Sec 27

1) Subject to the provisions of subsection (2), a party may call one or more witnesses to prove his claim, counterclaim or defence.

> 2) The provisions of subsection (1) shall not affect a court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced."

[20] It is perhaps apposite to interpose at this juncture to observe that on a reading of the provisions of the sections of the SCCA set out above it is evident that a Small Claims Court is a court *sui generis* which was conceived to provide a forum at which small claims can be adjudicated upon in an expeditious, less cumbersome and eminently cost-effective manner and to that end the conventional rules of procedure and evidence in the conduct of a trial in the ordinary courts of the land find no application whatsoever in the Small Claims Court.

[21] I now proceed to consider what appears to me to be the genesis that inspired the enactment of the SCCA. By way of summary I think I can

do no better than to quote liberally from the recommendations of the Commission that informed the enactment of the SCCA. That it is permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining, inter alia, the factors that informed the statutory enactment under consideration is now settled and desires its authority from judgments of our courts that have proclaimed this principle. [See for example in this regard : **S v Makwanyane and Another 1995 (3) SA 391 (CC)** at **405 B-C**] But before I do so I consider that it would be convenient if I were to recapitulate at this juncture the essence of the applicant's case against the respondents in these proceedings.

[22] As was alluded to at the outset of this judgment the applicant seeks to impugn the constitutional validity of ss 7(2) and 45 of the SCCA. In the first place the constitutional validity of sec 7(2) is impugned on the sole basis that it denies litigants in the Small Claims Court their constitutional right to legal representation and therefore effectively denying them justice. In the second place the constitutional validity of sec 45 is impugned on the sole basis that it denies a party who is aggrieved by an adverse judgment of the Small Claims Court of the right to take that judgment on appeal. It is therefore contended on behalf of the applicant that the denial of these fundamental rights infringed her rights as enshrined in ss 9 and 35 of the Constitution of the Republic of South Africa Act 108 of 1996 (The Constitution").

[23] In countering these contentions the third respondent on her part argued that the two sections of the SCCA under consideration do not infringe any of the rights alleged by the applicant. It was further argued on behalf of the third respondent that even assuming that the applicant

had made out a case that her rights were infringed (which was not conceded) the third respondent has said enough in the answering affidavit deposed to by Bezuidenhout to demonstrate a justification of the limitation complained of which satisfies the threshold required in terms of sec 36 of the Constitution.

[24] I interpose here to mention that at the commencement of his oral submissions Mr Madlanga made some play of the fact that the applicant's case was presented in a somewhat inelegant and slapdash fashion which made it difficult , if not impossible, for the respondents to know what case they were called upon to meet. In this regard it suffices to make the following observation. The object of pleadings is to ascertain definitely what is the question at issue between the parties and to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. This object can only be attained when each party states his/her case with precision. A pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another:
[See: **Trope v South African Reserve Bank and Another 1992(3) SA 208 (T)** at **210 G – 211 A; Imprefed (Pty) Ltd v National Trampert Commission 1993 (3) SA 94 (A)** at **107 C – E** and **H]** Nor can the applicant expect to be granted relief by the Court when no case for such relief has been made out in her founding affidavit. [See in this regard: **Mgoqi v City of Cape Town and Another 2006 (4) SA 355 (CPD)** at **362H** and **363C]** The same principle applies with equal force to motion proceedings. [See: **Manerberger v Manerberger 1948 (3) SA 731 (C)** at **732; Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T)** at **369 A; Shepherd v Mitchell Cotts Seafreights (SA) (Pty) Ltd 1984 (3) SA 202 (T) at 205 E; Bowman NO**

v De Souza Raldao 1988(4) SA 326 (T) at **327 D – 328 A**]

[25] Where a statutory provision is relied upon by a plaintiff (in action proceedings) or applicant (in motion proceedings) the particulars of claim (or founding affidavit in motion proceedings) should contain a statement to that effect with the number of the section and statute being relied upon set out or the claim must be sufficiently and clearly formulated so as to indicate with precision that reliance is being placed on that statutory provision. [See: **Yannakou v Apollo Club 1974 (1) SA 614 (A)** at **623 G; De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander 1995 (4) SA 347 (T)** at **354 B – D]**

[26] The rational underlying this fundamental and salutary principle of our law is that civil litigation is not a game. It is therefore necessary that a litigant must formulate his case in such a manner that both the court and his opponent know what case the opponent is required to meet. [See in this regard : **Imprefed (Pty) Ltd** case, supra at **107 C – E** where the following is stated :

> 'At the outset it need hardly be stressed that:
>
> > "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues

upon which reliance is to be placed."

When a constitutional challenge is mounted against any statutory provision it becomes all the more important that this principle should be vigorously enforced because any declaration of constitutional invalidity of a statutory provision might have, and very often has, far-reaching implications and ramifications. [See in this regard : **Van Dyk v National Commissioner, South African Police Service 2004 (4) SA 587 (T); Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004(6) SA 505 (CC); Shaik v Minister of Justice and Constitutional Development 2004 (3) SA 599 (CC)]**

[27] However, in the circumstances of this case I am satisfied on balance that (to borrow the phraseology used by Mr Madlanga in his written heads of argument) "*after metamorphosing a good few times, the applicant's case appears to be a challenge on the constitutionality of sections 7(2) and 45*" of the SCCA.

[28] I now revert to give considerations to the rational underlying the enactment of the SCCA. Those considerations are all collected and collated in Chapter Thirteen of the final Report of the Commission. By way of prelude it bears mentioning that the Commission made two telling

observations in its Report. In the first place it observed that there was a strong preponderance of opinion favouring the creation of a small claims court having found that there was a crying need for such a court. In the second place it made a telling point which, in my view, was a significant one, which is that a small claims court in South Africa would bring about '*a judicial innovation involving many novel features some of which would run counter to conventional and traditional legal concepts of civil trial procedure'*.

[29] I proceed to set out hereunder some of the key recommendations contained in the Report of the Commission that informed the enactment of the SCCA :

> " 1. No single model of a small claims court has gained universal approval. In trying to decide what form of small claims court will best be adapted to the needs of this country the Commission pays due regard to what seems to it to be the positive and negative features in some of the small claims procedures already applied elsewhere and briefly described in chapters 6, 7,8, 9, 10 and 11 of this report. At the same time it must bear in mind the socioeconomic environment; and it must be

particularly alive to the following two factors. The first is that in a South African small claims court many of the litigants will be poor, ill-educated and unsophisticated people. The second is that one of the many fields in which South Africa suffers a manpower shortage is in the administration of justice. South Africa has too few trained lawyers to meet the needs of a total population of 25 million people. Against the above background it is convenient to indicate shortly the broad guide-lines accepted by the Commission.

2. Since small claims courts are designed to facilitate that recovery of relatively modest amounts there is no real difficulty in determining the place and status of the small claims court in the hierarchy of courts. It will be one of the lower courts in the country. The Commission further accepts that the monetary limit of the claims brought in the small numerically by far the strongest; and it is upon their public-spirit that the successful operation of the small claims court must chiefly rely. The bulk of the country's population is concentrated within the Vaal triangle and there are more attorneys and advocates in the Transvaal than in the remaining three provinces taken together. A former President of the Transvaal Law Society told the

Commission that in his opinion members of his Society would be prepared to adjudicate in a small claims court. The Commission shares that belief. It should be stressed nevertheless, that in the opinion of the Commission any small claims court trying to operate without the active participation of attorneys as volunteer adjudicators will be doomed to early failure.

3. The Commission envisages the procedure to be adopted at the trial in a small claims court to be an arbitration conducted in an informal atmosphere by the adjudicator who will assume an active inquisitorial role. The adjudicator will adopt any method of procedure which he considers to be convenient, and to afford a fair and equal opportunity for each party to present his case; and in particular the rules of evidence will be relaxed.

4. The Commission is strongly of the view that in South African small claims court the requirements of justice would best be served by imposing a total bar on legal representation of either party at trial. The most obvious objection to legal representation is the increased cost to the litigants resulting therefrom. This is the very problem which small claims courts were designed to solve.

5. There are other and no less cogent arguments against permitting legal representation at small claims trials. Looking at the experience in Australia, England and the USA, the bulk of the available evidence seems to point to the conclusion that, so long as the adjudicator maintains an actively inquisitorial role in the proceedings, the absence of legal representation results in an easier and speedier fact-finding process.

6. Moreover, the presence at a small claims trial of either attorneys or advocates represents an insidious temptation to the adjudicator to relinquish his inquisitorial role, and to lapse into the more familiar adversary system of resolving disputes. Legal representation, so the commission considers, must inevitably tend to infuse into the proceedings that air of formality and technicality which is fundamentally alien to the real spirit of small claims procedures.

7. Last but not least, to allow legal representation is to give to the rich litigant an improper advantage over a poor opponent. In particular, so we consider many consumer cases would then present the spectacle of an unequal

contest between an indigent and unrepresented plaintiff on the one side and on the other side a lawyer representing an affluent business client.

8. The Commission is of the opinion that the claims of a complicated nature should not be entertained in the small claims court. The Commission considers that the adjudicator should have the power to certify that in his opinion a claim involves complex questions of law or fact which cannot adequately or fairly be resolved in a small claims proceedings. Thereupon the plaintiff will be obliged to have recourse to the conventional courts.

9. The Commission accepts that the only pleading required of a plaintiff should be a "notice" pleading in a very simple form; that no formal pleading by the defendant should be required; and that the defendant should not be required to make any appearance at the small claims court before the day of the actual trial.

10. A number of interested parties submitted to the Commission that in order to make any small claims procedure really effective the decisions of the court should be final and not subject to appeal. Mr Justice J J Trengove, who addressed the Commission in this vein, suggested nevertheless that some limited right of judicial review should be available to aggrieved litigants in the small claims court.

11. The nature of the problem involved in affording or limiting a right of appeal from lower courts, and the necessity for a pragmatic approach in seeking its solution, have been summed up in the following words by the late Mr Justice O D Schreiner –

"Where a hierarchy of Courts exists it is perhaps natural

> to regard the denial of what we are accustomed to call the right of appeal from any order whatsoever made by a lower Court as, to some extent, a refusal of justice. Under an ideal system it might be expected that whatever error an inferior Court has committed would be promptly correctable by a higher Court, and so on until the highest tribunal in the pyramid had pronounced upon the matter. But history shows that it has generally been thought advisable to limit appeals in certain respects. A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics".

It is my judgment that the aforegoing factors clearly and imperatively militate against the grant of the relief sought by the applicant *in casu*.

[30] In this case two issues arise for determination. The first issue has to do much with the constitutional validity or otherwise of the impugned sections of the SCCA. If it were found that either or both these impugned sections pass(es) constitutional muster this would be the end of the

matter. If on the other hand it were found that either or both of the impugned sections is/are constitutionally invalid (and the extent of such invalidity) they can only be saved if their limitation can be justified under sec 36 of the Constitution. Failing justification under sec 36 of the Constitution either or both sections would have to be declared invalid under sec 172 (1) of the Constitution. As was proclaimed in **Ex Parte Minister of Safety and Security and Others :** In **Re S v Walters 2002 (2) SACR 105 (CC)** this process necessarily entails essentially a two-stage exercise. Kriegler J, speaking on behalf of a unanimous Constitutional Court expressed himself in this regard in these terms in the **Ex Parte Minister of Safety and Security** case, supra, at **paras [26] and [27]**:-

> "[26] As observed at the outset, the Bill of Rights spells out the fundamental rights to which everyone is entitled and which the State is obliged to respect, protect, promote and fulfil. An enactment (like s 49) may limit these rights only if-and to the extent that-the limitation can be justified under s 36 of the Constitution. Otherwise it has to be declared invalid under s 172(1). This is essentially a two-stage exercise. First, there is the threshold enquiry aimed at determining whether or not the enactment in

question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of s 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then.

[27] If there is indeed a limitation, however, the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved."

[31] It must be said at the outset that applicant's reliance on sec 35 of the Constitution is clearly misplaced. That section certainly has no application in the context of the issues raised in these proceedings. The constitutional challenge founded on sec 35 of the Constitution must thus fail. So too was the applicant's reliance on the case of **Bangindawo & Others v Head of Nyanda Regional Authority and Another 1998 (3) BCLR 314 (Tk)** upon which the applicant pinned her faith in her quest to have the impugned sections declared unconstitutional.

[32] In so far as reliance is placed on sec 9 of the Constitution I must readily confess that I cannot conceive of any plausible and rational basis upon which it can be contended that ss 7(2) and 45 of the SCCA infringe the applicant's right to equality as enshrined in sec 9 of the Constitution. Nor could it be seriously contended that the applicant has been discriminated against in any of the respects set forth in sec 9(3) and (4) of the Constitution. Perhaps at the risk of stating the obvious it has to be emphasised that regard being had to the reasons that informed the enactment of the SCCA this piece of legislation has a legitimate purpose to fulfil in a country in which the great majority of the citizens are afflicted with an assortment of social ills such as poverty, unemployment and illiteracy.

[33] I have given anxious consideration to the cumulative effect of the factors that weighed heavily with the Commission as encapsulated in para [29] of this judgment and must readily confess that I find those factors and the reasons underpinning them compelling and accordingly have no hesitation in adopting them for purposes of this judgment. The inevitable result of this conclusion is that even if I were persuaded for present purposes that the applicant has made out a case that ss 7(2) and 45 of the

SCCA infringe her constitutional rights enshrined in ss 9 and 35 of the Constitution more than enough has been said to demonstrate a justification of the limitation of the rights that the applicant seeks to assert which is, in terms of sec 36 of the Constitution, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[34] I am, in the light of the aforegoing reasons, firmly convinced that the third respondent has discharged the onus resting on her to meet the minimum threshold that the limitation contended for is justified and is supported by the evidence presented in third respondent's answering affidavit. [Compare in this regard **: Phillips v Director of Public Prosecution (Witwatersrand Local Division) 2003(3) SA 345(CC); Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA)]**

[35] It was not contended and/or suggested even in the slightest either on the papers or in argument before me on behalf of the applicant that the failure by the Legislature not to afford an aggrieved litigant a right to appeal is manifestly a clear case of a *casus omissus* on the part of the Legislature. Nor could it ever have been seriously and with any degree of conviction so contended, in my view, in the light of the fact that the Commission had dealt with this aspect pertinently in its recommendations. Had it been so suggested such a contention would not have been deserving of anything but short shrift for our courts have in a

long line of cases acted with judicial restraint in regard to cases of alleged *casus omissus* as reflected in the *dictum* of Trollip JA in **Amalgamated Packaging Industries Limited v Hunt and Another 1975 (4) SA 943 (A) at 949 H** in which passage the following is stated :

> "It might possible be a *casus omissus* on the part of the legislature not to have afforded aggrieved members of the public some form of relief by way of appeal or review. If so the remedy lies with it and not with the Courts to remedy the omission."

[36] This principle should, in my view, be rigorously enforced in this day and age of our constitutional democracy in order to entrench the doctrine of separation of powers decreed and espoused by the Constitution which then means that our courts must eschew the temptation to intrude into the domain of the legislature in the guise of protecting individual rights though such rights admittedly lie at the heart of our democratic dispensation. [See in this regard for example : **Swartbooi and Others v Brink and Others 2006 (1) SA 203 (CC); Minister of Health and Others v Treatment Action**

Campaign and Others (No 2) 2002 (5) SA 721 (CC); De Lille v The National Assemble 1999 (4) SA 863 (SCA)]

[37] The conclusion to which I have come on the question of justification of the limitation renders it unnecessary for me to devote any further attention to the question relating to the constitutionality of the impugned sections of the SCCA save to re-iterate that it is my judgment that the impugned sections of the SCCA do pass constitutional muster. In this regard it bears mentioning that whilst not prepared to concede that whatever case the applicant may have made out in regard to the constitutional invalidity of the impugned sections such a case is demonstrably far-outweighed by the justification of the limitation of the rights contended for as contemplated in sec 36 of the Constitution Mr Noxaka said virtually nothing to counter the third respondent's contention on this score in his oral submissions. Indeed I detected that his failure and/or inability to do so was as a result of a realisation on his part that there would be insurmountable obstacles on his path if he were to seek to contend otherwise and endeavour to defend something that is manifestly indefensible.

[38] As a last ditch effort Mr Noxaka submitted in the final analysis that the impugned sections of the SCCA fall to be declared invalid on the simple basis that the SCCA was enacted prior to the advent of the new constitutional order ushered in by the Constitution. But this starling submission by Mr Noxaka is untenable for two reasons. In the first place it overlooks the fact that given our painful past the majority of acts on our statute book pre-date the Constitution. If all of them were to be struck down on that account alone regardless of whether they pass constitutional muster it is not difficult to imagine that there would be a statutory void that would have the great potential of causing chaos and untold disruptions in every facet of life in the country. [Compare : **S v**

Makwanyane, supra at **412 E-G**] In the second place and even more important all laws in force when the Constitution came into operation remain in force by virtue of the provisions of sec 2(1) of Schedule 6 to the Constitution. [Compare in this regard : **Mabaso v Law Society, Northern Province 2004 (3) SA 453 (SCA)**]

[39] For the aforegoing reasons, consequently, the following order shall issue:

"**The application is dismissed with costs**."

_____

X. M. PETSE
JUDGE OF THE HIGH COURT

HEARD ON	**:**	**10 NOVEMBER 2006**
DELIVERED ON	**:**	**26 JULY 2007**
APPLICANT'S ATTORNEY	**:**	**MR A.F. NOXAKA**
INSTRUCTED BY **&**	**:**	**MESSRS A. F. NOXAKA** COMPANY
COUNSEL FOR THE THIRD RESPONDENT SC	**:**	**MR M.R. MADLANGA**

IN THE HIGH COURT OF SOUTH AFRICA

INSTRUCTED BY : THE STATE ATTORNEY
EAST LONDON