Volume **ONE** Chapter **SEVEN**

Legal Challenges

þ INTRODUCTION

1 In the two and a half year period of the Truth and Reconciliation Commission's existence, it faced a number of legal challenges. At a macro level, the application filed on behalf of the Azanian Peoples Organisation (AZAPO), the Biko, Mxenge and Ribeiro families against the Government of South Africa, challenging the constitutionality of the amnesty provisions, struck at the heart of the Amnesty Committee's very existence. The Constitutional Court judgement upholding the amnesty provisions allowed the Amnesty Committee to begin its task, secure in the knowledge that there could be no further legal challenge to its existence.

2 Once the public hearings of the Commission commenced, a series of applications were launched by Brigadier Du Preez and Major General Van Rensburg against the Commission in the Cape High Court regarding the provisions of section 30 of the founding Act. These culminated in a judgement by the Appellate Division. This judgement had a profound effect on shaping the policy and procedures of the Commission.

3 From then onwards, the Commission faced a barrage of litigation, including an application from the National Party (NP) seeking the censure of the chairperson of the Commission and the removal from office of the vice-chairperson. A further application from the NP in the Cape High Court sought an order that amnesty decisions handed down by the Amnesty Committee in respect of thirty-seven African National Congress (ANC) members be declared void. Another political party, the Inkatha Freedom Party (IFP) filed a complaint with the Public Protector about its perceived treatment by the Commission. A group of South African Defence Force (SADF) generals also filed a complaint with the Public Protector complaining of bias by the Commission.

4 The Commission also faced challenges from perpetrators in respect of amnesty decisions.

5 One of the interesting legal challenges arose in the Chemical and Biological Hearing when Dr Wouter Bassoon, the project leader, who had been *subpoenaed* to give evidence, launched an application in the Cape High Court contending that his rights in terms of section 35 of the interim Constitution would be infringed if he was compelled to testify. The High Court ruled that he should testify.

6 During its lifetime, the Commission was so often involved in litigation that one could be forgiven for thinking that it was under siege. All of these matters are dealt with in detail in this chapter.

þ CHALLENGING THE CONSTITUTIONALITY OF THE ACT

The Azanian Peoples Organisation, Ms NM Biko, Mr CH Mxenge and Mr C Ribeiro v the President of the Republic of South Africa, the Government of the Republic of South Africa, the Minister of Justice, the Minister of Safety and Security, and the Chairperson of the Commission, in the Constitutional Court[1] .

7 The case was significant for a number of reasons. The applicants applied for direct access to the Constitutional Court and for an order declaring section 20(7) of the Promotion of National Unity and

Reconciliation Act (the Act) unconstitutional. The effect of section 20(7), read with other sections of the Act, is to permit the Amnesty Committee to grant amnesty to a perpetrator of an act associated with a political objective and committed before 6 December 1993 (later changed to 10 May 1994). A perpetrator cannot be criminally or civilly liable for an act or acts for which he or she has received amnesty. Similarly, neither the state nor any other body, organisation nor person that would ordinarily have been vicariously liable for such act can be liable in law.

8 In a judgement delivered by the Deputy President of the Constitutional Court, Judge Mahomed, the court unanimously upheld the constitutionality of the section. In doing so, it acknowledged that the section limited the applicants' right in terms of section 22 of the interim Constitution to "have justiciable disputes settled by a court of law, or ... other independent or impartial forum". However, it held that, in terms of section 33(2) of the interim Constitution, violations of rights are permitted either if they are sanctioned by the interim Constitution itself or if they are justified in terms of subsection 1 of the limitations clause (section 33(1)).

9 The Court held that the postamble, which was part of the interim Constitution[2] , sanctioned the limitation on the right of access to court. Amnesty for criminal liability was permitted by the postamble because, without it, there would be no incentive for offenders to disclose the truth about past atrocities.

10 Judge Mahomed said that he understood why the applicants wished to:

> *insist that wrongdoers who abused their authority and wrongfully murdered and maimed or tortured very much loved members of their families who had, in their view, been engaged in a noble struggle to confront the inhumanity of apartheid, should vigorously be prosecuted and effectively be punished for their callous and inhuman conduct in violation of the criminal law (para 16).*

11 However, he argued that there was good reason to believe that the granting of amnesty might assist in uncovering the truth about the past, thus assisting in the process of reconciliation and reconstruction.

> *Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.*
>
> *The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead, to unburden their grief publicly; to receive the collective recognition of a new nation that they were wronged and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible (para 1).*
>
> *That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole*

truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do (para 17).

12 Thus, he noted, the alternative to granting immunity could well have the effect of keeping relatives of victims ignorant of what happened, thereby perpetuating:

> *their legitimate sense of resentment and grief and correspondingly [allowing] the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order (para 18).*

13 Judge Mahomed noted that amnesty was a crucial component of the negotiated settlement itself, without which the interim Constitution would not have come into being. If the court kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation would never have been forthcoming (para 19). The Court held that amnesty for civil liability was also permitted by the postamble (para 2), again because the absence of such an amnesty would constitute a disincentive for the disclosure of the truth.

14 The court held that the postamble permitted the granting of an amnesty for any civil liability to the state, entitling Parliament to adopt a wide concept of reparations. This would allow the state to decide on proper reparations for victims of past abuses, having regard to competing demands on the limited resources of the state. Further, Parliament was authorised to provide for individualised and nuanced reparations that took into account the claims of all victims, rather than preserving state liability for provable and unprescribed delictual claims only. In this regard, Judge Mahomed noted, the families of those whose fundamental human rights were invaded by torture and abuse were not the only victims who have endured "untold suffering and injustice in consequence of the crass inhumanity of apartheid which so many have had to endure for so long". Indeed:

> *Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on the life and living for so many (para 43).*

> *The election made by the makers of the Constitution was to permit Parliament to favour "the reconstruction of society" involving in the process a wider concept of "reparation", which would allow the state to take into account the competing claims on its resources but, at the same time, to have regard to the "untold suffering" of individuals and families whose fundamental human rights had been invaded during the conflict of the past (para 45).*

15 The negotiators of the interim Constitution and the leaders of the nation were thus compelled to make hard choices and "were entitled to permit a different choice to be made between competing demands inherent in the problem".

16 The Court held, therefore, that the postamble authorised the granting of amnesty to bodies, organisations or other persons who would otherwise have been vicariously liable for acts committed in the past. Without the granting of amnesty, the truth might not be told. Indeed, the interim Constitution itself might not have been negotiated had amnesty not been provided for.

17 The application was dismissed by the Constitutional Court on the 25 July 1996.

Application for an interdict to restrain the Commission from granting amnesty

18 Before the delivery of the above judgement, the applicants - namely AZAPO, Ms Biko, Mr Mxenge and Mr Ribeiro - brought a further application seeking an urgent order from the Court directing that the respondents be interdicted and restrained from granting amnesty to any person pending the outcome of the Constitutional Court decision.

19 On 25 April 1996, the Commission gave an undertaking that it would not grant any amnesties pending the finalisation of the application. However, the other functions and processes of the Amnesty Committee would continue in the interim.

20 On 9 May 1996, the court dismissed the application. It found that there was sufficient indication that the word ‘amnesty’ intended in the Postamble of the interim Constitution included the conferring of immunity in respect of civil liability in addition to criminal liability. It found, further, that the applicants had established neither a clear right nor a *prima facie* (face value) right to an interdict.

þ APPLICATION OF THE PROVISION OF SECTION 30

21 From the inception of its work, the Commission sought to interpret the provisions of section 30. Section 30 reads as follows:

> *Procedure to be followed at investigations and hearings of Commission, committees and subcommittees*
>
> *(1) The Commission and any committee or subcommittee shall in any investigation or hearing follow the prescribed procedure or, if no procedure has been prescribed, the procedure determined by the Commission, or, in the absence of such a determination, in the case of a committee or subcommittee, as the case may be.*
>
> *(2) If during any investigation by or any hearing before the Commission -*
>
> (a) any person is implicated in a manner which may be to his detriment;
>
> (b) the Commission contemplates making a decision which may be to the detriment of a person who has been so implicated;
>
> (c) it appears that any person may have suffered harm as a result of a gross violation of human rights, the Commission shall, if such person is available, afford him or her an opportunity to submit representations to the Commission within a specified time with regard to the matter under consideration or to give evidence at a hearing of the Commission.

22 The Commission took statements from witnesses (potential victims) about gross human rights violations. In the event that a statement contained allegations implicating persons to their detriment, the Act envisaged that the Commission should give the implicated person an opportunity to address it on the issue, either in writing or orally.

23 In particular, where a witness was to testify at a pubic hearing and an alleged perpetrator was to be implicated, the Commission was required to inform the alleged perpetrator, in writing, of the substance of the allegations against him or her. In these circumstances too, the Commission was required to give the alleged perpetrator an opportunity to make representations to it either in writing or orally.

24 In endeavouring to ensure compliance with its legal obligations in terms of the Act, the Commission ran into problems with its East London office. The result was a series of actions and counter actions concerning a number of crucial questions:

a Could alleged perpetrators be named publicly without having been given proper and/or sufficient notice?

b Could alleged perpetrators appear and make oral representations at the hearing at which a witness was testifying?

c Was an alleged perpetrator entitled to all the documentation pertaining to him or herself, including the witness's statement?

d Was an alleged perpetrator entitled to cross-examine the witness?

25 One of the first cases in this respect was that of Brigadier Du Preez and Major General Van Rensburg who sought to prevent the mother of Mr Siphiwe Mthimkulu from testifying about them.

Brigadier Du Preez and Major General Van Rensburg:
first application

26 The application was brought by Brigadier Du Preez and Major General Van Rensburg[3] in the Cape of Good Hope Division of the Supreme Court.

Background to the case

27 The testimony in dispute involved the case of Mr Siphiwe Mthimkulu whose mother was scheduled to testify to the Commission about the death of her son.

28 Siphiwe Mthimkulu was a political activist in the Eastern Cape. He was detained on a number of occasions and subjected to severe forms of torture. He was shot in the arm and faced constant police harassment. In 1981, after his release from yet another arrest, his health deteriorated rapidly and he was diagnosed as having been poisoned with thallium. His body swelled, his hair fell out, he could not urinate and he was confined to a wheel chair. Despite the poisoning, he fought to recover and began slowly regaining his health. In 1982, he left his home for a check up at the Livingstone Hospital. He was never seen again.

29 On 30 April 1990, Captain Dirk Coetzee alleged that, after the poison had failed to kill Siphiwe Mthimkulu, he was killed by Brigadier Jan du Preez and Colonel Nick van Rensburg. This circumstance was reported in the press and was to be the subject of Ms Mthimkulu's testimony.

30 Consequently, on 13 April 1996, the Commission sent notices to Brigadier Du Preez and Major General Van Rensburg (addressed to the Commissioner of the SAPS). The notices were issued in terms of section 30 of the Act and informed Brigadier Du Preez and Major General Van Rensburg that: "an unnamed witness would testify that they were involved in, or had knowledge about, the poisoning and disappearance of a person, also unnamed" in Port Elizabeth in 1981 or 1982. They were informed that the hearing would take place in East London between 15 - 18 April 1996. Because Commission representatives in East London were concerned that the witness would be in danger if her identity became known, the notices were cautiously and vaguely worded.

31 The respondents objected to the notices on the basis that they were "vague in the extreme"; that they were unable to investigate the allegations and would not be able to do so before the 15 April 1996. They also said that the procedure proposed by the Commission contravened section 24 of the Constitution of the Republic of South Africa Act, 200 of 1993 (the interim Constitution).

32 On the 15 April 1996, Brigadier Du Preez and Major General Van Rensburg launched an urgent interim application. The applicants sought to interdict the Commission from hearing evidence or permitting the presentation of evidence by any person before they had been given "proper, reasonable and timeous notice" of the Commission's intention to receive evidence that would implicate them; and before they had been provided with "such relevant facts and information as might be reasonably necessary" to enable them to exercise and protect what were said to be their rights in terms of section 30 of the Act.

33 During the application hearing, the Commission conceded that "insufficient notice and insufficient particularity had been given to the applicants". However, it reserved its position "that the applicants are not entitled to notice of the date of the proposed hearing" and that the Commission was "entitled to hold the hearings without prior notice or the prior furnishing of witness statements". In effect, the applicants were seeking a prior right of rebuttal.

The decision of the court

34 On the 30 April 1996, Mr Justice King issued an order restraining the Commission from receiving or allowing evidence during its hearings "which would affect" the applicants. He ruled that the Commission had to give the applicants proper, reasonable and timeous notice of its intention to hear evidence presented by any

person which might detrimentally implicate or prejudicially affect the applicants, and of the time and place of the proposed hearings.

35 He also ruled that the Commission had to furnish Brigadier Du Preez and Major General Van Rensburg with sufficient facts and information as they would reasonably need to identify the events, incidents and persons concerning which it was proposed to present evidence that might detrimentally implicate them. This would enable them properly to exercise their rights in terms of Section 30.

36 The Commission requested leave to appeal against Judge King's decision.

Brigadier Du Preez and Major General Van Rensburg: second application

37 Brigadier Du Preez and Major General Van Rensburg brought a second application in the Supreme Court, Cape of Good Hope Division[4] in which they alleged that the Commission had acted in contravention of the judgement of Mr Justice King.

Appeal to the full bench of the Cape Provincial Division: first appeal

38 The Commission requested that Judge King recuse himself from the appeal hearing. Following the recusal, the Judge President directed that the appeal be heard by a full bench on 20 of June 1996.[5]

39 The court held that, in the context of its objectives, functions, powers and the limited time frame within which it had to complete its work, the Commission was not obliged to give prior notice to any person who might be implicated in a human rights violation hearing. However, if and when the Commission contemplated making a decision that might be detrimental to an implicated person after a hearing, that person should be granted an opportunity to submit representations or give evidence to the Commission. Moreover, at that time, the Commission should give the person involved whatever information it had at its disposal in order to enable him or her to answer the allegations.

40 Brigadier Du Preez and Major General Van Rensburg petitioned the Appellate Division in Bloemfontein for leave to appeal against the judgement.

Brigadier Du Preez and Major General Van Rensburg: appeal to the Appellate Division[6]

41 The appeal was heard before five judges of the Appellate Division, with Chief Justice Corbett presiding.

42 The Commission argued that Brigadier Du Preez and Major General Van Rensburg had ignored the fact that the hearing was an investigative procedure and not a judicial matter. It noted, however, that even where a witness may be implicated in impending legal proceedings, he or she has no right to prior notice or an opportunity to be heard at the hearing. The appropriate remedy where adverse publicity might result is afforded by a defamation action.

43 In support of this argument, the Commission's counsel submitted a paper by Sir Richard Scott who argues that the fundamental and significant differences between litigation and enquiries make comparisons unsafe.[7] Counsel also cited an earlier article by Sir Louis Blom-Cooper QC[8] who rejects the adversarial procedure adopted in the legal system as wholly inappropriate to an enquiry.

The decision of the court

44 Judge Corbett stated that the solution to the issues could be found in the common law which requires persons and bodies (statutory and other) to observe the rules of natural justice by acting in a fair manner. He held that the application of the *audi alteram partem* (hearing the other side) principle was applicable, irrespective of whether the body was quasi judicial or administrative. He supported the view that the principle comes into play whenever a statute empowers a public official or body to give a decision that could prejudicially affect an individual. He stated further that the *audi* principle would be enforced unless Parliament expressly or by necessary implication enacted that it would not apply, or if there were exceptional circumstances justifying the court in not giving effect to it. He held that there was nothing in the Act that expressly or by implication restricted or negated the duty to give reasonable and timeous notice; nor did he consider that there were exceptional circumstances in the present case.

> *It seems to me that in a case such as this, procedural fairness demands not only that a person implicated be given reasonable and timeous notice of the hearing, but also that he or she is at the same time informed of the substance of the allegations against him or her, with sufficient detail to know what the case is all about. What is sufficient information would depend upon the facts of each individual case (page 41).*

45 In answering the question, therefore, as to what the duty to act fairly demands of a public body, Judge Corbett held that, in the present case, this meant reasonable and timeous notice of such a hearing, so as to enable the persons or their legal representatives to be present to hear the evidence, to see the demeanour of the witness(es) and to provide the implicated person with an opportunity to rebut the evidence. In these circumstances, he said that the Commission might well be under a duty to hear the rebutting evidence or permit immediate cross-examination.

46 Judge Corbett held further that such granting of reasonable and timeous notice would not inconvenience the Commission, save in circumstances where a witness implicates a third party for the first time in *viva voce* (oral) evidence.

47 Judge Corbett allowed the appeal with costs and reinstated the order of Judge King with the addition of a new paragraph that stated that nothing in the order should be construed as necessarily obliging the Commission to disclose the identity of any witness.

48 The implications of the court's decision were that the Commission was now compelled to give prior notice to alleged perpetrators of human rights violations before evidence was heard publicly, and to provide them with sufficient information about the allegations against them to enable them to make representations.

Follow up by the Commission

49 On the 9 May 1996, the Commission provided Brigadier Du Preez and Major General van Rensburg with relevant extracts from the statement implicating them. On 15 May, at their request, a full copy of the witness's statement was issued to them. The hearing was set for the 23 May. In an attempt to accommodate Brigadier Du Preez and Major General Van Rensburg, the Commission undertook that the witness, Ms Mthimkulu, would not mention either applicant by name at the hearing.

Implications for the work of the Commission

50 Following the court ruling, the Commission adopted the procedure of sending section 30(2) notices to alleged perpetrators twenty-one clear calendar days in advance of the hearings. Notices were accompanied by all documentation necessary to provide the alleged perpetrator with sufficient detail of the substance of

the allegations against him or her. The procedures applied to notices for human rights violations hearings, section 29 investigative hearings and amnesty hearings.

51 The Commission expressed concern about the impact of the court ruling on public opinion, feeling that the Commission was coming to be seen as too 'perpetrator-friendly'. There were also concerns that the environment of the hearings would become too legalistic and formal, hampering the already painful and emotional process of giving public testimony and risking secondary trauma. Indeed, at the hearing where the Mthimkulu family was due to testify on the death of Siphiwe Mthimkulu, the audience became visibly upset when it was informed that the Commission could not permit members of the family to testify as the applicants had interdicted them from giving evidence.

52 The judgement raised further questions about the rights of victims: namely their right to legal representation and cross-examination of perpetrators.

53 The judgement imposed an administrative and logistic burden on the Commission, requiring it to employ further staff and allocate further resources to identify and trace implicated persons. In many instances, the alleged perpetrators were no longer in the same employment as previously and their addresses were not easily available.

54 In addition, the Commission had to contend with perpetrators demanding to be heard at the same hearings as victims and requesting that they be allowed to cross-examine witnesses. This had a traumatising effect on many victims who had finally found the courage to testify.

Impact on the report

55 However, once the public hearings had been completed, the full impact of the judgement became clear. Where the Commission contemplated making a finding against a person to their detriment in the report, the person would need to be notified of the decision contemplated as well as afforded the opportunity to make written representations to the Commission.

56 This meant that the Commission had to trace the alleged perpetrator and furnish him or her with the contemplated decision together with the supporting documentation. In essence, the Commission found itself in a position in which it was obliged to give alleged perpetrators a prior view of its report - a highly unusual circumstance for a report on a commission of enquiry.

57 The Commission also received correspondence from lawyers seeking to prevent publication of their clients' names in the report.

58 Despite these concerns, the Commission complied with the ruling of the Appellate Division to the best of its ability.

Gideon Nieuwoudt v the Truth and Reconciliation Commission[9]

Background

59 Mr Gideon Nieuwoudt, a member of the Security Branch in the Eastern Cape brought an application requesting that the Commission be interdicted from allowing evidence which would affect and/or implicate him, until and unless he had been given proper, reasonable and timeous notice of any evidence presented and until he had been provided with copies of all relevant documentation.

The decision of the court

60 In delivering judgement, Judge Buchanan commented on the first ground for argument by the applicant, that is, the judgement of King (above):

> *With the greatest respect to the learned judge in that matter, I am not at all convinced that the provisions of the Act or of the Constitution necessarily require the form of prior notice and disclosure envisaged in the order granted in that matter and also sought in this application....*
> *It seems to me that Section 30(2) of the Act does not, on a proper construction thereof, require prior notice to any person who may be implicated during the course of a hearing by a witness, even should the Commission itself have prior notice of such implication. Section 30 (2), in my view, merely requires that if a person is so implicated such person shall be afforded a proper and appropriate opportunity to submit representations to the Commission to answer and deal with any such implications.*
>
> *Furthermore, it does not seem to me that the Constitutional right to procedurally fair administrative action entitles the Applicant to the relief sought in this application. It seems to me that it is inappropriate to equate the hearings of the Commission's Committee on Human Rights Violations with an administrative or quasi-judicial hearing. The Act envisages rather a procedure which is unique and which, in the national interest, is designed to investigate and establish as complete a picture as possible of the nature causes and extent of gross violations of human rights committed during the relevant period.*

61 Judge Buchanan went on to state that it would be undesirable, except where absolutely necessary, to place procedural obstacles before witnesses wishing to make full disclosure:

> *Whilst this may cause prejudice to a person who may be implicated is unfortunate... Such prejudice, however, should in my view, nevertheless be weighed against the laudable and important objects which the Act seeks to achieve. In addition, the prejudice which may be caused to persons should, at least to an extent, be offset by the opportunity for reply and answer entrenched in the Act itself.*

62 Commenting on the second ground relied upon by the Applicant (the written and unequivocal undertaking), Judge Buchanan noted that, in terms of section 30 (1), the Act provided for the Commission to establish a prescribed procedure. Although it appeared that the Commission had determined no specific procedure in respect of the Committee on Human Rights Violations, in this particular case the letter of the Commission dated 6 May 1996 indicated that the Commission had bound itself to a procedure in respect of the applicant.

The agreement

63 The matter was settled by agreement between the parties on 5 June 1996 on the basis that no evidence would be received or allowed to be presented during the Commission's hearing, until and unless:

a the respondent had been given proper, reasonable and timeous notice of its intention to hear evidence which might detrimentally implicate or prejudicially affect him, and

b the Commission had furnished the applicant with such facts and information necessary to enable him to identify the events, incidents and persons concerning which or whom it proposed to present or allow evidence that could detrimentally implicate him. In other words, such notice and facts as were sufficient and adequate to enable the applicant properly to exercise his rights in term of section 30 of the Act.

c in the event of any person testifying before the Commission, who had not furnished a statement affecting or implicating the applicant, the Commission would ascertain beforehand whether the person testifying would mention the applicant. If so, the witness's evidence would be postponed and stand over until the above provisions had been complied with; and

d where, in the course of testimony, a witness attempted to implicate the applicant, the Commission would immediately prevent the giving or receiving of such evidence and would take reasonable steps to prevent a recurrence of this - provided that such testimony could be admitted once the aforementioned provisions had been compiled with.

64 The agreement was made an order of the court.

Gideon Nieuwoudt v the Truth and Reconciliation Commission: second application

65 On 22 May 1996, the applicant brought contempt of court proceedings against the Commission in terms of the order obtained on 20 May 1996.10

66 Nieuwoudt alleged that, at the human rights violations hearing held in New Brighton on 21 May, the Commission had allowed evidence to be given by Mr Mlandile Quntu, who alleged that Nieuwoudt had harassed and intimidated him in 1984. He also alleged that, in giving evidence, a Mr Dennis Neer had mentioned Nieuwoudt's name and had implied that Nieuwoudt had threatened to kill him.

67 The matter was settled and the settlement was made an order of court.

Gideon Nieuwoudt v the Truth and Reconciliation Commission: third application

68 On 6 June 1996, Nieuwoudt brought a further application alleging contempt of court against the Commission, the chairperson of the Commission, Archbishop Desmond Tutu, the vice-chairperson Dr Alex Boraine, the Reverend Bongani Finca and three others11.

69 Nieuwoudt argued that, whilst witnesses were told not to mention his name, they were allowed to refer to him as "the man whose name they shouldn't mention" or "Mr X", making it clear to all that he was the person being referred to. He also stated that this received wide media coverage and constituted a violation of paragraphs 2(i-iii) of the order of 22 May 1996.

70 Nieuwoudt alleged that he had been given no notice of such evidence being led and that the Commission had failed to comply with its undertaking to prevent the giving of evidence which clearly affected, implicated and caused prejudice to him.

71 The following settlement was reached between the two parties and made an order of the court:

a Nieuwoudt would have the opportunity to submit representations or give evidence, either immediately or at a mutually convenient time.

b The Commission would take all reasonable steps in good faith to furnish Nieuwoudt with any witness statement in its possession which might implicate him in the violation of human rights prior to any such evidence being led, together with information about when and where such evidence was to be heard.

c The Commission undertook to pay Nieuwoudt's costs in respect of the application.

72 This agreement substituted the agreement of 22 May 1996.

Implications for the work of the Commission

73 Following the terms of the settlement, the Commission formally adopted procedures to comply with the provisions of section 30.

74 There were now two judgements that substantially supported each other: that of the Full Bench of the Cape High Court and that of Judge Buchanan. These were in conflict with the earlier decision of Judge King.

75 The Commission awaited the decision of the Appellate Decision in order to deal conclusively with the issues.

Postscript

76 It is important to note that Gideon Nieuwoudt (a member of the Port Elizabeth Security Branch between 1977 and 1989) applied for amnesty for the following: the kidnapping and killing of Siphiwe Mthimkulu and Topsy Madaka in April 1982; the kidnapping and death of the 'Pebco Three' in May 1985; the Motherwell incident in which four people were killed in December 1989; the assault on Peter Jones and Steve Biko in September 1977 and the assault on Mkhuseli Jack in August 1985.

þ **CHALLENGES TO THE IMPARTIALITY OF** THE COMMISSION

The National Party v Desmond Mpilo Tutu and Others

77 The case was brought by the National Party of South Africa against Desmond Mpilo Tutu, Alexander Lionel Boraine, the Truth and Reconciliation Commission, the President of the Republic of South Africa and the Minister of Justice.

Background

78 At a press conference on 15 May 1997, members of the Commission expressed certain views concerning the testimony presented to the Commission by former State President, Mr FW de Klerk on 14 May 1997.

79 Following the press conference, on 2 June 1997, attorneys acting on behalf of the NP wrote to the Commission alleging that the conduct of both the chairperson and the vice-chairperson of the Commission had contravened certain provisions of the Act, in particular sections 36(5)(a) and 36(6)(a). The letter demanded an unconditional apology and an undertaking that the said members of the Commission would comply with the provisions of the Act. It also threatened urgent legal action in the event of a failure to comply with these demands.

80 The gravamen of the relief sought by the NP amounted to a censure of the chairperson and the removal from office of the vice-chairperson of the Commission.

81 After an exchange of various letters and unsuccessful attempts on the part of the Commission to arrange a meeting with the NP to discuss and settle the matter, the NP launched an urgent application in the Cape Provincial Division of the High Court.

82 The matter eventually came before the court on 5 September 1997, when further inconclusive steps were taken to settle the matter. The matter was eventually postponed after the presiding judge urged the parties to take serious steps to settle. In view of the fact that the chairperson of the Commission was abroad at the time, it was decided that the matter should stand over pending his return, whereafter the parties would meet with a view to effecting a settlement.

Settlement

83 At a meeting on 19 September 1997, both the chairperson and vice-chairperson of the Commission issued personal apologies for criticising the evidence presented by Mr FW De Klerk on behalf of the NP.

84 It was further agreed that the issue of co-operation between the NP and the Commission would be pursued in further discussion between the parties.

85 Consequently, the NP withdrew its application and it was agreed that each party should pay its own legal costs.

þ CHALLENGES TO AMNESTY DECISIONS

Leonard Veenendal v Minister of Justice, the Truth and Reconciliation Commission and the Government of Namibia12 and DG Stopforth v Minister of Justice, the Truth and Reconciliation Commission and the Government of Namibia and Minister of Safety and Security[13]

86 The applicants were members of the organisation known as Orde Boere Volk and were both involved in attempts to disrupt the elections in Namibia. They committed various criminal acts in Namibia, including an attack upon an election office during which a security guard was killed. They afterwards fled to South Africa where they were arrested during September 1989 and were returned to Namibia. In December 1989, they managed to escape from custody and returned to South Africa where they were again arrested. The Namibian authorities applied for their extradition to face criminal charges in Namibia.

87 Both applicants applied for amnesty and launched high court applications in the Transvaal Provincial Division (citing the Commission as one of the respondents) to have the application for extradition suspended pending the outcome of their amnesty applications.

88 The Court found that the acts forming the subject matter of the applicants' amnesty applications did not fall within the ambit of acts associated with a political objective in terms of section 20 of the Act and that they would not, therefore, qualify for amnesty.

89 The applications were accordingly dismissed with costs.

Gerber v Amnesty Committee, Truth and Reconciliation Commission[14] and Van Wyk v Amnesty Committee, Truth and Reconciliation Commission[15]

90 Gerber and Van Wyk brought separate applications to the Transvaal Provincial Division to have the decisions of the Amnesty Committee refusing their applications for amnesty set aside, or alternatively referred back to the Amnesty Committee for reconsideration. The applications were based on the allegation that the Amnesty Committee discriminated against them. They claimed that their applications were identical to another application heard by the Committee where amnesty was granted.

91 The Commission argued that the applicants had failed to satisfy the criteria of the Act, particularly the requirement that the offences be associated with a political objective.

Background

92 Cornelius Johannes Van Wyk, one of four members of the Nasionale Sosialiste Partisane (NSP), faced twelve charges: for motor vehicle theft, three counts of murder, attempted robbery with aggravating circumstances, two charges of contravening the Weapons and Ammunition Act, housebreaking, two counts of robbery, housebreaking and illegal possession of weapons. He applied for amnesty in respect of the above charges on the basis that he committed them in pursuance of the political objectives of the NSP. He was refused amnesty on the 6 December 1996.

93 Gerber was employed by Fidelity Security Guards. He tortured, burnt and killed a co-worker whom he suspected of working for the Pan Africanist Congress.

94 The Court found that the Committee had approached the applications properly and that the decisions were not reviewable. The cases were dismissed with costs.

Truth and Reconciliation Commission v Coleman and 36 Others[16] and the National Party and Another v the Chairperson, Committee on Amnesty and Others[17]

95 On 28 November 1997, the Amnesty Committee considered and granted the amnesty applications by thirty seven members - in some instances high profile leaders - of the ANC. The applications were considered in chambers and granted without hearing any evidence. The Committee's order indicated that amnesty was granted "for all offences associated with a political objective as defined by the Act and which fall within the ambit of the Act, committed or authorised" by the applicants. The applications were largely identical. They were based on the fact that, as members of the leadership at the time, they assumed responsibility for all acts committed by members of the ANC in execution of the policy decisions of the organisation.

96 No specific acts or omissions were specified in the applications. In fact, the applicants indicated that they were not aware what acts had been committed by their followers and said that they had not themselves committed any specific acts.

97 On 13 January 1998, the Commission issued a public statement giving notice of its intention to have the decision of the Amnesty Committee reviewed.

98 Other political parties also indicated an interest in attacking the decision of the Amnesty Committee and, indeed, the NP launched an application a few days before the Commission had issued court papers. The result was that two separate applications were placed before the Court in respect of the same matter.

99 The Commission's application was launched on 13 March 1998, seeking an order declaring the decision of the Amnesty Committee void. Alternatively, it sought an order reviewing and setting aside the decision and directing the Amnesty Committee to consider the applications for amnesty afresh.

100 In his founding affidavit, the chairperson of the Commission noted that the amnesty decisions were invalid by virtue of at least four irregularities:

a The Amnesty Committee failed to grant amnesty in respect of identified acts, omissions or offences and failed to identify specific offences for which amnesty was granted.

b The Amnesty Committee failed to consider whether each offence for which amnesty was granted was a political offence as required by the Act.

c The Amnesty Committee did not satisfy itself that full disclosure had been made in respect of the acts for which amnesty was granted.

d The Amnesty Committee could not have satisfied itself that there was no need for a hearing, since it did not enquire whether these offences involved gross violations of human rights as specified by the Act.

101 The court granted the application by the Commission and set aside the amnesties. The matter was referred back to the Amnesty Committee for reconsideration.

þ REQUESTS FOR INFORMATION

The State v Dirk Johannes Coetzee and four others[18]

102 Dirk Johannes Coetzee issued a *subpoena* to the head of the Investigation Unit of the Commission, calling on him to produce the transcript of evidence given to the Commission by Joseph Tshepo Mamasela.

103 The Commission responded that it was not required to produce the information as the Act entitles the Commission to refuse disclosure (Section 29(5)); that it would not be in the public interest, and that it would defeat the object of the Act. It responded further that the videotape requested was not compellable in terms of section 179 of the Criminal Procedure Act 51 of 1977.

104 The accused argued that there was no absolute privilege and that large portions of the evidence had already been made public.

The decision of the court

105 The Court held that the accused was entitled to the evidence sought on the basis that:

a there was no absolute privilege;

b Coetzee had a right in common law to a fair trial, including the right to adduce and challenge evidence;

c the Commission had not established that Mamasela's evidence was so sensitive and important that it outweighed the rights of the accused to a fair and proper trial;

d no grounds had been set out as to why the court should restrict the information sought; and

e the video *subpoenaed* was issued in terms of the rule 54(5) of Uniform Rules of the Court and not the Criminal Procedure Act and was therefore compellable.

þ COMPLAINTS TO THE PUBLIC PROTECTOR

Inkatha Freedom Party (IFP)

106 On 9 October 1997, the Commission was notified by the Office of the Public Protector (the Public Protector) of a complaint received from Mr Baldwin Sipho Ngubane, national chairperson of the IFP, on behalf of his party. The complaint related to the treatment of the IFP at the hands of the Commission.

107 The complaint stated that, in conducting its affairs and functions, the Commission had acted in a biased manner against the IFP and thereby:

a violated the IFP's constitutional rights;

b impaired its dignity and prerogatives in terms of the constitutional system;

c acted in contravention of its own statutory objectives to promote national unity and reconciliation in a spirit of understanding which transcends the conflict and divisions of the past.

108 It claimed further that certain actions of the Commission had hindered rather than assisted in the achievement of its statutory objective to promote national unity and reconciliation. The IFP cited a number of specific incidents, decisions of the Amnesty Committee and examples of what it described as the Commission's partisan approach.

109 The Public Protector requested that the Commission respond to the IFP's complaints. The request was complied with.

Former SADF members

110 On 29 January 1998, the Public Protector received a complaint from Generals JJ Geldenhuys and Liebenberg based on a mandate received from 350 members of different ranks of the former South African Defence Force (SADF) during a symposium held on 30 August 1997 to the following effect :

> *The [Truth and Reconciliation Commission] and some of its members have displayed continuous prejudice, bias and lack of impartiality towards the former South African Defence Force and its members. This attitude and these actions by the [Truth and Reconciliation Commission] are also considered to be probably in violation of the constitutionally-guaranteed human rights of the SADF members concerned as described in chapter 2 sections 9 and 23 of Act 108 of 1996. The disregard which resultantly (sic) developed in the minds of members of the former SADF undermines the overall mission of the [Truth and Reconciliation Commission] to promote reconciliation and national unity.*

111 The symposium registered a number of specific complaints.

Further complaint by former SADF members

112 On 6 February 1998, the Commission received a document from Generals Malan, Viljoen, Geldenhuys and Liebenberg, Major General Marais and Warrant Officer Holliday. This contained an assessment of the treatment of the former SADF by the Commission with the view "to making constructive suggestions with the aim of promoting national reconciliation".

113 The document raised concerns reflected in the previous complaint and made a number of suggestions to the Commission.

þ MR PW BOTHA'S REFUSAL TO APPEAR BEFORE THE COMMISSION

114 On 5 December 1997, the Commission issued a section 29 notice to former State President Mr PW Botha, asking him to appear before the Commission to answer questions about the State Security Council. The notice was issued in terms of section 29 of the Act.

115 Mr Botha failed to appear and a criminal charge was brought. He was prosecuted at the magistrate's court in George on 1 - 5 June 1998, with Mr Victor Lugaju presiding.19 Amongst the witnesses for the state were Archbishop Tutu and other members of the Commission. Mr Eugene de Kock also gave evidence.

116 On 21 August 1998, Mr Botha was found guilty of failing to attend at the time and place specified in the *subpoena.* He was sentenced to a fine of R10 000 or twelve months imprisonment, and twelve months imprisonment suspended for five years.

þ DR WOUTER BASSON AND THE CHEMICAL AND BIOLOGICAL WARFARE PROGRAMME

Wouter Basson v the Truth and Reconciliation Commission: application to the Commission

Background

117 The Commission conducted a public hearing into the Chemical and Biological Warfare programme (CBW) of the former apartheid government (8 and 12 June 1998). A number of witnesses involved in the CBW programme were *subpoenaed* to testify, amongst them a Dr Philip Mijburgh and Dr Wouter Basson, the project leader.

Application

118 During the course of the hearing, an application was lodged by lawyers for the two witnesses, Drs Basson and Mijburgh, requesting that the taking of their evidence be held over, or alternatively that the proceedings be stayed pending the finalisation of their criminal trials.

119 At the time of the hearing, only Dr Wouter Basson had been formally charged for offences that ranged from murder and fraud to the manufacture of dependence-producing substances. The Attorney-General also indicated that the charge sheet was still provisional.

120 In the case of Dr Mijburgh, no charges had been preferred and there was only a possibility that he too, would be charged.

121 Their application was premised on a submission that compelling the witness to testify would amount, amongst other things, to a breach of the witnesses' right to remain silent as well as a right against self-incrimination as entrenched in section 35 of the South African Constitution. Both witnesses had been *subpoenaed* to appear and give evidence in terms of section 29 of the Act.

122 The application was opposed by the Commission's Legal Adviser, Mr Hanif Vally, who contended that:

- a the testimony of the two witnesses was critical as it concerned matters of grave importance to the nation which vitally affected the mandate and obligations of the Commission;
- b although the provision of section 35 of the South African Constitution applied to this matter, the obligation of the two witnesses to testify did not amount to a breach of their fundamental right to remain silent and their right against self-incrimination.

123 He submitted further that section 31(3) of the Act provided sufficient immunity and safeguards and stated that, if there was a breach of the witnesses' rights in terms of section 35, this was permissible given the

overriding social and other objectives pursued by the Commission and the discreet and narrowly tailored interference with the witnesses' right crafted by section 31(3).

Decision

124 The Commission, through Adv Potgieter SC, ruled that the proceedings would not be stayed; nor would the testimony of the witnesses be held over. The Commission ruled that the witnesses were compelled to testify.

125 In considering the matter, the Commission took the following facts into account:

a Any potential prejudice that the witnesses would suffer by disclosing elements of their case prior to the criminal trial was sufficiently accentuated by the provisions of section 31(3);

b The importance of the testimony of the witnesses for the Commission and issues relating to its mandate.

c The fact that the testimony of the witnesses would not be available to the Commission if they did not testify at this time, as there was uncertainty in regard to the finalisation of the prospective criminal trial. In view of the termination of the Commission's mandate to conduct hearings from 31 July 1998, it would be precluded from establishing the fullest possible picture of the CBW programme in accordance with its mandate.

Application to the Cape High Court by Dr Wouter Basson[20]

126 On the 25 June 1998, Dr Wouter Basson launched an application in the Cape High Court reviewing the decision of the Commission of 12 June 1998 and requesting that the High Court set it aside.

Basis

127 Dr Wouter Basson contended that he would be prejudiced in his pending criminal case should he be compelled to testify before the Commission before his criminal matter was dealt with. He also contended that he had a right, amongst other things, to enforce his right to remain silent and his right against self-incrimination in terms of section 35 of the South African Constitution.

128 Dr Basson also claimed that the Commission's ruling of 12 June 1998 was a violation of his rights in terms of section 35 of the Constitution and in direct conflict with the South African Constitution.

Counter application by the Commission

129 The Commission opposed Dr Basson's application and filed a counter application, asking that the matters in the two applications be urgently dealt with.

130 The Commission sought a further order compelling Dr Basson to appear before the Commission's Human Rights Violations Committee on Wednesday, 29 July 1998, and to answer all questions lawfully put to him.

131 Dr Basson's application had been set down by way of normal motion court rules. If the Commission had not asked that the matter be dealt with as a matter of urgency, it would have been heard after the date of expiry of the Commission's Human Rights Violations Committee, the Committee competent to hear the evidence.

132 The Commission sought a further order that the filing of an application for leave to appeal by Dr Basson in respect of any of the prayers in the Commission's Notice of Motion should not suspend the operation or execution of the court's order.

Order

133 On the 25 July 1998, Judge Hlope of the Cape High Court dismissed Dr Basson's application with costs and granted the Commission's counter application. Judge Hlope ordered Dr Basson to appear before the Human Rights Violations Committee on 29 July 1998 and to answer all questions lawfully put to him.