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A re-evaluation of the Special Investigating Unit and Special Tribunal in South Africa

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DECLARATION

I, LUVUYO REUBEN NDUNYANA, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed: 

Date: 22 February 2018.

DEDICATION

To my wife Fundiswa-Lilitha and my daughters Xola and Asiphile, for being there for me during the hard times in my life and career when I was pursuing my studies towards the LLM Degree.

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First and foremost, I want to thank God the Almighty for my successful completion of the programme. Special thanks go to my wife Fundiswa-Lilitha for her understanding and support during the programme. I give my love and appreciation to my late parents, Gcayi and Nomabandla, for their underlying love and confidence in me, even when it has always been very tough during my studies. Their unconditional love and sense of achievement at my first graduation is a lifelong token of my appreciation and will never be forgotten. While this study was undertaken under the supervision of Ms Rashri Baboolal-Frank, it benefited greatly from her comments and Ms Tracy Govender (the National Librarian of the Special Investigating Unit who is stationed in East-London) and Ms Sanette Blignaut (the Legal Secretary of the Special Investigating Unit who is stationed in Pretoria) for the tireless support they gave me. To you all, I thank you most sincerely for your open, honest and valuable comments on my earlier drafts of this dissertation. I also wish to humbly thank the Head of the Special Investigating Unit, Advocate Jan Mothibi for blessing and approving the study of this topic. Finally, I wish to extend my heartfelt gratitude and thanks to the Special Investigating Unit for financing my studies and giving me the opportunity to pursue a master's degree programme at the University of Pretoria, and especially to all the staff for their academic and administrative assistance.

SUMMARY

The main focus of this dissertation is to critically evaluate the functioning of the Special Investigating Unit ('SIU') and Special Tribunal in the execution of its mandate, which includes the fight against fraud and corruption on state institutions in South Africa. The dissertation seeks to explore the importance of a functional SIU and Special Tribunal in the eradication of maladministration, fraud and corruption on state institutions in terms of the Special Investigation Units and Special Tribunals Act 74 of 1996 ('the SIU Act').

The questions investigated by this dissertation is whether the Special Tribunal established in terms of the SIU Act is designed to perform administrative functions or purely judicial functions; how the SIU institutes civil proceedings on behalf of the state institutions and whether the SIU is completely functional in its present form.

The main findings of the dissertation, among others are that the SIU Tribunal is a purely judicial tribunal. However, the SIU performs administrative functions relating to the mandate assigned to the SIU by the President in the proclamation. Furthermore, the SIU and Special Tribunal derive their mandate from the SIU Act and operate within the ambit of the terms of reference in the empowering proclamations.

Based on these findings, among others, the dissertation concludes that although the Special Tribunal is presently not composed as is provided for in terms of s 7 of the SIU Act, or functional like the SIU Act envisages, the Special Tribunal is a purely judicial tribunal. This view is based on the fact that the Special Tribunal consists of officers of court ranging from judges; magistrates; advocates or attorneys of the Supreme Court of South Africa. The Special Tribunal may furthermore make any order which it deems appropriate to give effect to its decision. It functions in the same way as a court according to rules made by its President. The Special Tribunal has jurisdiction to adjudicate upon any justiciable civil disputes (arising out of civil proceedings instituted in that Special Tribunal) emanating from the investigations by the SIU. The SIU must have acted within the ambit of its terms of reference as set out in the proclamation referred to in s 2(3) of the SIU Act.

The research, finally, finds that in the absence of a fully functional Special Tribunal, the SIU is not fully effective in the manner in which the legislature intended it to be as envisaged by the SIU Act. What was envisaged by the SIU Act was simply a fully functional Special Tribunal.

Against this background, the main recommendation of this dissertation, among others, is that the SIU and Special Tribunal should amend their empowering legislation, namely the

SIU Act in order to give them more powers for the proper performance of their functions. A fully functional Special Tribunal will provide benefits to the SIU by it being more effective, with improved turnaround times on investigations and civil litigation, and should be outcomes orientated.

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CHAPTER I

I. INTROUCTION

This study is a re-evaluation of the Special Investigating Unit ('SIU') and Special Tribunal in South Africa. The purpose of this study is to ensure that both the SIU and Special Tribunal improve their functionality in resolving matters. The SIU was established in terms of the Special Investigating Units and Special Tribunals Act ¹(as amended) to investigate serious malpractices or maladministration in connection with the affairs of state institutions and matters related thereto. In addition, a Special Tribunal was also established for the purpose of adjudicating civil matters emanating from investigations by the SIU.² The SIU's predecessor was the Heath Commission, which was headed by Justice Willem Heath, who was the Head of the SIU, who has headed the SIU since its establishment by the President on 14 March 1997.

However, Justice Heath's impartiality and independence as the Head of the SIU was questioned as a result of the separation of powers principle. In *South African Association of Personal Injury Lawyers (Saapil) v Heath and Others*³ the Constitutional Court followed this principle. The judgment in *Saapil* posited that Justice Heath's leadership of the SIU meant that as a judge, he was directly involved in the investigation of government corruption and maladministration.⁴ According to the judgment, these aspects were determined by the President and not by the unit.⁵ This was incompatible with the separation of powers between the judiciary and the executive and legislative branches of government required by the Constitution.⁶ In this instance, the executive was seen to be exercising its function through the use of a judge who was assigned with judicial responsibilities. The *Saapil* judgment went on to add that the functions performed by Judge Heath were beyond the powers and functions of a judge.⁷

This dissertation will first provide a brief background on the establishment of the SIU in South Africa. It is important to note that because this was a newly established *ad hoc* unit which was trying to find stability ground on which to balance and how to execute its

¹ 74 of 1996, (the SIU Act).

² The Preamble to the SIU Act.

³ 2001(1) SA 883 (CC), (the *Saapil* case).

⁴ Ibid para 17.

⁵ Ibid 3 para 17.

⁶ Constitution 1996, (the Constitution).

⁷ Ibid 3 para 45 and 46.

mandate, the SIU was involved in litigation and was challenged in a number of matters in this regard. The challenges mainly related to the jurisdiction of the SIU in respect of its mandate as well as same having being headed by a judge. As a consequent of these challenges, the SIU Act was constantly amended⁸ in order to overcome these hurdles.

This dissertation is aimed at discussing the background for the establishment of the SIU and Special Tribunal; its jurisdictional requisites with specific reference to case law;⁹ its powers in terms of the SIU Act and the remedies available to the SIU through civil law. The challenges that the SIU has with regards to the performance of its functions as empowered by the SIU Act, as well as the proposed future legislative amendments to the SIU Act, which may assist the SIU in the performance of its mandate will also be dealt with.

Recommendations, including concluding remarks on the proposed amendments to the SIU Act in order to give it more powers in the proper performance of its functions will be dealt with.

II. RESEARCH STATEMENT

There are shortcomings in respect of both the SIU and Special Tribunal that will be addressed to improve the functioning and efficiency of these institutions. The object of this dissertation is to critically evaluate the functioning of the SIU and Special Tribunal in the execution of their mandate, which includes the fight against fraud and corruption on state institutions in South Africa.¹⁰

⁸ Judicial Matters Second Amendment Act 122 of 1998; Judicial Matters Amendment Act 62 of 2000; Special Investigating Units and Special Tribunals Amendment Act 2 of 2001; Prevention and Combating of Corrupt Activities Act 12 of 2004; Judicial Matters Amendment Act 22 of 2005 and Judicial Matters Amendment Act 11 of 2012.

⁹ *Konyn and Others v Special Investigating Unit* 1999 (1) SA 1001 (Tkh); *Stafford v Special Investigating Unit* 1998 (4) All SA 543 (E); *Toto v Special Investigating Unit* 2002 (2) All SA 91 (E); *Special Investigating Unit v Ngcingwana* 2001 (1) All 392(E); *Special Investigating Unit v Nadasen* (5/2001) [2001] ZASCA 117; [2002] 2 All SA 170 (A).

¹⁰ The Preamble to the SIU Act states, 'To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions; to provide for the revenue and expenditure of Special Investigating Units; to provide for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto.'

III. BACKGROUND TO RESEARCH STATEMENT

In order to explain the research statement, it is necessary to reflect upon case law. In *Special Investigating Unit v Nadasen*,¹¹ Harms JA remarked that ‘corruption and fraud, for some years now, have been matters of serious public concern. This is evidenced by a number of recent enactments, the use of special task forces and the appointment of commissions of inquiry.’¹² Statutes that have been promulgated include the Prevention and Combating of Corrupt Activities Act;¹³ the Prevention of Organised Crime Act¹⁴ and the SIU Act.’ The SIU and the Special Tribunal is the subject of this topic. As it appears from the long title, the object of the SIU Act is to provide for the establishment of:

“(a) *special investigating units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and (b) special tribunals to adjudicate upon civil matters emanating from these investigations.*”

The SIU was indeed established together with the Special Tribunal by way of a Presidential Proclamation of March 1997.¹⁵ During its establishment, the SIU was headed by a full time judge of the Supreme Court, Justice Wilhelm Heath. As was stated herein above, during this period, the SIU was inundated with litigation as its jurisdiction was challenged in a number of aspects. Again and as already been stated, in the *Saapil* case, the Constitutional Court held that because the Head of the SIU and Special Tribunal was a judge, the Proclamation was later found to be inconsistent with the provisions of the Constitution but the declaration of its invalidity was suspended for one year from 28 November 2000¹⁶ to allow the legislature to amend the SIU Act¹⁷ in order to deal with the issues raised by the judgment.¹⁸

¹¹ (5/2001) [2001] ZASCA 117; [2002] 2 All SA 170 (A), (the *Nadasen* case).

¹² Ibid.

¹³ 12 of 2004, (the PaCoCA).

¹⁴ 121 of 1998, (the POCA).

¹⁵ GN 420 in GG 17854 of 14 March 1997.

¹⁶ Ibid 3 para 17. See Also: *Executive Council, Western Cape Legislature v President of the Republic of South Africa* (*Western Cape* case) 1995 (4) SA 877 (CC): The view is that if the constitutional defects were not ratified within a period of one year from the date of judgment, then the declaration of invalidity would be activated on the 28 November 2001. From that date, s 3(1) of the then SIU Act and Proclamation R24 of 1997 would be declared invalid with retrospective effect. If s 3(1) of the SIU Act and Proclamation R24 of 1997 were repealed before expiry of the one-year period, the *Western Cape* case suggests that the declaration of invalidity would ‘fall away.’ Even if the declaration of invalidity did not ‘fall away’ and was in due course activated on the 28 November 2001, there would be nothing in existence that could be declared invalid on that date.

¹⁷ In consequence of the decision of the Constitutional Court in *Saapil*, Proclamation R.24 of 1997, as amended from time to time, was repealed by Proclamation R.118 of 2001.

In its judgment, the Constitutional Court held that the Head of the SIU is required to perform executive functions. He is responsible for the appointment of the staff of the SIU¹⁹ who may include officers seconded from the public service.²⁰ He is also responsible for their supervision and has the power to remove any member of the unit from office 'if there are sound reasons for doing so.'²¹

In terms of the SIU Act, the SIU may require any person to provide it with information that may be reasonably necessary for the performance of its functions.²² The SIU may further require any person to appear before it to produce books, documents or objects,²³ and may question any person under oath.²⁴ The SIU member may enter and search premises in accordance with the provisions of the SIU Act,²⁵ and for that purpose may 'use such force as may be necessary to overcome resistance against such entry and search of the premises, including the breaking of any door or window.'²⁶ The SIU must refer evidence pointing to the commission of an offence to the relevant prosecuting authority.²⁷ It may further institute civil proceedings in a Special Tribunal if it has obtained evidence substantiating any allegation contemplated in s 2(2) of the SIU Act.²⁸ The Head of the SIU is ultimately accountable for the performance of these functions. The Head of the SIU may also refer matters to the Public Protector²⁹ and to the state attorney or a state institution for the institution of legal proceedings against any person, if during the course of investigation information comes to his attention which in his opinion justifies the institution of such proceedings by a State institution.³⁰

Once again, in the *Saapil* case, it was held that the separation of powers required by the Constitution must be upheld otherwise the role of the court as an independent arbiter of issues involving the division of powers between the various spheres of government will be undermined.³¹ The prescripts of the Constitution recognise this and impose a positive

¹⁸ Ibid 3 para 67.

¹⁹ S 3(2) of the SIU Act.

²⁰ S 3(3) of the SIU Act.

²¹ S 3(4) (c) of the SIU Act.

²² S 5(2) (a) of the SIU Act.

²³ S 5(2) (b) of the SIU Act.

²⁴ S 5(2) (c) of the SIU Act.

²⁵ S 6(1) of the SIU Act.

²⁶ S 6(8) (a) of the SIU Act.

²⁷ S 4(1) (d) of the SIU Act.

²⁸ S 5(5) of the SIU Act.

²⁹ S 5(6) (b) of the SIU Act.

³⁰ S 5(7) of the SIU Act.

³¹ Ibid 3 para 26.

obligation on the state to ensure that this is done.³² It provides that courts are independent and subject only to the Constitution and the law which they must ‘apply impartially without fear, favour or prejudice.’³³ ‘No organ of state or other person may interfere with the functioning of the courts,’³⁴ and all organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.³⁵

Furthermore, it is of relevance to add that the SIU has always been assimilated to a commission of inquiry. In *S v Naudé*,³⁶ Corbett JA reminded of the invasive nature of commissions and how they can easily make important inroads upon basic rights of individuals. ‘A unit such as the SIU is constrained by the boundaries set by the Act and its founding proclamation.’³⁷ It is important that an exercise of powers by a tribunal should be strictly in accordance with the statutory or other authority whereby they are created. The introductory part of s 4(1) of the SIU Act is said to emphasise this point that the functions of the SIU are within the framework of its terms of reference as set out in the proclamation referred to in s 2(1). Section 2(1) of the SIU Act empowered the President to establish an SIU for the purposes of investigating allegations of serious maladministration or unlawful or improper conduct on any of the grounds specified in s 2(2) of the SIU Act.

According to Harms J in the *Nadasen* case,³⁸ and referring to the *Saapil* case, the framework within which the SIU should operate is in line with the approach of the Constitutional Court. The jurisprudence from the *Saapil* case is that s 2(2) of the SIU Act deals with the ambit of the application of the Act which contains various provisions that impact upon an entrenched constitutional right to privacy³⁹ of the persons affected by them; the broader the reach of the Act and the greater the invasion of privacy. In construing s 2(2) regard must be had to ‘the spirit, purport and objects’ of the Bill of Rights.⁴⁰ In the *Saapil* case, it was held further that ‘the spirit, objects and purport of the Bill of Rights, namely the protection of privacy, will be better met by giving a narrow rather than a broad interpretation to the provisions of the Act.’⁴¹

³² S 165(2) of the Constitution.

³³ S 165(2) of the Constitution.

³⁴ S 165(3) of the Constitution.

³⁵ S 165(4) of the Constitution.

³⁶ 1975 (1) SA 681 (A), (the *Naudé* case).

³⁷ Ibid 704 para B-E.

³⁸ Ibid 11 para 5.

³⁹ S 14 of the Constitution.

⁴⁰ S 39(2) of the Constitution.

⁴¹ Ibid 3 para 52.

Even before the *Saapil* case, and in *Fey NO and Whiteford NO v Serfontein and Another*,⁴² it was stated that ‘a tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly.’ This therefore reaffirms that the tribunal is like a Magistrate’s court without the inherent jurisdiction of a superior court, and is therefore a creature of statute. Since the promulgation of Proclamation R24, legislation has been issued extending the terms of reference of the SIU and Special Tribunal.⁴³

Pertaining to the establishment of special investigating units and special tribunals, s 2 of the SIU Act empowers the President to establish special investigating units and special tribunals for what is provided for in the preamble to the SIU Act.⁴⁴ The concept of ‘state institution’ as used in the SIU Act is ambiguous⁴⁵ and must be read together with the provisions of the Public Finance Management (PFMA) Act 1 of 1999.⁴⁶ With regards to the scheme of the SIU Act, a unit must investigate the matter referred to it,⁴⁷ collect relevant evidence⁴⁸ and may then institute proceedings in the tribunal against the parties concerned⁴⁹ for the recovery of what is due to the particular state institution.⁵⁰ Section 2 of the SIU Act further gives the President power to define the terms of reference of the SIU, which terms must fall within the limitations of those powers referred to in the SIU Act. Conversely, the SIU’s terms of reference must therefore fall within the framework of the powers established by the Act.

In the *Konyn* case,⁵¹ the court held that the SIU can claim no powers which cannot be found within the four corners of its constituent Act. In respect of jurisdictional facts, and remedies through civil law, the SIU can institute civil proceedings in a Special Tribunal if,

⁴² 1993 (2) SA 605 (A) 613F-J, (the *Fey* case).

⁴³ Judicial Matters Second Amendment Act 122 of 1998; Judicial Matters Amendment Act 62 of 2000; Special Investigating Units and Special Tribunals Amendment Act 2 of 2001; Prevention and Combating of Corrupt Activities Act 12 of 2004; Judicial Matters Amendment Act 22 of 2005 and Judicial Matters Amendment Act 11 of 2012; See Also: Ibid 14.

⁴⁴ Ibid 6.

⁴⁵ It is defined as follows in s 1, ‘State institution’ means any national or provincial department, any local government, any institution in which the State is the majority or controlling shareholder or in which the State has a material financial interest, or any public entity as defined in s 1 of the Reporting by Public Entities Act No. 93 of 1992 (RPEA).

⁴⁶ The RPEA was repealed by section 94 of the Public Finance Management Act 1 of 1999 (‘the PFMA’), as read with Schedule 6 thereof.

⁴⁷ S 4(1) (a) of the SIU Act.

⁴⁸ S 4(1) (b) of the SIU Act.

⁴⁹ S 5(5) of the SIU Act.

⁵⁰ S 5(7) of the SIU Act.

⁵¹ Ibid 9.

arising from its investigation, the SIU has obtained evidence substantiating any allegation contemplated in s 2(2) of the SIU Act. The SIU does not have unlimited powers to obtain evidence substantiating any allegation contemplated in s 2(2). The powers are limited by the terms of reference as published in a particular proclamation. The power provided for by the Legislature in s 5(5) cannot be read independently of sections 2(1), 2(3) and s 4(1) of the SIU Act.⁵²

Again s 2(1)(b) of the SIU Act provides that the President may, on account of any of the grounds mentioned in subsection (2), by proclamation in the Gazette establish one or more Special Tribunals to adjudicate⁵³ upon civil proceedings emanating from any investigation of any particular Special Investigating Unit. Furthermore, s 34 of the Constitution has reaffirmed that parties brought before a tribunal have a right to fair hearing.⁵⁴ This Constitutional provision emphasises that like all other tribunals, the SIU enjoys no better right than it has in law. It should subscribe to the due processes of the law. Furthermore, and concerning regulations made by the Minister of Justice for the tribunal, such regulations must be certain and not couched in ambiguous terms with regards to procedure for instituting proceedings. Where there is such uncertainty the rules and regulations would be void for vagueness and ambiguity.⁵⁵

Consequently, and considering the submissions made above, this topic seeks to provide a brief background for the establishment of the SIU and Special Tribunal with specific emphasis on its jurisdictional requisites with reference to case law; its powers in terms of the SIU Act and the remedies available to the SIU through civil law. The challenges that the SIU faces in the execution of its mandate within the bounds of its enabling statute

⁵²Ibid 9 at 1013.

⁵³ *Special Investigating Unit v Mfeketo* 2001 1 SA 1089 (Spec Trb), (the *Mfeketo* case).

⁵⁴ In this context, in *Special Investigating Unit v Kim Diamonds (Pty) Ltd* 2004 (2) SA173 (SpT), the court held that the SIU was substituted for, but was in the same position as, the Provincial Government and/or the Tender Board would have been, had either of those parties instituted the proceedings. The Act did not create any new causes of action or give the SIU the right to relief where no such right would otherwise have been available to the parties themselves (Paras 3.9 at 182G - I/J and 3.6 at 182B/C - C/D.) E. See Also: *Special Investigating Unit v Ngcingwana and Another* 2001 (1) SA 392 (E) where the Court held that the SIU was a juristic person which could sue and be sued in its own name. Like any other person, however, it could only sue another party if it had a valid claim or cause of action against that party. As a statutory creation, the SIU had only those functions and powers given to it by the Act. The court added that there was no provision in the SIU Act that empowered the SIU to institute proceedings in the Special Tribunal on behalf of public or State institutions.

⁵⁵ In the *Konyn* case, the court found that the rules of procedure of a Special Tribunal, as read with the regulations made by the Minister of Justice published in the Government Notice R420 of 14 March 1997 (as published in the Government Notice 894 of 1997 and in Government Gazette 18054 dated 6 June 1997), are required not to be couched in terms which are so uncertain as to the procedure for instituting proceedings that interested parties do not know what procedures have to be followed; See Also: *Metal and Allied Workers Union and Another v State President of the Republic of South Africa and Others* 1986 (4) SA 358 (d) at 365H-366A; See Also, s 11 of the SIU Act.

will be discussed. Proposed amendments to the SIU Act in order to provide efficacy and efficiency to the SIU in the execution of its mandate will also be discussed. Recommendations, including concluding remarks, will be made.

IV. RESEARCH QUESTIONS

Against the background outlined above, this dissertation attempts to answer the following questions:

- (a) Is the Special Tribunal established in terms of the SIU Act, designed to perform administrative functions or is it designed to perform purely judicial functions?⁵⁶
- (b) How does the SIU institute civil proceedings on behalf of the state institutions?
- (c) Is the SIU effective in its present form and in the absence of a functional special tribunal?

V. OBJECTIVES OF THE STUDY

The main objective of the study is to attain the following:

- (a) To critically evaluate and assess the functions of the SIU and Special Tribunal;
- (b) To investigate through case law, the jurisdiction of the SIU's Special Tribunal in South Africa;
- (c) To assess to what extent the SIU may institute civil proceedings on behalf of state institutions through the Special Tribunal; and
- (d) To examine the effectiveness of the SIU's Special Tribunal in the presence of a proposed functional tribunal.

VI. THE SIGNIFICANCE OF THE STUDY

It will be argued that the relevance of a functional Special Tribunal in the fight against fraud and corruption on state institutions in South Africa is ideal for responsive and good governance. This will instil and enhance accountability on the use and administration of State assets and public funds. The study will have a significant academic and legal contribution as it will explore the importance of a functional fraud and corruption busting SIU and Special

⁵⁶ K Hopkins 'Some Thoughts on the Constitutionality of "Independent "Tribunals established by the State.' (2006) *Obiter* 150.

Tribunal in order to eradicate maladministration, fraud and corruption on state institutions in South Africa.

VII. METHODOLOGY OF THE RESEARCH

The approach adopted in this work consists of a re-evaluation of the Special Investigating Unit and Special Tribunal in South Africa. In order to conduct the research, the researcher will rely on textbooks; published articles; journals and case law. The research will be based on quantitative research.

VIII. STRUCTURE AND OVERVIEW OF CHAPTERS

This research will consist of four chapters. A brief overview of the chapters, starting from chapter one, is provided below.

- (a) The first chapter is an introductory chapter consisting of an introduction and research problem; the background to the research; research questions; the objective of the study; significance of the study; method of research and the structure.
- (b) The second chapter will focus on jurisdictional grounds relating to the Special Tribunal established in terms of the SIU Act, through case law; the powers of the SIU as well as the institution of civil proceedings by the SIU.
- (c) The third chapter provides some of the challenges that the SIU has with regards to the performance of its functions as empowered by the SIU Act. The chapter further deals with some proposed future legislative amendments to the SIU Act which may assist the SIU to perform on its mandate. It finally deals with what value a functional Special Tribunal will add to the SIU.
- (d) Chapter four consists of conclusions and recommendations, including concluding remarks with regards to the efficiency of the SIU and Special Tribunal in the performance of their functions.

IX. REFERENCE TECHNIQUES

In this dissertation, the *South African Law Journal (SALJ)* House Style is employed. Full details of sources of reference are included in the text of the footnotes but may be found in the bibliography. Given the increased tendency for secondary sources, including academic

and practitioners' commentary; media reports; as well as codes; policies and practice manuals, to be accessible electronically via the internet, it was decided not to differentiate in the bibliography between secondary sources referred to in hard copy and those accessed via internet websites. Only sources specifically mentioned in the footnotes have been included in the bibliography.

In certain chapters there are numerous references, in the footnotes, to many different cases and paragraph numbers in judgments, with cross-references to judicial comment in relation to other judgments. In order to avoid confusion, the decision was made to use the term "Ibid" in the footnotes. However, it is hoped that, overall, this will be more convenient for the reader.

In this dissertation, as a rule, references reflect the spelling of the party's name as it appears in the relevant law report. The Renaming of High Courts Act 30 of 2008 came into operation on 1 March 2009.⁵⁷ As a result, the high courts were renamed. In this dissertation, each high court division will be referred to by the name which it bore at the time of the occurrences under discussion. Specific case references reflect the name of the court as it appeared in the relevant law report at the time of reporting.

CHAPTER II

I. INTRODUCTION

(a) General Background

The powers of the Special Tribunal to hear proceedings by the SIU before such a tribunal have been challenged in a plethora of court decisions.⁵⁸ The legal challenges that the Special Tribunal held concerned jurisdictional facts relating to the SIU in the execution of its mandate within the terms of reference of the empowering proclamations read with the SIU Act.

This chapter seeks to provide a detailed synopsis of the jurisdiction of the SIU through case law. A brief discussion of specific powers of the SIU with regards to search and seizure, as well as some of the remedies applicable to the SIU through civil litigation will be dealt with. In conclusion, a clear position providing the basis upon which the SIU derives its jurisdiction will be established.

⁵⁷ GG 31948 of 23 February 2009.

⁵⁸ Ibid 9.

(b) *Jurisdictional facts relating to the Special Investigating Units and Special Tribunal*

The *Saapil* case, among others, brought about the amendment of the SIU Act by the Special Investigating Units and Special Tribunals Amendment Act.⁵⁹ Before and after the amendment of the SIU Act, as has been stated in Chapter 1 above, the SIU had been involved in much litigation.

The scope of jurisdiction of the SIU is elaborated on in s 2(2) of the SIU Act⁶⁰ read with the terms of reference of the empowering proclamation.⁶¹ Although the SIU is performing its functions with the assistance of other state entities,⁶² this topic is however not aimed at discussing these state entities. The ensuing discussion will highlight the circumstances which gave rise to the challenges to the SIU jurisdiction. The decided cases provide guidance on how the SIU should interpret its terms of reference within the ambit of the proclamations and the SIU Act.

⁵⁹ 2 of 2001, (the SIU Amendment Act).

⁶⁰ S 2(2) states that 'The President may exercise the powers under subsection (1) on the grounds of any alleged-

(a) serious maladministration in connection with the affairs of any State institution;

(b) improper or unlawful conduct by employees of any State institution;

(c) unlawful appropriation or expenditure of public money or property;

(d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;

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

(f) offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was [sic] committed in connection with the affairs of any State institution; or

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

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

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

⁶¹ Ibid 48.

⁶² Office of the Public Protector; Assets Forfeiture Unit; Directorate of Priority Crimes Unit; South African Police Services, South African Revenue Services etc. See also: PH Munzhedzi 'Fostering public accountability in South Africa: A reflection on challenges and successes' (2016) *The Journal for Transdisciplinary Research in Southern Africa* 12(1), a339, p5. <http://dx.doi.org/10.4102/td.v12i1.339>. See Also: M Montesh 'An Analysis of the Role of the South African Assets Forfeiture Unit and the Special Investigation Unit' (2009) *Acta Criminologica* 22(2), p39, 'The SIU works with government departments and to assist them in fighting corruption more effectively. It has formed partnerships with government departments to create a dedicated anti-corruption capacity.'

(c) *Case Law*

- (i) *Minister of Public Works v Haffeejee NO* [1996] 4 All SA 355⁶³ (The *Haffeejee* case)

Although this case is *obiter dictum* and does not arise out of litigation relating to the SIU, it is of utmost importance and of relevance as there are a number of subsequent decisions which make reference to it with approval.⁶⁴ The case reaffirms the legal position that a tribunal derives its powers from the enabling statute and must act within the confines of the law.

The facts are briefly that the Minister of Public Works (Appellant) had, in 1986, expropriated a property vesting in the administrator of a deceased estate (the Respondent) in terms of s 13(1) of the Development Trust and Land Act⁶⁵ read with the Expropriation Act.⁶⁶ In terms of a notice sent to the Respondent by the Appellant, an amount of R20 500.00 was offered as compensation under s 12(1)(a) and subsection (2) of the Expropriation Act. This offer was subject to s 10(5) of the Expropriation Act which provided that, should the Respondent elect not to apply to a compensation court or division of the supreme court with jurisdiction within eight months for the determination of the compensation, the offer would be deemed to be accepted by the Respondent.⁶⁷

The Respondent rejected the offer and in August 1992 lodged an application in the compensation court for compensation in the amount of R80 410.00. The Appellant sought declaratory orders against the Respondent contending that the provisions of the Expropriation Amendment Act⁶⁸ implemented from 1 May 1992, had subsequently abolished the compensation court, nullified the Respondent's aforesaid application and that the Respondent was deemed to have accepted the Appellant's offer. The Respondent opposed the application, submitting that the amending Act did not operate retrospectively. The court *a quo* dismissed the application concluding that the

⁶³ Parallel Citation: 1996(3) SA 745 (A).

⁶⁴ Ibid 9 at 1015 and Ibid 11 para 5 at 751F.

⁶⁵ 18 of 1936, (the Land Act).

⁶⁶ 63 of 1975, (the Expropriation Act).

⁶⁷ Ibid 63 at 355.

⁶⁸ 45 of 1992, (the Expropriation Amendment Act).

amended Act did not retroactively affect vested rights. The Appellant was granted leave to appeal.⁶⁹

The appeal court considered a point *in limine* as to whether the compensation court was vested with sufficient jurisdiction to adjudicate on the merits of the Respondent's application for compensation. The court concluded that the compensation court, as an *ad hoc* tribunal vested with no inherent powers, could not confer a jurisdiction upon itself which it did not possess in law.⁷⁰

The appeal court then considered whether the amendments provided by the Expropriation Amendment Act applied to a right of compensation which had arisen prior to the coming into operation of that Expropriation Amendment Act, but had not yet been invoked by the lodging of an application for compensation in compensation court. The effect of the amendments was to delete from the Expropriation Act all references to, and provisions dealing with, a compensation court.⁷¹

The court, in distinguishing between procedural and substantive provisions, held that the amendments were procedural. Citing various cases, the court pointed out that in order to decide whether a statute applied retrospectively to a case it was necessary to consider whether the said statute would impair existing rights and obligations.⁷²

The court concluded that in terms of s 12(2)(c)⁷³ of the Interpretation Act,⁷⁴ the amendments did not affect any right or privilege of the Respondent.⁷⁵ The court also held that the manifest purpose of the amending legislation was to eliminate compensation courts from the expropriation scene and to direct future compensation claims to the Supreme Court.⁷⁶ The appeal was accordingly upheld with costs.⁷⁷

⁶⁹ Ibid 67.

⁷⁰ Ibid.

⁷¹ Ibid 63 at 357.

⁷² Ibid 63 at 360.

⁷³ S 12(2)(c) states that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed.

⁷⁴ 33 of 1957, (the Interpretation Act).

⁷⁵ Ibid 63 at 363.

⁷⁶ Ibid 63 at 361.

⁷⁷ Ibid 63 at 364.

- (ii) *Konyn And Others v Special Investigating Unit* 1999 (1) SA 1001 (Tkh)⁷⁸ (The *Konyn* case)

This case illustrates the principle that parties brought before the Special Tribunal are entitled to a 'fair public hearing' as contemplated in s 34 of Constitution. It further confirms that regulations made in terms of s 11 of the SIU Act and published in Government Notice R420 of 1997, must not be couched vaguely so as to preclude the right to a fair trial before the Special Tribunal.⁷⁹ Furthermore, fundamental to the process of adjudication of disputes is that material facts giving rise to the cause of action must be clearly pleaded, thus, unless the SIU pleads its cause of action with required particularity, defendants will be unable to prepare defences properly. This would then infringe the right to a fair hearing.⁸⁰

Furthermore, the SIU may institute civil proceedings in a Special Tribunal if, arising from its investigation, it has obtained evidence substantiating any allegation contained in s 2(2) of the SIU Act. The functions of a SIU provided for in s 4 of the SIU Act are limited by the terms of reference incorporated in the proclamation.⁸¹ The powers of the SIU set out in s 5 specify how the functions referred to in s 4 can be performed. The SIU does not have unlimited powers to obtain evidence 'substantiating any allegation contemplated in s 2(2).' Those powers are also limited by the terms of reference as published in the proclamation.⁸²

During May 1997; *Konyn & Others* (Appellants) received a 'Notice of Civil Proceedings to be Instituted in the Special Tribunal' issued by the SIU (Respondent). After the service of the aforesaid notices, each of the appellants was served with a notice of set down and a notice of intention to amend the 'Notice of Civil Proceedings to be Instituted in the Special Tribunal'. The appellants thereafter were given notice of hearing before the Special Tribunal for 3 November 1997.⁸³

⁷⁸ Ibid 9.

⁷⁹ Ibid 9 at 1001.

⁸⁰ Ibid 9 at 1002.

⁸¹ Ibid 9 at 1003 p1011E-H.

⁸² Ibid 9 at 1003 p1012H-I.

⁸³ Ibid 9 at 1005.

During October 1997, the appellants instituted proceedings against the SIU in the Eastern Cape Provincial Division of the high court, to interdict the SIU from continuing with legal proceedings against the appellants before the Special Tribunal in terms of the provisions of the SIU Act. The matter was argued on 31 October 1997, and an order was granted on the same date. In its judgment, the court did not deal with the merits of the application, but dismissed the application on the basis that the matter had to be determined first by the Special Tribunal established in terms of the SIU Act; and on the further ground that the Special Tribunal should have been a party to such interdict proceedings.⁸⁴

On 3 November 1997; and following the dismissal of the application by the Eastern Cape Provincial Division, the SIU commenced with the proceedings against the appellants in terms of the SIU Act before the Special Tribunal, sitting in Umtata. At the commencement of the proceedings, the appellants raised, *in limine*, the same issues which had been argued in the interdict proceedings before the Eastern Cape Provincial Division. In support of their arguments and in order to place the factual basis thereof before the Special Tribunal, the parties agreed to hand in to the Special Tribunal the application papers, together with their respective heads of argument, which were before the Eastern Cape Provincial Division, on 31 October 1997. Accordingly, the Special Tribunal dealt with the merits of the application (which the Eastern Cape Provincial Division had declined to do), and Claassen AJ dismissed all the points *in limine* in a judgment handed down on 5 November 1997.⁸⁵

The appellants appealed to the full bench of the high court, sitting as a court of appeal, against the judgment of the Special Tribunal. This appeal was brought in terms of s 8(7) of the SIU Act against the judgment of Claassen AJ delivered on 5 November 1997. The court held that the SIU is a statutory body established by the President in terms of the SIU Act. The SIU is a creature of statute with no jurisdictional powers or functions beyond those granted by the statute creating it, namely the SIU Act. The Special Tribunal established in terms of the SIU Act has no inherent jurisdiction such as that possessed by the

⁸⁴ Ibid 9 at 1005.

⁸⁵ Ibid 9 at 1006.

high court. The respondent can claim no powers which cannot be found within the four corners of its constituent SIU Act.⁸⁶

The court held further that purposive interpretation of the authority and powers conferred by SIU Act and its subordinate legislation will only arise where the enabling statute is silent or not clear as to the authority and powers actually conferred. Guidance as to the legislative purpose of the enactment in question can be found in the preamble to the SIU Act and the title of the SIU Act, namely 'Special Investigating Units and Special Tribunals.' The respondent (in this case the SIU) is defined in SIU Act as meaning 'a Special Investigating Unit established under s 2.' The court made reference to s 2(1) of the SIU Act which empowers the President in the exercise of a discretion given in terms of s 2(2).⁸⁷

The court again made reference to s 2(3) of the SIU Act and added that the 'terms of reference' are not defined in the SIU Act. Section 2(4) provides that the President may at any time amend a proclamation issued by him or her in terms of subsection (1). The functions of the SIU are dealt with in s 4(1) of the SIU Act. These functions may, however, only be exercised by a SIU authorised thereto by the terms of reference set out in the proclamation referred to in s 2(3) of the SIU Act.⁸⁸

The terms of reference may, however, be subsequently amended by the President in terms of s 2(4), in order to include those functions which may have been excluded or omitted from the original terms of reference laid down by the President in the exercise of his discretion when the SIU was established by proclamation. Section 5(1) provides that subject to the SIU Act and the regulations, the Head of a SIU may determine the procedure to be followed in conducting an investigation.⁸⁹

It is quite apparent from a reading of the SIU Act that the primary intention of the legislature in making provision for the establishment of a SIU was for the purposes of investigation as revealed by the preamble to the Act. The court referred to Kellaway on *Principles of Legal Interpretation*⁹⁰ (1995)

⁸⁶ Ibid 9 at 1010H-I.

⁸⁷ Ibid 9 at 1010I-J.

⁸⁸ Ibid 9 at 1011E-H.

⁸⁹ Ibid 9 at 1013.

⁹⁰ E.A.Kellaway *'Principles of Legal Interpretation of Statutes, Contracts and Wills'* 1 ed (1995) 68.

68 which deals with the determination of the purpose of an enactment and states that in seeking the purpose of an act the court may:

- “(1) look at the preamble to the Act or at other express indications in the Act as to the object that has to be achieved;*
- (2) study the various sections wherein a purpose may be found;*
- (3) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);*
- (4) draw logical inference from the context of the enactment.”⁹¹*

The primary purpose for the establishment of SIU was therefore for investigation, consistent with the purpose for the establishment of commissions by the President. The ground in question reads as follows:

- “(2) The President may exercise the powers under subsection (1) on the grounds of any alleged (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property.”⁹²*

The functions of a SIU provided for in s 4 of the SIU Act have been limited by the terms of reference incorporated in the proclamation. Those functions mentioned in sections 4(1)(a);⁹³ 4(1)(f)⁹⁴ and 4(1)(g)⁹⁵ and the first part of 4(1)(b)⁹⁶ had accordingly been authorised by the terms of reference as published in the proclamation.⁹⁷

The court held that the SIU had no authority to institute proceedings before a Special Tribunal as it purported to do under regulation 7.⁹⁸ The SIU’s power to institute proceedings before a Special Tribunal under s 4(1)(b) of the SIU Act would only come into operation and could only be acted upon by it, when

⁹¹ Ibid 9 at 1012H-I.

⁹² S 2(2)(d) of the SIU Act.

⁹³ Subsection 4(1)(a) relates to investigation all allegations regarding the matter concerned.

⁹⁴ S 4(1)(f) relates to report to the President on the progress made in the investigation and matters brought before the Special Tribunal concerned or any court of law.

⁹⁵ S 4(1)(g) relates to the submission of a final report to the President upon the conclusion of the investigation.

⁹⁶ S 4(1)(b) relates to the collection evidence regarding acts or omissions which are relevant to its investigation.

⁹⁷ Ibid 9 at 1010I/J.

⁹⁸ Ibid 9 at 1017 C/D-F-G.

those powers were specifically conferred upon it by its terms of reference as set out in the Proclamation and published in the Government Gazette.⁹⁹

The court further held that the powers of a SIU as set out in s 5 specify how the functions referred to in s 4, as limited by the terms of reference published in the proclamation, may be performed. It has already been stated that a SIU does not have unlimited powers to obtain evidence '*substantiating any allegation contemplated in s 2(2)*.' These powers are also limited by the terms of reference as published in the proclamation.¹⁰⁰

The powers provided for by the legislature in s 5(5) cannot be read independently in relation to sections 2(1), 2(3) and 4(1) of SIU Act. These sections of the SIU Act have to be read together. As in the case of the second part of s 4(1)(c) of SIU Act, the SIU is empowered to institute civil proceedings in the Special Tribunal:

- (a) If it is authorised to do so by the terms of reference as published in the proclamation; and
- (b) If it has obtained evidence substantiating any allegations emanating from investigations authorised by the terms of reference.

Section 2(1)(a)(i) of the SIU Act empowers the President to set out the terms of reference of a SIU and such particulars regarding the establishment of a Special Investigating Unit, as he may deem necessary.¹⁰¹

Section 8(2) gives a Special Tribunal jurisdiction to adjudicate upon any civil dispute brought before it by a SIU or any interested party as defined in the regulations, '*emanating from the investigation*' by such SIU.¹⁰² It was added that the President in the exercise of his discretion, decides what matters should be investigated and this is then set out in the proclamation as required by s 2(3). It is to be noted that s 8(2) differs from the provisions of s 2(2) in that it refers to the jurisdiction to adjudicate upon 'any civil dispute' brought before it by a SIU or 'any interested party' emanating from the investigation by such SIU. It was further stated that this is a clumsily worded section and what was obviously intended was that a Special Tribunal should have jurisdiction to adjudicate upon any justiciable civil dispute (arising out of civil

⁹⁹ Ibid 9 at 1012.

¹⁰⁰ Ibid 9 at 1012H-I.

¹⁰¹ Ibid 9 at 1013.

¹⁰² S 8(2) (a)-(c) of the SIU Act.

proceedings instituted in that Special Tribunal) emanating from the investigations by the SIU, within the framework of its terms of reference as set out in the proclamation referred to in s 2 of the SIU Act.¹⁰³

In the matter, the President exercised his discretion not to authorise the institution of proceedings by the SIU arising out of its investigations at that stage. The SIU first had to examine; inquire into and consider all the matters which it was required to investigate and then report on them to the President. The President clearly derives his powers from the SIU Act and his powers are limited and defined by the relevant provisions of the SIU Act. The Special Tribunal is empowered to adjudicate upon any civil dispute brought before it by an interested party as defined in the regulations, emanating from the investigations of the SIU,¹⁰⁴ which defined 'interested party' as meaning 'any party who has a direct and substantial interest in an issue which is such that a judgment or order by a Special Tribunal cannot be sustained without necessarily prejudicing that interest.'¹⁰⁵

In the result the court found that the SIU had no authority to institute proceedings before the Special Tribunal as it purported to do under Regulation 7¹⁰⁶ of the Regulations. The proceedings instituted by the SIU were accordingly *ultra vires* and of no force and effect. It followed that the SIU also did not have the authority within its terms of reference to issue suspension orders or interdicts as contemplated by s 5(8) of SIU Act. The court finally held that where a tribunal is a creature of statute with no inherent powers, it cannot by its own ruling or decision confer a jurisdiction upon itself which it does not in law possess.¹⁰⁷

(iii) *Special Investigating Unit v Ngcingwana and Another* 2001 (4) BCLR 411 (E)¹⁰⁸ (The *Ngcingwana* case)

This case collaborates the *Konyn* case in that the SIU may institute civil proceedings in a Special Tribunal if, arising from its investigation, it has

¹⁰³ Ibid 9 at 1013.

¹⁰⁴ GN 894 GG 18054 of 6 June 1997.

¹⁰⁵ Ibid 9 at 1013.

¹⁰⁶ Ibid 9 at 1018A/B-B/C.

¹⁰⁷ Ibid 9 at 1015 F-G.

¹⁰⁸ The *Ngcingwana* case.

obtained evidence substantiating any allegation contained in s 2(2) of the SIU Act. The functions of a SIU provided for in s 4 of the SIU Act are limited by the terms of reference incorporated in the proclamation.¹⁰⁹

The SIU (Appellant), appealed to the high court against decisions of the Tribunal President in a number of unopposed applications for default judgment over which he had presided. In all of the matters in question, the SIU had sued as plaintiff in its own name for the recovery of arrear rates and taxes; water and refuse charges allegedly owed by Ngcingwana and Another (Respondents) and various defendants in respect of properties owned by them. These rates and charges were alleged to have been owing to various Transitional Local Councils who had levied these charges against the premises in question in terms of powers granted by legislation.¹¹⁰

In each matter the appropriate Transitional Local Council was cited as Second Plaintiff. The various defendants had not responded to notices served upon them and Appellant applied for default judgment against each of them. The Tribunal President dismissed the applications for default judgment. In doing so he observed that nowhere in the papers was there any indication that anything had been served on the various Second Plaintiffs, or that Second Plaintiffs had even consented to be parties to the litigation, or to associate themselves with it. Nor did it appear that they were even aware of the litigation.

Although the applications for default judgment could be dismissed on that narrow basis, in his judgment, the Tribunal President had gone further. He had analysed the provisions of the SIU Act in some detail and had made a number of 'findings' in relation thereto. The SIU's appeal was directed at certain of these 'findings.'¹¹¹

The court observed that the SIU's approach was misconceived. What was appealable was the order or judgment made by the Tribunal President, not his reasons. The appealable order in the case was the dismissal of the applications for default judgments, and nothing else. The merits of the appeal could be disposed of quite simply. The proceedings brought before the Special Tribunal

¹⁰⁹ Ibid at 77.

¹¹⁰ Ibid 108 at 411.

¹¹¹ Ibid.

were initiated in the name of two plaintiffs, SIU and in each case the relevant Transitional Local Council. The latter clearly had standing to enforce payment of any arrears in court by way of civil proceedings.¹¹²

The SIU, however, did not have such competence. The SIU was a juristic person which could sue and be sued in its own name.¹¹³ Like any other person, however, it could only sue another party if it had a valid claim or cause of action against that party. As a statutory creation, the SIU had only those functions and powers given to it by the Act.

The only basis in the SIU Act upon which the SIU might institute civil proceedings before the Special Tribunal was if it had obtained evidence in its investigations substantiating any allegation of maladministration, corruption or the like under the SIU Act. In such a case it could institute proceedings in the Special Tribunal against the parties concerned.¹¹⁴

The court added that there was no provision in the SIU Act which empowered the SIU to institute proceedings in the Special Tribunal on behalf of public or State institutions. It followed that there were no legal grounds upon which the SIU could obtain judgment by default or otherwise against the various defendants.¹¹⁵ The appeal was dismissed.¹¹⁶

(iv) *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) (The *Saapil* case)

This case emphasises that the SIU Act vests the Special Tribunal with jurisdiction to adjudicate upon any civil dispute emanating from the SIU's investigations and brought before it by the SIU. The Special Tribunal may make any order which it deems appropriate to give effect to its decision. The Special Tribunal functions in the same way as a court according to rules made by its President.¹¹⁷ The SIU must refer evidence pointing to the commission of an offence to the relevant prosecuting authority,¹¹⁸ and may institute civil

¹¹² Ibid.

¹¹³ Section 13 of the SIU Act.

¹¹⁴ Ibid 108 at 416.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid 3 para15.

¹¹⁸ S 4(1) (d) of the SIU Act.

proceedings in a Special Tribunal if it has obtained evidence substantiating any allegation contemplated in s 2(2) of the SIU Act.¹¹⁹

The case further endorses the principle of judicial independence. It confirms that while there may be no express provision of the Constitution dealing with the separation of powers, the doctrine of separation of powers is based on inferences drawn from the structure and provisions of the Constitution, more than on any expressed entrenchment of the principle of separation of powers, classifying the judiciary distinctly from other branches of government namely, the executive and legislature. The doctrine is an important aspect of the separation of powers required by the Constitution and is essential to the independent and impartial role of the courts under the Constitution. It is crucial to the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. A failure to maintain the separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, will undermine the role of the court as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive powers.¹²⁰

In March 1997 the President, acting under the provisions of the SIU Act, established a SIU, which was the second respondent in the appeal. The Head of the SIU was the first respondent who was a judge of the high court.¹²¹ On 26 March 1999 an allegation was referred to the second respondent for investigation in terms of the SIU Act. The allegation was that there had been 'a failure by attorneys, acting on behalf of any person with regard to a claim for compensation from the Road Accident Fund (RAF), to pay over to such persons the total net amount received in respect of compensation from the RAF after deduction of a reasonable and/or taxed amount in respect of attorney client costs.'¹²²

The appellant was the South African Association of Personal Injury Lawyers, whose members were attorneys and advocates whose practices

¹¹⁹ S 5(5) of the SIU Act.

¹²⁰ Ibid 3 Flynote; See Also: R Baboolal-Frank 'Special Tribunals in South Africa and Access to Justice' Vol4 Dec 20015 *International Journal of Business, Economics and Law* 125-6.

¹²¹ Ibid 3 para 5.

¹²² Ibid 3 para 6.

involved personal injury litigation. The appellant contended that the investigative powers vested in the second respondent by the SIU Act are highly intrusive, that the exercise of such powers against any of its attorney members would constitute an invasion of their privacy and would cause irreparable damage to their professional reputation.¹²³ Although the appellant denied that any of its members had ever acted unlawfully or improperly in connection with the amounts received by them on behalf of their clients in respect of compensation from the RAF, it said that it had ascertained that the SIU was soliciting complaints against some of its members to enable the SIU to investigate the manner in which they dealt with RAF claims.¹²⁴

It was in these circumstances that the appellant brought proceedings in the Transvaal Provincial Division. It asked for an order declaring certain provisions of the SIU Act to be inconsistent with the Constitution. Further, the appellant asked for orders reviewing and setting aside the proclamation under which the first respondent was appointed and the proclamation under which allegations concerning personal injury lawyers were referred to the second respondent for investigation. Other relief not relevant to the appeal was also claimed.¹²⁵

The application was dismissed by Coetzee AJ in the high court¹²⁶ and, with leave granted in terms of Rule 18, the appellant appealed directly to the Constitutional Court against that order. The first and second respondents indicated in the high court that they took a neutral stand in the matter, and that they would abide by the decision of that court. They had made no representations to the Constitutional Court. The third and fourth respondents opposed the appeal. The Constitutional Court held that the SIU Act vests the Special Tribunal with jurisdiction to adjudicate upon any civil dispute emanating from the SIU's investigations and brought before it by the SIU. The Special Tribunal may make any order which it deems appropriate to give

¹²³ Ibid 3 para 7.

¹²⁴ Ibid.

¹²⁵ Ibid 3 para 8.

¹²⁶ Ibid 3 para 9.

effect to its decision. The Special Tribunal functions in the same way as a court according to rules made by its President.¹²⁷

The Constitutional Court held¹²⁸ further that the SIU must refer evidence pointing to the commission of an offence to the relevant prosecuting authority,¹²⁹ and may institute civil proceedings in a Special Tribunal if it has obtained evidence substantiating any allegation contemplated in s 2(2) of the SIU Act.¹³⁰ The Constitutional Court further held that s 2(2) deals with the ambit of the application of the SIU Act which contains various provisions that impact upon an entrenched constitutional right to privacy¹³¹ of the persons affected by them- the broader the reach of the SIU Act, the greater the invasion of privacy. In construing s 2(2) regard must be had to the 'the spirit, purport and objects' of the Bill of Rights.¹³² The spirit, objects and purport of the Bill of Rights, which is the protection of privacy, would better be met in the case by giving a narrow rather than a broad interpretation to these provisions.¹³³

The *Saapil* case posited that s 2(2)(g) contemplates unlawful or improper conduct by 'any person.' It is the conduct of that person that has to cause 'serious harm' to 'the interests of the public or any category thereof.' Each of these requirements has to be met, and that is not done by rolling up all attorneys who overcharge their clients, and all clients who are overcharged, and treating the totality of all the attorneys as 'any person,' the totality of all the clients as 'the public or any category thereof,' and the total overcharging as 'serious harm.'¹³⁴

The Constitutional Court reasoned that the allegation that was the subject matter of the investigation in the case was in extremely wide terms. It made no

¹²⁷ Ibid 3 para15. See also: S7 of the SIU Act which states that a Special Tribunal established under s2 (1) consists of a judge, including a retired judge, of a High Court, as Tribunal President, and such additional members as may be appointed under subsection (3). S 7(2) adds that the Tribunal President must be appointed by the President after consultation with the Chief Justice of South Africa. Additional members of the Tribunal may be appointed by the President from the ranks of (a) judges or acting judges; and (b) magistrates and advocates or attorneys of the Supreme Court of South Africa who have been involved in the administration of justice for a period of at least seven years. In terms of s 7(4), the President may only appoint a serving judge or magistrate as a member of the Tribunal after consultation with the Chief Justice or the Magistrates Commission, as the case may be.

¹²⁸ Ibid 3 para17.

¹²⁹ S 4(1) (d) of the SIU Act.

¹³⁰ S 5(5) of the SIU Act.

¹³¹ S 14 of the Constitution.

¹³² S 39(2) of the Constitution.

¹³³ Ibid 3 para 52.

¹³⁴ Ibid 3 para 60.

distinction between overcharging that was an isolated occurrence and overcharging that was a persistent practice. It made no distinction between the theft of money and the charging of excessive fees. It made no distinction between cases in which a full and proper disclosure had been made to clients concerning the compensation received, and the fees charged and cases in which clients might have been misled. It covered cases in which the harm that might have been suffered by a particular client was not ‘serious harm,’ and cases in which the conduct of a particular attorney who might have been investigated, affected only the interests of that client and not those of any other person.¹³⁵

The Constitutional Court further held that the allegation required the SIU to undertake a fishing expedition to establish whether there might have been malpractices by individual attorneys. It lacked the specificity required by s 2(2)(g) of the SIU Act to justify the launching of an investigation. In particular, it failed to specify particular acts by a particular attorney, which could be said to cause ‘serious harm’ to the ‘interests of the public or any category thereof.’¹³⁶ It followed that the matter referred to by the President to the SIU did not relate to an allegation contemplated by s 2(2) and the President had no power to refer an allegation in those terms to the SIU for investigation under the SIU Act. The Proclamation ordering the investigation therefore violated the principle of legality and was accordingly inconsistent with the Constitution and invalid.¹³⁷ The appeal was upheld with costs.

(v) *Special Investigating Unit v Nadasen* [2002] 2 All SA 170 (A)¹³⁸ (The *Nadasen* case)

This case reiterates that the SIU was established in order to adjudicate upon civil disputes emanating from investigations by Special Investigating Units. The jurisdiction of the Special Tribunal established in terms of s 2(1) of the

¹³⁵ Ibid 3 para 61.

¹³⁶ Ibid 3 para 62.

¹³⁷ Ibid 3 para 63.

¹³⁸ Ibid 11.

SIU Act has to be interpreted strictly in accordance with provisions of the SIU Act and founding proclamation.¹³⁹

The SIU's reliance on a 'liberal' (that is, executive-minded) construction was therefore misplaced: a Tribunal under the Act, like a commission, has to remain within the boundaries set by the Act and its founding proclamation. It has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction has to be interpreted strictly.¹⁴⁰ The SIU (Plaintiff/Respondent) launched an investigation into irregularities within the Durban Metropolitan Council, and instituted proceedings in the Special Tribunal, against Nadasen (Defendant/Appellant). The latter then appealed. The appeal was upheld, leading to the appeal under discussion.¹⁴¹

A commission was appointed by the Premier of the Eastern Cape to investigate corruption and fraud in the Eastern Cape Province. Upon a request by the Premier of the province, the President transformed the commission into a special unit. The claim against the defendant arose from matters dealing with the local authority in KwaZulu-Natal. The issue before the court was whether, as a question of interpretation, the proclamation extended to matters within the exclusive competence of that province.¹⁴²

In deciding the issue, the court had regard to the object of the SIU Act. The SIU Act and its founding proclamation govern both the units and the tribunals' jurisdictions. Both the SIU and Special Tribunal jurisdictions are therefore strictly interpreted. Section 2 of the SIU Act empowers the President to establish these special units and tribunals, should grounds exist for alleged maladministration or corruption in any State institution or any alleged unlawful or improper conduct of State employees.¹⁴³ The section provides further that should these allegations relate to a particular province, then the President shall exercise his powers after consultation with the Premier of the province. Thus, even though the President possesses these powers, the SIU Act

¹³⁹ Ibid 11 Flynotes.

¹⁴⁰ Ibid 11 para 5 (610A-D).

¹⁴¹ Ibid 11 para 3.

¹⁴² Ibid 11 para 9.

¹⁴³ Ibid.

respects the autonomy granted by the Constitution to the provinces.¹⁴⁴ Also relevant to the court, was s 14(1) of the SIU Act that deals with the conversion of existing commissions of enquiry into units and tribunals. It is clear from the scheme of the SIU Act, that the SIU must investigate the allegations of corruption or maladministration, collect evidence and may then institute proceedings in the tribunal for the recovery of what may be due to the particular State institution.¹⁴⁵

Relying on the wording of the proclamation, the appellant argued that the proclamation showed an intention to appoint the unit to examine any act without any territorial limitation. In deciding the issue, the court relied on the President's actions. Firstly, the President acted upon the request of the Premier of the Eastern Cape in terms of s14 (1) of the SIU Act. Secondly, he did not act after consultation with all the provincial Premiers, which was a necessary requirement for extending the unit's powers and jurisdiction.¹⁴⁶ The court further quoted from various authorities and added that a unit such as the SIU is similar to a commission of inquiry.

The court emphasised the words of Corbett JA in the *Naudé* case,¹⁴⁷ relating to the invasive nature of commissions, how they can easily make important inroads upon basic rights of individuals and that it is important that an exercise of powers by a non-judicial tribunal should be strictly in accordance with the statutory or other authority whereby they are created. The introductory part of s 4(1) of the SIU Act emphasises this point.¹⁴⁸ According to the court, this accords with the approach of the Constitutional Court decision in the *Saapil* case that a tribunal under the Act, like a commission, has to stay within the boundaries set by the Act and its founding proclamation; it has no inherent jurisdiction and, since it trespasses on the field of the ordinary courts of the land, its jurisdiction should be interpreted strictly.¹⁴⁹

The court concluded that since there was no consultation with all the premiers, it could not have been the President's intention to issue a proclamation which would, countrywide, encompass matters falling within the

¹⁴⁴ Ibid 11 paras 16; 17 and 18.

¹⁴⁵ Ibid 11 para 14.

¹⁴⁶ Ibid 11 para 15.

¹⁴⁷ Ibid 36.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 11 para 46.

exclusive jurisdiction of the provinces. Adopting the narrower interpretation of the Proclamation, the court held that the SIU did not possess the necessary standing to sue the defendant and that the Tribunal did not have the jurisdiction to hear the matter.¹⁵⁰ The appeal was accordingly dismissed with costs.

(vi) *Special Investigating Unit v Kim Diamonds (Pty) Ltd* 2004 (2) SA 173 (SpT) 2004 (2) SA 173¹⁵¹ (The *Kim Diamonds* case)

The case highlights that the SIU Act enables the SIU to institute civil proceedings in cases where it considers that a justiciable civil dispute exists and, acting in the public interest and as a protector of public¹⁵² property, it is specially empowered, in effect, to intervene and to take steps before a Special Tribunal to pursue such claims as might not have been pursued by an aggrieved party itself.¹⁵³

This matter arose out of an investigation conducted by the SIU (Applicant) into the irregular conclusion of contracts between the government of the Province of the Northern Cape and Kim Diamond (Pty) Ltd (Respondent) for the acquisition from Kim Diamond (Pty) Ltd of the Kim Diamond Mines Building in Kimberley. It also related to the alleged irregular procedures followed in that regard by officials in the Provincial Tender Board, Departments of Finance and Public Works and the office of the Premier of the Northern Cape. The lease agreement was the subject matter of an application instituted by the respondent in the High Court, against the Premier.¹⁵⁴

The application was subsequently settled on the basis of an amended lease agreement between the parties. In this matter, the SIU sought an order declaring the settlement agreement/amended lease agreement to be invalid, alternatively void *ab initio* on the basis that the Director-General of the Northern Cape Province, in signing the settlement agreement on behalf of the Province, had acted *ultra vires*. The Director General failed to secure the requisite prior approval of both the Tender Board and the Treasury. The

¹⁵⁰ Ibid 11 para 17 p 614E-G/H.

¹⁵¹ The *Kim Diamonds* case.

¹⁵² Ibid para 3.6 p 182C.

¹⁵³ Ibid 151 para 3.9 p 182G - I/J and para 3.6 p 182B/C - C/D.

¹⁵⁴ Ibid 151 at 174.

approval of the Tender Board, it was contended, had been required because the lease agreement, which was amended in the settlement agreement, had been concluded pursuant to the Provincial Tender Board's acceptance of a tender which had been submitted to it by Kim Diamond (Pty) Ltd. It was further stated that in accordance with the provisions of s 4 of the Northern Cape Provincial Tender Board Act,¹⁵⁵ the Director-General had had no authority to enter into an agreement which was different from the tender awarded.¹⁵⁶

The SIU contended that approval of the Treasury had been required by the provisions of s 4(5) of the Tender Board Act, read together with s 157 of the Constitution in that the settlement agreement 'may have been to the prejudice of the Provincial Government.' Absent such approval, it contended, the conclusion of the settlement agreement had been *ultra vires*.¹⁵⁷

The court held that the SIU Act enables the SIU to institute civil proceedings in cases where it considers that a justiciable civil dispute exists. Acting in the public interest and as a protector of public property, the SIU is specially empowered, in effect, to intervene and to take steps before a Special Tribunal. The SIU performs this function in order to pursue such claims as may not have been pursued by an aggrieved party itself. In such a matter, the SIU substitutes itself as plaintiff but remains in precisely the same situation as an individual litigant would have been in pursuing such cause of action and would have to face such defences as might have been available to the defendant against the individual litigant.¹⁵⁸

Thus, in this case, the SIU was substituted for, but was in the same position as, the Provincial Government and/or the Tender Board would have been had either of those parties instituted the proceedings. The SIU Act did not create any new causes of action or give the SIU the right to relief where no such right was unavailable to the parties themselves.¹⁵⁹

The court held further that, in terms of s 7 of the Public Service Act¹⁶⁰ read with Schedule 1 thereto, the Director-General headed the provincial administration of the Northern Cape and, in terms of s 7(3)(b) of the Public

¹⁵⁵ 2 of 1994, (the Tender Board Act).

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 154.

¹⁵⁸ Ibid 154 at 175.

¹⁵⁹ Ibid 151 para 3.9 p 182D.

¹⁶⁰ Act 103 of 1994, (the Public Service Act).

Service Act, was 'responsible for the efficient management and administration of his or her department.' Although s 7(3)(b) did not confer express powers on the Director-General to settle disputes on behalf of the Province, the words 'the efficient management and administration of his or her department' were of wide import and held within their purview, a wide array of acts designed to facilitate the attainment of the Director-General's functions.¹⁶¹

The power to settle litigation in which the Province was engaged was reasonably required for the purposes of enabling the Director-General to achieve 'efficient management and administration of his or her department' and such power was reasonably ancillary or incidental to his designated functions.¹⁶² The court held further that, while s 4 of the Northern Cape Tender Board Act bestowed upon the Tender Board the 'sole power' for the letting and hiring of anything, that power had already been exercised by the Board in considering the tenders before it, and in awarding that particular tender to Kim Diamond (Pty) Ltd. The implementation of that award with the terms of the contract upon signature thereof, and the subsequent decision to settle the application as agreed to by the parties after the matter had been fully considered, fell within the Province of the Director-General and within the scope of his power and authority.¹⁶³

The court held further, that the Director-General, in signing the agreement of settlement, had therefore the necessary authority to do so. There had been no necessity for him to have reverted to the Tender Board in order to acquire an authority which he originally had.¹⁶⁴ The court held, finally, that the SIU had therefore failed to establish its cause of action.¹⁶⁵ Accordingly, the SIU's claim was dismissed.¹⁶⁶

(d) The Powers of the SIU

The powers of the SIU are stipulated in s 5 of the SIU Act. However, for purposes of this discussion, the powers that the SIU has and which are worthy of discussion

¹⁶¹ Ibid 151 para 6.7 p 191J – 192A/B and para 6.8 p 192B/C-D/E.

¹⁶² Ibid.

¹⁶³ Ibid 151 para 8.5 p 199F/G-H.

¹⁶⁴ Ibid 151 para 6.12 p 193F-G.

¹⁶⁵ Ibid 151 para 6.20 p 195D.

¹⁶⁶ Ibid 151 para 16.1 p 216B.

are those stated in s 6 of the SIU Act.¹⁶⁷ Section 6(1) empowers members of the SIU or police officers who are duly authorised by the SIU and acting within the confines of sections 4 and 5, to enter and search any premises on or in which anything connected with an investigation is, or is suspected to be. Furthermore, s 6(3) of the SIU Act empowers authorised members of the SIU or police officers to inspect and search the premises concerned;¹⁶⁸ examine any book, document or object found;¹⁶⁹ request necessary information in respect of what has been found;¹⁷⁰ make relevant copies of any of the material found at the premises;¹⁷¹ and attach anything at the premises which has a bearing on the investigation.¹⁷²

It is submitted that the powers vested in s 6 have to be exercised within the confines and terms of reference of the empowering proclamation. Again, it is submitted that this therefore means the SIU member or police official may not purport to act on the premise of the SIU Act if there is no relevant proclamation empowering such a conduct. It is deduced further that there should be a nexus between the grounds upon which the powers are exercised (founded on the terms of reference in the proclamation) as well as the person or entity in or on which such powers are exercised. A member of the SIU or police office may not be expected to exercise powers of search and seizure on the items in lawful possession of an entity or person through a lien, and which entity or person is not under investigation by the SIU.¹⁷³

It is important, however, to note that Chapter 2 (Bill of Human Rights) of the Constitution¹⁷⁴ or other appropriate legislation has to be continuously considered

¹⁶⁷ S 6 of the SIU Act relates to entering and search of premises and attachment and removal of books, documents or objects by the SIU.

¹⁶⁸ S 6(3) (a).

¹⁶⁹ S 6(3) (b).

¹⁷⁰ S 6(3) (c).

¹⁷¹ S 6(3) (d).

¹⁷² S 6(3) (e).

¹⁷³ Ibid 53. Analogous to this is that in the *Mfeketho* case, the court held that the jurisdiction of the Special Tribunal is established only to adjudicate upon justiciable civil disputes emanating from Unit's investigations, and its jurisdiction is limited to such matters only. If no dispute exists in the sense of conflicting views or contentions, the Tribunal has no jurisdiction. The function of the SIU is to investigate matters as instructed in the proclamation by President, which matters must qualify in terms of provisions of s 2(2) of SIU Act and nothing beyond that. In the institution of proceedings by SIU, the Head of the Unit is not entitled, as the accepted representative (or organ) of Unit to institute proceedings, or to delegate the institution of such proceedings by blanket delegation. A delegation to act on her or his behalf in specific matters or for specific purposes to achieve specific goals may be sufficient to support their authority to act. (1108A/B-B/C.)

¹⁷⁴ S 8(2); S 9 - Right to Equality; S 10 - Right to Human Dignity; S12 - Right to security of the person; S14 - Right to privacy; S23 - Labour Relations; S25 - Property; S32 - Access to information; S33 - Just

when applying search and or seizure. It is again important to note that the application of search and seizure legislation is generally, but not exclusively, conducted by the South African Police Services (SAPS) under search warrants issued in terms of s 21 of the Criminal Procedure Act.¹⁷⁵ Articles that can be seized are mentioned in s 20 of the CPA.

(e) Remedies through civil law

Section 4(1) of the SIU Act relates to the functions of the SIU within the terms of reference as set out in the relevant proclamation referred to in s 2 (1), among others,

- “(c) *to institute and conduct civil proceedings in a Special Tribunal or any court of law for*
- (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;*
 - (ii) any relief relevant to any investigation; or*
 - (iii) any relief relevant to the interests of a Special Investigating Unit.”¹⁷⁶*

Based on case law, the view is that in respect of the institution of legal proceedings, the SIU has *locus standi* which allows it to institute proceedings before a Special Tribunal or any court of law, utilising whatever cause of action formerly vested in a state institution. A further view is that the defendant is further prevented from raising a counter-claim in such proceedings. In effect, the SIU ‘usurps’ the right of the state institution concerned.¹⁷⁷

Administrative Action; S35 - Rights of arrested, detained, accused persons - e.g. right to a fair trial; and S36 - Limitations of Rights.

¹⁷⁵ 51 of 1977 (the CPA, as amended). See Also Ibid 58: See Also: PH Munzhedzi ‘Fostering public accountability in South Africa: A reflection on challenges and successes’ (2016) *The Journal for Transdisciplinary Research in Southern Africa* 12(1), a339, p5. <http://dx.doi.org/10.4102/td.v12i1.339>. The role performed by the SIU is very significant in that its functions cannot be performed by any other constitutional body.

¹⁷⁶ S 4(1) of the SIU Act.

¹⁷⁷ Ibid 53. Before the amendment of the Act by the Special Investigating Unit and Special Tribunals Amendment Act 2 of 2001, it has been held in the *Mfeketo* case that, more generally, the SIU Act does not grant the SIU any cause of action to recover debts owed to the state institution. See Also: Ibid 105 at 397-8. See Also: Ibid 159.

It is important to emphasise that s 4(1)(c)(i) of the SIU Act relates to the institution of civil proceedings by the SIU for ‘any relief to which the State institution concerned is entitled.’ The only relief that the SIU may seek to recover is the relief to which the state institution itself would be entitled. Accordingly, the view is that if the claim on the part of the State institution has prescribed, it would follow that the SIU too would be precluded from seeking to recover damages.¹⁷⁸

(f) *The nature of a Special Tribunal of the SIU*

The Special Tribunal is presently not functional, as the SIU institutes and conducts civil proceedings in high courts¹⁷⁹ and not in the Special Tribunal. Although the SIU Act provides for the composition of a Special Tribunal,¹⁸⁰ it is presently not composed as provided for in terms of the SIU Act. It is clear from s 7(1) that the Special Tribunal cannot function without the Tribunal President. The author’s view is that until such time that as a Tribunal President is appointed, the Special Tribunal is effectively impotent. With regards to the nature of the Special Tribunal, the author’s respectful view is that it is a judicial tribunal. This view is founded on the fact that the Special Tribunal may make any order which it deems appropriate to give effect to its decision. The Special Tribunal functions in the same way as a court according to rules made by its President.¹⁸¹

¹⁷⁸ Prescription Act 68 of 1969 (the Prescription Act), s 12 deals with when prescription begins to run. The relevant provisions are the following:

‘(1) Subject to the provisions of subsection (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.’ See Also: *Link v Member of the Executive Council, Department of Health, Northern Cape Province* (CCT 29/15) [2016] ZACC 10 (30 March 2016) para [26].

¹⁷⁹ S 4(c) of the SIU Act.

¹⁸⁰ S 7(1). This is based purely upon a reading of the requirements of the section. Baxter, *Administrative Law* (1984) at 426 posits that, ‘Legislation confers powers on named officers (such as ‘the State President’), ‘the Minister’ or ‘the Chief Inspector’) or bodies (such as ‘the Commission’ of ‘the Board’). Even when less definitive terms are employed, such as ‘the competent authority,’ specific officers or institutions are intended and they will almost invariably have to be identified by reference to the definitions contained in the empowering legislation. Power is not conferred upon ‘the administration’ generally, and any power which is conferred may be exercised by the office holder or body upon which it was conferred alone. If someone else purports to exercise the power, the latter’s act is simply *ultra vires* and invalid.’ This principle occurred in the case of *S v Malindi and Others* 1990 (1) SA 962 (A) (the ‘*Demas Treason Trial*’) which ran for some three and a half years. In the course of the trial, the trial judge dismissed one of the two assessors. In consequence, the trial proceeded before the Presiding Judge and one assessor. This was held to be a fatal irregularity and the entire trial was vitiated. See Also: *Ibid* 159.

¹⁸¹ *Ibid* 127.

Although the SIU performs administrative duties relating to investigations as sanctioned by the President in the relevant proclamation, the Special Tribunal performs purely judicial functions.¹⁸² The decisions of the Special Tribunal are binding until they are taken on appeal to a high court.¹⁸³ Judgments and orders of the Special Tribunal are, subject to the rules, executed in any area in like manner as if they were judgments or orders of the division of the high court having jurisdiction in such area.¹⁸⁴

This view is founded on the fact that if the Special Tribunal was performing administrative functions as well,¹⁸⁵ it would then be performing functions that should ordinarily or similarly be performed by the SIU. This would then mean that the Special Tribunal is *siu generis* or hybrid in nature.¹⁸⁶ This position would compromise the independence of the Special Tribunal in the adjudicating of matters brought before it by the SIU, because the Special Tribunal and SIU would have concurrent functions. In essence, the view is that the Special Tribunal should adjudicate upon civil matters brought before it by the SIU, and independently of the SIU's affairs and administration. Conversely, the view is supported and reiterated that if the Special Tribunal were to also perform administrative functions of the SIU, it would compromise its independence and would merely be an extension of the latter and thus biased in the execution of its functions as a tribunal. The *Saapil* case clearly intended to avoid this eventuality.¹⁸⁷

(g) Conclusion

In the light of the discussion relating to jurisdictional aspects, case law has revealed that a tribunal is vested with no inherent powers and confers no jurisdiction upon itself which it does not possess in law.¹⁸⁸ Likewise, the Special Tribunal may, however, only exercise its functions as authorised thereto by the

¹⁸² Ibid 127; See Also: S 4 (1)(c), a Special Tribunal is established for purposes of SIU to institute and conduct civil proceedings before it for the grounds as set out in (i);(ii) and (iii). In terms of s7(1), the Special Tribunal is composed independent of the SIU; the powers and functions of the Special Tribunal as stated in s 8 of the SIU Act are independent of the powers vested to the SIU in terms of section 4; 5 and 6 of the SIU Act. In terms of s 8 of the SIU Act, the decisions, rulings or orders of the Special Tribunal are appealable to the high court.

¹⁸³ S 8 (7) of the SIU Act.

¹⁸⁴ S 9 (7) of the SIU Act.

¹⁸⁵ As provided for in sections 4(1), 5 and 6 of the SIU Act.

¹⁸⁶ Ibid 117.

¹⁸⁷ Ibid 3 at 35 and 36.

¹⁸⁸ Ibid 63 at 357.

terms of reference as set out in the proclamation referred to in s 2(3) of the SIU Act. This only means that a Special Tribunal should have jurisdiction to adjudicate upon any justiciable civil disputes (arising out of civil proceedings instituted in that Special Tribunal) emanating from the investigations by the SIU within the framework of its terms of reference as set out in the proclamation referred to in s 2 of the SIU Act.¹⁸⁹

As a statutory creation, the SIU has only those functions and powers given to it by the Act.¹⁹⁰ Consequently, the only basis in the SIU Act upon which the SIU may institute civil proceedings before the Special Tribunal, is if it has obtained evidence in its investigations substantiating any allegation of maladministration, corruption or any other allegation as provided for under the SIU Act. In such a case, it can institute proceedings in the Special Tribunal against the parties concerned.¹⁹¹

A tribunal has to stay within the boundaries set by the Act and its founding proclamation, as it has no inherent jurisdiction, and its jurisdiction should be interpreted strictly.¹⁹² With regards to the exercise of its powers in terms of s 6 of the SIU Act, members of the SIU must always be mindful of the rights and liberties that persons enjoy as provided for in the Constitution. The view is that a disregard of, and arbitrary trampling on such rights would subject the SIU to unnecessary civil claims for damages and this would pose a risk to the SIU and the integrity that it passionately seeks to protect.

It is further concluded and submitted that in respect of the institution of legal proceedings, the SIU has *locus standi* which allows it to institute such proceedings before a Special Tribunal or any court of law, utilizing whatever cause of action formerly vested in a state institution.¹⁹³ The author's view is that the defendant is further prevented from raising a counter-claim in such proceedings.¹⁹⁴ The only relief that the SIU may seek to recover is the relief to which the state institution itself would be entitled.¹⁹⁵ Accordingly, and if the claim on the part of the State

¹⁸⁹ Ibid 78; 79 and 105.

¹⁹⁰ R Baboolal-Frank 'Special Tribunals in South Africa and Access to Justice' Vol 4 Dec 2015 *International Journal of Business, Economics and Law* 126, 'Each civil Tribunal in South Africa is a creature of Statute and the legislation dictates the rules so that each tribunal adheres to a different set of rules.'

¹⁹¹ Ibid 83; 114 and 127.

¹⁹² Ibid 83; 136 and 137.

¹⁹³ Ibid 110.

¹⁹⁴ Ibid 174.

¹⁹⁵ Ibid 8; 142; 148 and 149.

institution has prescribed, the SIU would also be precluded from seeking to recover damages from such claim.¹⁹⁶

The final analysis with regards to the nature of the Special Tribunal is that it has all the characteristics of a judicial tribunal.¹⁹⁷ As the SIU performs administrative duties relating to investigations as sanctioned in the relevant proclamation read with the SIU Act,¹⁹⁸ the Special Tribunal performs purely judicial functions.¹⁹⁹

CHAPTER III

I. INTRODUCTION

This chapter addresses some general considerations that ought to steer a debate on the effectiveness of the SIU and the Special Tribunal and the consequent impact that this may have in the exercise of their functions. This immediately ignites at least three significant concerns relating to the establishment of the Special Tribunal.

- (a) First, do the SIU and Special Tribunal effectively perform their duties in view of the empowering SIU Act in its present form?
- (b) Secondly, does the SIU Act require an amendment in order for the SIU and Special Tribunal to have an impact on its mandate?
- (c) Thirdly, what value if any, a functional Special Tribunal may contribute to the SIU?

In response to these concerns, this chapter therefore sets out some of the challenges that the SIU has with regards to the performance of its functions as empowered by the SIU Act. The chapter further deals with some proposed future legislative amendments to the SIU Act,

¹⁹⁶ Ibid 110; 111; 142 and 154.

¹⁹⁷ Ibid 123.

¹⁹⁸ As provided for in sections 4(1), 5 and 6 of the SIU Act.

¹⁹⁹ Ibid 124; See Also: S4(1)(c), a Special Tribunal is established for purposes of SIU to institute and conduct civil proceedings before it for the grounds as set out in (i);(ii) and (iii). In terms of s 7(1), the Special Tribunal is composed independent of the SIU; the powers and functions of the Special Tribunal as stated in s 8 of the SIU Act are independent of the powers vested to the SIU in terms of section 4; 5 and 6 of the SIU Act. In terms of s 8 of the SIU Act, the decisions, rulings or orders of the Special Tribunal are appealable to the High Court.

which may assist the SIU to perform its mandate as proposed in the Draft Bill dated the 7 December 2016.²⁰⁰

II. THE CHALLENGES THAT THE SIU HAS IN THE PERFORMANCE OF ITS LEGISLATIVE MANDATE

On the 7 December 2016, the SIU made Propositions for Legislative Amendments to the SIU Act²⁰¹ which was introduced to the Department of Justice and Constitutional Development and the Office of the President for primary consideration. The rationale is to amend the SIU Act and overcome the challenges that the SIU presently encounters with regards to its functions. The SIU is a creature of statute and only operates within the confines of legislation (the SIU Act). The SIU has deemed it necessary to propose amendments to the SIU Act in order to overcome its daily challenges in the performance of its legislative mandate.²⁰²

The discussion which follows highlights the challenges that the SIU has with regards to the SIU Act in its present form, and makes some recommendations as provided for in the Propositions for Legislative Amendments, on how these challenges may be overcome.

(a) The SIU has to conduct limited preliminary assessments of allegations received before it applies for a Proclamation to investigate said allegations

The SIU forms an integral part of the anti-corruption and crime busting agencies²⁰³ operating within the Justice cluster.²⁰⁴ It has to be noted that South Africa has numerous agencies that are mandated to investigate and combat corruption. The SIU,²⁰⁵ the Directorate of Priority Crimes Investigation²⁰⁶ (DPCI) famously known

²⁰⁰ Propositions for Legislative Amendments (Propositions for Legislative Amendments) to the Special Investigations Units and Special Tribunals Act 74 of 1996 dated 7 December 2016.

²⁰¹ Ibid.

²⁰² Ibid 200 at 1-22.

²⁰³ Ibid 62.

²⁰⁴ The parent department to the SIU is the Department of Justice & Constitutional Development (DOJ&CD).

²⁰⁵ Reference is hereby made to the SIU Act.

²⁰⁶ The Directorate for Priority Crime Investigation has been established as an independent directorate within the South African Police Service in terms of Section 17C of the South African Police Service Act, 1995 as amended by the South African Police Service Amendment Act 57 of 2008. The Directorate for Priority Crime Investigation is now responsible for the combating, investigation and prevention of national priority crimes such as serious organized crime, serious commercial crime and serious corruption in terms of Section 17B and 17D of the South African Police Service Act, 1995 as amended.

as ‘the Hawks’ (previously known as ‘the Scorpions’) and the Public Protector,²⁰⁷ based upon the analysis of their respective legislative mandates, are considered to be the only agencies with a common goal of investigating offences referred to in Parts 1 to 4 of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004 (PaCoCA), with the exception of the Hawks whose mandate is not limited to offenses referred to in Chapter 2 and section 34 of the PaCoCA. On a continuous basis, allegations purportedly falling within the ambit of s 2(2)²⁰⁸ of the SIU Act are directed to the SIU from various sources. In most instances the allegations received are serious but are not supported by sufficient information that will empower the SIU to assess the veracity of such allegations to determine whether they meet the jurisdictional requirements of s 2(2) of the SIU Act. The President may only issue a Proclamation to the SIU to investigate if one or more of the grounds mentioned in s 2(2) (a) to (g) are met.

In addition, the SIU has learnt and gathered from previous experience that in such circumstances, it finds itself in a position where it is unable to fully grasp the gravity or veracity and extent of the investigation required as the information offered is limited and often sketchy.²⁰⁹ Another predicament that the SIU ordinarily faces is whether it can venture into investigations of this nature before the proclamation is issued.²¹⁰ The SIU has found that when a proclamation is issued and the investigation has commenced, there are unforeseen consequences that could have been avoided had the SIU been able to gather pre-proclamation

²⁰⁷ Reference is hereby made to the public Protector Act 23 of 1994.

²⁰⁸ Section 2(2) states that ‘The President may exercise the powers under subsection (1) on the grounds of any alleged-

(a) serious maladministration in connection with the affairs of any State institution;

(b) improper or unlawful conduct by employees of any State institution;

(c) unlawful appropriation or expenditure of public money or property;

(d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;

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

(f) offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was [*sic*] committed in connection with the affairs of any State institution; or

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

²⁰⁹ The SIU relies on informants; members of the public and other documentation provided in order for it to apply for proclamation to investigate the allegations concerned. The SIU Act does not provide for pre-investigative and assessment process before the investigations. The SIU therefore cannot reasonably comprehend and evaluate the veracity of the information given, which is most of the times too scanty, in order to apply for such proclamation. Hence the proposal that the SIU Act should be amended to make provisions for this eventuality.

²¹⁰ Ibid 200 at 15.

information. This information could have been obtained from various sources prior to the drafting of the proclamation. The information could have informed the scope and ambit of the allegations available to the SIU in order to form part of the proposed proclamation prior to applying for such a proclamation.²¹¹

When a matter is referred to the SIU, s 4(1)(a) provides that the SIU must in effect do the investigation ‘within the framework of its terms of reference as set out in the proclamation referred to in s 2(1).’²¹² The terms of reference mentioned in s 4(1)(a) are the President’s definition of the matter referred for investigation, that is, the allegations of public misconducts as described in the President’s proclamation. It becomes the SIU’s terms of reference which determine the scope of its investigation as limited by the proclamation. It follows that the scope of the investigation is determined in every case by the description in the President’s proclamation of the particular allegations of public misconduct referred for investigation.²¹³

This issue has manifested itself in various times and forms in investigations that were proclaimed over the last few years. The SIU would begin an investigation only to later establish that the real issues are not covered by the proclamation. This leads to unnecessary and costly delays in investigations and the attainment of effective outcomes, as the SIU would need to seek an amendment or extension to the relevant proclamation. The SIU has in the past attempted to mitigate the problem by conducting preliminary assessments and enquiries relating to the allegations received. This process has unfortunately led to the Auditor-General of South Africa making a finding that any expenses incurred on a matter prior to a Proclamation being issued are regarded as irregular expenditure as the SIU Act does not allow for such preliminary investigations. Again, this has been a risky way to proceed by the SIU as it could be seen to be acting beyond the scope of its empowering legislation.²¹⁴

The complaints received from informants and members of the public often revolve around decisions being taken to apply or not to apply for proclamations without the SIU members fully understanding the processes giving rise to the decision. In most instances, while the complaints are, *prima facie* serious enough to

²¹¹ Ibid.

²¹² However, s 2(1) does not expressly provide for the proclamation to set out the SIU’s terms of reference.

²¹³ Ibid 200 at 15-6.

²¹⁴ Ibid 200 at 15.

warrant an investigation, the complainants do not have access to the necessary documents or information to support their complaints and allegations or for a determination to be made as to what should be investigated.²¹⁵ The dearth of information often makes it impossible for the SIU to frame the investigative area if it is unsupported by valuable information with a degree of precision that would allow the SIU to operate at optimum levels.²¹⁶

Propositions for Legislative Amendments should be sought in order to empower the SIU to assess the allegations received; enquire as to the circumstances surrounding the allegations and then forward same to the President if just cause exists for the President to exercise his powers in terms of s 2(1) of the SIU Act. The benefit of such an approach will be to allow the SIU to ensure that an investigative area is adequately set out the first time. It will also limit the number of occasions that amendments in respect of extensions to proclamations are sought. It will further cure shortcomings and provide a measure of precision to proclamations to achieve a speedy, cost effective and outcomes based investigations.²¹⁷

Understanding the ambit of an investigation is often reliant on the SIU having access to documents and particulars giving rise to the allegations. With the amendment of the SIU Act, the SIU must seek to place itself in a position where it can access the necessary documents to establish whether *prima facie* merit exists in the complaint and to importantly assess the scope and ambit of the investigation required.²¹⁸

Again, the inclusion of the power to subpoena documents for this purpose at this stage is vital for the SIU as it will empower the SIU to access the necessary documents in making the assessment of whether an investigation would comply with s 2(2). The SIU's ability to assess the complaints received would be seriously hampered should the SIU be precluded from invoking its statutory powers as contained in sections 5 and 6 of the SIU Act, hence the desired and necessary inclusion of the SIU's powers during the assessment stage.²¹⁹ In the proposed

²¹⁵ Ibid.

²¹⁶ Ibid 200 at 16-7.

²¹⁷ Ibid 200 at 17.

²¹⁸ Ibid 200 at 17; See Also: Ibid 183 and 185. The SIU Act is not assisting in this regard, as it does not provide for investigations before the issue of the proclamation. As a creature of Statute, the SIU derives its mandate from the enabling statute read with the terms of reference in the proclamation.

²¹⁹ Ibid.

amendment, the use of the SIU's powers will be limited to establish whether a complaint falls within the ambit of s 2(2) and the scope of the investigative area to be covered. This process will make no findings against individuals or entities but will simply be used to determine if an investigation is warranted, and this will then inform the basis for an application for a proclamation. A proper assessment will also allow the SIU to establish whether the complaint is of such a nature that an intervention could be best achieved by proposing a secondment of the necessary skills to a state institution if necessary.²²⁰

The Propositions for Legislative Amendments further suggest the need to report to the President on outcomes of assessments conducted. This is informed by the fact that an assessment may not necessarily yield sufficient evidence that would warrant the SIU referring matters to the President to issue a proclamation. However, the SIU would, in conducting the assessment, have expended time and public money on the assessment. By reporting to the President on the outcome of the assessment, the SIU is able to account for work done and the time expended, as well as public money that would have been spent as a consequence of this exercise.²²¹

(b) The SIU has to report on its investigations to specified persons or entities

Section 4(1) duly provides a reporting responsibility by the SIU to the President²²² and parliament.²²³ The SIU Act however, does not provide for this responsibility regarding persons or state institutions which it investigates. This is so, regardless of the state institutions being expected to pay for fees and costs incurred as a result of proclaimed investigations by the SIU,²²⁴ hence the proposed amendment.

²²⁰ Ibid 200 at 17-8.

²²¹ Ibid 200 at 18. The proposed amendment to the SIU Act will therefore create a pre-investigation reporting responsibility above the one provided for in s 4(1)(h) of the SIU Act.

²²² S 4(1)(f) 'from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned or any court of law, and (g) upon the conclusion of the investigation, to submit a final report to the President.'

²²³ S 4(1)(h) 'to at least twice a year submit a report to Parliament on the investigations by and the activities, composition and expenditure of such Unit.'

²²⁴ S 5(1)(b) 'subject to this Act and the regulations, the Head of a Special Investigating Unit may- charge and recover fees and expenses from a State institution for anything done in terms of this Act in respect of that State institution or a State institution identified by that State institution, together with legal costs relating to the institution and conducting of civil proceedings in terms of this Act, and interest, calculated at the rate prescribed in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), from the date of demand.'

The amendment will broaden the SIU's reporting in the interests of transparency and good governance. The need to broaden the SIU's reporting capabilities is necessitated by the fact that as presently formulated, the SIU Act precludes the SIU from reporting certain matters to the state institutions whose affairs the SIU is investigating. For example, where the SIU investigation yields evidence of misconduct or systemic weaknesses, the SIU should be allowed to relay such information to the affected state institutions forthwith, in order for the necessary action to be taken immediately and before the investigation is finalised.²²⁵

In addition, if during an assessment conducted in terms of the proposed amendment in paragraph (a) above, the SIU obtains evidence which would sustain a civil or criminal cause of action, the SIU should be in a position to refer such evidence to the affected state institution in order for the state institution to take immediate steps to protect its interests. In so doing, the need for a proclamation may be negated as a positive outcome would have been achieved through the intervention of the SIU.²²⁶ Naturally, the SIU should see such situations as being the exception rather than the norm and they should not detract from or limit the SIU's statutory power to litigate either in its own name or on behalf of a state institution for the necessary relief during a proclaimed investigation.²²⁷

There are also instances where the SIU finds that certain matters may be best dealt with by another agency for example, the Assets Forfeiture Unit of the National Prosecuting Authority; the South African Revenue Service or the South African Police Service and that in the interest of expediency and good governance, a referral of the necessary information is warranted in such circumstances.²²⁸

(c) The SIU has to publish its final report for public awareness, after having been directed to do so by the President

Reference has been made to section 4(1) of the SIU Act,²²⁹ which does not make provision for reporting of SIU investigations to the citizens of the country. The view is that this is unfair and against the spirit, the purport and the object of the

²²⁵ Ibid 200 p18. In instances where claims by state institutions may prescribe before the SIU obtains proclamations from the President, this risk factor may be mitigated or eliminated as the state institutions will be able to institute and conduct civil proceedings in courts of law in their own names.

²²⁶ S 4(1)(c).

²²⁷ Ibid 200 at 19.

²²⁸ Ibid 62.

²²⁹ Ibid 214.

SIU, which is to rid South Africa of corruption, viewed in the light of the preamble to the SIU Act.²³⁰

The SIU therefore proposes that, in the interests of transparency, accountability and good governance, its Final Report to the President be published in the government gazette for public scrutiny. Given that the SIU is funded by public money,²³¹ it is submitted that taxpayers have an interest in the outcomes of the SIU's investigations. Again, the knowledge which is duly imparted to the public would have a deterrent effect on potential offenders who may have been involved (or having a similar interest) in the commission of offenses or maladministration against their respective entities or state institutions.²³²

(d) The National Treasury or the relevant provincial treasury to provide funding for a Special Investigating Unit's investigations upon such investigation being proclaimed

Since the amendment of the SIU Act in 2012,²³³ provision was made for *inter alia*, the SIU to charge and recover fees and expenses from a state institution for anything done in terms of the SIU Act.²³⁴ However, the SIU has been met with fierce resistance from some state institutions who argue that the SIU's fees and expenses were never budgeted for or that the state institution should not be required to pay fees and expenses for work done by the SIU which work was never commissioned by such state institution.²³⁵

While the 2012 amendments²³⁶ also provide for state institutions that are unable to pay the SIU's fees and expenses to apply to National Treasury or the relevant provincial treasury for an exemption from having to pay the SIU,²³⁷ the

²³⁰ Ibid 2.

²³¹ Ibid 216.

²³² Ibid 219.

²³³ Ibid 8. In this instance, it was amended by the Judicial Matters Amendment Act 11 of 2012.

²³⁴ Section 13A relates to the funding of Special Investigating Units and states that, '(1) The funds of a Special Investigating Unit consist of-(a) money appropriated by Parliament; (b) money lawfully accruing from any other source, including fees and expenses recoverable for services rendered.'

²³⁵ Ibid 200 at 20-1. This view is contrary to the prescripts of s 5(1)(b) of the SIU Act.

²³⁶ Ibid 224.

²³⁷ S 5(1A) states that,

'(1A)(a) A State institution which is unable to pay the fees, expenses or legal costs or any part thereof, charged or to be recovered in terms of subsection (1)(b) for a specific financial year or any part thereof, may apply to the National Treasury or, when applicable, the relevant provincial treasury as contemplated in the Public Finance Management Act, 1999 (Act 1 of 1999), to be exempted from the payment of such fees, expenses or legal costs or any part thereof.'

SIU has found that such applications have been declined by National Treasury. Since 2 October 2012, when the SIU began levying fees and expenses incurred on state institutions, the SIU has raised invoices amounting to a substantial amount of money. Although the SIU has received payments, some fees and expenses which were reasonably incurred and charged remain unpaid.²³⁸

In the circumstances, it is submitted that the 2012 amendment empowered the SIU to be able to charge and recover its fees and expenses from the state organs and entities. These were noble intentions which were aimed at enabling the SIU to move towards becoming self-reliant. However, this move is often met with fierce resistance and has not held the desired effect. The SIU should thus propose that, upon publication of a Proclamation, the President directs the National Treasury or the relevant provincial treasury to secure funds in order to fund the proclaimed investigations. The SIU should further propose that the amount of money to be secured shall be determined by the Head of the SIU in consultation with National Treasury or the relevant provincial treasury as well as the relevant state institution where appropriate.²³⁹

Where state institutions are adversely affected by the withholding of such funds, the state institutions may apply to the relevant treasury for an exemption, in which case the relevant treasury then becomes liable for the payment of fees; expenses or legal costs incurred by the state institution or any part thereof, to be charged or recovered by the SIU in terms of the SIU Act.²⁴⁰

-
- (b) The National Treasury or relevant provincial treasury, which receives an application in terms of paragraph (a) must, after consultation with the Head of the Special Investigating Unit and after considering the financial position of the State institution -
- (i) make a finding regarding the ability of the State institution to pay the fees, expenses or legal costs or any part thereof charged or to be recovered in terms of subsection (1)(b) for a specific financial year or any part thereof; and
 - (ii) inform the Head of the Special Investigating Unit and the State institution concerned of the outcome of the application.
- (c) A State institution which applies for an exemption in terms of paragraph (a), is liable to pay the fees, expenses or legal costs as provided for in terms of subsection (1)(b) to the extent determined by the National Treasury or relevant provincial treasury in terms of paragraph (b)(i).'

²³⁸ Ibid 227.

²³⁹ Ibid.

²⁴⁰ Ibid.

(e) The SIU has to be empowered to appoint attorneys for litigation

The SIU is in the process of building in-house litigation capacity. In the interim, the SIU requires litigation experts to facilitate the institution of legal proceedings in current matters. By the very nature of the SIU's investigations, State institutions are usually parties to litigation.²⁴¹ These State institutions are mostly represented by the Office of the State Attorney, which, in such circumstances, cannot also represent the SIU in such proceedings. In order to avoid this conflict of interest,²⁴² it is proposed that the SIU be empowered to appoint attorneys in private practice in order to assist the SIU in its litigation.²⁴³

In addition, the SIU would need to comply with the Rules of Court with regards to service addresses falling within the requisite distances of court in which the action or application proceedings have been instituted.²⁴⁴ In order to comply, the SIU would need to appoint correspondent attorneys in situations where the State Attorney cannot be utilised.²⁴⁵ Currently private practitioners are able to recover certain allowances when briefing correspondents. This should be extended to the SIU.²⁴⁶

(f) The Special Tribunal should be empowered to make and impose a financial penalty where impropriety has been established

Section 4 of the SIU Act relates to the functions of the SIU. Investigations by the SIU may involve large sums of moneys.²⁴⁷ However, the SIU Act does not make

²⁴¹ Ibid 200 at 22.

²⁴² According to the extract from *The Law of South Africa (Repl) Vol 14 at p. 407* ("LAWSA"):

'Conflict of interest relates to the fact that, 'An attorney should not act for a client whose interests conflict with his (the attorney's) interests or those of another client. He must, while holding his position of trust and confidence, prefer the interest of his principal even to his own in case of conflict, and to his skill diligence and zeal must be added good faith.'

A number of authorities are cited in support of this contention, and more especially: *Law Society of the Cape of Good Hope v Tobias*²⁴² (27) (two clients with conflicting interests).'

²⁴³ Ibid 200 at 21.

²⁴⁴ Rule 13(4)(c) of the Magistrates' Court Rules issued in terms of the Magistrates' Court Act 32 of 1944 and Rule 19(3) of the Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the several Provincial and Local Divisions of the High Court of South Africa, published in GN R516 and GN R518 of 8 May 2009 [with effect from 15 June 2009].

²⁴⁵ More especially in areas where the Office of the State Attorney is not available.

²⁴⁶ Ibid 242.

²⁴⁷ In Part B: Performance Information, of the SIU Annual Report for the Financial Year 2015/2016 (the Annual Report) pp. 30, it is stated that, the SIU's performance highlights at a glance (key highlights) are the following:

(i) R73 million is the potential value of money that may be recovered for the State;
(ii) R52 million is the actual value of money and/or assets that have been recovered for the State;

any provisions for the SIU to impose financial penalties on private entities doing business with the state institutions in situations where impropriety has been proved.²⁴⁸

The SIU should propose amendments allowing the Special Tribunal to impose financial penalties in order to first, align a Special Tribunal's powers to impose penalties with those of other similar tribunals.²⁴⁹ In terms of the Competition Act,²⁵⁰ the Competition Tribunal is empowered to impose an administrative penalty in certain prescribed circumstances. This penalty may not exceed 10 per cent of a firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year.²⁵¹ Secondly, the SIU should propose that a Special Tribunal be empowered to impose a financial penalty on private entities doing business with the state institutions where impropriety has been established.²⁵² The imposition of such a penalty will hopefully serve as a deterrent to malpractices and maladministration in public sector procurement, and also provide a benefit to government to save more costs on litigation.²⁵³

(g) Section 14 of the SIU Act which provides for the application of the SIU Act to Commissions of Inquiry should be repealed

Statistics show trends that procurement crimes and corruption in South Africa is still increasing at an alarming rate.²⁵⁴ The importance and relevance of the SIU is still very evident.²⁵⁵

(iii) R 583 million is the value of the civil matters that were instituted by the SIU between 1 April 2015 and 31 March 2016;

(iii) R6.8 billion is the value of the 307 matters that have been referred to the National Prosecuting Authority for prosecution and Assets Forfeiture Unit for forfeiture orders;

(iv) R717 million is the value of three contracts that were set aside as a result of the SIU's intervention(s); and

(v) R310 million is the value of payments that were not made in two matters as a result of SIUs intervention(s).

²⁴⁸ The SIU Act has created a serious lacuna with regards to pecuniary loss which is constantly suffered by the state entities and institutions, and that the amendment sought should surely address this vital aspect.

²⁴⁹ The Competition Commission established in terms of the Competition Act No. 89 of 1998, (the Competition Act) is one of the tribunals empowered to provide for similar penalties.

²⁵⁰ Ibid.

²⁵¹ Ibid 200 at 21.

²⁵² Ibid.

²⁵³ Ibid 235.

²⁵⁴ Ibid 246. See Also: S Dintwe 'The [IN] effectiveness of Anti-Corruption Programmes in Addressing Public Sector Corruption: A Corporative Governance Perspective' (2013) *Journal of Public Administration*, vol. 48 (4), December, p 563, It is added that 'the South African experience is that there is no much visibility as far as the sanctions for corruption are concerned. The conclusion is that the current state of affairs leaves behind a lot to be desired. The wheels of justice are grinding at the lowest pace and most of those accused of corruption escape unscathed due to prolonged criminal justice processes.'

²⁵⁵ Ibid.

Section 14 of the SIU Act provides that the President may, in respect of any Commission of Inquiry, appointed by him or her or appointed by any other executive authority, upon the request of such executive authority, and prior to the commencement of the SIU Act, dissolve an existing Commission of Inquiry and establish, in its stead, a Special Investigating Unit and Special Tribunal. While the SIU is of the opinion that s 14 needs to be repealed, the author is of the contrary view that this is not necessary. The SIU submits that s 14 of the SIU Act is rarely applied (it has only been applied once),²⁵⁶ is not relevant to the SIU and has fallen by disuse. The SIU further adds that the President has appointed a number of Commissions of Inquiry since the establishment of the SIU in 2001,²⁵⁷ and that only one of these Commissions was 'converted' into Special Investigating Units.²⁵⁸ This fact bolsters the SIU's argument that s 14 of the SIU Act should be removed.²⁵⁹

However, the author's view is that s 14 of the SIU Act is still relevant and necessary. A commission of inquiry is still possible to 'convert' into a SIU. The purport of the section is the use of the SIU in the stead of a commission where, in the opinion of the President, the objects of such commission can 'better be achieved' by the SIU and Special Tribunal.²⁶⁰ However, the conversion of the commission into an SIU can only be done if s 14(1)(b) has been complied with.

III. WHAT VALUE A FUNCTIONAL SPECIAL TRIBUNAL WILL ADD TO THE SIU

In Chapter two, it was argued that the Special Tribunal is a judicial tribunal.²⁶¹ The question is now whether a functional Special Tribunal²⁶² can add any value to the SIU, and if so, what would such benefits be? It is argued that the SIU will enjoy more autonomy when the Special Tribunal is functional as a judicial tribunal with enhanced expertise and prescribed rules. It will further have more effect in the fight against fraud and corruption. The discussion which follows therefore supports this contention.

²⁵⁶ Ibid 11 para 11 (In terms of Proclamation R24 of 1997).

²⁵⁷ For example. Khampepe Commission of Inquiry; Ginwala Commission of Inquiry; Hefer Commission of Inquiry; Marikana Commission of Inquiry and Seriti Commission of Inquiry. Notably, the President appointed the Jali Commission of Inquiry (appointed in terms of Proclamation No. 135 of 2001) soon after the establishment of the SIU in terms of Proclamation No. R118 of 2001

²⁵⁸ Ibid 138.

²⁵⁹ Ibid 138 (*Nadasen* case). See Also: Ibid 139.

²⁶⁰ S14 (1) (b).

²⁶¹ Ibid 182 and Ibid 183.

²⁶² Ibid 56.

(a) *Judicial tribunal*

K Hopkins has, in his article, ‘Some Thoughts on the Constitutionality of “Independent” Tribunals established by the State,’²⁶³ commented on the legality of some of the so-called “independent tribunals” or forums that are established to make quasi-judicial decisions. He added that sometimes the tribunals are designed to only perform administrative functions and other times they are designed to perform purely judicial functions on issues of compensation or to make decisions that resolve disputes.²⁶⁴ Hopkins rightfully argues that the apparent feature of the tribunal is that even if the executive’s intention is to take the decision making prerogative out of the hands of an independent judiciary and place it under its own control, this will not mean that the tribunal will have the latitude to make decisions which are unfair or unreasonable.²⁶⁵ He adds that this is so because, whether or not the tribunal is acting judicially or administratively, it will always be required to act in a manner that is both impartial and fair.²⁶⁶ He argues that an additional safeguard which would provide additional procedural protection is that decisions made in a tribunal or forum other than a court of law are always subject to judicial review by an independent court of law.²⁶⁷ It makes no difference whether the decision being reviewed is an administrative one or a judicial one.²⁶⁸

A decision by the Special Tribunal may be taken on appeal to the High Court.²⁶⁹ The advantage that the SIU may have in the operation of a fully functional Special Tribunal is that the SIU will have more access to justice as its cases will be dealt with as speedily as possible.²⁷⁰ The SIU will not be hampered by heavy rolls of the high court for its civil matters to be adjudicated.²⁷¹ A

²⁶³ Ibid 56 at 154.

²⁶⁴ Ibid at 150.

²⁶⁵ Ibid at 154.

²⁶⁶ Ibid.

²⁶⁷ Ibid at 154-5.

²⁶⁸ Ibid 56. He refers to the High Court Rule 53 of the Uniform Rules of Court and adds that the right to have any decision of a tribunal reviewed by the High Court has been held to be part of the guarantee given in section 34 of the Constitution to have access to justice.

²⁶⁹ Ibid 127.

²⁷⁰ Ibid 188 at 124, Referring to S.B Marsh & J Soulsby, ‘Business Law’ (2002) 8thed Nelson Thornes Limited 30, R Baboolal-Frank (See: Ibid 117) stated that in England, there were various reasons over the years for the establishment of specified courts and tribunals, and among such reasons, the procedure of ordinary courts was stifled and tribunals were created to decide upon matters expeditiously.

²⁷¹ S 8(1) of the SIU Act guarantees the independence and impartiality of the Special Tribunal in the performance of its functions. S 8(2) further gives a Special Tribunal jurisdiction to adjudicate upon any civil

Tribunal President together with additional members would be assigned to hear matters brought before the Special Tribunal by the SIU.²⁷² This is an important aspect of the Special Tribunal as it will ensure the independence thereof and the performance of its functions ‘without fear, favour or prejudice and subject only to the Constitution and the law.’²⁷³

(b) *Independence*

R Creyke has, in his article ‘Tribunals and access to justice,’²⁷⁴ and referring to the *Better Decisions*²⁷⁵ posited that, ‘How to be and be perceived to be independent is one of the most pressing issues for tribunals.’ He adds, the *Better Decisions*²⁷⁶ report noted, in words which apply generally to tribunals:

*‘The Council ... acknowledges that many issues of independence arise in relation to tribunals as well as courts. It is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence. The Council noted in its discussion paper that satisfaction with a tribunal’s performance appears to be highly correlated with opinions as to the quality of its members, and this point has been reinforced during the inquiry.’*²⁷⁷

Creyke further adds that several of the other well-recognised methods of achieving an optimal level of independence include centralising the management of tribunals, ensuring an arrangement for administrative support for tribunals separate from those which apply generally within public administration, managing the appointments process through a single, preferably ‘neutral’ agency,

proceedings brought before it by a SIU in its own name or on behalf of a State institution or any interested party as defined by the regulations, emanating from the investigation by such SIU, including the power to- (a) issue suspension orders, interlocutory orders or interdicts on application by such Unit or party; (b) make any order which it deems appropriate so as to give effect to any ruling or decision given or made by it; and (c) make any order which it deems appropriate as to costs.

²⁷² Ibid 127.

²⁷³ S 8(1) of the SIU Act.

²⁷⁴ R Creyke ‘Tribunals and access to justice’ 2 (2002) *Queensland University of Technology & Justice Journal*.

²⁷⁵ Administrative Review Council, *Better Decisions: Report of Commonwealth merits review tribunals (Better Decisions)*, Report No 39 (1995) paras 4.8-4.20

²⁷⁶ Ibid 274 para 4.4.

²⁷⁷ Ibid 273 at 76.

devising a transparent and rational way of allocating administrative costs of tribunals and of determining the salaries of members, and introducing specific statutory criteria which identify desirable membership qualifications.²⁷⁸ Furthermore and with regards to increased independence, C Radcliffe²⁷⁹ adds that in the Leggatt Report,²⁸⁰ Leggatt placed great value on an increased perception of the independence of tribunals, stating in his Report:

‘Tribunals are an alternative to court, not administrative processes.’²⁸¹ They will keep the confidence of users only in so far as they are seen to demonstrate similar qualities of independence and impartiality to the courts.’²⁸²

This need to increase the perceived independence of tribunals was the motivation behind divorcing the administrative support for tribunals from those departments whose decisions were under challenge, and the consequent creation of the Tribunals Service.²⁸³ As submitted previously, over and above the benefit of a speedy resolution of its civil matters, the Special Tribunal will have increased independence. The author’s view is based on submissions made by Hopkins and Radcliffe that the SIU will enjoy autonomy in the use of a judicial and functional Special Tribunal. The high court or superior courts will only be used on appealable decisions of the Special Tribunal.²⁸⁴

Accordingly and in the view of Creyke, the Special Tribunal will be perceived to be independent with its administrative support separate from those which apply generally within public administration. As Leggatt²⁸⁵ and Radcliffe²⁸⁶ correctly put it, Tribunals are an alternative to court, not administrative processes, so shall be the Special Tribunal.

²⁷⁸ Ibid.

²⁷⁹ C Radcliffe ‘The Tribunal Revolution’ (2007) 12 *Jud.Rev.* 197.

²⁸⁰ Sir A Leggatt ‘Tribunals for Users One System, One Service Report of Review of Tribunals’ (March 2001); <http://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>.

²⁸¹ Although the Special Tribunal is a judicial tribunal, it has no inherent jurisdiction like the High Court. It is a creature of statute like the Magistrates’ Court.

²⁸² Ibid 278 at 202 para 32.

²⁸³ Ibid para 33.

²⁸⁴ Ibid 183.

²⁸⁵ Ibid 279.

²⁸⁶ Ibid 278.

(c) *Expertise*

Creyke argues that a criticism of a general jurisdiction tribunal, often made by those within public administration, is that its membership does not boast the expertise of the primary decision-maker, much less of any specialist review body.²⁸⁷ To address the issue, members who have expertise in all the areas of specialism reviewed by the general jurisdiction review body can be appointed to tribunals.²⁸⁸

He further states that another way of meeting this criticism is to ensure that where expertise is required, that expertise is specified in the statute constituting the reviewing body.²⁸⁹ In its discussion of the selection processes for tribunal members, the *Better Decisions* report recommended that 'all prospective members should be assessed against selection criteria that relate to the tribunal's review functions and statutory objectives.'²⁹⁰ Referring to the Leggatt report, Creyke adds that it also recommended that '[s]tatutory qualifications for appointment to all tribunals should ... be amended to provide specific criteria for appointment'²⁹¹ and to ensure that 'candidates will be chosen for their ability and propensity to develop and display the necessary interpersonal skills, as well as possessing other relevant professional skills and knowledge.'²⁹²

He adds further that reference to propensity is significant, and that there is a tendency for each member of a multi-disciplinary tribunal panel to acquire a comparable level of expertise to others on a panel.²⁹³ Creyke suggests that given intelligence, training, and flexibility, a member of a tribunal is capable of developing familiarity with discipline-specific concepts and facts sufficient to enable the member to test and evaluate technical evidence.²⁹⁴ He posits further that this was a conclusion of the *Better Decisions* report which argued that tribunal members should at least have core skills and competencies, namely;

²⁸⁷ Ibid 273 at 74.

²⁸⁸ Ibid at 75.

²⁸⁹ Ibid.

²⁹⁰ Ibid at 75 & Ibid 273 para 7.7.

²⁹¹ Ibid.

²⁹² Ibid 273 para 7.7.

²⁹³ Ibid 273 at 75.

²⁹⁴ Ibid.

demonstrable intelligence; analytical skills; an ability to write and decision-making experience in order to be effective tribunal members.²⁹⁵

It is therefore submitted that for the Special Tribunal to succeed, the SIU should recruit personnel with requisite skills and expertise in order for the Special Tribunal to achieve more outcomes.²⁹⁶ The SIU is an organization which employs multi-disciplinary approaches in its investigations. It should therefore recruit more personnel with skills ranging from forensic investigations; cyber experts; data analysts; computer engineering experts; accountants; project and program managers; forensic lawyers; in house quantity surveyors; strategists; procurement and supply chain management experts etc.²⁹⁷

In this regard, the SIU will then have to encourage its employees to impart the required skills among each other through training and experience in order to achieve multi-skilling, demonstrable intelligence, analytical skills, and decision-making experience in order to be effective tribunal members as suggested by Creyke.²⁹⁸ It is on this basis that the SIU members are constantly involved in specialist training in order to develop skills which will enable them to carry out their daily investigations.

(d) *Prescribed rules*

R Baboolal-Frank adds with approval that each civil tribunal in South Africa is a creature of statute and the legislation defines the parameters within which the tribunal will operate, and the procedural mechanisms which regulate it.²⁹⁹ It is added that the Special Tribunal may formulate and develop rules and directives within which it will adhere to.

²⁹⁵ Ibid 273 at 75-6.

²⁹⁶ Ibid.

²⁹⁷ These approaches are informed by the provisions of s 4(1)(a), (b) and (c) of the SIU Act. See also: The Special Investigating Unit Cyber Forensic First Responder (Level 1): Skills Programme Training Manual 2017 (Developed by The French Cyber Technical Expert in co-operation with the Special Investigating Unit Learning and Development Team). In its Foreword, it is stated in the Manual that, '[t]oday, in our connected world many opportunities are created for criminals and growth in online services increases the scale of corruption. Nowadays, digital skills are a key part of all investigation related to corruption.' So the cyber forensic responders must face this new, complex and evolving digital environment and manage their investigations to find "digital evidence." As "specialists" have no ubiquity, each investigator must become a "generalist." That means mastering a basic and orientated knowledge in law; computer science; information systems security; management; engineering etc.

²⁹⁸ Ibid 273 at 75.

²⁹⁹ Ibid 190 at 126.

(e) *Systemic effect*

Creyke refers to systemic effect and argues that what is needed is an office or body charged with ensuring that tribunals and Access to Justice³⁰⁰ decisions are implemented in individual cases.³⁰¹ This means that when courts or tribunals have found anomalies, injustice or inconsistency in legislation or policy, the legislation or the policy is changed and that front-line decision-makers take account of court and tribunal findings.³⁰² He further adds that ensuring that public administration heeds what courts and tribunals decide is a product of good communications and respect for rule of law.³⁰³ The author's view is that systemic effect is the positive and administrative impact that Tribunals have on the functions and governance of institutions.

Creyke further posits that a disturbing aspect of an empirical report into dissemination of information is that the majority of agencies have an *ad hoc* approach to keeping their staff informed of developments.³⁰⁴ Information shared is mostly passed on through informal methods of communication such as discussion with colleagues and emails. This indicates an absence of focus on the systemic impact of review. If fewer than half of all officers are able to absorb relevant developments, it is unlikely that any lessons are being learned from review bodies and recommendations are not at all implemented. This undermines the potential for external review to produce substantive change in the policy and practice of government decision-making.³⁰⁵ The findings also show that agencies are more likely to repeat mistakes.³⁰⁶ There have been a range of suggestions about an institutional response to these issues. There should be a role in monitoring systemic problems, and ensuring that steps be taken on a regular basis to advise government of them.³⁰⁷

³⁰⁰ S 34 of the Constitution guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, where appropriate, another independent and impartial tribunal or forum. Section 34 has entrenched a principle of legal redress through courts, tribunals or forums.

³⁰¹ Ibid 273 at 81.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid 273 at 81.

³⁰⁷ Ibid.

In summary, the author's view is that if the Special Tribunal finds anomalies and flaws which may result in injustice or inconsistency in legislation or policy of a state institution or organ, it must recommend that such legislation or policy is changed and that decision-makers take account of tribunal findings. When the state institutions implement the decisions of the Special Tribunal, this will promote accountability, good governance and rule of law in these institutions. Systemic recommendations that will be made by the Special Tribunal will result in public administration officers focusing on the systemic impact of review of governing legislations and policies on their entities. Upon implementation of the legislations and policies, they will foster relevant developments. A further view is that it will then be unlikely for public administration officials to be recidivist in their actions. The final view is that monitoring and evaluation of the recommendations made will provide a systemic institutional attitude and response on the problems in order for the SIU to advise government proactively.

(f) *Conclusion*

What was required at the beginning of this research was a vigorous inquiry to ascertain whether the Special Tribunal established in terms of the SIU Act is designed to perform administrative functions or to perform purely judicial functions. The analysis has shown that through its empowering legislation and submissions made by various academic writers,³⁰⁸ the Special Tribunal is a judicial tribunal. Hopkins reiterates the fact that a trait of a tribunal is that even if the executive takes the decision making prerogative out of the responsibility of an independent judiciary and places it under its control, the tribunal does not have the latitude to make decisions which are unfair or unreasonable.³⁰⁹ He adds that whether or not the tribunal is acting judicially or administratively, it will always be required to act in a manner that is both impartial and fair.³¹⁰

The Special Tribunal is presently not functional³¹¹ although the SIU Act provides for the composition of a Special Tribunal.³¹² It is clear from s 7(1) that the Special Tribunal cannot function without the Tribunal President. As a judicial

³⁰⁸ K. Hopkins; R. Baboolal-Frank and C. Radcliffe.

³⁰⁹ Ibid 53 at 150.

³¹⁰ Ibid. See Also: Section 34 of the Constitution.

³¹¹ Ibid 180.

³¹² Ibid 181.

tribunal, the Special Tribunal may make any order which it deems appropriate to give effect to its decision. The Special Tribunal functions in the same way as a court according to rules made and published in the Government Gazette.³¹³

The research finding is that the SIU performs administrative duties relating to investigations as sanctioned by the President in the relevant proclamation.³¹⁴

These are executive functions as they are sanctioned by the President.³¹⁵

However, the author's shared view is that decisions of the Special Tribunal are made 'without fear or favour,'³¹⁶ and are binding until they are appealed.³¹⁷

Relating to the second research question on how the SIU institutes civil proceedings on behalf of the state institutions, the finding is that the SIU performs its functions within the terms of reference as set out in the relevant proclamation³¹⁸ referred to in s 2(1). The SIU institutes and conducts civil proceedings in a Special Tribunal or any court of law.³¹⁹ It does so utilising whatever cause of action formerly vested in a state institution. The only relief that the SIU may seek to recover is the relief to which the state institution itself would be entitled.³²⁰

The third research question was intended to evaluate whether the SIU is effective in its present form and in the absence of a functional Special Tribunal. The research has shown that the SIU is still effective. The SIU has made tremendous inputs in its mandate to fight fraud and corruption.³²¹ With some amendments to its empowering legislation in 2012, more especially with the view to enhance its civil litigation capabilities, the SIU has developed considerably.³²²

However, research has also shown that in the performance of its functions, the SIU has not been without shortcomings or challenges. As has already been submitted in this research, the SIU as a creature of statute which operates within

³¹³ S 9 of the SIU Act relates to procedure and evidence, and states that '(1) (a) Subject to this Act and the regulations, a Tribunal President may make rules to regulate the conduct of proceedings in such Special Tribunal, including the process by which proceedings are brought before the Special Tribunal, and the form and content of that process; (b) The Tribunal President may amend or repeal any rule made by him or her; and (c) Any rule made, or amendment or repeal thereof by the Tribunal President must be published in the *Gazette*.

³¹⁴ Ibid 182.

³¹⁵ S 2(1); s 2(2); s 3(1) and s 4 (1) (f) of the SIU Act.

³¹⁶ S 8(1) of the SIU Act.

³¹⁷ Ibid 183.

³¹⁸ S 4(1) of the SIU Act.

³¹⁹ S 2(1)(c)(i); (ii) and (iii).

³²⁰ Ibid 178.

³²¹ Ibid 246.

³²² Ibid 8 (Judicial Matters Amendment Act 11 of 2012).

the confines of the SIU Act, needs to enhance its capacity and capabilities. This can only be achieved through, among others interventions, amendments to the SIU Act.

If the submissions contained herein were to be implemented, they would give the SIU an opportunity to draw on the experience of the different suggestions made in relation to tribunals in order to formulate a desired functional Special Tribunal. The time is now for SIU to introduce a more functional Special Tribunal.³²³ The view is that if the SIU seizes this opportunity sooner rather than later, the formation of a Special Tribunal will yield greater outcomes for the SIU and the country as a whole.

CHAPTER IV

I. FINDINGS AND RECOMMENDATIONS

(a) Introduction

Chapter four consists of findings and recommendations, including concluding remarks with regard to a need for a fully functional SIU tribunal. The SIU will have systemic effect in the execution of its mandate in South Africa which is constantly riddled with corruption and maladministration.³²⁴

(b) Findings

This dissertation has shown that the Special Tribunal may only exercise its functions within the terms of reference as set out in the proclamation referred to in s 2(3) of the SIU Act. The Special Tribunal has jurisdiction to adjudicate upon civil dispute emanating from investigations by the SIU within the framework of its terms of reference as set out in the proclamation.³²⁵

The only basis in the SIU Act upon which the SIU may institute civil proceedings before the Special Tribunal is if it has obtained evidence in its investigations substantiating any allegation of maladministration, corruption or any other allegation as

³²³ Ibid 181 and 182.

³²⁴ Ibid 246.

³²⁵ Ibid 189, 190 and 191.

provided for under the SIU Act.³²⁶ Furthermore, and in respect of the institution of legal proceedings, the SIU has *locus standi* which allows it to institute civil proceedings before a Special Tribunal or any court of law, utilizing whatever cause of action formerly vested in a state institution.³²⁷ The SIU may only seek the relief to which the state institution itself would have been entitled.³²⁸ As a judicial tribunal,³²⁹ a decision of the Special Tribunal is appealable to the High Court.³³⁰

(c) *Recommendations*

The SIU is still confronted with a number of challenges as it does not litigate its civil matters before a Special Tribunal as it is empowered to do by the SIU Act. These challenges have no tailor made solutions but the SIU strives to overcome them. The following are the recommendations which could be applied to address these problems.

- (i) The SIU and Special Tribunal should have the SIU Act amended in order to give them more powers in the proper performance of their functions.³³¹
- (ii) The Special Tribunal must be fully functional in order to provide the SIU with the benefits associated with such a tribunal such as the speedy resolution of cases and efficiency in the provision of outcomes.³³²
- (iii) The Special Tribunal must formulate and develop rules for its proper functioning.³³³
- (iv) For the Special Tribunal to succeed, the SIU should recruit personnel with requisite skills and expertise in order to achieve outcomes based investigations at a more improved turnaround time.³³⁴
- (v) Systemic recommendations to be made by the Special Tribunal ought to result in public administration officers focusing on the systemic impact of

³²⁶Ibid 191.

³²⁷Ibid 193.

³²⁸Ibid 177 and 319.

³²⁹Ibid 180; 181 and 182.

³³⁰Ibid 183 and 268.

³³¹Ibid 200 and 201.

³³²Ibid 269.

³³³Ibid 294.

³³⁴Ibid 301 and 302.

review of governing legislations and policies on their state institutions. Upon implementation, this will foster relevant and effective developments.³³⁵

- (vi) The SIU must develop monitoring and evaluation mechanisms on the recommendations made to state institutions in order to achieve systemic improvements. This will foster a systemic institutional attitude and proactive response by institutions in order to overcome challenges and avoid recidivism.³³⁶

With the implementation of these recommendations, the SIU will enjoy more autonomy with enhanced expertise³³⁷ and systemic effect.³³⁸ It will also provide government with an opportunity to save more costs on litigation as well as to recoup more funds in penalising perpetrators, who will be found to have derived financial gain from impropriety.³³⁹

(d) Conclusion

This paper has shown that the Special Tribunal established in terms of the SIU Act is a purely judicial tribunal performing judicial functions.³⁴⁰ As a judicial tribunal, the Special Tribunal operates independently of the SIU³⁴¹ but adjudicates civil matters brought before it by the SIU. The Special Tribunal adjudicates civil matters brought before it by the SIU.³⁴² On the other hand, the SIU performs administrative functions as provided for in the SIU Act, read with the terms of reference, to the proclaimed investigations.³⁴³ The author's view is that the terms of reference in proclaimed investigations are designed to achieve executive intentions as desired by the President.

The SIU institutes civil proceedings on behalf of the State only where the Special Tribunal has jurisdiction to adjudicate upon civil disputes, emanating from the investigations by SIU in respect of the proclaimed investigations.³⁴⁴ The SIU has only

³³⁵ Ibid.

³³⁶ Ibid 304; 305 and 306.

³³⁷ Ibid 268.

³³⁸ Ibid 332.

³³⁹ Ibid 247.

³⁴⁰ Ibid 182 and Ibid 194.

³⁴¹ Ibid 185 and 186.

³⁴² Ibid 187.

³⁴³ Ibid 189.

³⁴⁴ Ibid.

those functions and powers given to it by the SIU Act.³⁴⁵ In the SIU Act, the only basis upon which the SIU may institute civil proceedings before the Special Tribunal is if it has obtained evidence in its investigations substantiating any allegation of maladministration, corruption or any other allegation as provided for under the SIU Act.³⁴⁶

Furthermore, the SIU has *locus standi* which allows it to institute such proceedings before a Special Tribunal or any court of law, utilizing whatever cause of action formerly vested in a particular state institution.³⁴⁷ The SIU therefore has no better right in law than that which the state institution has³⁴⁸ as it steps in the shoes of the state institution concerned.³⁴⁹ The defendant may raise a defence that it would have reasonably raised against the state institution concerned.³⁵⁰

It is finally submitted that in the absence of a fully functional Special Tribunal and in its present form,³⁵¹ the SIU is not fully effective in the manner in which the legislature intended it to be. What was envisaged by the SIU Act was simply a fully functional Tribunal. The final view is that with the implementation of the recommendations, relating to mostly legislative amendments, the SIU and Special Tribunal will be more effective, with improved turnaround time on investigations (by the former) and civil litigation (by the latter).³⁵²

³⁴⁵ Ibid 188.

³⁴⁶ Ibid.

³⁴⁷ Ibid 99 and 189.

³⁴⁸ Ibid 114; 191 and 192.

³⁴⁹ Ibid 177.

³⁵⁰ Ibid.

³⁵¹ Ibid 180 and 181.

³⁵² Ibid 200.

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