FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 024/2004

PARTIES : MARY PATRICIA KING & 92 OTHERS
COLLEEN JUDITH VAN STRAATEN & 6 OTHERS
NAMCOAST (PTY) LTD
C M TAPSON & 2 OTHERS
PLAINTIFFS

and

THE ATTORNEYS FIDELITY FUND BOARD OF CONTROL
THE MINISTER OF JUSTICE
DEFENDANTS

REFERENCE NUMBERS -

- Registrar: 878/2002
  1376/2002
  1377/2002
  1523/2002

DATE HEARD: 2 August 2004

DATE DELIVERED: 2 September 2004

JUDGE(S): CHETTY J

LEGAL REPRESENTATIVES:

Appearances:

- for the Plaintiffs: PJ de Bruyn SC / MJ Lowe SC
  for the 1st Defendant: JJ Gauntlett SC / RG Buchanan SC / O Ronaasen, N Gqamana
  for the 2nd Defendant: RG Buchanan / O Ronaasen / N Gqamana

Instructing Attorneys:

- Plaintiffs: Wheeldon Rushmere & Cole
- For the 1st Defendant: Burman Katz c/o Neville Borman & Botha
  For the 2nd Defendant: State Attorneys, PE

CASE INFORMATION -

- Nature of proceedings: Trial
- Keywords: Stated case - determination in terms of Rule 33(6) of the Uniform Rules of Court - Constitutionality of ss 47(1)(g), (4), (5) and 47A of the Attorneys Act 53 of 1979

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

In the matter between:	Date Delivered:
MARY PATRICIA KING & 92 OTHERS	Case No: 878/2002
COLLEEN JUDITH VAN STRAATEN & 6 OTHERS	Case No: 1376/2002
NAMCOAST (PTY) LTD	Case No: 1377/2002
C M TAPSON & 2 OTHERS	Case No: 1523/2002
	(The Plaintiffs)

and

THE ATTORNEYS FIDELITY FUND BOARD OF CONTROL	First Defendant
THE MINISTER OF JUSTICE	Second Defendant

Summary Stated case - determination in terms of Rule 33(6) Uniform Rules of Court - Constitutionality of ss 47(1)(g), (4), (5) and 47A of the Attorneys Act 53 of 1979.

JUDGMENT

CHETTY, J

[1] These four actions against the first defendant were consolidated for the purposes of trial. The parties proposed that the issue of the liability of the first defendant be determined as a separate issue in terms of Rule 33(4) and that the determination be made in terms of Rule 33(6) on the basis of a stated case. This was an eminently sensible proposition to which I agreed and so ordered. The issue raised concerns the constitutionality of sections 47(1)(g), (4), (5) and 47A of the **Attorneys Act, 53 of 1979** (the Act) which were introduced into the Act by ss 1 and 2 of the **Attorneys and Matters Relating to Rules of Court Amendment Act 115 of 1998** (the Amendment). The constitutional imploration for invalidity is premised on the allegation that Parliament failed, in relation to the passage of the amendment, to facilitate public participation and/or involvement in its processes as it was enjoined to do by s 59(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). Hence the joinder of the second defendant.

[2] The background facts, as they emerge from the pleadings (identical in each of the 4 actions), amount to the following: The

plaintiffs deposited substantial sums of money into the Trust account of Van Schalkwyk Attorneys, a firm of attorneys practicing in Port Elizabeth, "to be held in Trust on their behalf until utilised in a factoring scheme being *inter alia* described as 'factoring of claims in general which includes amongst others the discounting of bank guarantees pertaining to commissions earned by estate agents and nett proceeds on sales by sellers of properties' (the factoring scheme)". The money so deposited was, according to the pleadings, "to be utilised solely in the factoring scheme, and were only to be disbursed by **VAN SCHALKWYK ATTORNEYS** against production to them of specifically relevant documents and bank guarantees in respect of each and every transaction sufficient to satisfy **VAN SCHALKWYK ATTORNEYS** (acting as an expert attorney in conveyancing) that the monies were properly to be disbursed into the factoring scheme such as to be utilised solely in that scheme in a *bona fide* manner for the purpose set out in paragraph 63 above, to be recovered thereafter by **VAN SCHALKWYK ATTORNEYS** and returned to the Plaintiffs with a stipulated amount of interest". (Particulars of claim - case no 878/2002 para 97.2, 98).

[3] The plaintiffs in each of the actions then allege that Van Schalkwyk Attorneys misappropriated the monies so deposited and

that accordingly the first defendant was liable to compensate the plaintiffs by virtue of the provisions of s 26 of the Act, which provides: -

> **"26 Purpose of fund -**
>
> Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of -
>
> (a) theft committed by a practising practitioner, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity; and
>
> (b) theft of money or other property entrusted to an employee referred to in paragraph (cA) of the definition of "estate agent" in section 1 of the Estate Agents Act, 1976 (Act 112 of 1976), or an attorney or candidate attorney referred to in paragraph (d) of

> the said definition, and which has been committed by any such person under the circumstances contemplated in those paragraphs, respectively, and in the course of the performance -
>
> (i) in the case of such an employee, of an act contemplated in the said paragraph (cA); and
>
> (ii) in the case of such an attorney or candidate attorney, of an act contemplated, subject to the proviso thereof, in the said paragraph (d)."

[4] In its defence the first defendant denied that the payments were entrusted to Van Schalkwyk Attorneys or effected in the course of its practice and pleaded, *inter alia*, that the instruction to Van Schalkwyk was to invest the money as envisaged by s 47(1)(g) read with sections 47(4) and 47A of the Act and that consequently the first defendant was exempted from liability. As adumbrated herein before, the constitutionality of these sections is the issue which arises for determination.

[5] S 47(1)(g), (4), (5) and 47A had its genesis in a Bill, the preamble of which, *inter alia* reads:

> "To amend the Attorneys Act, 1979, so as to limit liability of the Attorneys Fidelity Fund; to insert transitional provisions relating to liability of the Attorneys Fidelity Fund for investments."

[6] The amendment's history, as agreed to by the parties and incorporated in the stated case is the following:-

[6.1] It was introduced in the National Assembly by the Minister of Justice on 30 January 1998 in the form of a Bill the relevant portions of which read:-

> "1. Section 47 of the Attorneys Act, 1979 (hereinafter referred to as the principal Act), is hereby amended-
>
> (a) by the addition to subsection (1) of the following paragraph:
>
> "(g) by any person as a result of theft of money which a practitioner has been instructed to invest on

behalf of such person after the date of commencement of this paragraph.”; and

(b) by the addition after subsection (3) of the following subsections:

“(4) Subject to subsection (5), a practitioner must be regarded as having been instructed to invest money for the purposes of subsection (1)(g), where a person -

(a) who entrusts money to the practitioner; or

(b) for whom the practitioner holds money,

instructs the practitioner to invest all or some of that money in a specified investment or in an investment of the practitioner’s choice.

(5) For the purpose of subsection (1)(g), a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person-

(a) to pay the money into an account contemplated in section 78(2A) if such payment is for the purpose of investing such money in such account on a temporary or interim basis only pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which investment the practitioner exercises

exclusive control as trustee, agent or stakeholder or in any fiduciary capacity;

(b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender -

(i) specifies the borrower to whom the money is to be lent;

(ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and

(iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement; or

(c) to utilise money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph (b).

(6) Subsection (1)(g) does not apply to money which a practitioner is authorised to invest where the practitioner acts in his or her capacity as executor, trustee or curator or in any similar capacity in so far as such investment is governed by any other law.

Insertion of section 47A in Act 53 of 1979

2. The following section is hereby inserted after section 47 of the

principal Act:

"Transitional provisions relating to liability of fund for investments

47A. (1) The fund is not liable for loss of money caused by theft committed by a practitioner, candidate attorney, employee or agent of a practitioner where the money is invested or should have been invested on instructions given before the date contemplated in section 47(1)(g) and where -

(a) the money is to be repaid, at any time after that date, to the beneficiary specified in any agreement whether with the borrower or practitioner;

(b) the theft is committed any time after the expiration of 90 days after the investment matures or after the expiration of 90 days after the date contemplated in section 47(1)(g);

(c) repayment is subject to the lender making a demand or is subject to the occurrence of an impossible or uncertain event; or

(d) the repayment date is not fixed."

[6.2] It was accompanied by a memorandum on the objects of the Bill, a clause by clause analysis of the Bill and a list of bodies consulted. Its reproduction in this judgment is unavoidable. It reads:-

"MEMORANDUM ON THE OBJECTS OF THE ATTORNEYS AMENDMENT BILL, 1998

PART 1

OBJECTS AND EXPLANATION

1.1 Section 26 of the Attorneys Act, 1979 (Act 53 of 1979) (hereinafter referred to as the Act), provides that the Attorneys Fidelity Fund (hereinafter referred to as the Fund) must be applied for the purposes of reimbursing persons who may suffer pecuniary loss as a result of, *inter alia*, theft committed, by a practicing practitioner, of money or other property entrusted to the practitioner by or on behalf of such persons.

1.2 The Board of Control of the Fund points out that attorneys administer substantial sums of money entrusted to them for investment purposes which, in itself, creates an opportunity for theft. In terms of the present provisions of the Act, the Fund is exposed to the risk of considerable loss. The Board of Control holds the opinion that if the Fund has to cover the theft of moneys entrusted to attorneys for investment purposes, the possibility exists that it would not be able to meet its primary

obligation of protecting members of the public against loss of moneys entrusted to attorneys in the ordinary course of their practice.

1.3 The former TBVC states, after having obtained legislative powers, enacted their own laws in certain instances. The former Bophuthatswana and Venda enacted their own laws regulating the attorneys' profession in their areas. Although these laws, as is the case with the South African Attorneys Act, 1979, provide for the establishment of an Attorneys Fidelity Fund and matters related thereto, no such Funds exist in the above areas at present. The result is that members of the public in the said areas are not protected. In order to overcome this problem it has been decided, as an interim measure until the rationalisation of the attorneys' profession has been finalised, to extend the fidelity fund cover offered by the Attorneys Fidelity Fund, established in terms of the South African Attorneys Act, 1979, to those areas.

1.4 In view of the above the Board of Control requested the Department of Justice to amend the Act.

PART 2

CLAUSE BY CLAUSE ANALYSIS

Clauses 1 and 2

2.1 Clauses 1 and 2 seek to amend section 47 so as to provide that

money received by an attorney for investment on behalf of his or her client are, in the case of theft, not covered by the Fund. They also provide for transitional matters that relate to the liability of the Fund for investments.

Clause 3

2.2 Clause 3 seeks to amend section 5 so as to provide for the application of Chapter II in respect of practitioners in the areas of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei.

Clause 4

2.3 Clause 4 seeks to empower the Law Society of the Transvaal to exercise certain powers in respect of practitioners in the areas of the former Republics of Bophuthatswana and Venda.

Clause 5

2.4 Clause 5 provides for savings and repeals.

Clause 6

2.5 Clause 6 states the short title and date of commencement.

PART 3

OTHER BODIES CONSULTED

The Department consulted the following bodies:

- The Attorneys Fidelity Fund
- The Association of Law Societies of the RSA
- National Association of Democratic Lawyers
- Black Lawyers Association
- Law Society of Bophuthatswana
- Transvaal Law Society
- Law Society of Venda
- Regional representatives of the Department of Justice (Mmbatho and Thohoyandou)

PART 4

PARLIAMENTARY PROCEDURE

In the opinion of the Department and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution since it does not contain any provision to which procedure established by section 74 or 76 applies."

[6.3] The matter was referred to the Portfolio Committee on Justice: National Assembly. At the time of the introduction of the Bill, parliament was not in session and accordingly the provisions of

standing rule 148 applied. On 26 February 1998, with a deadline of 27 March 1998, Mr J de Lange MP (the Chairperson of the Portfolio Committee on Justice) issued a press statement headed: "Theft of Client Funds for Investment by Attorneys will no longer be covered by the Attorneys Fidelity Fund, New Bill Proposes." It reads:

> "The **Attorneys Amendment Bill**, which has been tabled in Parliament, makes provision that money received by an attorney for investment on behalf of a client will, in the case of theft, not be covered by the Attorneys Fidelity Fund.
>
> The proposed amendment has been drafted after the Fund's Board of Control pointed out that it was exposed to considerable risk because attorneys administered substantial sums of money for investment purposes. The board feels that if it is exposed to cover the theft of money entrusted to attorneys for investment purposes, the possibility existed that it would not be able to meet its primary obligation of protecting members of the public against loss of moneys entrusted to attorneys in the ordinary course of their practice.

As an interim measure, the bill also proposes to extend its cover to people resident in the former Bophuthatswana and Venda homelands because no fidelity fund exists in those areas at present.

> Any person or any organisation who would like to make written representations on the Attorneys Amendment Bill (B7-98) should do so by not later than 27 March 1998. Anyone who would like to give oral evidence to the committee in regard to their written representations should also notify the committee by not later than 27 March 1998.
>
> Although it is permissible to make general comments on the Bill, representations about specific proposed amendments to the Bill are preferred.

The Portfolio Committee on Justice requests all people and institutions who want to make written representations to make 40 copies, if this is possible.

It should be pointed out that the Portfolio Committee

reserves the right to decide:

- whether or not to hold public hearings on the bill;
- whether to give people or representatives of organisations the opportunity to appear before it; and
- the date, time and venue of any hearings.

All correspondence in this regard should be addressed to The Secretary to Parliament, PO Box 15, Cape Town, 8000, marked for the attention of Mr Ben Kali (Fax: 021-462 2141). Copies of the bill may also be obtained from Mr Kali."

[6.4] The Portfolio Committee on Justice held public hearings on the Attorneys Amendment Bill on 20 April 1998 under the chairmanship of Mr De Lange. It was addressed by Ms N J Mayedwa of the Law Society of Bophuthatswana, Mr Landman and Mr J W Moorehouse of the Attorneys Fidelity Fund, and on 4 May 1998 by Mr Arno Botha and Mr Chris du Plessis, both of the Law Society of South Africa. No other persons asked to address or addressed the Portfolio Committee.

[6.5] Prior notice of the abovementioned public hearings was published in the Order Papers of Parliament. The Order papers of Parliament are displayed on the Parliamentary notice board, in the form of Annexures **"G"** and **"H"** to the stated case.

[6.6] Various submissions were received by the Portfolio Committee. Four drafts relevant to the amendments were produced and the Bill introduced in the National Assembly on 30 July 1998 at the second reading debate. After a brief sojourn to the National Council of Provinces, the Bill (as amended) was finally assented to on 6 November 1998 in the form of the Amendment. It reads:

> "1. Section 47 of the Attorneys Act, 1979 (hereinafter referred to as the principal Act), is hereby amended-
>
> (a) by the addition to subsection (1) of the following paragraph:
>
> "(g) by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person after the date of commencement of this paragraph."; and
>
> (b) by the addition after subsection (3) of the following subsections:

"(4) Subject to subsection (5), a practitioner must be regarded as having been instructed to invest money for the purposes of subsection (1)(g), where a person-

(a) who entrusts money to the practitioner; or

(b) for whom the practitioner holds money,

instructs the practitioner to invest all or some of that money in a specified investment or in an investment of the practitioner's choice.

(5) For the purpose of subsection (1)(g), a practitioner must be regarded as not having been instructed to invest money if he or she is instructed by a person-

(a) to pay the money into an account contemplated in section 78(2A) if such payment is for the purpose of investing such money in such account on a temporary or interim basis only pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and over which

investment the practitioner exercises exclusive control as trustee, agent or stakeholder or in any fiduciary capacity;

(b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender-

(i) specifies the borrower to whom the money is to be lent;

(ii) has not been introduced to the borrower by the practitioner for the purpose of making that loan; and

(iii) is advised by the practitioner in respect of the terms and conditions of the loan agreement; or

(c) to utilise money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph (b).

(6) Subsection (1)(g) does not apply to money which a practitioner is authorised to invest where the

practitioner acts in his or her capacity as executor, trustee or curator or in any similar capacity…"

2. The following section is hereby inserted after section 47 of the principal Act:

"Transitional provisions relating to liability of fund for investments

47A. (1) The fund is not liable for loss of money caused by theft committed by a practitioner, candidate attorney, employee or agent of a practitioner where the money is invested or should have been invested on instructions given before the date contemplated in section 47(1)(g) and where -

(a) the money is to be repaid, at any time after that date, to the beneficiary specified in any agreement whether with the borrower or practitioner;

(b) the theft is committed at any time after the expiration of 90 days after the investment matures or after the expiration of 90 days after the date contemplated in section 47(1)(g);

(c) repayment is subject to the lender making a demand or is subject to the occurrence of an impossible or uncertain event; or

(d) the repayment date is not fixed."

[6.7] Prior to the Bill being assented to, various versions were disseminated on
the Government website.

[7] It will be gleaned from the aforegoing that the effect of the amendment was to preclude persons from claiming compensation when the loss caused through the attorney's theft does not occur in the normal course of an attorney's practice but pursuant to an instruction (as contemplated by s 47(1)(g) read with s 47(4) and 47A of the Act as amended) to invest the funds. This invocation elicited the basis of the plaintiffs' clamour for constitutional invalidity encapsulated in the replication, as follows: -

"The Plaintiffs replicate as follows to the Defendants' Plea dated 28 October 2003.

1. **Ad Paragraphs 9.4.2, 11.3, 17.2 and 17.3 thereof:**

1.1 Plaintiffs plead that Section 47(1)(g), (4) and (5) and 47A, of the Attorneys Act 53 of 1979 (having been inserted therein by the provisions of Sections 1 and 2 of Act 115 of 1998), are invalid, unenforceable, in that:

1.1.1 The public, and in particular persons affected by the said sections, including the Plaintiffs, were not involved in the legislative process, including preparation, passing and enactment of the said sections, as is required by Sections 57(1)(b) and 59(1)(a) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), as also the National Assembly Rules and the Joint Rules of Parliament, inasmuch as:

1.1.1.1 The provisions of the Attorneys Amendment Bill, relating to the amendment of Sections 47 and the insertion of s 47A of Act 53 of 1979, was preceded by a consultation with only the following:

1.1.1.1.1 The Attorneys Fidelity Fund;

1.1.1.1.2 The Association of Law Societies of the Republic of South Africa;

1.1.1.1.3 The National Association of Democratic Lawyers;

1.1.1.1.4 The Black Lawyers Association;

1.1.1.1.5 The Law Society of Bophuthatswana;

1.1.1.1.6. The Transvaal Law Society;

1.1.1.1.7 The Law Society of Venda;

1.1.1.1.8 The Regional Representatives of the Department of Justice (Mmabatho and Thohoyandou);

1.1.1.2 There was no involvement with the public, or in particular people affected by the said sections, either by way of consultative process, notice or otherwise;

1.1.1.3 The legislative process, being the preparation, passing and enactment of Section 115 of 1998, and the proceedings of the Attorneys Amendment Bill relevant to

the amendment of Section 47 and the insertion of s 47A of Act 53 of 1979 did not occur with any public involvement, apart from the consultations already referred to above;

1.1.1.4 Submissions were only made by and received from the Attorneys Fidelity Fund, the Bophuthatswana Law Society, the Law Society of South Africa and the Transvaal Law Society.

1.2 In the premises, it is alleged that the public and people affected by the said sections, were not given prior notice of the said intended amendments, nor were they invited to make representations or comment thereupon as is required by the Sections of Act 108 of 1996, and the Rules of the National Assembly;

1.3 The correct parliamentary procedures were not followed in preparing, passing and enacting the said amendments as required by Chapter 4 of the Constitution and the said rules referred to herein above;

1.4 The public and the Plaintiffs referred to above, were not given a hearing alternatively were not given a proper hearing, or consulted in regard to the said amendments.

1,5 In the premises, it is not open to the Defendant, to rely upon the provisions of Section 47(1)(g), (4) as read with (5) or Section 47A of Act 53 of 1979.

1.6 Plaintiffs join issue with the Defendants in respect of the other allegations contained in the Plea."

The Case for Constitutional Invalidity

[8] At the hearing, Mr. De Bruin, who, together with Mr. Lowe appeared on behalf of the plaintiffs, submitted that at the outset the steps taken by the legislature (set out in para 6.1 - 6.7 above) should be evaluated in order to determine whether they individually or collectively constitute compliance with the constitutional injunction "to facilitate public involvement" (s 59). The interpretation of the section is central to the question raised. The invitation so kindly extended by Mr. De Bruin must be declined. Not only is it self serving but the wrong approach.

[9] Mr. Gauntlett correctly submitted that the inquiry must perforce commence with s 59 in order to ascertain its meaning. Before embarking on that exercise however the proper approach to constitutional interpretation needs to be stated in the light of the plaintiffs' s contention that the section be extensively interpreted. A distinction must be drawn between interpreting a provision in the Bill of Rights and a provision elsewhere in the Constitution. In the first place the Constitution has what amounts to three rules of interpretation (section 39 (1)(a), (b) and (c)) which apply only to the Bill of Rights. In the second place, the authorities (notably the judgment in **S v Makwanyane and Another** *1995 (3) SA 391 (CC) at para [9] and [10]*; **S v Zuma and Others** *1995 (2) SA 642 (CC) at para [15]*; **Soobramoney v Minister of Health, KZN** *1998 (1) SA 765 (CC) at para [16]*) requiring a purposive (or value-orientated or teleological) interpretation as regards the Constitution have been delivered with specific reference to the Bill of Rights.

[10] The question whether this mode of interpretation applies beyond the Bill of Rights to other provisions of the Constitution was deliberately not decided in **S v Makwanyane** (*supra*). However even

assuming in favour of the plaintiffs that the suggested interpretive mode be applied, the starting point must, as pointed to earlier, be the text itself. As Kentridge A.J. pointedly emphasized in **S v Zuma** (*supra*) para [17],

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean."

[11] Section 59(1)(a) reads:

> "**(1) The National Assembly must -**
>
> **(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and**
>
> **(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public,**

but reasonable measures may be taken -

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."

[12] The key word in the provision is "**facilitate**". This must immediately be contrasted with the direct requirement in s 59(1)(b) that it must "conduct" its business in the prescribed manner. In its ordinary meaning, "facilitate" means to "make easy or easier; promote, help forward (an action, result etc). **The New Shorter Oxford English Dictionary** (1993 ed.) Vol. 1 p 903. In the wider context of the Constitution, there is, in my judgment, no justification

for departing from its plain and ordinary meaning. The argument that the inclusion of the words "public involvement" in s 59 recognises the dichotomy between Parliament and the people is misconceived. S 42(3) states in unequivocal terms that: -

> " The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action."

As Mr. Gauntlett trenchantly remarked, Parliament is the people and a provision such as s 59(1)(b) must be seen in that light for in truth, in our constitutional scheme, there is the closest connection between the public and Parliament.

[13] It must be emphasized that the crux of the argument and the thrust of the plaintiffs' case is not the absence of public involvement but the insufficiency thereof.

[14] In my judgment the steps outlined in paragraphs 6.1 - 6.7

constituted due compliance with the constitutional obligation imposed by s 59(1)(a). The fact that only a relatively small percentage of the South African populace (17 %) would have been aware of the proposed amendment does not assist the plaintiffs. Even assuming in favour of the plaintiffs that only the agreed percentage of the population would have been privy to the proposed amendment, it is not supportive of the contention that insufficient opportunity was afforded the general populace. Implicit in the notion of a free press is the freedom enjoyed by the media to accord government press releases the degree of prominence which it considers appropriate. The fact that the vast majority of the newspapers did not publish details of the proposed Bill and, a fortiori, the majority of the population may have remained ignorant of its ramifications cannot mean that the opportunity for making representations was compromised. In fact had the new National Assembly rules (which provides merely for the intended Bill to be published in the Gazette-National Assembly-Rule 241(1)(b)), there would have been no basis, as Mr. De Bruin readily conceded, for arguing constitutional invalidity.

[15] It must be borne in mind that it is not the function of the courts to prescribe to Parliament the procedure it must follow in relation to the passage of Bills. In this regard it must be emphasized that the

attack on the validity of and/or non-compliance with the parliamentary rules foreshadowed in the replication was expressly abandoned at the inception of the argument by Mr. De Bruyn. The argument was confined to the alleged insufficient opportunity to make representations. The Constitutional Court has recognised that "[h]aving regard to the importance of the legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interest of justice for a Court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation". See **President of the Republic of South Africa v UDM and Others** *2003 (1) SA 472 (CC) para [31].*

[16] In my judgment there has been due compliance with s 59(1)(a) of the Constitution. The stated case must be therefore be answered in favour of the defendants.

Costs

[17] In non-constitutional litigation, costs, though in the discretion of

the trial court, generally follow the result in the sense that the successful litigant is usually awarded his /her costs. Although the Constitutional Court recognised that in constitutional litigation, the principles which have been developed over the years in relation to an award for costs may, if the need arises, have to be substantially adapted, (**Ferreira v Levin NO and Others** *1996 (2) SA 621 (CC))*, Ackermann J, writing for the Full Court in **Motsepe v Commissioner for Inland Revenue** *1997(2) SA 898 (CC)* emphasized that the principle was not immutable and that [para 30] :-

> "This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this Court, no matter how spurious the grounds for doing so may be or how remote the possibility that this Court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks."

[18] It is important to note that the plaintiffs' claim is one sounding in money. There is no assertion nor reliance on any breach of any fundamental right. The attack on the constitutionality of s 59 was raised for the first time in the replication. In the final analysis it must

be borne in mind that the individual plaintiffs willingly invested monies with Van Schalkwyks in the expectation of receiving a substantially higher rate of interest. Unfortunately for them they lost their money, hence the action against the first defendant. To now assert that they not be mulcted in costs, would be to ignore the true nature of their cause of action. This militates against an order for costs as suggested.

[19] In the result the following order will issue:

1. The stated case is answered in favour of the first and second defendants. The impugned sections are not unconstitutional.

2. The plaintiffs are to pay the costs of the first and second defendants both in relation to the stated case and the hearing, jointly and severally, all such costs to include the costs of two counsel.

D. CHETTY
JUDGE OF THE HIGH COURT