COMMISSIONS OF INQUIRY AND THE RULES OF EVIDENCE

1 Introduction

A commission of inquiry appointed by the president in terms of section 84(2)(f) of the Constitution is entitled, the courts have pointed out on various occasions, to adopt its own procedures, including those related to the receipt of evidence, unless the Commissions Act 8 of 1947 or the president has provided otherwise that is (see *S v Naude* 1975 1 SA 681 (A); and *Nklaweni v Chairman, White Commission* [1998] 2 All SA 225 (E)).

A commission's discretion to determine its own procedure is not, however, an unfettered one. This is because, as an organ of state engaged in administrative action, a commission is bound by the provisions of the Promotion of Administrative Justice Act 3 of 2000 and in particular the duty to act fairly (see Freedman "Commissions" in *LAWSA Vol 2 Part 2* 2ed (2003) par 169).

The duty to act fairly does not mean, however, that a commission is bound by the rules of evidence applicable to a court of law. This is because the rules of evidence applicable to a court of law are not determinative of the duty to act fairly. The duty to act fairly is an inherently flexible concept and always depends on the circumstances (see Hoexter *The New Constitutional and Administrative Law Vol 2: Administrative Law* (2002) 196).

A commission is furthermore not a court of law. There are no issues for it to try; there is neither plaintiff nor defendant. Counsel leading evidence for the commission does not perform the functions of a prosecutor and there is no accused. There are no individual parties entitled to a hearing and a verdict on the evidence (*Bell v Van Rensburg* 1971 3 SA 693 (C); and *S v Sparks* 1980 3 SA 952 (T)).

Given that it may determine its own procedures, a commission is, the South African courts have pointed out further, responsible for collecting its own evidence. In this respect it may consider information of any nature, including hearsay evidence, newspaper reports, and submissions or representations that are nothing more than opinions (see *Bell v Van Rensburg supra*; *S v Mulder* 1980 1 SA 113 (T); *S v Sparks supra*; and *Bongoza v Minister of Correctional Services* 2002 6 SA 330 (Tk)).

Unfortunately, these principles appear to have been overlooked by the

Bloemfontein High Court in *Munusamy v Hefer NO* (2004 5 BCLR 508 (O)). In this case the court relied, unnecessarily, on the provisions of the Criminal Procedure Act 51 of 1977 to determine whether a summons should be set aside on the grounds that the applicant's evidence was inadmissible and irrelevant.

2 The facts

The facts of this case were as follows. The applicant, a journalist, provided the City Press newspaper with information alleging that the National Director of Public Prosecutions, Mr Bulelani Ngcuka, had been a spy for the apartheid government. After these allegations were published by the newspaper, the president appointed a commission of inquiry to determine whether the published allegations were in fact true. When he appointed the commission, the president also made the provisions of the Commissions Act applicable to it.

After the commission was established, the applicant was summoned to give evidence. When she appeared before the commission, however, the applicant applied for an order either excusing her from testifying at all or excusing her from testifying until all of the other evidence had been gathered. The first respondent, who had been appointed as the chairperson of the commission, dismissed the application on the grounds that, while the applicant was entitled to object to questions which she found objectionable, she was not entitled to a blanket exemption.

The applicant then applied to the High Court for an order reviewing and setting aside, *inter alia*, the first respondent's decision to summon the applicant as a witness. In this respect the applicant argued that the first respondent's decision should be set aside on the grounds that a commission's power to summon a witness in terms of section 3(1) of the Commissions Act is similar to a court's power to subpoena a witness in terms of s 186 of the Criminal Procedure Act (514H).

A court's power to subpoena a witness in terms of section 186, the applicant argued further, is, however, limited to those witnesses whose evidence is either admissible or relevant (514I). Her evidence as to whether Mr Ngcuka was in fact an apartheid spy, the applicant then submitted, was inadmissible because it was based on information she had been given by informants and would therefore be hearsay (514A). In addition, her evidence as to whether Mr Ngcuka was in fact an apartheid spy, the applicant submitted further, was also irrelevant because it was based on rumours (514B).

3 The judgment

The court (per Malherbe JP, Lombard J concurring) rejected the applicant's submissions and found that she was a witness who could give admissible and

relevant evidence (514H). In arriving at this conclusion, the court made the following points. First, that the applicant was in possession of, or had seen, important documents relating to the commission's terms of reference. Many important questions could be put to the applicant regarding those documents which would not require her to divulge the identity of her source of information. In addition, it was not clear whether these documents could be obtained from any other party (514F). Second, that the applicant had already revealed the identity of three of her sources of information, namely Mr Maharaj, Mr Shaik and Mr Edwards. She could therefore be questioned about her interviews with them and her answers would not amount to hearsay in view of the fact that Mr Maharaj and Mr Shaik had also been called to testify. In addition, the degree to which these sources either confirmed or contradicted the applicant's version of her interviews with them could also be very helpful to the commission in making findings of fact (514G).

4 Comment

While the court's decision that the applicant was a witness who could give admissible and relevant evidence appears to be correct, the court's decision, unfortunately, may also give rise to the impression that a commission is bound by the rules of evidence applicable to a court of law. This is not correct, as the authorities set out in the introductory paragraph of this note have repeatedly held.

The fact that a commission is not bound by the rules of evidence applicable to a court of law, and in particular by the rules of evidence relating to admissibility and relevance, has recently been emphasized by the Privy Council. In *Mount Murray Country Club Ltd v Macleod* ([2003] UKPC 53) the Privy Council held that insofar as questions of admissibility and relevance are concerned, a commission is bound simply by the requirement that its decisions must be reasonable.

In this case a commission of inquiry was appointed by the Lieutenant-Governor of the Isle of Man to investigate and report on the manner in which the government of the Isle of Man had dealt with irregularities allegedly committed by the appellant during the construction of a tourist resort known as Mount Murray. After the commission was established and had begun its investigations, the appellant applied for an order prohibiting the commission, *inter alia*, from using documents supplied to it by the revenue authorities concerning the appellant's tax affairs. The appellant based its application on a number of grounds, one of which was that the documents in question were irrelevant to the inquiry which the commission was conducting.

The Privy Council (per Walker LJ; Bingham, Hoffman, Rodger LLJ and Tipping J concurring) dismissed the appellant's argument on the grounds

that it had received various tax incentives from the government, all of which fell within the commission's wide terms of reference.

In arriving at this decision, Walker LJ referred with approval to the judgment of the Federal Court of Australia in *Ross v Costigan* ((1982) 41 ALR 319 (FCA)). In this case Ellicott J pointed out that a commission should be left largely to determine for itself which facts are relevant and which are not:

> "In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the commission or counsel assisting, may nevertheless fail to do so. But if the commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference by doing so. This flows from the very nature of the inquiry being undertaken" (334).

This does not mean, however, Ellicott J explained, that a commission has an entirely free hand to determine which facts are relevant and which are not. If a commission goes off on a "frolic of its own", Ellicott J explained further, the courts should not hesitate to intervene:

> "This does not mean, of course, that a commission can go off on a frolic of its own. However, I think a court if it has the power to do so, should be very slow to restrain a commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the commission is going off on a frolic of its own. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the commission is required to investigate under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the Inquiry" (335).

These principles, and in particular the requirements that a commission may not go off on a frolic of its own, Walker LJ then pointed out (relying on the decision in *Douglas v Pindling* [1996] AC 890 (PC)), mean that insofar as questions of admissibility and relevance are concerned, a commission is bound by the requirement that its decisions must be reasonable. In other words, that the decision of a commission should not be set aside unless it is one which no reasonable commission could possibly arrive at (see *Douglas v Pindling supra* 904).

There is no reason to suppose that these principles are not equally applicable to a commission appointed by the President in South Africa.

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