

VOLUME I

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THIRD AND FINAL REPORT

PART THREE

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- (A) A SPECIALIST COURT FOR INTELLECTUAL PROPERTY LAW MATTERS ; And**
- (B) A SPECIALIST INSOLVENCY COURT**
-

INTRODUCTION

- (1) In paragraph (1)(c)(i) of its Terms of Reference the Commission is required to make recommendations with reference to the need for improved access to justice for civil litigants in the Supreme Court (now the High Court) through the creation of specialist courts, such as the Commercial Court in Johannesburg.
- (2) The South African Institute for Intellectual Property Law submitted to the Commission that there should be established in Pretoria a specialist court, exercising jurisdiction throughout South Africa, to deal with intellectual property matters. The proposal was supported by certain interested parties and resisted by others.
- (3) The South African Insolvency Institute submitted to the Commission that wherever a Commercial Court now exists, or may in future be created, there should be established

a specialist insolvency court in which Judges of the Commercial Court should preside. The proposal was supported by certain interested parties and resisted by others.

- (4) PART THREE of the Third and Final Report consists of two separate sections.
- (5) In SECTION (A) there are considered the written and oral submissions made to the Commission for and against the establishment of a **specialist court for intellectual property law matters**. The Commission's recommendation on the subject is set forth in Chapter 11 of SECTION (A) at page 55 of this Report.
- (6) In SECTION (B) there are considered the written and oral submissions made to the Commission for and against the establishment of a **specialist insolvency court**. The Commission's recommendations on the subject are set forth in Chapter 8 of SECTION (B) at page 100 of this Report.

PART III

SECTION (A)

CHAPTER 1

THE AMBIT OF INTELLECTUAL PROPERTY LAW AND THE EXISTING JURISDICTIONAL POSITION IN SOUTH AFRICA

1.1 THE AMBIT OF INTELLECTUAL PROPERTY LAW IN SOUTH AFRICA

1.1.1 In South Africa Intellectual Property Law derives from both the common law and statutory law. For the greater part the statutory law is encapsulated in the following four Acts :-

- (a) The Patents Act, No 57 of 1978 ;
- (b) The Trade Marks Act, No 194 of 1993 ;
- (c) The Designs Act, No 195 of 1993 ; and
- (d) The Copyright Act No 98 of 1978.

1.1.2 To the statutes enumerated in paragraph 1.1.1 above may be added a number of lesser-known enactments such as those relating to business names, merchandise marks, plant breeders' rights, performers' rights ; and also :-

The Registration of Copyright in Cinematograph Films Act, No 62 of 1977.

1.1.3 With the exception of the Copyright Act, No 98 of 1978, each of the statutes mentioned in paragraphs 1.1.1 and 1.1.2 above, provides for the maintaining of a REGISTRY which is situated in Pretoria.

1.1.4 The common law component of our Intellectual Property Law involves the principles of unlawful competition, passing-of and trade secrets.

1.2 A BRIEF OUTLINE OF THE EXISTING JURISDICTIONAL POSITION IN SOUTH AFRICA IN REGARD TO THE ADJUDICATION OF INTELLECTUAL PROPERTY MATTERS

- 1.2.1 The Patents Office and its Registrar are situated in Pretoria. The Registrar is the chief controller of the Patents Office. In terms of the Patents Act the Judge President of the Transvaal Provincial Division [TPD] is empowered to designate Judges or acting Judges of the TPD to be Commissioners of Patents.
- 1.2.2 The Commissioner of Patents exercises the same powers as a Judge in a civil action and he is bound by the same rules of court applicable in the High Court. The main function of the Commissioner of Patents is to serve as a court of first instance in the hearing of all actions involving patent rights, such as infringement and revocation proceedings. In addition the Commissioner of Patents hears appeals against the decisions of the Registrar of Patents. Appeals from the Court of the Commissioner lie to the Full Court of the Provincial Division. Further appeal to the Supreme Court of Appeal is possible. The Commissioner of Patents serves the entire Republic. However, unless he otherwise decides, proceedings before him take place in Pretoria. In effect, therefore, the TPD doubles as the Court of the Commissioner of Patents and exercises exclusive jurisdiction in patent matters.
- 1.2.3 The Trade Marks Office is in Pretoria. An officer for the Republic styled the Registrar of Trade Marks has, subject to the directions of the Minister of Trade and Industries, the chief control of the Trade Marks Office. The Minister may, whenever he deems it necessary, appoint a Judge or an advocate or an attorney to exercise any power or to perform any duty conferred or imposed upon the Registrar under the Act.
- 1.2.4 At the Trade Marks Office there is a register of trade marks which comprises all trade marks registered or deemed to be registered under the Act. The register constitutes *prima facie* evidence of the matters required by the Act to be inserted therein.
- 1.2.5 Any proceedings before the Registrar under the Act are disposed of at the Trade Marks Office unless he orders otherwise. In connection with proceedings before him the Registrar has the powers and jurisdiction of a single Judge in a

civil action before the TPD.

- 1.2.6 In terms of sec 2(1)(vi) of the Act “court” means the TPD, but, in relation to any claim or counterclaim for removal or variation affecting any entry in the register arising from proceedings instituted in any other division of the High Court having jurisdiction in relation to the proceedings, includes that division in respect of such claim or counterclaim.
- 1.2.7 A person aggrieved by any decision or order of the Registrar may apply to the TPD for relief. The TPD has power to consider the merits of the matter, to receive further evidence, and to make any order it deems fit.
- 1.2.8 The TPD thus has virtually exclusive jurisdiction over all matters arising under the Act in respect of the removal, amendment, variation or other relief affecting an entry in the register. The TPD further has exclusive jurisdiction in appeals against decisions of the Registrar.
- 1.2.9 The Designs Act provides for the registration of designs and matters connected therewith. The Designs Office is in Pretoria. The Registrar of Designs has the chief control of the Designs Office at which a register of designs is kept. The register affords *prima facie* proof of any matter directed or authorised by the Act to be entered therein.
- 1.2.10 The Registrar of Designs has various powers under the Act to receive by affidavit or *viva voce*, and to award and tax costs but, unlike the Registrar of Trade Marks, he does not have the powers of a single Judge in a civil action.
- 1.2.11 In terms of sec 1 of the Designs Act “court”, in relation to any matter, means the division of the High Court having jurisdiction in the matter. In terms of sec 42 any party to proceedings before the Registrar may appeal to the court against any order or decision of the Registrar, which is deemed to be an order or judgment of a magistrate in a civil action.
- 1.2.12 Under the Copyright Act the Registrar of Copyright is the person appointed as Registrar of Patents under sec 7 of the Patents Act.
- 1.2.13 The Copyright Act contains no definition of “court”, and consequently any court of competent jurisdiction may hear matters under the Act. In practice, however, copyright infringement actions are generally pursued in the High

Court.

- 1.2.14 In terms of sec 29 of the Copyright Act the Judge from time to time designated as Commissioner of Patents under the Patents Act is also “the Copyright Tribunal”. The tribunal’s function is defined in sec 30 as being the determination of disputes arising between licensing bodies, or other persons from whom licences are required and persons requiring licences or organisations claiming to be representatives of such persons.
- 1.2.15 The Registration Office for Copyright in Cinematograph films is in Pretoria. An officer styled the Registrar of Copyright has the chief control of the Office.
- 1.2.16 In terms of sec 1 of the Registration of Copyright in Cinematograph Films Act “court”, in relation to any matter, means the division of the High Court having jurisdiction in respect of that matter.
- 1.2.17 In connection with proceedings before him the Registrar of Copyright has all the powers and jurisdiction of a single Judge in a civil action before a provincial division of the High Court having jurisdiction at the place where the proceedings before the Registrar are held. A party to proceedings before the Registrar (other than sec 11 informal proceedings) may appeal to the court against any decision or order pursuant to such proceedings.

CHAPTER 2

THE PROPOSAL BY THE SOUTH AFRICAN INSTITUTE FOR INTELLECTUAL PROPERTY LAW THAT A SPECIALIST COURT FOR INTELLECTUAL PROPERTY LAW MATTERS SHOULD BE ESTABLISHED

- 2.1 The South African Institute of Intellectual Property Law [“the Institute”] is a voluntary association formed in 1954, whose members are practitioners in the field of intellectual property law.
- 2.2 In order to qualify for fellowship of the Institute a practitioner must be an attorney of the High Court who has passed a series of examinations conducted under the auspices of the Patents Examination Board or the Institute. The examinations cover the entire spectrum of intellectual property law. The examination is structured to enable a practitioner to qualify either as a patent attorney or as a trade mark practitioner. The qualification for patent attorney is statutory ; that for trade mark practitioner is set by the Institute.
- 2.3 The membership of the Institute currently consists of 91 Fellows ; 24 Associate and 73 Student members. Members of the Institute practise mainly in the Pretoria and Johannesburg areas, but also in Midrand, Randburg, Sandton, Durban and Cape Town.
- 2.4 In a written response dated 23 June 1995 the then President of the Institute [Mr D.M. Dold] submitted on behalf of the Institute that there should be created a specialist court having jurisdiction throughout the Republic for the adjudication of intellectual property law matters. A copy of the Institute’s written response is to be found in Appendix “L” at pages 79 to 81 of VOLUME II of this Report.
- 2.4.1 The written response indicated that what the Institute had in mind was a court based “at least to some degree” on the English model of the :-

“ specialist Patents Court which is part of the High Court in London and to which one of the High Court Judges is permanently assigned. He is a former patent barrister and therefore has extensive experience of intellectual property law and practice...A number of other High Court Judges have also been designated as available to be assigned to the Patent Court, and one of these is a former patent barrister. Although the role of the Patents Court is to hear actions concerning patents and registered designs, in practice it hears the full range of intellectual property infringement and revocation actions.”

- 2.4.2 In its written response the Institute pointed out that for smaller actions there is also a specialist Patent County Court having jurisdiction in England and Wales. The County Patent Court, so the Institute said, had not been a great success ; and it did not wish to reproduce this part of the English model.
- 2.4.3 Regarding the seat of the specialist court, the composition of its Bench, and the jurisdiction to be exercised by it, the essential features of the Institute’s proposal were the following :-
- 2.4.3.1 The specialist court should have its seat at Pretoria, not only because of its status as a capital city but because all the relevant registries are located there. The court should be named “the Intellectual Property Court” .
- 2.4.3.2 A Judge with experience of intellectual property law and practice would be appointed as the permanent President of the Court. His appointment should not be a political one. Fundamental to the success of the Court is the ability and experience of its President.
- 2.4.3.3 Two or three other Judges should be designated to be available for the specialist court on an *ad hoc* basis.
- 2.4.3.4 The specialist court would have exclusive jurisdiction throughout South Africa in respect of (a) patents ; (b) designs ; (c) trade marks ; and (d) cinematograph films.
- 2.4.3.5 The specialist court would exercise concurrent jurisdiction with the various divisions of the High Court in respect of copyright and non-statutory intellectual property matters such as passing-off, trade secrets and confidential information cases.

2.4.4 In support of its proposal for an Intellectual Property Court the Institute's written response urged the following :-

“ Patent matters, in particular, are usually complex cases, highly technical both in so far as subject matter and law are concerned, and often at least one of the litigants is a foreign company. Invariably the outcome of the litigation has serious economic and commercial implications for the litigants. It is thus of the utmost importance to the standing of the South African judiciary that judgments are based upon the correct and applicable legal principles.

Much of what I have said in relation to patent matters applies equally to other specialist areas of law with which my Institute is concerned, namely trade marks, copyright, designs, passing-off, trade secrets, counterfeiting and unlawful competition in general. These are specialized esoteric branches of the law.”

2.4.5 The Institute's written response concluded by expressing a wish to make oral representations to the Commission.

CHAPTER 3

SOME OF THE SUBMISSIONS SET FORTH IN A WRITTEN RESPONSE TO THE COMMISSION BY MR D.F. SHEPPARD OF ADAMS AND ADAMS, PRETORIA

- 3.1 Mr D.F. Sheppard is a partner in Adams and Adams in Pretoria, and a specialist in patent litigation before the Court of the Commissioner of Patents. Until 1969 Mr Sheppard practised as a chartered patent agent in the United Kingdom. He practised initially in a small London firm of patent agents, and then moved to the patent department of a pharmaceutical company near Maidenhead which was the British subsidiary of a very large American organisation. There he ended up by doing patent work which, apart from the USA and Canada, took him throughout the world.
- 3.2 By letter dated 23 June 1995 Mr Sheppard addressed to the Commission a written response as a submission made by him with the support of other litigation partners in his firm. A copy of his written response is to be found in Appendix “M” at pages 82 to 86 in VOLUME II of this Report. In April 1996 Mr Sheppard further made oral representations to the Commission [see VOLUME III at pages 121-127] at a public sitting at Midrand. Here it is convenient to quote extracts from some of the submissions set forth in Mr Sheppard’s written response.
- 3.3 In para 2.3 of his written response [see page 83 in VOLUME II] Mr Sheppard writes :-

“ Through the writer’s specialization in patent matters, he is aware that a Plaintiff who is litigating world-wide has had the advantage that a hearing can take place in South Africa earlier than in most if not all other major countries. The writer acted for the Defendants in the matter of Stauffer Chemical Company v Safsan Marketing and Distributing Company (Pty) Limited (1983 BP 44) where the two litigating parties were effectively both large USA chemical multinationals and the South African decision was the first decision. They were very pleased to have a hearing in an English speaking country where each side could find out how the witnesses appeared in the witness box, what evidence

they have, etc., in a country such as South Africa with a respected high quality legal system before the litigation proceeded further in more expensive and larger countries such as the USA.”

- 3.4 Dealing with the adjudication of patents by the Commissioner of Patents under the current system, Mr Sheppard observes in paragraph 5.2 of his response [see page 85 in VOLUME II] :-

“ Generally, in countries around the world, the Supreme Court which hears Intellectual Property matters also is the Supreme Court situated in the capital city. For patent matters, this has been the position for South Africa and is the present position as a Judge President of the Transvaal Provincial Division designates one or more Judges of that Division to act as the Commissioner of Patents...The patent matters are heard in Pretoria...i.e. the city where the Patents Office is situated. For consistency with other countries, it is strongly submitted that this situation should remain. ”

- 3.5 As to the present quality of patent litigation in South Africa Mr Sheppard makes the following comments in paragraphs 5.4 and 5.5 [see pages 85 - 86 in VOLUME II] of his letter :-

“ 5.4 *We attend many overseas conferences on Intellectual Property Law and advise overseas clients on such matters. We have always been able to assure them that the Advocates and Judges involved in such matters have considerable practical experience in this specialist field through being involved in many cases over the years. We would not want this situation to change as good Intellectual Property decisions encourage investment.*

5.5 *The writer is responsible for seeing that Intellectual Property cases are abstracted and published in the journal, ‘European Intellectual Property Review’, published in the U.K. He frequently meets with people overseas who have read such cases and who discuss them with the writer. In addition, the writer has received requests for copies of actual decisions of cases at various times. If there is any change in the specialist Court of the Commissioner of Patents, or even in its seat, we submit that*

this would be to the detriment of the country. We repeat that good Intellectual Property protection by the Court is vitally important for ensuring that foreign investment comes into South Africa.”

CHAPTER 4

A SUMMARY OF THE MAIN ORAL SUBMISSIONS IN REGARD TO THE ADJUDICATION OF INTELLECTUAL PROPERTY LAW MATTERS MADE TO THE COMMISSION BY VARIOUS INTERESTED PARTIES AT MIDRAND DURING APRIL 1996

- 4.1 In amplification of the two written responses respectively described in Chapters Two and Three above, oral submissions were made to the Commission by a number of interested parties during public sittings held at Midrand over several days during April 1996. Extracts from these oral submissions are to be found at pages 121 to 147 in VOLUME III of this Report.
- 4.2 The first speaker on Intellectual Property Law to address the Commission at Midrand was Mr D.F. Sheppard. In the course of his oral submissions Mr Sheppard handed in [see para 9 at page 122 in VOLUME III] the Report of the Proceedings of the 702nd Ordinary General Meeting of the Chartered Institute of Patent Agents held in London on 17 January 1996. This included an address by Mr Justice Jacob, the senior Patents Judge in the Chancery Division. A copy of the said Report is to be found in Appendix “N” at pages 87 to 93 in VOLUME II of this Report.
- 4.3 Dealing with the address by Mr Justice Jacob in the said Report Mr Sheppard said, *inter alia*, the following [see paras 11 & 12 at pages 122-123 in VOLUME III] :-

“ From the many people that I speak to around the world in patent matters most countries are infamous for the long time it takes to get to court. This has been recognised in the U.K. and Mr Justice Jacob in that paper.....said....look at British litigation : ‘If the parties want a fight, if one party wants a fight, within a short time, by world standards I believe we stand out as one of the fastest countries in the world.’ Now I am aware in the U.K. that was not the situation a few years ago. Although he talks about being one of the fastest countries in the world, if a South African and a U.K. infringement matter, patent court

matter where there would be oral evidence, started on the same dates, the South African matter would get to court earlier.”

4.4 Mr Sheppard stressed [see paras 15 to 17 at pages 123-124 in VOLUME III] that a specialist court needed not a single Judge but a group of Judges. He sought to illustrate his point with reference to the single Judge sitting in the Patent County Court in London. This Court has not proved successful. Mr Sheppard continued [see para 18 at page 124 in VOLUME III] by saying :-

“ I am aware that the South African Institute of Intellectual Property Law, of which I am a member, will be making their presentation on Monday, and all I wanted to say is that we have had a Commissioner of Patents who has been selected from a group of judges who have experience over a considerable number of years of different patent matters and it has worked very well. And I like the idea of it not just being one judge but being one from a group of judges.”

4.5 During the Midrand Public sittings oral submissions in support of a specialist Intellectual Property Court were made by the following interested parties : (a) Mr Chris Job (who had meanwhile succeeded Mr D.M. Dold as the President of the Institute) ; (b) Mr M. le Roux, the managing partner of D.M. Kisch Inc ; and (c) Dr T. Burrell.

4.6 In elaboration of their oral submissions the above-mentioned three speakers handed in to the Commission : (a) Heads of Submission ; and (b) Supporting Documentation. Copies of these two documents are respectively to be found in Appendix “O” [at pages 94 to 110] and in Appendix “P” [at pages 111 to 122] in VOLUME II of this Report.

4.7 Appended to the Institute’s Heads of Submission is a letter dated 9 April 1996 by the Registrar of Patents to the President of the Institute, the second paragraph of which reads as follows :-

“ Please note that my office is in favour, in principle, of the broadening of the jurisdiction of the Court of the Commissioner of Patents to include other

intellectual property rights, and supports, in general, your submission for the establishment of a specialist court.”

- 4.8 In the course of his oral submissions Mr le Roux [at paragraphs 34 & 35 at page 134 in VOLUME III] remarked :-

“ Mr Chairman, if I may come to the main business of the day. That is the motivation for the establishment of an Intellectual Property Court...we say in the first instance that it is our submission that intellectual property law is a specialised subject which requires adjudication by judges who have sound experience and knowledge in this field of law...In the case of patent law there is an undeniable need for a judge with substantial prior experience at the Bar or in practice. That patent law requires specialist attention is borne out by the fact that the Court of Commissioner of Patents exists.”

- 4.9 In developing the argument in favour of specialisation the spokesmen for the Institute thereafter proceeded [see paras 36 to 44 at pages 135-136 in VOLUME III] to deal first with design law and then with trade mark law :-

“ MR LE ROUX : In the case of design law a new Act came into force in 1995 which made substantial changes to the then existing law and which makes provision for the first time for functional designs in addition to the traditional ornamental or aesthetic designs...and it has, in the case of a functional design rendered design law more technical in nature which, in our submission, makes it more suitable for adjudication in a specialist court to ensure that sound law is made in the interpretation of the Designs Act...

MR JOB : ...also in trade mark law...a new Act came into force last year which itself will require exceptional skill in interpretation. The new Trade Marks Act has liberalised trade marks law in South Africa and has brought it into line with international trends...

MR LE ROUX : ...We now have in the Trade Marks Act the concept of a well-known trade mark which can be enforced even if unregistered ; we have the anti-dilution provisions which are entirely new, in the Act, and these are going to be difficult matters to deal with in the courts and especially will one need judges of exceptional experience.

MR JOB : If I can elaborate very slightly, those are two very important new provisions in our Act. There are others, one of which is the extension of infringement protection in trade mark matters to similar goods and services and

various others, but the essential point I wish to make is that our trade mark legislation is state of art in the sense that it has followed the approach adopted by the European Union which was laid out in the directive of the European Union in relation to the harmonisation of trade mark law in Europe.”

- 4.10 The desirability that in respect of certain matters a specialist intellectual property court should exercise jurisdiction concurrently with the High Court was also explored [at paras 48 to 52 at pages 137-138 in VOLUME III] :-

“ MR LE ROUX : There are other areas of intellectual property law which could equally be served by an Intellectual Property Court but not necessarily exclusively so. The most important of these is copyright law which differs fundamentally from patent, design and trade mark law in that copyright is not registered and hence there is no registry. It is nonetheless, a specialized field of law which historically and by its nature, forms part of intellectual property law.

CHAIRMAN : May I interrupt there, just to see how far the argument on behalf of the Institute extends...assume a large copyright action were to be instituted in Cape Town, how would it be dealt with ?

MR LE ROUX : Mr Chairman as the law stands at present a large copyright matter could be instituted and dealt with in Cape Town. In our proposal that action could, as an alternative...(intervenes)

CHAIRMAN : Concurrent jurisdiction ?

MR LE ROUX : Indeed, be instituted in the Intellectual Property Court in Pretoria if the litigant so desired.

CHAIRMAN : By consent ?

MR LE ROUX : That is not a point that we have specifically considered whether a consent would be required as in the case of the Commercial Court in Johannesburg, but it is a distinct possibility.”

- 4.11 In the course of his oral submissions Mr le Roux described thus the benefits which would flow from a specialist court [see para 45 at pages 136 - 137 in VOLUME III] :-

“ we...say that judgments will not only be of a high standard in this field of law but will be characterized by consistency. There will be an overall improvement in the administration of justice for litigants in an important specialized field and an improvement in the efficiency with which this field of law is dealt with in the

courts will result.”

- 4.12 Stressing that foreign companies would not invest in South Africa if their intellectual property were not capable of vigorous enforcement in our courts [see paras 54 & 55 at pages 138-139 in VOLUME III] Mr le Roux cited statistics [see paragraphs 56 & 57 at page 139 in VOLUME III] to show the strong foreign flavour in patent and trade mark litigation :-

“...In the case of patents in the years from 1990 to 1995, these are statistics to which Dr Burrell has already alluded, 51 patent judgments were handed down of which 19 or 57% involved one or more foreign parties...In the case of trade marks, 107 trade mark judgments emanated from the Registrar of Trade Marks in the same six year period. Of the 107 cases, 64 or almost 60% involved one or more foreign parties. The percentage involving foreign parties before the Transvaal Provincial Division was 41%, that is 19 out of 46 cases, and before the Registrar it was 73% - 45 out of 61 cases.”

- 4.13 Dealing with the Institute’s submission that the President of the proposed specialist court should be a permanent appointment [see para 62(A) at page 140 in VOLUME III] Mr le Roux also put forward [see para 63 at page 140 in VOLUME III] an alternative arrangement “but very much as a second choice” :-

“...that the position of President could be dispensed with and judges or other suitably qualified persons could be assigned on an ad hoc basis by the Judge President of the Transvaal Provincial Division to hear matters as and when required.”

- 4.14 From the ensuing discussion between the Commission and the spokesmen for the Institute [see paras 64 to 68 at pages 141-142 in VOLUME III] it became clear, however, that in regard to this critical issue opinions within the Institute were divided :-

“ CHAIRMAN : What does the Institute see as the manifest advantages of having a permanent President ?

MR LE ROUX : Mr Chairman, if I may say so quite frankly, this is a subject on which there is some disagreement within the Institute and differences of

opinion.

CHAIRMAN : Your personal opinion ? I imagine that consistency would be a basic consideration ?

MR LE ROUX : That is the point, it is the question of the quality of the jurisprudence which is handed down by the courts and the consistency thereof. Mr Chairman you asked me for my personal opinion and, to be brutally frank, I personally prefer the alternative which I have stated here, but it is the Institute's proposal that a permanent appointment be made.

MR JOB : Mr Chairman this is, as you will appreciate, there is some unease at this end, it is a controversial issue. I can certainly speak for myself and members of my firm [Adams & Adams], we are in favour of the second alternative...

CHAIRMAN : Pausing there, why ?

MR JOB : Well frankly we are concerned that in the event of a permanent President being appointed that person might not be appropriately qualified.

CHAIRMAN : You do not want to be landed with a dud ?

MR JOB : Thank you Mr Chairman, we are very concerned about that and it is considered in the more perhaps conservative ranks of our Institute that it would be better to extend the current system of Commissioner of Patents who is appointed ad hoc by the Judge President from normally a body of several judges who have experience in these matters, that we would rather spread the risk as it were...but in an ideal world, and I emphasize that, a permanent President would be an advantage ; but we are uncertain at this point as to who might fill that position.

DR BURRELL : Mr Chairman, I am of the dissenting school, as it were, really representing the view of the Institute, namely that there should be a permanent President of this court. One recognises one has got to choose one's words very carefully, but the problems with the existing structure and certainly in the field of patents is that there are simply less and less judges available to us who have any experience..."

- 4.15 Dealing with the right of appearance in the proposed specialist court Mr le Roux [see para 75 at page 143 in VOLUME III] said :-

“ As far as the right of audience is concerned we would submit that the right of audience before an Intellectual Property Court should be the same as that before the Supreme Court, with the one proviso that in patent matters a practitioner seeking audience other than an advocate should meet the

requirements set out in the Patents Act, that is in terms of the definition of 'agent' in that Act."

- 4.16 A member of the Commission, Mr Maluleke, thereupon voiced his disquiet at the fact that while an advocate would enjoy the right of appearance the ordinary attorney would be the victim of discrimination [see para 76 at page 144 in VOLUME III]. In response to a question by Mr Maluleke, the following historical explanation [see paras 78 & 79 at page 144 in VOLUME III] was given on behalf of the Institute :-

" DR BURRELL : ...Under the repealed Act, Act 37 of 1952, the attorneys did have the right of audience in the Court of the Commissioner of Patents and it did not work very well. In fact there were not many...submissions made by such attorneys to the Court of the Commissioner of Patents. Then came the new Act...Act 57 of 1978 ; and in terms of that Act the rights of audience are confined to people who are qualified in terms of the Act, namely patent agents and patent attorneys...Effectively now almost everybody is a patent attorney, to wit an attorney who is qualified both as a patent agent and as an attorney. That is the one body of persons who have right of audience, and the other being advocates in the ordinary sense."

- 4.17 On behalf of the Institute, it was lastly urged, [see paras 90 to 94 at pages 146-147 in VOLUME III] that since the basic infrastructure was already in place, the establishment of a specialist intellectual court would not entail any significant capital expenditure on the part of the Government :-

" MR MALULEKE : The proposal that a fully-fledged...specialist court with its President and perhaps...a pool of two or three judges...would also be closely related to the cost...to the State. If it can be shown that the cost of setting up such a court is not out of proportion with the service...you may find greater sympathy possibly from the Government. If it is shown that the cost is completely out of proportion, would you then be in agreement that setting up such a specialist court with its own President may be placing an undue burden on the taxpayers of this country...?"

MR JOB : Mr Commissioner broadly I would agree with that statement, perhaps that is where the...alternative that we have put forward comes in ; and that the extension, as it were, of the existing court of the Commissioner of Patents would not require the establishment of a separate court...I would,

however, point out that as far as a separate court is concerned there is already physically, the bones as it were, the skeleton of such a system. The Registrar of Patents and not the Registrar of the Supreme Court, serves as the Registrar of the Court of the Commissioner of Patents...and of course the Registrar of Patents is also the Registrar of Trade Marks so that in fact practically there would be very little administrative extension or further expansion.

CHAIRMAN : The Institute's proposal I take it does not involve the building of an elaborate separate structure ?

MR JOB : Definitely not Mr Chairman, the current Transvaal Provincial Division, whatever its fate may be, could well serve, there are facilities at the Patent and Trade Marks Office at the moment as well...So in effect in so far as cost is concerned, the way we see it, if a permanent President were to be appointed it would really only be the cost of that President. The other judges that we have suggested in our first submission would be chosen presumably from an existing pool of judges so we see actually fairly minimal further cost involved."

CHAPTER 5

THE COMMISSION'S INVITATION TO OTHER INTERESTED PARTIES TO RESPOND IN WRITING TO THE PLEA FOR THE CREATION OF A SPECIALIST INTELLECTUAL PROPERTY LAW COURT MADE ON BEHALF OF THE INSTITUTE AT THE PUBLIC HEARINGS AT MIDRAND

- 5.1 Following upon the public sittings at Midrand in April 1996 the Commission issued to all interested parties a circular calling attention to the nature of the oral submissions made at Midrand and summarising, *inter alia*, the effect of the Institute's proposal for the establishment of a specialist intellectual property court.

- 5.2 The circular contained an urgent request to all interested parties to make written responses to the Commission, by not later than 31 August 1996, dealing with the issue of a specialist intellectual property court. Appended to the circular were copies of the Institute's written response dated 23 June 1995 to the Commission and the Heads of Submission handed in at the Midrand hearing by the Institute's spokesmen.

CHAPTER 6

REACTIONS TO THE CIRCULAR AND A FURTHER PUBLIC SITTING OF THE COMMISSION TO DEBATE THE ISSUE OF A SPECIALIST INTELLECTUAL PROPERTY LAW COURT

- 6.1 In response to the circular described in Chapter Five the Commission received the following three memoranda :-
- 6.1.1 A memorandum dated 4 July 1996 by the Cape Bar [“the **Cape Bar Memorandum**”]. A copy of the **Cape Bar Memorandum** is to be found in Appendix “ Q ” at pages 123 to 127 in VOLUME II of this Report.
- 6.1.2 A memorandum dated 12 August 1996 from the Society of Advocates of Natal [“the **Findlay Memorandum**”]. A copy of the **Findlay Memorandum** is to be found in Appendix “ R ” at pages 128 to 138 in VOLUME II of this Report.
- 6.1.3 A memorandum dated 13 August 1996 [“the **AD Memorandum**”] signed by Harms JA and Plewman AJA (now Plewman JA). A copy of the **AD Memorandum** is to be found in Appendix “ S ” at pages 139 to 147 in VOLUME II of this Report.
- 6.2.1 Upon receipt of the memoranda mentioned in paragraph 6.1 above, and with a view to stimulating further debate upon the issue of a specialist intellectual property court, the Commission forthwith arranged for a further public hearing of the Commission to be held at Bloemfontein on 21 August 1996 [“the **Bloemfontein sitting**”].
- 6.2.2 In advance of the **Bloemfontein sitting** interested parties were invited to attend the hearing and copies of the three memoranda described in paragraph 6.1 were supplied to them.
- 6.2.3 The **Bloemfontein sitting** was attended by a number of interested parties. The oral submissions made thereat will be summarised in Chapter Seven of this

Report. In this Chapter it is convenient to indicate the main thrust of each of the three memoranda described in paragraph 6.1 above.

6.3 THE CAPE BAR MEMORANDUM :

6.3.1 In paragraphs 7 and 8 of the **Cape Bar Memorandum** the following arguments against the creation of a specialist intellectual property court were marshalled :-

“ 7. *In our view there are a number of disadvantages to the creation of a Specialist Court for Intellectual Property Matters (“ SCIP ”) proposed by the South African Institute of Intellectual Property Law and supported by the Registrar of Patents.*

7.1 *Intellectual Property Law cannot reasonably be described as a field of law which requires knowledge which is any more unusual than is required in a number of other fields which judges of the Supreme Court regularly encountered.*

7.2 *It is correct that Patent Law, to a greater extent than any other category of Intellectual Property Law, requires a degree of specialist attention but this is already accommodated by the existence of the present Court of the Commissioner of Patents.*

7.3 *We are not persuaded by the arguments that the new Designs Act and the new Trademark Act will ‘require exceptional skill in...interpretation.’. The interpretation of statutes is not an area of expertise peculiar to those versed in the Law of Trademarks and Patents.*

7.4 *The creation of an SCIP would, given the resources at present available in this country, require it to be located in one centre - the Transvaal is suggested - with the result that the remaining Divisions would be stripped of that work to the detriment, we believe, of both litigants*

and practitioners.

8. *In general it is our view that the temptation to create specialized niche areas of the law should be resisted. It is likely to be of more benefit to practitioners who specialize in the particular field than to the litigants concerned.*”

6.4 THE FINDLAY MEMORANDUM :

- 6.4.1 In a covering letter to the **Findlay Memorandum** the Chairman of the Society of Advocates of Natal informed the Commission as follows :-

“ It is the practice of this Bar to refer documents such as yours [the circular described in Chapter Five above] to a member of the Bar who is considered familiar with the relevant topic.

It is unusual for the Bar Council to endorse or pass any further comment upon the member’s efforts. I accordingly send Advocate Findlay SC’s comments to you but they do not necessarily represent the views of the Bar Council.”

- 6.4.2 In a comprehensive analysis by its author the **Findlay Memorandum** details reasons for its opposition to the Institute’s proposal for a specialist intellectual property court having its sole seat in Pretoria, and having exclusive jurisdiction in matters involving an intellectual property element. Hereunder follow a number of extracts from the **Findlay Memorandum** :-

- 6.4.3 In paragraph 12.5 [see page 133 in VOLUME II] the following is said :-

“ Undoubtedly patent litigation, involving complex aspects of technology, is in itself often difficult and time-consuming. This has led to the situation where litigation in the field of patents is, in all probability, the most expensive form of litigation and it is probably unavoidably so. A very real danger is to concentrate other forms of Intellectual Property litigation generally in the hands of relatively few practitioners as this would have an adverse effect on the cost of litigation involving other forms of Intellectual Property. This is the

likely outcome and natural consequence of the establishment of an Intellectual Property Court having exclusive jurisdiction.”

6.4.4 In paragraph 13.1 of the **Findlay Memorandum** [see pages 133-134 in VOLUME II] it is said :-

“ Other forms of Intellectual Property such as trademarks, copyright, passing off and the law relating to merchandise marks and anti-counterfeiting do not have the same technological element as patents and functional designs. Consequently expertise in these fields does not require a technological background and this is not often appreciated. Acquiring expertise in these fields requires the interest and application such as is found in other branches of the law which may also be regarded by some as esoteric. It is trite to say that these forms of Intellectual Property affect a far wider sector of the public than do patents and registered designs.”

6.4.5 Paragraph 13.4 of the **Findlay Memorandum** [see page 135 in VOLUME II] is in the following terms :-

“ Matters involving trademarks, copyright, merchandise marks, passing off and unlawful competition have been dealt with by the ordinary courts of jurisdiction for many years. A perusal of the law reports shows that Courts of first instance in divisions outside the Transvaal have given leading judgments in these fields for decades...In any event, appeals from the Commissioner of Patents and in other Intellectual Property matters are dealt with by the ordinary Appeal Courts. Simply to argue that the field of Intellectual Property law is esoteric and requires a particular acumen is no ground for requiring litigants in the field to litigate at greater expense and inconvenience in a single court. The issues involved in these matters are, at the end of the day, no more difficult than in other branches of commercial law.”

6.4.6 Paragraphs 13.8 and 13.9 of the **Findlay Memorandum** [see pages 137-138 in VOLUME II] read as follows :-

“ Care must be taken not to cloud Intellectual Property with an aura of mystique. It is a branch of the law which, like any other branch of the law, a legal practitioner with an interest and with application can

master, and therefore it should remain open for practitioners in all the provinces to exercise the freedom of choice to practise in that field in the Courts of local jurisdiction. Broadening the base of expertise is in the interests of the public at large.

This in turn will give a wider freedom of choice to members of the public in matters which involve essentially their ordinary commercial interests. For example, it makes little sense for a litigant located in Cape Town, whose dispute relates to whether one trademark is confusingly similar to another or whether a passing off has taken place, to have to litigate in a Court 1 600 kms away. Such a dispute is best dealt with, like any other commercial dispute, in Courts of local jurisdiction. The convenience of litigants dictates that this should be so.”

6.5 THE AD MEMORANDUM :

6.5.1 The **AD Memorandum** was prepared at the request of Corbett CJ. Each of its authors has had long and very extensive experience in intellectual property litigation both at the Bar and on the Bench. The **AD Memorandum** was approved by all the other Judges of Appeal.

6.5.2 While endorsing the notion that South Africa should have a strong intellectual property regime [see page 139 in VOLUME II] paragraph 2 of the **AD Memorandum** proceeds to say :-

“ We however differ from the Institute in believing that there is any realistic probability that this will be achieved by the proposal it has made.”

6.5.3 In paragraph 3 [see pages 139-140 in VOLUME II] the **AD Memorandum** makes the following points :-

“ The Institute’s memorandum indicates that it consists of 115 practitioners. Our experience suggests that there are only of the order or six firms of attorneys engaged in the field. In all these firms the intellectual property work falls into two categories. The main function of these firms is the registration of patents, trade marks and designs and

when it is said that the field is an esoteric one much of its quality as such (if it be such) derives from this aspect of the work of these firms. We accept that skill and experience are a necessary qualification to the proper discharge of these functions. We also accept that in the course of the prosecution of applications for registration of these rights practitioners acquire an extensive knowledge not only of practice but also of the underlying legal principles. That said, it remains the case that this work does not seriously impinge on the field of actual litigation and can (for present purposes) be described, without in any way seeking to denigrate it or minimize its importance, as registration work much in the nature of perhaps conveyancing. It is an aspect of practice which comes before the courts only to a limited extent.”

6.5.4 That the group of intellectual property lawyers engaged in actual court work is a small one is stressed in paragraph 4 [see pages 140-141 in VOLUME II] of the **AD Memorandum** :-

“ It also appears to us that of the practitioners in this field a very limited number are actually engaged in court work. The importance of this observation is that the pool of suitably qualified persons who will be able to appear in a specialised court and, possibly, constitute a source of recruitment for its personnel is very limited indeed. In addition, those members of the Institute who are not patent attorneys, do no patent work and are not specialists in that field. As a rule, patent attorneys are not experts in trade mark law. This yet further reduces the pool of skilled persons.”

6.5.5 In paragraphs 5 and 6 of the **AD Memorandum** [see pages 141 to 144 in VOLUME II] its authors examine the history of earlier attempts in South Africa at specialisation in the adjudication of patent cases :-

“ Prior to the Patents Act 37 of 1952 patent cases, as also of course trade mark and design cases, were dealt with in the ordinary courts. The 1952 Patent Act introduced an innovation...a Court of the Commissioner of Patents was created with exclusive first instance jurisdiction to hear cases arising under the Act. In addition, patent agents were given rights of audience...One notable feature of practice in that court was that, with only the rarest exceptions, patent agents did not themselves appear. Almost invariably counsel were briefed in patent

cases...While this served to increase, within limits, the pool of advocates who could claim experience in this field, it did nothing to create a pool of patent agents with court experience...After some years the incumbent [the Commissioner of Patents] died and a successor had to be found. No suitable candidate offered himself or could be prevailed upon to make himself available...In order to meet the difficulty which had thus arisen the Act was amended to return patent matters to the ordinary court by means of a provision directing that a judge of the Transvaal Provincial Division could be designated to sit as Commissioner of Patents. This is the system which has been continued to the present time...

What this history illustrates is that a fundamental premise upon which the proposal rests - namely that two or three specialist judges (willing to accept permanent appointments as such) will be found - is a very doubtful proposition."

6.5.6 As to whether in intellectual property matters a specialist court is desirable at all, paragraph 7 of the **AD Memorandum** [see pages 144-145 in VOLUME II] contains the following observations :-

" As far as designs and trade marks are concerned, they have never been dealt with other than by the ordinary courts. The reported decisions suggest that they were quite adequately dealt with by (for the purposes of this memorandum) non-specialist judges. The same must be said of patent matters. With all these cases the final court has been the Appellate Division which has never been constituted on the basis of specialised appointments. We would suggest that the reported cases show that the Appellate Division has, despite this, not found intellectual property matters beyond its competence. It is accordingly at least an open question whether the field is indeed so esoteric as to call for a specialist court.

6.5.7 In paragraph 8 of the **AD Memorandum** [see page 145 in VOLUME II] doubt is expressed as to whether the volume of intellectual property cases would be sufficient to warrant the attention of three or four permanent judges :-

" Our experience in the Transvaal Provincial Division (as judges often

designated to sit as Commissioner of Patents or chosen to deal with Trade Mark or design matters) suggests strongly that there are not enough cases to do so.”

6.5.8 The **AD Memorandum** concludes with two paragraphs numbered 9 and 10 respectively [see pages 145 to 146 in VOLUME II]. Paragraph 9 stresses the importance of having generalist judges of wide experience. Paragraph 10 urges the abolition of the Commissioner’s Court :-

“ ...Our experience...suggests that the component of wide trial experience may in fact outweigh technical expertise in any given field, as a qualification for judicial office. That would suggest that the Institute’s proposal approaches the desired result by an inappropriate emphasis on technical qualifications. In our considered view the more appropriate remedy would be for the Institute members to endeavour to broaden or attempt to increase the available pool of trial lawyers with intellectual property experience and, by this means, (however slowly) to raise the level of experience of the judges who will come, in time, to man the ordinary courts of the land.

May we suggest that the Commission rather consider the abolition of the Commissioner’s court, transferring its jurisdiction to the Transvaal Provincial Division. It has its own administration, duplicating the registrar’s work. Otherwise it hardly justified its existence, save as a relic from the past. We believe that the Judge President, in allocating judges, will (as in the case of tax or water cases) continue to use his so-called expert patent judges for patent cases.”

CHAPTER 7

A SUMMARY OF THE FURTHER ORAL SUBMISSIONS IN REGARD TO A SPECIALIST INTELLECTUAL PROPERTY LAW COURT MADE TO THE COMMISSION BY VARIOUS INTERESTED PARTIES AT THE BLOEMFONTEIN SITTING ON 21 AUGUST 1996

- 7.1 At the Bloemfontein sitting the following interested parties addressed the Commission on the subject of the proposed specialist intellectual court : (1) Harms JA ; (2) Schutz JA ; (3) Mrs E.D. du Plessis (a member of the Institute who is Vice-Chairperson of the Statutory Intellectual Property Advisory Committee and who was at the time also the President of the Law Society of the Transvaal) ; (4) Mr M. le Roux (one of the Institute's spokesmen who had already made oral submissions at the Midrand hearings) ; and (5) Eloff JP. In addition brief replies to what other speakers had said were delivered by Harms JA, Schutz JA and Mrs du Plessis.
- 7.2 Mr Justice L.T.C. Harms briefly recited the qualifications of the two authors of the **AD Memorandum**. Harms JA himself was the first Chairman of the Intellectual Property Advisory Committee. He is now the Vice-Chairman of the Paris Convention, which dates from the last century, and which governs intellectual property other than copyright. He was responsible for the present Trade Marks Act and the present Designs Act. Both Harms JA and Plewman JA practised extensively in intellectual property litigation at the Bar. Harms JA described Plewman JA as having been probably the most experienced intellectual property practitioner in the country and someone who had thereafter had extensive judicial exposure to the same work. Both authors of the **AD Memorandum** had been involved in the present Patents Act and the amendments to the Copyright Act.
- 7.3 Harms JA pointed out [para 8 at page 210 in VOLUME III] that appointment as a Judge of Appeal required general and non-specialist legal competence rather than purely specialist qualifications :-

“ I do not see how a specialist Judge can be appointed to the Appellate Division. What is he going to do here ? In other words you...place your highly qualified persons in a little chamber and you limit their expertise and their qualities to that limited Court and you reduce the capability of the Appellate Division to develop the law.”

- 7.4 Harms JA told the Commission [para 23 at page 213 in VOLUME III] that he believed that the record of non-specialist Judges in the field of intellectual property law might be better than that of specialist Judges ; and that the former had delivered some of the leading Appellate Division judgments on the subject. He cited [para 23 at page 213 in VOLUME III] the following example :-

“ May I say that I believe the present Chief Justice [Corbett CJ] is probably the Judge who has written most judgments on intellectual property law, and coming from the Cape I doubt whether he had any practical experience in Patent or other related matters.”

- 7.5 A patent attorney required scientific knowledge, so explained Mr Justice Harms, for the reason that scientific knowledge is indispensable in the drafting of a patent specification [para 17 at page 212 of VOLUME III]. Should however, the patent in question become the subject of a legal dispute, scientific knowledge was not essential for the decision of the case :-

“ Because obviously the evidence that has to be led in the Court of first instance, must be led in such a manner that the Higher Court can understand it...”

- 7.6 In the course of his oral submissions [para 21 at page 213 in VOLUME III] Harms JA expanded on the objections to a specialist court mentioned in the **AD Memorandum** :-

“ ...the pool of qualified persons is very limited. There are very few firms of attorneys in this field. Conflict of interest will inevitably arise which will lead to recusal ; and I do not say this as a matter of surmise. I know it as a fact because of experience in the Trade Mark office. The Registrar of Trade Marks is entitled to appoint a practitioner or ex-practitioner to act in his or her stead

to hear cases, and it has been found that whenever a practitioner is appointed, that the likelihood of a conflict of interest or a request for recusal is high.”

- 7.7 In regard to copyright [paras 24 to 27 at pages 213 to 214 in VOLUME III] Harms JA made the following observations :-

“ There is a so-called specialist copyright tribunal created by the Copyright Act. This tribunal is nothing more than a Judge of the Supreme Court. It has existed at least since 1965 ; and in the thirty years it has sat twice...Let us assume you have a simple copyright dispute in the Cape, your specialist Court will be presumably in Gauteng. The issue is simply the question of quantum of damages. It may be R50,00, it may be R1 000,00, it may be R5 000,00. Must, for that case, the litigants litigate in the specialist Court in the Transvaal ? I do not believe that that is justified...copyright is often a criminal matter, infringement of copyright. It is dealt with in the Magistrate’s Court. Must this also go to the specialist Court ?”

- 7.8 Turning to the United States of America [paras 29 to 31 at page 214 in VOLUME III] Harms JA explained that in that country the creation of a specialist Appeal Court for patent cases [*the Court of Appeals for the Federal Circuit in Washington DC*] had become necessary in order to resolve conflicts :-

“ ...Patent cases are Federal cases and therefore, because of a conflict in appellate jurisdiction, they have recently [in 1982] introduced a specialist Appeal court for all federal patent cases...The real reason behind this is that very few patent cases reach the Supreme Court of the United States because they are not of constitutional importance and because one circuit in the United States is not bound by the judgment of another circuit. In other words, the patent may be found invalid in one circuit and not in another...For that reason, and for consistency, they have introduced this Court [the Court of Appeals for the Federal Circuit].”

- 7.9 In concluding his main address [paras 32 & 33 at page 215 in VOLUME III] Harms JA made clear that he fully appreciated the skills of members of the Institute and, indeed, their fitness for judicial office ; and that his opposition to the Institute’s proposal was based on principle :-

“ Mr Chairman, lest I be misunderstood, I do not wish to suggest in any way that the members of the Institute are not qualified to be appointed Judges. I believe they are highly trained... in my own experience they are of the best attorneys and they are clearly suitable for appointment as Judges. I need only mention one person who is no longer with us, and that is the late Dr Jan Steyn...So that is not our point. Our real point is this, that we do not believe that there is place for a separate Court, either on principle or on practicality. We do not believe that the work, all of the work of the Registrar which is administrative or deals with simple matters, justifies a separate Court.”

7.10 By way of replication [paras 1 & 2 at page 235 in VOLUME III] Harms JA dealt further with the role of the Registrar of Trade Marks :-

“As far as the Registrar of Trade Marks is concerned, the reason why these so-called judicial functions or truly judicial functions have been entrusted to the Registrar, as is the position in the United Kingdom and I believe in most Commonwealth countries, is because the Registrar in deciding many of those cases, has to have access to the records and other cases because it often turns on a comparison between two or three or four Trade Marks. Only the Registrar will know what is the position in the other cases...The position of the Registrar and his or her ability to decide these cases was not raised when the new Trade Marks Act, which was before Parliament in December 1993, was considered. Everyone was satisfied at that stage over a period of years that the Registrar can perform these functions.”

7.11 In a brief main address Schutz JA [para 1 at page 216 in VOLUME III] endorsed the remarks earlier made by Harms JA. He went on [paras 3 & 4 at page 216 in VOLUME III] to say the following :-

“ Frequently emphasis is placed on the sometimes technical complexity of particularly Patent cases. I think when any outsider first approaches these arcane arts...he tends to be intimidated, as I was in the beginning, but I think if a man has experience as particularly an advocate, he has the means for overcoming his ignorance and getting on top of these things.

Another point I would like to deal with, it seems to me wrong that, for instance, copyright cases, which are small, should have to go all the way up to the

Transvaal... ”

- 7.12 By way of reply to other speakers [paras 5 and 6 at page 237 in VOLUME III] Schutz JA made the following observations :-

“ Now, I agree with what Judge Harms said about skill in registration being in no way equivalent to skill in litigation. Litigation is a very special skill. What drives up costs, is unskilled litigation : people spending weeks over matters that should take a few hours. So what you want is not a person skilled in the abstrusities of Patents, but a man who is capable of making a good Judge ; and you have got good Judges in the Supreme Court.

Judge Eloff has said something about the mystique that is supposed to surround these mysteries. I think it has been the experience of many of us that a breath of fresh air is introduced when the, shall we call him the unqualified Judge who has never stuck his toe into these waters before, suddenly appears in these Courts and he applies ordinary rules as to interpretation of statutes and so forth, and introduces quite healthy new tones. ”

- 7.13 An interested party very well equipped to make submissions to the Commission on the subject of a specialist intellectual property court was Mrs E.D. du Plessis. Apart from being a member of the Institute, she is Vice-Chairperson of the Statutory Intellectual Property Advisory Committee and the President of the South African chapter of the International Association for the Protection of Intellectual Property. A partner in a very large firm of patent attorneys, she was formerly an Associate Professor in Mercantile Law at UNISA in which capacity she lectured in Intellectual Property Law. Last but not least, Mrs du Plessis is the Chairperson of the Standing Committee on Intellectual Property Matters [“the Standing Committee”] of the Association of Law Societies [“the ALS”].

- 7.14 At the Bloemfontein sitting Mrs du Plessis handed in a document [“the du Plessis Memorandum”] dated 21 August 1996 in which she sets forth her views in regard to the concept of a specialist intellectual property court. A copy of the du Plessis Memorandum is to be found in Appendix “ T ” in VOLUME II of this Report. The views expressed in the du Plessis Memorandum were further developed by Mrs du Plessis in the course of her oral representations to the Commission.

- 7.15 In her introductory remarks to the Commission [para 4 at page 217 in VOLUME III] Mrs du Plessis informed the Commission that she was addressing the Commission without the mandate of the Standing Committee, but that the latter would in due course make its own written submission to the Commission.
- 7.16 Under cover of a letter dated 5 February 1997 the ALS forwarded to the Commission a document [“the Standing Committee’s Memorandum”] entitled :-

“ Specialist Intellectual Property Court ”

Comments by the Standing Committee on Intellectual Property Law of the Association of Law Societies”

- 7.17 A copy of the Standing Committee’s Memorandum is to be found in Appendix “ U ” at pages 164 to 181 in VOLUME II of this Report. It is signed by Mrs du Plessis on behalf of the Standing Committee’s other members (Dr O.H. Dean, Mr A. van der Merwe and Mr M. von Seidel). The contents of the Standing Committee’s Memorandum correspond closely with the contents of the du Plessis Memorandum handed in by Mrs du Plessis at the Bloemfontein sitting.
- 7.18 In the light of what has been mentioned in paragraphs 7.14 to 7.17 above it is necessary here to mention only those matters in the oral representations of Mrs du Plessis which are not fully traversed in the du Plessis Memorandum.
- 7.19 Dealing with decisions by the Registrar of Trade Marks [paras 13 and 14 on page 219 in VOLUME III] Mrs du Plessis stressed the following :-

“ ...decisions by the Registrar of Trade Marks often find their way to international litigators. That is where his decisions are in fact considered. And I think that is where consistent judgments is what the Institute would like to see. Not, with respect to Judge Harms, in regard to the judgments given by Judges of the Supreme Court, but to these very important first-level judgments which have the effect of a decision by a single Judge, but given by an administrative person.

Mr Chairman, permit me one last point in regard to the Registrar of Trade Marks' position. I think he is in a much greater perilous position in regard to possible conflict. A person who has to take administrative decisions in regard to matters before him and who also has to sit in a judicial function, I think in fact is exposed to criticism for perceived lack of impartiality."

- 7.20 Explaining the rationale for a specialist court [para 17 at page 220 in VOLUME III]
Mrs du Plessis said :-

" I think, Mr Chairman, that we have an opportunity here to speak in favour of an attempt to rationalise and formalise what we already have in practice in the field of Intellectual Property. Reference has been made to the Court of the Commissioner. We believe that the Court of the Commissioner has executed its functions in an admirable fashion. But at the same time there are peripheral areas where a merging of judicial functions could comfortably take place."

- 7.21 In regard to the reluctance shown in the past by patent agents to make use of their right of audience in the Court of the Commissioner [para 27 at page 222 in VOLUME III]
Mrs du Plessis remarked :-

" It was part of a culture that existed in our country. Attorneys never thought in terms of appearing themselves in a Court of law. Now that culture has changed and I think we will see in future that more and more Patent practitioners will make use of their right of appearance in the Commissioner's Court and eventually in an Intellectual Property Court and hopefully that will have a cost-reducing effect."

- 7.22 Turning to the somewhat controversial issue of the composition of the specialist court [paras 35 to 37 at pages 223-224 in VOLUME III] Mrs du Plessis took the following stance :-

" What I do know and understand and accept after having heard the other submissions here today, is that the constitution of the Bench will be the greatest problem that we will be facing in regard to such a special Court. I know the Institute of Intellectual Property Law has expressed a preference for a single president of the Court, a permanent appointment in the person of a single

president or Judge. I am not certain that this is the route that should be followed. I believe that a panel of designated Judges would be a more practical way of handling Intellectual Property matters. It would also fit in, I believe, with the model which does exist in the Commercial Court.”

- 7.23 As to the size of the reservoir of talent from which appointments to a specialist court might be made [paras 38 & 39 on page 224 in VOLUME III] Mrs du Plessis took a rosier view of the situation than Harms JA had done :-

“ I am not convinced that the pool from which adequately qualified and experienced Judges could be drawn is all that small. First of all the number of Intellectual Property attorneys has in fact increased. If one bears in mind that in most firms of Patent attorneys there is a very definite retirement age of 60 years, and a cut-off age of 65 certainly, I can think of a number of experienced practitioners who have recently retired from their firms ; and if one can think of 5 or 6 or 7 such persons, I believe that there is in fact a pool in the field of the...Patent attorneys, where one could look for possible appointments.

The same applies to the advocates. We have heard that the number of advocates dealing with Intellectual Property cases has in fact increased. So my contention is that if one should look at the combination of available Judges, available advocates and available Patent attorneys, there would be a pool sufficient to provide a workable and effective panel of persons to deal with Intellectual Property matters.”

- 7.24 On behalf of the Institute Mr M. le Roux [paras 4 to 8 at pages 227-228 in VOLUME III] stressed that the Institute’s proposal was not based on self-interest :-

“ The approach of the Institute is in the interest of South Africa. As a background to that statement, I can say that there is absolutely no doubt that Intellectual Property Law plays a vitally important role in the industrial world...The recent significant clash between the United States of America and mainland China was based entirely on transgression of Intellectual Property rights...If our country is to flourish, we believe that Intellectual Property must be nurtured and protected in this country and the establishment of an Intellectual Property Court will create a significant signal to the industrial countries that will encourage them to initiate and continue investment in this

country...a significant inducement to overseas companies who are on the threshold or who are perhaps considering investment in this country.”

- 7.25 Mr le Roux explained [paras 9 to 12 at page 228 in VOLUME III] that in truth the creation of a specialist court involved no more than a modest enlargement of the present jurisdictional scheme of things :-

“ ...In the case of Patents the Transvaal Provincial Division already has exclusive jurisdiction ; and in the case of Trade Marks it has significant jurisdiction to the point of exclusivity, but not quite...So the de facto position is that the Transvaal Provincial Division is doing the greatest amount of work in the fields of Patents and Trade Marks, and that, to my mind, leads to two considerations. The first, Mr Chairman, is that, as the Court already has substantial jurisdiction in those two areas, what the Institute is asking is merely to expand the position slightly, to round it off, and you will have an Intellectual Property Court. The second point...is that we are asking for exclusivity only in certain areas where the law provides for a registry in Pretoria...”

- 7.26 Lastly Mr le Roux intimated [para 17 at pages 229-230] that the Institute might well be prepared to compromise on the matter of a permanent President for the specialist Court :-

“ Mr Chairman, the appointment of a permanent Judge does not find favour with many members of the Institute for reasons such as those advanced by Judge Harms this morning. I believe that I am able to say that the Institute would support the notion of the concept of a pool of Judges from whom may be drawn suitable candidates to hear suitable matters.”

- 7.27 In the course of his oral representations to the Commission [paras 1 to 4 at page 231 in VOLUME III] Eloff JP made plain his view that the adjudication of Patent cases was well within the capabilities of a generalist Judge :-

“ When I was appointed a Judge I had very little exposure, if any, to Patent disputes, but the then Judge President saw fit to have me hear these matters and over the 23 years that I have been on the Bench I have sat over a large number of Patent disputes and presided over Full Bench Appeals from such

decisions...It is not necessary...that a specialist Court should be established to hear this type of case. Any Judge is capable of hearing these disputes...the Judge President...endeavours, when there is a complicated Patent dispute or Intellectual Property dispute, to assign the case to those Judges who have a lot of experience in that...I refer to the closing remark of the previous speaker of a pool of Judges who would be assigned to hear these cases. That is exactly what happens in practice in Transvaal in the division which I administer...By creating statutorily a specialist Court you are not improving on the situation at all."

- 7.28 The Judge President of the Transvaal furthermore doubted [paras 9 to 11 at page 232 in VOLUME III] whether the volume of Patent work was sufficient to occupy a Judge fully :-

" It is a rough guess...but I would say at the end of this year, possibly two weeks of hearing time would have been taken up by Patent cases. If on the present system a Judge who has to hear a Patent matter, which is set down for ten days, if on the second day, as very often happens, the case collapses, or is settled, then on the present system I can at once put him on other matters, trials, criminal cases, Motion Court. If he has got exclusive jurisdiction, presumably he does nothing but that sort of thing."

- 7.29 Eloff JP [para 13 at page 233 in VOLUME III] warned against the tendency towards eccentricity sometimes displayed by specialist Judges :-

" I had the experience once of keeping a Judge with skill and experience in the Tax Court. I received a lot of criticisms because he had his own particular perceptions on particular points of law, and I found there too it was necessary to spread the...tax work amongst the other Judges."

CHAPTER 8

THE COMMISSION'S INVESTIGATIONS ABROAD INTO THE ISSUE OF A SPECIALIST INTELLECTUAL PROPERTY LAW COURT

- 8.1 In regard to the desirability or otherwise of establishing a specialist intellectual property court in South Africa the Commission has corresponded with and has also consulted directly with a number of Judges, practitioners and legal academics in other countries, all of whom have special knowledge and skills in the field of intellectual property law and in the adjudication of intellectual property litigation. In particular the Commission has discussed the merits of the Institute's proposal with intellectual property lawyers in Australia and New Zealand, in the United States of America and in London.
- 8.2 Neither New Zealand nor Australia has a specialist intellectual property court. In Australia a jurist with extensive knowledge of intellectual property litigation, not only in the Antipodes but also in the United Kingdom, the United States and Germany, is the Hon Mr Justice Ian Sheppard of the Federal Court of Australia.
- 8.3 In a letter dated 30 August 1996 ["the **Sheppard letter**"] Mr Justice Sheppard was kind enough to give the Commission the benefit of his views on the merits and demerits of the establishment of specialist courts in the area of intellectual property law. A copy of the **Sheppard letter** is to be found in Appendix " V " at pages 182 to 185 in VOLUME II of this Report.
- 8.4 It is convenient to quote in paragraphs 8.5 to 8.9 hereunder from the introductory passage and thereafter from the bulk of paragraphs 1 to 4 in the **Sheppard letter**.
- 8.5 In the introductory passage of the **Sheppard letter** [at page 182 in VOLUME II] the learned writer says the following :-

" Can I say to you quite firmly that I am personally against the establishment

of specialist courts in the area of intellectual property law. I do not think the idea would be supported at all in this country and I doubt whether it would be supported in either the United Kingdom or the United States. There are a number of factors which lead me to have this view. I shall endeavour to summarise them in the following paragraphs.

8.6 Paragraph 1 of the **Sheppard letter** [see page 182 in VOLUME II] , reads as follows :-

“ It is true to say, I think, that Australian judges, at least at the senior level, are opposed to specialist courts in any area. We believe strongly in judges exercising jurisdiction at the level which is required, having a wide general experience even though they may have some specialist knowledge of a particular area of the law. This tends, we believe, to bring to bear on a given problem a broader mind and outlook. It has to be remembered that, as a case goes up the appellate ladder from the trial level, it is not likely that it will be dealt with by specialist judges. The most significant decisions in intellectual property cases are those given by ultimate courts of appeal. The Judicial Committee of the House of Lords, the Supreme Court of the United States, the Supreme Court of Canada and the High Court of Australia (which is Australia’s Supreme Court) are not specialist tribunals and yet make decisions which have critical importance in explaining, developing and, in some cases, making, the law in a variety of areas.”

8.7 Paragraph 2 of the **Sheppard letter** [see page 183 in VOLUME II] reads as follows :-

“ This does not mean that one may not, in relation to a particular subject matter such as intellectual property, have a specialist list in which those who deal with cases have a closer knowledge of the subject than do others. In England, as you know, intellectual property matters are usually dealt with in the Chancery Division. There is usually a judge in charge of the patent list. Until recently it was Aldous J. It is now Jacob J who, I think, has spread his wings a little wider and includes all intellectual property matters in his list. He was a very well known practitioner in intellectual property matters before he was appointed and he is the editor of a current text-book on the topic at least in relation to copyright.

In the United States intellectual property cases are tried by the broad run of Federal District Judges. Except in patent matters, and perhaps also in those relating to trade marks and designs, appeals go to the Circuit Courts of Appeal which are again comprised of mainstream judges. In patent cases, appeals go to the United States Court of Appeals for the Federal Circuit. This sits usually only in Washington and hears all appeals in patent cases by District Judges. It is usually staffed by judges with knowledge of patent matters but this is not invariably the case...It is as close as could be to a specialist court but that is the only exception that I know of in the United States...

8.8 Paragraph 3 of the **Sheppard letter** [see page 183 in VOLUME II] reads as follows :-

“ In Australia and New Zealand the position is that the court dealing with the matter is comprised of generalist judges some of whom may have specialist experience in intellectual property matters. In the Federal Court in Sydney and Melbourne, where the bulk of the intellectual property work is, we have specialist lists which are presided over by judges. This does not mean, however, that all cases are tried by those judges. The judge in charge of the list will oversee their preparation. When they are ready for hearing, the cases may go either to that judge or to any one of a number of other judges.”

8.9 Paragraph 4 of the **Sheppard letter** [see pages 183 to 184 in VOLUME II] reads :-

“ A number of problems may arise as a consequence of the establishment of a specialist court. One of these is what I may describe as overlap. We have a lot of cases in this Court which are brought as actions for infringement of copyright and as actions for passing off. The same thing occurs in relation to actions for infringement of trade marks. Sometimes the action for infringement of copyright or trade mark will fail but the action for passing off or an action brought under one of the consumer protection provisions of our trade practices legislation dealing with engaging in misleading or deceptive conduct, will succeed. Is the specialist court to have jurisdiction in relation to these other causes of action or do parties have to bring those causes of action in separate proceedings in a different court? This can become a very expensive operation for litigants.”

8.10 During its visit to Sydney the Commission had the advantage of discussing specialist courts in general and a specialist intellectual property court in particular with many jurists. These included Gummow J, a very distinguished member of the High Court of Australia, the Chief Justice of the Federal Court, the Hon Mr Justice M.E.J. Black (from whom the Commission received every possible assistance) ; and a number of Sydney-based Judges of the Australian Federal Court.

In addition, and through the good offices of Mr David Hammerschlag (who formerly practised as an attorney and later as an advocate in Johannesburg, and who is now a busy commercial lawyer in Sydney) the Commission had the advantage of listening to the views of a number of leading practitioners including two senior counsel.

8.11 Suffice it to say that none of the various opinions expressed to the Commission by the lawyers mentioned in 8.10 above appeared to be at variance with the view expressed in the **Sheppard letter** to the effect that in Australia the idea of specialist courts in the area of intellectual property law finds no support.

8.12 During its stay in Chicago the Commission paid a visit to the offices of the firm of Pattishall, McAuliffe, Newbury, Hilliard & Geraldson L.L.P, a firm specialising in intellectual property law. Under the auspices of Mr David C. Hilliard the Commission was given the benefit of a most instructive presentation by a number of the firm's litigation partners.

8.13 In the course of the presentation the historical origins of the US Court of Appeals for the Federal Circuit [" the CAFC "] were explored and discussed. The genesis of the CAFC is dealt with in some detail in Chapter Nine of this Report. In addition Mr Hilliard presented to each member of the Commission a copy of his firm's "Trademark and Unfair Competition" Deskbook written by Beverley W. Pattishall, David C. Hilliard and Joseph N. Welch II. The Deskbook is printed for the use of the firm and its clients but it is used also by the Federal Judges as part of their intellectual property training programme. The Deskbook has provided the Commission with valuable background information.

8.14 During the Commission's visit to Washington DC, and at 1200 I Street NW, its

members enjoyed the privilege of being the guests of the intellectual property law firm of Finnegan, Henderson, Farrabow, Garrett & Dunner, L.L.P. The firm has offices also in Tokyo and Brussels. The Commission is deeply appreciative of the firm's hospitality and of the outstanding arrangements made by one of its senior partners, Mr Stephen L. Peterson, who planned the elaborate and stimulating programme which enabled the Commission to visit the various Courts and to consult with the various intellectual property law experts. Mr Peterson is a skilled intellectual property lawyer with vast experience of litigation in this field in many countries. Throughout the three days Mr Peterson, in total neglect of his busy office, not only accompanied the members of the Commission everywhere but at the same time gave them his invaluable tutelage. Mr Peterson furnished the Commission with much instructive contemporary legal literature on the subject of the U.S. Court of Appeals for the Federal Circuit. In addition he presented each member of the Commission with a useful history of the Court published by authorisation of the U.S. Judicial Conference Committee. From this work excerpts are quoted in Chapter Nine [in paragraphs 9.2.1 and 9.4.2].

8.15 Among the Judges, practitioners, officials of the US Patent and Trademark Office and legal academics to whom Mr Peterson introduced the Commission, and from whom its members received useful advice, some of the more notable are mentioned in 8.15.1 to 8.15.11 hereunder :-

8.15.1 George Hutchinson of Finnegan Henderson, who had earlier worked for the Court of Customs and Patents Appeals [“ CCPA ”]. The United States Court of Appeals for the Federal Circuit [“ CAFC ”] was formed by fusing the CCPA and the Court of Claims. Judges of the CCPA were well-grounded in patent law and patent cases were an important part of its jurisdiction.

8.15.2 Chief Judge Glenn L. Archer, Jr., and Judge Randall R. Rader of the Court of Appeals for the Federal Circuit [“ CAFC ”]. The Commission had the benefit of a lengthy discussion in the Chief Judge's chambers. The genesis of the CAFC, the jurisdiction exercised by it, the composition of its Bench, the nature of its caseload and the way in which it functions will be dealt with in some detail in Chapter Nine of this Report. Both these Judges were strongly opposed to the idea of a specialist intellectual property court.

8.15.3 James I. Myers, Gary M. Hnath and Lindsay B. Meyer of the firm of Venable, Baetjer, Howard and Civiletti, L.L.P, in Washington DC. These practitioners explained to the Commission the role of the International Trade Commission

which was later visited by the Commission. Mr James I. Myers, who is the administrative partner in the firm's intellectual property group, further described to the Commission the advantages of litigating in the Alexandria Division of the US District Court for the Eastern District of Virginia, which was also later visited by the Commission.

- 8.15.4 Judge Sidney Harris at the International Trade Commission [“ ITC ”], 500 E Street, SW, Courtroom B, Washington DC. Judge Harris has been an Administrative Judge on the ITC for twelve years. The ITC is designed to protect US nationals by preventing unfair imports, and, in particular “dumping”. The orders of the ITC are directed not at the parties but at the US Customs Service. Patent cases account for some 98% of Judge Harris's caseload. Before his appointment Judge Harris had been an anti-trust lawyer with no patent law background. Of the persons consulted by the Commission in Washington DC Judge Harris stood alone in favouring a specialist intellectual property court.
- 8.15.5 Nancy Linck and Mary Anna Capria of the United States Patent and Trademark Office. Ms Linck is the Solicitor of the Office. They discussed with the Commission the litigation of patent issues arising from the Patent and Trademark Office.
- 8.15.6 Donald R. Dunner of Finnegan Henderson. Mr Dunner is a former Chairman of the Advisory Committee to the United States Court of Appeals for the Federal Circuit. He gave the Commission a practitioner's view of specialised patent courts and the merits and demerits of a jury in patent litigation.
- 8.15.7 Judge Roderick McKelvie, US District Court for the District of Delaware. Delaware produces more patent cases than any other State and Judge McKelvie carries a heavy case-load. He told the Commission that he subscribed to the view that Judges should have a broader rather than a narrower perspective ; and he did not favour specialist courts.
- 8.15.8 Rochelle Cooper Dreyfuss, Professor of Law, New York University Law School. Professor Dreyfuss has done extensive research into and has written prolifically on specialist courts and the success so far achieved by the CAFC.
- 8.15.9 District Judge Leonie M. Brinkema of the Alexandria Division of the Eastern District. This is one of the 94 Federal District Courts in the USA which hear,

inter alia, all patent infringement cases. This Court applies a very strict system of case management which has earned it the reputation of being the fastest federal court in the country. It has been nicknamed “The Rocket Docket” ; and the escutcheon over the entrance to the Court bears the inscription “Justice Delayed is Justice Denied”. On average a case filed in this Court, regardless of its size and complexity, reaches trial within seven months. Management control begins when the case is filed and is rigidly enforced thereafter through local rules governing motions and discovery. It was made clear to the Commission that although the Court holds distinct advantages for plaintiffs its brisk procedure creates pitfalls for unwary defendants.

8.15.10 Daniel John Meador. He is the James Monroe Professor of Law at the University of Virginia. In the opinion of the Commission Professor Meador was one of the most impressive jurists encountered by it during its fact-finding trip abroad. Meador has done much research into courts in the United States, England and Germany and he has been involved in many projects to improve the administration of justice in the United States. When under the Carter administration there was established within the Department of Justice the Office for Improvements in the Administration of Justice the President named Meador as the Assistant Attorney General to head this office. In July 1978 Professor Meador circulated for public comment a proposal to reconstruct the federal judicial pyramid by merging the appellate functions of the United States Court of Claims, the United States Court of Customs and Patent Appeals, with the addition of three extra Judges, into a new Circuit Court of Appeals. In February 1979 President Carter urged the Congress to establish the Court of Appeals for the Federal Circuit on the same tier as the existing Courts of Appeals ; and by the Federal Court Improvements Act of 1982 the Court of Appeals for the Federal Circuit [“CAFC”] was established.

8.15.11 Professor Meador is the author of two informative and lucidly written booklets on US Courts : “American Courts” [1991] ; and (with Jordana Simone Bernstein as co-authoress) “Appellate Courts in the United States” [1994]. Professor Meador was good enough to present a copy of each of these two works to the Commission.

8.16 During the Commission’s brief stay in London the Chairman and the Hon R.N. Leon were able to listen for some hours to an interlocutory motion being argued in Chancery before Mr Justice Robin Jacob ; and upon the adjournment of his

Court they had the benefit of a short but useful general discussion with him. Mr Justice Jacob stressed the crucial importance of keeping discovery proceedings in intellectual property cases within manageable limits.

CHAPTER 9

THE ROLE AND THE FIELD OF JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

9.1 THE UNITED STATES COURTS OF APPEALS IN THE FEDERAL SYSTEM

- 9.1.1 The hierarchy of courts in the U.S. federal judicial system may be likened to a pyramid. At the base of the pyramid are the 94 U.S. District Courts of general jurisdiction spread nationwide. From the trial judgments of the District Courts (sitting with or without a jury) appeals lie to the middle layer of thirteen United States Courts of Appeals. The apex of the pyramid is the United States Supreme Court with its nine Justices which hears appeals from the judgment of the courts below it. Making its own discretionary selection of what appeals it will hear the Supreme Court hands down annually opinions in no more than some 150 cases. In most cases involving federal law the Circuit Courts of Appeals are, therefore, effectively the Courts of last resort.
- 9.1.2 Twelve of the thirteen circuits are territorial in their jurisdiction. Eleven of these circuits are designated numerically : the First to the Eleventh Circuits. The Twelfth circuit is the District of Columbia Circuit. In each circuit there is a United States Court of Appeals. Each circuit hears appeals from the federal district courts located with its own circuit. The jurisdiction of each circuit is therefore geographically limited.
- 9.1.3 The United States Court of Appeals for the Federal Circuit [“ CAFC ”] established by Congress in 1982 has its headquarters in Washington DC although it may (and does, when enough cases justify the expense of travel) sit elsewhere in the country. Although it is co-equal with the twelve territorially structured federal intermediate appellate courts the jurisdiction of the CAFC is not territorially limited. Its jurisdiction extends nationwide and is defined by reference to subject-matter of the cases. In particular (although this represents only a portion of its case-load) the CAFC has jurisdiction over appeals from federal district courts in patent cases throughout the country. The

CAFC also hears appeals from trade mark decisions of the Patent and Trademark Office, but it does not hear appeals from district court trade mark actions.

9.2 THE REASONS UNDERLYING THE ESTABLISHMENT OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

9.2.1 As pointed out by Harms JA [see para 7.8 at page 32 in Chapter Seven] one circuit of the Courts of Appeals is not bound by the judgment of another. Mr George Hutchinson of Finnegan Henderson [see para 8.15.1 at page 44 in Chapter Eight] explained to the Commission that, apart from the modest annual output of opinions by the U.S. Supreme Court, that court had down the years displayed a disinclination to deal with patent appeals. What further exacerbated the problem is described thus by Senior Judge Marion T. Bennett of the CAFC :-

“ Still another factor entered the picture to diminish the patent system further as an incentive to industrial innovation. Some of the regional circuit courts, expressing strong feelings about the dangers of monopoly and having a low regard for the expertise of the Patent Office, tended not to give any deference to the administrative examination process and invalidated many patents. It thus became important to make sure, where possible, that a patent suit be brought in the least inhospitable forum. This became a high-risk game of forum-shopping. If an inventor could not be sure that his patent rights would be respected in the marketplace, or enforced in the courts, he was deprived of important incentives to research and development. The risk factor in technological development was too great.”¹

Uncertainty in the field of patents was detrimentally affecting business and the industrial community. Across the country there was a pressing need for uniformity in the interpretation and application of patent laws in order to achieve judicial decisions conducive to industrial research and business productivity. The CAFC was created in order to achieve uniformity of

¹ *“The United States Court of Appeals for the Federal Circuit - A History 1982 - 1990” published by authorisation of the U.S. Judicial Conference Committee, at page 10.*

decisions in the critical area of patent law without the need for the Supreme Court to resolve conflicts between circuits.

9.3 THE AMERICAN SOLUTION TO THE PROBLEM OF THE LACK OF A NATIONALLY UNIFORM RESOLUTION OF PATENT LAW DISPUTES WAS SHAPED BY A LEGAL PHILOSOPHY DISTRUSTFUL OF SPECIALIST COURTS

9.3.1 In its discussions with many American lawyers the Commission encountered an almost universal aversion to specialist courts functioning outside the ordinary mainstream judicial system.

9.3.2 The Commission soon became aware of a strong American tradition favouring generalist Judges. It is feared in the U.S.A. that the narrowness of the work of a specialist court tends to doctrinal isolation and short-sighted vision. It is felt that the essential talent of a Judge is his faculty of judging ; and that this aptitude is best developed and honed by the widest exposure to the law in all its ramifications.

9.3.3 In an article in the Houston Law Review Vol 32 (1995) No 1, 67 John B. Pegram writes at p 125 :-

“ The Federal Circuit’s first Chief Judge, Howard T. Markey, who had supported the establishment of the Federal Circuit in 1981 with the argument that judges who frequently deal with the same type of cases would be more efficient, opposed a specialized trial court having only patent jurisdiction in 1989, saying, “There is a possibility of the horse-blinders, tunnel-vision type approach at that level if you had nothing but patent lawyers day in and day out, day in and day out.” ”²

² “ Should the U.S. Court of International Trade be given Patent Jurisdiction concurrent with that of the District Courts ?”

9.4 THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT IS NOT A “SPECIALIST” COURT IN THE ORDINARY SENSE OF THE WORD

9.4.1 In creating the Court of Appeals for the Federal Circuit Congress resolved the most powerful objection to the proposed new court - the dangers inherent in specialisation - by the broad range of jurisdiction which it bestowed upon the court. The CAFC has almost plenary jurisdiction over patent law because it has been given the jurisdiction of the CCPA to review decisions of the Patent and Trademark Office, the power of the Court of Claims to review its trial division’s adjudication of patent disputes against the United States, and the jurisdiction of the regional circuit courts over appeals from cases arising under patent law. But in addition it has been given jurisdiction spanning a broad range of legal issues and types of cases. This ensures that its Judges have no lack of exposure to a wide variety of legal problems. The breadth of its jurisdiction is indicated in 9.4.2 below.

9.4.2 Writing the foreword to the history of the CAFC (the work cited in footnote ¹ to para 9.2.1 at page 48 above) the late Chief Judge Helen W. Nies of that Court said the following (at page xii) :-

“ The creation of the Federal Circuit was not without controversy. ‘Specialized’ courts have been criticized as subject to myopic vision. The Federal Circuit, while unique among the circuits, has never been specialized in the sense of concentrating on only a single jurisdictional base, which thereby may become separate from the mainstream of the law. The judges must be generalists in the tradition of our judicial system. From its inception, the court has had jurisdiction over widely diverse legal fields. As the reviewing court for the U.S. Court of International Trade and the U.S. International Trade Commission, it is involved in problems of importation and exportation. As the reviewing court of the U.S. Claims Court, it hears the complaints of persons having monetary grievances against the government. As examples, cases arise in connection with fifth amendment taking claims, breaches of government contracts, claims for tax refunds, mismanagement of Indian lands, vaccine injury compensation claims, monies payable under various government programs, and garnishment of government wages for alimony and child support.”

In addition to the matters mentioned above the CAFC has also been given

jurisdiction over the U.S. Courts of Veterans.

9.4.3 The CAFC is statutorily constituted of twelve Judges. Congress has authorised it to sit in panels of three or more judges. These panels do not specialise. Instead panel membership rotates and each panel has a cross-section of cases randomly assigned to it. Chief Judge Archer told the Commission that patent cases represent roughly 25% of the CAFC's caseload.

9.4.4 It is interesting to notice the career and to examine the legal background of Chief Judge Glenn L. Archer before his appointment to the CAFC. After law school graduation and admission to the Bar of the District of Columbia in October 1954, he took a Commission as a first lieutenant in the Judge Advocate General's Office of the U.S. Air Force. Returning to Washington in December 1956 he entered private practice with a law firm in which he became a partner in 1960. During his 25 years of private practice Judge Archer specialised in tax and corporate law. In 1981 President Reagan nominated him to be Assistant Attorney-General for the Tax Division in the Department of Justice, and he was confirmed by the Senate in December 1981. The Tax Division conducted and was responsible for all tax refund, tax collection, and related civil tax litigation in the courts of the United States. In October 1985 President Reagan nominated Judge Archer to be a Circuit Judge of the United States Court of Appeals for the Federal Circuit. He was confirmed by the Senate and took his oath of office in December 1985.

CHAPTER 10

THE BROAD GUIDE-LINES ADOPTED BY THE COMMISSION AND ITS MAIN FINDINGS OF FACT IN REGARD TO THE PROPOSAL FOR THE ESTABLISHMENT OF A SPECIALIST INTELLECTUAL PROPERTY LAW COURT

- 10.1 The Commission accepts unreservedly that the proposal of the South African Institute for Intellectual Property [“the Institute”] for the establishment in South Africa of a specialist intellectual property court is not inspired by motives of self-interest.
- 10.2 The Commission accepts that it is essential for the proper industrial and commercial development of South Africa that it should have a sound and effective intellectual property regime.
- 10.3 The Commission is satisfied that at the present time in South Africa intellectual property rights enjoy satisfactory protection; and that this is recognised to be the position in other countries.
- 10.4 The Commission finds that the Court of the Commissioner of Patents is functioning well. The Commission finds that it is expedient (and indeed essential) for the Registrar of Trade Marks to perform both administrative and judicial functions; and that the latter are satisfactorily performed by him.
- 10.5 The Commission accepts that a sound grasp of the principles of intellectual property law (or any one of its diverse branches) and practical experience of their application in litigation is important alike for a practitioner presenting a case to the court and for the Judge who has to decide the matter. But this is no less true for tax law, company law, the law of negotiable instruments, ever-burgeoning administrative law - and, indeed, for any other intricate branch of the law.

10.6 The Commission is opposed to the notion that the adjudication of intellectual property law matters should be the exclusive preserve of a specialist court. The Commission considers to be well-founded the apprehension of American jurists that a specialist court tends towards doctrinal isolation, tunnel vision; and not infrequently, idiosyncratic Judges.

10.7 The Commission agrees with the suggestion made in the **AD Memorandum** that as a qualification for judicial appointment:-

“... the component of wide trial experience may in fact outweigh technical expertise in any given field.”

10.8 The Commission shares the view expressed in the **Cape Bar Memorandum** :-

“... that the temptation to create specialized niche areas of the law should be resisted. It is likely to be of more benefit to practitioners who specialize in the particular field than to the litigants concerned.”

10.9 The Commission agrees with the following statements in the **Findlay Memorandum** :-

“ Matters involving trademarks, copyright, merchandise marks, passing off and unlawful competition have been dealt with by the ordinary courts of jurisdiction for many years. A perusal of the law reports shows that Courts of first instance outside the Transvaal have given leading judgments in these fields for decades ... In any event, appeals from the Commissioner of Patents and in other Intellectual Property matters are dealt with by the ordinary Appeal Courts. ”

10.10 The Commission agrees with the following view expressed by Mr Justice Ian Sheppard of the Federal Court of Australia [in the **Sheppard letter**] :-

“ The most significant decisions in intellectual property cases are those given by ultimate courts of appeal. The Judicial Committee of the House of Lords, the Supreme Court of the United States, the Supreme Court of Canada and the High Court of Australia (which is Australia’s Supreme Court) are not specialist tribunals and yet make decisions which have critical importance in explaining,

developing and, in some cases, making the law in a variety of areas.”

- 10.11 In the case of the United States the position since 1982 has been that effectively the Court of Appeals for the Federal Circuit [”The CAFC”], rather than the US Supreme Court, has been the court of last resort for patent law disputes. For the reasons set forth in Chapter Nine of this Report the Commission is satisfied that the CAFC is a generalist rather than a specialist court.
- 10.12 The Commission considers that the above-quoted observations of Mr Justice Sheppard apply with particular force to the Supreme Court of Appeal in South Africa. It is instructive in this connection to notice from the South African Law Reports the outstanding contribution to intellectual property law reflected in the many judgments delivered over an appellate career of 23 years by the former Chief Justice, Mr Justice MM Corbett, who came to the Appellate Division as a generalist Judge.
- 10.13 The Commission finds that the pool of suitably qualified persons (and it is accepted that their qualifications are excellent) from whom appointments to the Bench of a specialist intellectual property court might be made is unacceptably small.
- 10.14 In the light of past experience the Commission considers it improbable that in future more patent practitioners will appear personally in the Court of the Commissioner or (should such be established) a specialist intellectual property court.
- 10.15 The Commission is satisfied that it will be difficult to find a suitable candidate for appointment as President of a specialist intellectual property court. This difficulty is fully appreciated by more than one member of the Institute.
- 10.16 Scarce judicial manpower should be deployed productively and economically. Leaving aside the merits of specialist Judges as opposed to generalist Judges, the Commission is not satisfied that the volume of intellectual property litigation in South Africa is sufficient to keep Judges in a specialist court productively and economically occupied.

CHAPTER 11

THE COMMISSION'S RECOMMENDATION IN REGARD TO THE PROPOSED SPECIALIST INTELLECTUAL PROPERTY LAW COURT

The unanimous recommendation of the Commission is that a specialist intellectual property law court should NOT be established in South Africa.

SECTION (B)

CHAPTER 1

THE PROPOSAL BY THE ASSOCIATION OF INSOLVENCY PRACTITIONERS OF SOUTH AFRICA THAT A SPECIALIST INSOLVENCY COURT SHOULD BE ESTABLISHED

1.1 The Jurisdiction of the High Court

1.1.1 Insolvency :

In South Africa jurisdiction in insolvency is vested in the High Court in any of its provincial or local divisions. Included in its jurisdiction is the power to review any decision, ruling, order or taxation of the Master (excluding the appointment of or the refusal to appoint a trustee) as well as any decision, ruling or order of the presiding officer at a meeting of creditors.

1.1.2 The Master :

The Master is appointed in terms of sec 4 of the Administration of Estates Act No 66 of 1965. He is appointed to each provincial division of the High Court. Extensive powers are entrusted to the Master. He may at any time during the sequestration of an estate summon the insolvent or trustee or any other person to appear before him or before a magistrate to be interrogated about the affairs of the estate. To his custody are entrusted all documents relating to insolvent estates.

1.1.3 Companies :

The provincial or local division of the High Court within whose area of jurisdiction the registered office or the main place of business of a company or

other body corporate is situate has jurisdiction in matters under the Companies Act in respect of that company. In the appropriate circumstances such court accordingly has jurisdiction to deal with matters relating to judicial management, the winding-up of the company, compromises, take-overs, etc.

1.2 The Association of Insolvency Practitioners of South Africa [AIPSA] is a voluntary association which is in the process of seeking statutory recognition. AIPSA has 250 members. Approximately 98% of the total number of insolvency practitioners in South Africa belong to AIPSA. Its members include persons who take appointments as trustees, liquidators, curators, receivers for creditors etc.

1.3 Under cover of a letter dated 26 July 1995 by the Secretary of the Project Committee for the Review of Insolvency Law of the South African Law Commission [the **Project Committee**] there was sent to the Commission a written response by the **Project Committee** dealing with Specialised Insolvency Courts. A copy of the **Project Committee's** written response is to be found in Appendix " W " at pages 186 to 188 in VOLUME II of this Report.

1.4 The **Project Committee's** written response concluded with the following two paragraphs :-

“ 7. *It would be appreciated if specialised courts for insolvency matters could be considered by the RPLD Commission [the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court], perhaps initially on a pilot basis and as part of the existing Commercial Court in Johannesburg.*

8. *If the idea of a specialised insolvency court finds favour in general principle then it is suggested that more detailed research be conducted by the SA Law Commission as to exactly how such courts function in other countries which have bankruptcy law which is similar to South African bankruptcy law.”*

1.5 On 11 April 1996 and at a public sitting of the Commission held at Midrand the

Commission was addressed successively by the following three persons on behalf of AIPSA : Professor M. Katz ; Mr L.F. Pereira ; and Dr E. de la Rey. Each in turn proposed the establishment of a specialist insolvency court as part of the Commercial Court wherever a Commercial Court now exists [Johannesburg] or may in future be created. Before he addressed the Commission Professor Katz handed in a memorandum [the **AIPSA Memorandum**] setting out the essence of AIPSA's submissions in relation to the proposed specialist insolvency court. A copy of the **AIPSA Memorandum** is to be found in Appendix " X " at pages 189 to 194 in VOLUME II of the Report.

- 1.6 In paragraph 5 of the **AIPSA Memorandum** it is stressed that in the context of insolvency law it is helpful to distinguish between those functions which are purely judicial and those which are administrative. It is said that judicial functions include the hearing of the following seven matters : (1) applications for winding up ; (2) applications for liquidation ; (3) applications for judicial management ; (4) applications for curatorship ; (5) applications for sequestration ; (6) schemes of arrangement and offers of compromise ; (7) all insolvency matters arising from the provisions of the Insolvency Act, 1936 and the Companies Act, 1973, including the challenging of impeachable transactions. Administrative matters on the other hand -

“ include almost all other routine matters arising in insolvency law such as creditors meetings and so forth. There are also the conducting of enquiries and interrogations pursuant to sections 65 and 417 of the Insolvency and Companies Act.”

- 1.7 Under the heading "Purpose" paragraph 5 of the **AIPSA Memorandum** describes the objectives of a specialist insolvency court as including the benefits of :-

- (1) high levels of skills ;
- (2) high levels of experience ;
- (3) the attainment of speed ; and
- (4) the development of the law.

- 1.8 The **AIPSA Memorandum** concludes with the following paragraph :-

“ **8. PROPOSAL**

- 8.1 *Taking cognisance of the foregoing it is proposed that in those Provincial Divisions where a Commercial Court exists or is established there should be established as a part of that Court a Specialist Bankruptcy Court. Naturally this does not take cognisance of the problems that exist at present with the Commercial Court arising from the fact that it requires the consent of both parties. This is a limitation which should be eliminated.*
- 8.2 *The suggestion in paragraph 8.1 above appears to accord with the position which exists in England. There the Bankruptcy Court is a part of the Chancery Division.*
- 8.3 *It is also pointed out that in Canada the Bankruptcy Court is part of the Commercial Court. This arises by way of the Rules of the High Court.*
- 8.4 *Thus, in those Provincial Divisions where the volume of commercial work does not justify a Commercial Court, so too would there be little purpose served in establishing a Bankruptcy Court.*
- 8.5 *In those Divisions where a Commercial Court is established, a separate insolvency Court could be formed as a part of the Commercial Court. This would enable, for example, all of the Commercial Court judges to be available for the Insolvency Court.*
- 8.6 *In addition to the foregoing suggestion a distinction would be made between Judicial and Administrative functions along the lines set out in paragraph 5 above.”*

CHAPTER 2

2.1 A SUMMARY OF THE MAIN ORAL SUBMISSIONS IN REGARD TO THE CREATION OF A SPECIALIST INSOLVENCY COURT MADE TO THE COMMISSION BY INTERESTED PARTIES AT MIDRAND DURING APRIL 1996

2.2 In amplification of the **AIPSA Memorandum** oral submissions were made to the Commission at Midrand on 11 April 1996 by Professor Katz, Mr Pereira, Dr E. de la Rey and Adv M.B. Cronje. In addition certain information regarding interrogations under the Insolvency Act and the Companies Act was furnished to the Commission by Mr J. Stuart, Deputy-Master of the Transvaal Provincial Division and Mr R. Mandelstam, a senior Johannesburg Magistrate. [see pages 80-92 in VOLUME III of this Report].

2.3 In the course of his oral submissions [see pages 80-82 in VOLUME III] Professor Katz dealt *seriatim* with the submissions set forth in the **AIPSA Memorandum**. He pointed out that before one could formulate any specific proposal for the establishment of a specialist insolvency court it was necessary to examine the environmental factors :-

“ These include need, availability of resources, accessibility, distinction between judicial and administrative functions, purpose and recognition of the relevant substantive law...on need based on volume, I think that there is a significant volume and therefore a need for a specialist insolvency court. The availability of resources is self-evident... ”

2.4 Professor Katz stated that in considering the criterion of accessibility the fact that we had a Special Income Tax Court did not provide a helpful analogy :-

“ The Special Income Tax Court is an appeal court and accessibility to cope with urgency is not a factor there. In insolvency work urgency is often an acute factor and therefore accessibility is fundamental ; so that the analogy of this Special Income Tax Court would, with respect, be inappropriate here, and we say that this needs a permanent court. ”

- 2.5 Pointing out that at the moment bankruptcy was dealt with in a multiplicity of statutes, Professor Katz mentioned that the **Project Committee** would probably recommend a consolidated statute dealing comprehensively with all facets of insolvency :-

“ There is the Insolvency Act relating to individuals, the Companies Act to most companies, the Banks Act relating to banks and Insurance Act relating to insurance companies ; and this has given rise to, particularly in the context of insurance companies, some unfortunate consequences also of the curatorship of banks. One of our recommendations is likely to be a single Bankruptcy Act dealing with all aspects of bankruptcy and shall we say that is also a relevant factor in the establishment of a specialist insolvency court.”

- 2.6 Dealing with the necessity to observe the distinction between judicial and administrative functions, Professor Katz pointed out that in the Chancery Division in London many of the routine applications were handled by the Registrar and never came before a Judge.

- 2.7 Lastly Professor Katz complained that the provisions of the Companies Act relating to the examination of persons in winding-up worked unsatisfactorily in practice :-

“ Chairman, one last point if I may, at the moment there is an unfortunate occurrence and that is the so-called section 417 interrogations, the inquiries under the Companies Act. Now the objective of that could be very useful. In practice unfortunately I think that it is recognised that this has become prone to abuse...And we say that that is one of the functions that could be handled by the specialist insolvency court. That would remove we believe, with respect, a large part of the factors that currently give rise to the abuse and some of the Constitutional challenges that have been made would lose some of their impetus.

ADV JAPPIE : ...The problem of interrogations, right now of course it is being done in the magistrate's court normally before a magistrate. Are you then suggesting that interrogations likewise be done by the insolvency court ?

PROFESSOR KATZ : With respect, no that is not our suggestion. That we say can remain as it is.”

2.8 The next speaker [at pages 83-87 in VOLUME III] was Mr L.F. Pereira, the official spokesman for AIPSA. He began by stating his qualifications :-

“ I am an attorney by profession. I am still on the roll of attorneys although I do very little legal work. I am a full-time insolvency practitioner. I practise with others in Sandton at the moment. I was admitted in 1954 as an attorney and since then I have practised as a specialist insolvency attorney. In about 1986 I decided to change course and become a full-time insolvency practitioner which I have done since then. I am the Deputy-Chairman of AIPSA. I am a council member of INSOL International which is the governing body of insolvency internationally. I am a member of the American Bankruptcy Institute. I am a member of the Association of Insolvency Practitioners of Europe.”

2.9 Mr Pereira emphasised the importance of insolvency to commerce and to all aspects of business activity in South Africa. Estates were becoming bigger and the amounts involved were becoming larger :-

“ The point I am trying to make is two-fold...the one is that insolvency for commerce, industry, the banking sector has become very, very important ; and number two, it is becoming more and more complex, more and more specialised for various reasons. That brings me to our fundamental approach : that insolvency law is a specialised subject, that it is desirable that insolvency matters should be dealt with by judges who specialise in insolvency. That is judges experienced in insolvency and knowledgeable as to insolvency law.”

2.10 In order to demonstrate his point Mr Pereira referred the Commission to the liquidation in South Africa of CET Trading SA (Pty) Limited :-

“ This was a company formed to export motor components and to take advantage of the government’s export allowance. Unfortunately the company was formed and run by a dishonest person who in the process committed a fraud involving the government to the extent of some R600 000 000. After our appointment as liquidators we found dummy companies in Jersey. We had to bring urgent applications to attach monies in Jersey. We found components in Rotterdam and in Germany...So eventually we ended up with litigations...in Rotterdam, in Den Haag, in Switzerland and in Germany and we are still busy

with that litigation. Now that illustrates the complexity of the matters.”

2.11 Mr Pereira stressed that in insolvency everything was urgent :-

“ The minute the liquidator is appointed he takes the place of the directors. He immediately has to start making decisions with or without the consent of anybody...He closes the business, carries on with the business, insures the assets, defends litigation instituted, and to enable him to carry out his duties he needs immediate access to the courts, and that is why it is so important to have...dedicated judges who you can approach even at night, over the weekends to obtain urgent orders to protect the assets of the estate, Sir.”

2.12 In Switzerland, Holland, France, Germany and elsewhere in Europe, so Mr Pereira explained to the Commission, there were dedicated judges :-

“ It appears to me that those judges are singled out as judges who wish...to be involved in insolvency matters...and what we appreciate about the system is once that judge is appointed to a matter he remains with that estate until it is completed and he is accessible at very short notice for instance, for the interrogation of witnesses or for the attachment of assets etc.”

2.13 Mr Pereira told the Commission that while he regarded it as the first prize, if a specialist insolvency court were not possible, he considered as an alternative, and the next best solution, that certain judges should be identified as specialist judges :-

“ It is so that in every system such as the WLD there are judges who whilst at the Bar specialised in insolvency and they would make the best judges. And that is the problem we have up to now, and I say this with all due respects, is lack of accessibility and lack of experience on the part of the judges.”

CHAIRMAN : And you say the alternative is that one judge would shepherd the whole case through from beginning to end ?

MR PEREIRA : Yes sir, including the conduct of inquiries...if the inquiry is substantial enough such as Tollgate matter. The smaller matters, there are the other sections of the Companies Act and the Insolvency Act, and those inquiries can be conducted before the presiding officers, the magistrate or before the

Master. ”

- 2.14 Mr Pereira further complained about the manner in which the examination of persons as to the affairs of a company was conducted :-

“ The way the sec 417 inquiries are conducted...is not satisfactory at all. It is not conducted in a judicial atmosphere and in a judicial manner...I would level the following criticism, and again, the Assistant-Master is sitting here, I say I do it with all respect Sir, that I feel in too many instances the Master allows sec 417 inquiries to be conducted when in my opinion they are not justified.

My second complaint is this. Normally the attorney acting for the estate, and even my colleagues the insolvency practitioners, they nominate certain advocates who we see frequently appear as commissioners...and in my many years of experience I have come to the conclusion that that just does not work...I do not have the statistics in front of me...but my own experience is that very few of these inquiries produce sufficient assets to justify the costs. That is my personal view.

And another problem we have sir is these commissioners...do not have powers to arrest the witnesses who do not arrive or bring the documents, matters must be referred back to the judge.”

- 2.15 Mr Pereira submitted that at an early stage insolvency matters should be assigned to a particular judge well versed in insolvency law :-

“...we as the people at the coal face who deal with these matters, actually we would like to see either specialised insolvency courts with specialised judges or generally in the system identified insolvency judges who once they hear the first matter, let us say the application for liquidation, then this matter is delegated to them. That has obvious advantages. The judge gets to know the matters.

It is easier for him to make a decision and as happens I know in the United States...there the judge not only plays a role as judge but also he plays a guiding influence in the whole development of the estate and a sounding board for the committee of creditors and the liquidators. It is a whole team that works together...I am not talking about the run of the mill estates, I am talking about

the bigger estates.”

- 2.16 According to Mr Pereira only a small fraction of the total number of insolvency matters in the WLD were complex enough matters which merited the attention of a specialist insolvency court :-

“ I want to support what Professor Katz says that with unopposed matters somebody such as the Registrars deal with them. Now if one would look at the Witwatersrand Local Division roll of insolvency matters I would say that about 90%...are plain sailing and there is no reason why the Registrar should not grant the orders because they are practically administrative of nature. You can grant the orders and if they become opposed you can pass them onto the judge as is done now in the WLD.”

- 2.17 Mr Pereira considered that the possibility of international cross-border insolvency laws underlined the need for specialist judges in South Africa :-

“ Now I have no doubt that very soon there will be an international uniform cross-border insolvency set of laws and the judges will be phoning each other, faxing each other...and therefore only for that reason it is important that we have in South Africa specialised insolvency judges who are experienced...otherwise this is not going to work as far as South Africa is concerned.”

- 2.18 The next speaker [at page 88 in VOLUME III] was Dr E.M. de la Rey. She has a doctorate in Company Law and she was an associate professor at UNISA, specialising in Insolvency Law before she joined the Financial Services Board. In 1988 she brought out the eighth edition of Mars on Insolvency Law.

- 2.19 In the course of her oral submissions Dr de la Rey stressed the importance of a thorough grasp of accounting in grappling with complicated insolvency matters :-

“ Mr Chairman, the one thing I think that one does not always realise is the necessity for a grasp of accounting principles and especially complex accounting principles in insolvency. And that is also one reason why one should have dedicated judges so that they can have the chance to improve their

grasp of accountancy. Because it is very difficult for a person with absolutely no accountancy background to deal with complex insolvency matters.

The other thing is that I think that if we had dedicated insolvency courts it would facilitate our re-entry into the global commercial village because participants in international trade are used to the systems in their own court in their own countries where they have these specialised courts and then they would expect it here too...

- 2.20 On behalf of the **Project Committee** Adv M.B. Cronje [at page 89 in VOLUME III] informed the Commission that Mr Nico Coertze, a member of the **Project Committee** who was unable to attend the Commission's public sitting :-

"...supports the general views expressed here. His suggestion is that perhaps there should be an introduction of the specialised court on a pilot basis in the bigger centres."

- 2.21 Mr J. Stuart has been with the Department of Justice for 25 years. Since 1991 he has been the Deputy-Master of the High Court in the Transvaal.

- 2.22 In the course of his oral submissions [at pages 90-91 in VOLUME III] Mr Stuart provided the Commission with statistics regarding the number of interrogations under the Insolvency Act and the Companies Act at the Pretoria Master's Office. Thereafter Mr Stuart dealt with the criticisms earlier voiced [see para 2.14 above] by Mr Pereira :-

"...insofar as Mr Pereira pointed out the [sec] 417 and 418 inquiries are conducted at random, I must, with respect, take issue with Mr Pereira there. The 417 inquiries, before they are consented to, those applications are very, very comprehensive and each application is judged on its merits in that any person who feels aggrieved obviously can take the Master on review when he does consent to a 417 inquiry.

As far as the commissioners are concerned Mr Chairman, it is true that where the Master does consent to a 418 inquiry the commissioners who preside thereat are on many occasions the same...

CHAIRMAN : When you say the same people you mean the same people are appointed time and time again ?

MR STUART : Exactly, Mr Chairman, they would be attorneys who are clued up on insolvencies, senior counsel, and for that reason we would appoint those commissioners just as Mr Pereira pointed out that in the insolvency courts they wish to have dedicated judges. ”

2.23 In response to a question by the Commission Mr Stuart indicated that he supported the notion of a specialised insolvency court :-

“ MR MALULEKE : Mr Stuart, you would also support the view that such a specialised court should ideally be in the WLD or in Johannesburg because of the volume of work, the pilot project ?

MR STUART : Yes, I would support that too.

MR MALULEKE : Would you consider that...it would be advisable then to have a Master...in Johannesburg ?

MR STUART : Mr Chairman, most probably it would be more practical, yes. ”

2.24 At the invitation of the Commission to others present, the following opinions [at page 91 in VOLUME III] on this last-mentioned point were then expressed :-

“ MR PEREIRA : Mr Chairman, it is quite obvious that there should be a Master’s Office in Johannesburg. In fact, we have been lobbying for the Master’s Office for many years...

DR DE LA REY : ...I would just like to elaborate on Mr Pereira’s point of a Master’s Office for Johannesburg. The same applies of course to Durban and Port Elizabeth. It is totally artificial that you do not have Master’s Offices in your most important commercial centres in the areas. ”

2.25 Mr R. Mandelstam is a senior Magistrate in Johannesburg. As head of the Civil Section he is required to allocate daily two Magistrates on a full-time basis to deal with

interrogations and other work relating to insolvencies. Mr Mandelstam [at page 92 in VOLUME III] supported the plea for the establishment of a Master's Office in Johannesburg :-

“ I have actually written representations to my Department to this effect a long time ago, Chairman, and nothing has happened as yet. I am convinced it is essential. ”

CHAPTER 3

THE COMMISSION'S INVITATION TO OTHER INTERESTED PARTIES TO RESPOND IN WRITING TO THE PLEA FOR THE CREATION OF A SPECIALIST INSOLVENCY COURT MADE ON BEHALF OF THE ASSOCIATION OF INSOLVENCY PRACTITIONERS OF SOUTH AFRICA [AIPSA] AT THE PUBLIC HEARINGS AT MIDRAND

- 3.1 Following upon the public sittings at Midrand in April 1996 the Commission issued to all interested parties a circular calling attention to the nature of the oral submissions made at Midrand and summarising, *inter alia*, the effect of AIPSA's proposal for the establishment of a specialist insolvency court.
- 3.2 The circular contained an urgent request to all interested parties to make written responses to the Commission, by not later than 31 August 1996, dealing with the issue of a specialist insolvency court. Appended to the circular was a copy of the **AIPSA Memorandum**.

CHAPTER 4

REACTIONS TO THE CIRCULAR AND A FURTHER PUBLIC SITTING OF THE COMMISSION TO DEBATE THE ISSUE OF A SPECIALIST INSOLVENCY COURT

- 4.1 In response to the circular described in Chapter Three the Commission received the following four written responses :-
- 4.1.1 A memorandum dated 4 July 1996 by the Cape Bar [the **Cape Bar Memorandum**]. A copy of the **Cape Bar Memorandum** is to be found in Appendix “ Q ” at pages 123 to 127 in VOLUME II of this Report.
- 4.1.2 A memorandum dated 12 August 1996 from the Society of Advocates of Natal [the **Findlay Memorandum**]. A copy of the **Findlay Memorandum** is to be found in Appendix “ R ” at pages 128 to 138 in VOLUME II of this Report.
- 4.1.3 A letter dated 3 June 1996 from the Judge President of the Transvaal Provincial Division [the **Eloff letter**]. A copy of the **Eloff letter** is to be found in Appendix “ Y ” at page 195 in VOLUME II of this Report.
- 4.1.4 A letter dated 22 July 1996 from the Association of Law Societies [the **ALS letter**]. A copy of the ALS letter is to be found in Appendix “ Z ” at page 196 in VOLUME II of this Report.
- 4.2.1 Upon receipt of the written responses mentioned in paragraph 4.1 above, and with a view to stimulating further debate upon the issue of a specialist insolvency court, the Commission forthwith arranged for a further public hearing of the Commission to be held at Bloemfontein on 21 August 1996 [the **Bloemfontein sitting**].
- 4.2.2 In advance of the **Bloemfontein sitting** interested parties were invited to attend the hearing.
- 4.2.3 The **Bloemfontein sitting** was attended by a number of interested parties. The

oral submissions made thereat in relation to the issue of a specialist insolvency court will be summarised in Chapter Five of this Report. In this Chapter it is convenient to indicate the main thrust of each of the four written responses mentioned in paragraph 4.1 above.

4.3 THE CAPE BAR MEMORANDUM:

4.3.1 In paragraphs 5 and 6 of the **Cape Bar Memorandum** the following arguments against the creation of a specialist insolvency court were marshalled :-

- “
5. *In our view there is no need for the creation of a Specialist Insolvency Court (SIC) either in its own right or as an adjunct to a Commercial Court. With the exception of the Transvaal Provincial Division, it is difficult to envisage which other Divisions may in the foreseeable future generate sufficient commercial work to warrant the creation of a Commercial Court. This has not yet been found necessary in our Division, and the volume of insolvency work as but one component of commercial work, does not in our view justify the creation of a separate court - albeit one which may be staffed by Judges presiding in the Commercial Court.*
 6. *Factors which weigh against the creation of an SIC are the following :*
 - 6.1 *The Law of Insolvency is not esoteric or inaccessible. It is not the type of work which requires specialist training or procedures on the part of either Judges presiding in insolvency matters or practitioners practising in that field.*
 - 6.2 *Perhaps the most important motivation advanced by Professor Katz et al in their memorandum proposing the establishment of the SIC, is that of accessibility : insolvency work by its very nature often involves, to a greater extent than other forms of commercial litigation, a degree of urgency which necessitates timeous access to*

court. However, this aspect is adequately addressed by the flexibility which exists in our Division as a result of the present 'fast lane' of the Third Division.

6.3 *There is, in our view, not sufficient work which can be characterised as purely insolvency-related to justify the establishment of a separate court or division dedicated thereto. Even if the volume of such work was significant, we do not believe that the nature of this work is such that it warrants separation from the general body of litigation. To do so would involve a material risk that rules and procedures will develop which make such court less accessible to the public and to non-specialist practitioners."*

4.4 THE FINDLAY MEMORANDUM:

4.4.1 In a covering letter to the **Findlay Memorandum** the Chairman of the Society of Advocates of Natal informed the Commission as follows :-

" It is the practice of this Bar to refer documents such as yours [the circular described in Chapter Three] to a member of the Bar who is considered familiar with the relevant topic.

It is unusual for the Bar Council to endorse or pass any further comment upon the member's efforts. I accordingly send Advocate Findlay SC's comments to you but they do not necessarily represent the views of the Bar Council."

4.4.2 In the **Findlay Memorandum** the issue of a specialist insolvency court is dealt with in paragraphs 4 to 10 thereof. Quoted hereunder are the contents of paragraphs 4 to 7 :-

" 4. The Natal Bar is of the view that there is no need for a separate specialist court, whether it functions as an independent court or as a Division of the Commercial Court.

5. *Were such Court to be created as a specialist Court, the problem would arise of whether or not an entire structure of specialist Appellate Courts would also have to be created, as the rationale presupposes that the Supreme Court Judges would not be able to sit on appeal as they would not have had the necessary specialist experience to so qualify them.*
6. *In any event the law of insolvency is not so highly specialised as to warrant specialist training or require it to be dealt with in a Court other than the Supreme Court.*
7. *To the extent that it is suggested that urgency, which often relates to matters of insolvency, is a factor in favour of a specialist Court, this is not so in that the rules of Court and practices permitting the bringing of urgent applications are sufficiently flexible to cater therefor.”*

4.5 THE ELOFF LETTER:

- 4.5.1 On behalf of the Transvaal Provincial Division its Judge President responded as follows in the **Eloff letter** to the proposed specialist insolvency court :-

“ There is no need for such a court. Insolvency matters are dealt with by all judges in this division (and, I should imagine, by all judges in the other divisions) as cases considered in the ordinary course. Insolvency matters usually come up in our motion courts, and are, I think, dealt with very adequately by the judges who preside over those courts from time to time. It would create all sort of problems and bring about an additional burden, if insolvency matters had to be assigned to a specialist court.”

4.6 THE ALS LETTER:

The **ALS letter** was in the following terms :-

“ Die Vereniging van Prokureursordes ondersteun die voorstelle wat aan die Hoexter-kommissie gemaak is oor die instelling van ‘n gespesialiseerde insolvensiehof.”

CHAPTER 5

A SUMMARY OF THE FURTHER ORAL SUBMISSIONS IN REGARD TO A SPECIALIST INSOLVENCY COURT MADE TO THE COMMISSION BY VARIOUS INTERESTED PARTIES AT THE BLOEMFONTEIN SITTING ON 21 AUGUST 1996

5.1 At the **Bloemfontein sitting** the following three interested parties addressed the Commission [see pages 193-208 in VOLUME III of this Report] on the subject of the proposed specialist insolvency court : (1) Zulman JA ; (2) Mr Attorney L. Sackstein ; and (3) Eloff JP. After the address by Eloff JP, brief replies to his oral submissions were delivered by Zulman JA and Mr Sackstein.

5.2 The Hon Mr Justice R.H. Zulman is the Chairman of the Special Project Committee for the Review of the Insolvency Law [the Project Committee]. Addressing the Commission [at pages 193-199 in VOLUME III] in the above capacity, and also in his personal capacity, Zulman JA said by way of introduction :-

“ We had a discussion among the Appeal Court Judges yesterday and they have not yet formulated their views, so I do not purport to speak on their behalf at all. In addition, I have taken the liberty of inviting Attorney Leslie Sackstein to be present. He, as you may know, Mr Commissioner, is an attorney who practises in Bloemfontein, and of course practises countrywide, particularly specialises in the field of insolvency and has considerable experience in matters of that nature...”

5.3 Zulman JA explained that for the past seven years the Project Committee had been concerned with the revision of the 1936 Insolvency Act by attempting to consolidate provisions relating to liquidations and insolvencies into a single Bankruptcy Act :-

“ That work, I am happy to say, has reached a fairly advanced stage, and as recently as last week a draft Act has been circulated which has detailed

provisions relating to various matters. As is obvious from these memoranda, the [Project] Committee is fully supportive of the idea of a specialised Court. The detail of such a Court is of course another matter, and I want to stress at the outset that we believe that a great deal more research is necessary as to the detail.”

- 5.4 Referring to a Convention of United States Bankruptcy Judges in New Orleans attended by him a year or two earlier, Zulman JA went on to say :-

“ That is a body which consists of approximately 300 Bankruptcy Judges in the United States. They have had a specialised Court for years, they do not know any other system. I do not think, with respect, the system is entirely comparable. Bankruptcy is a federal matter in America and the scale of operations is very much bigger.

I was fortunate to spend a short while...attending the hearings of the Bankruptcy Court in New York, and spent some time with the Chief Bankruptcy Judge, Justice Lifland, who was very helpful to me. But it seemed to me that from the scale of operations and the available manpower their system is a great deal different to ours.”

- 5.5 Pointing out that in England the Bankruptcy Court is a sub-division of the Chancery Division, Zulman JA said that he thought that in South Africa the specialised Court should form part of the existing High Court structure. Turning to the particular model of a specialist insolvency court which he recommended for South Africa, Zulman JA observed :-

“ It seems to me that the model that commends itself best to our system is the model that is followed in Canada. The Canadian model is to use the Commercial Court which has been set up, particularly in Toronto, under the direction of...Judge Farley, who is an extremely competent person. I was privileged to meet him when I was in Canada...He met with some opposition, and he took the view somewhat boldly to start on a pilot basis with expanding the use of the Commercial Court and I understand from what he tells me, that it works very well.”

- 5.6 Dealing next with the Commercial Court in Johannesburg as presently structured, Zulman JA said that its greatest drawback was that appearance before it required the consent of the defendant. The Commercial Court in London did not require the defendant's consent :-

“ I believe that if one overcomes that difficulty in the Commercial Court and deals with one or two other matters of practical moment, the Commercial Court, and certainly in Johannesburg, can be adapted to take in matters relating to bankruptcy. I would earnestly request this Commission to look very seriously at what has happened from a practical point of view in Canada. I would suggest, speaking for myself, that if there is a decision to deal with this matter, to support the idea in principle, one should start the matter on the basis of a pilot scheme.”

- 5.7 In response to questions from the Commission, Zulman JA explained where and how the pilot project proposed by him would operate :-

“ CHAIRMAN : I just want to gain clarity on one point... You suggest a pilot scheme as an integral part of a Commercial Court ?

ZULMAN JA : Yes.

CHAIRMAN : Again just to gain clarity, Judge Zulman, is the suggestion that in such a pilot scheme, all insolvency matters presently heard in the Supreme Court would be channelled to the pilot scheme ?

ZULMAN JA : Yes, yes. Of course there is a more elaborate proposal and... this is what the American Bankruptcy Court does and as I have indicated earlier, I am not sure that we have reached that stage. That is to incorporate not only judicial functions in the Bankruptcy Court, but a great number of administrative functions.”

- 5.8 Zulman JA expressed dissatisfaction with the manner in which the examination of persons as to the affairs of a company was conducted. He said that in many cases the proceedings under sec 417 of the Companies Act involved abuses :-

“ If one looks at section 417, it is very plain in its provisions that the Court can conduct such an inquiry. ‘Court’ of course means a Judge. In practice this is

delegated by the Court to a retired practitioner or more often nowadays to an advocate in practice of some seniority.

One of the difficulties with that system is that the advocate certainly, and even the retired judicial officer, is briefed by an attorney, and although theoretically he is part of a Court, he is really in a different position, and on some occasions, regrettably, I will not say in all of them, there have been abuses of the system, and I believe it is the type of matter which should come under the purview of a specialised Court. Whether it requires necessarily the Court actually conducting these inquiries, I am not sure that one needs to go that far, but a far more direct involvement and supervision of these matters by the Court is necessary.”

- 5.9 Later during his oral submissions Zulman JA explained what abuses under the sec 417 procedure he had in mind :-

“...the misconduct of liquidators, how they behave, the general perception, one reads with some horror in the newspapers of conduct of liquidators and their appointment, how they behave subsequently, the squandering of money and the costs of a lot of these proceedings.”

- 5.10 In answer to a further question by the Commission Zulman JA explained the significance for South Africa of sec 426 of the United Kingdom Insolvency Act :-

“ CHAIRMAN : I see that for purposes of section 426 of the United Kingdom Insolvency Act, South Africa became a relevant country as from 1 March of this year [1996]. What are, briefly, the practical implications for our law ?

ZULMAN JA : What that relates to is this. It is specifically in the field of cross-border insolvency that it is important. It affords a quick method of recognition of a local insolvency practitioner, a liquidator, affords him reciprocal recognition.

It has application to the cross-border field of insolvency and we are hoping to bring about legislation in this country where we will afford reciprocal recognition to United Kingdom practitioners, liquidators should I say.”

5.11 What Zulman JA saw as the main defect in the present system appears from the following questions and answers :-

“ LEON J : Judge Zulman, I just wanted to ask you one question if I may. On the question of principle, is it part of your case that the present system is not sufficiently hands-on as far as the Court is concerned ?

ZULMAN JA : Very much so.

LEON J : And that you believe that the only way of getting the hands-on approach properly functioning, is to have a separate Court, a Bankruptcy or Insolvency Court ?

ZULMAN JA : Yes, very much so, with respect. ”

5.12 Zulman JA rounded off his main address on the following cautionary note :-

“...I would just in conclusion like to stress one final point, and that is that I believe that there is a need for far more detailed research into the subject of the need for specialised Courts.”

5.13 Mr L.M. Sackstein, an attorney of Bloemfontein [at pages 200-201 in VOLUME III], briefly stated his qualifications :-

“ I have been practising for 34 years. I have been actively involved in insolvency practice for about 25 years. I would not like to say how many estates I have dealt with, but it must run into hundreds.”

5.14 Because he had received very short notice of the Commission’s **Bloemfontein sitting**, so explained Mr Sackstein, he was unable to make detailed submissions to the Commission. However, he had spoken to his correspondents in England ; and from his brother in-law, who is a senior Judge in Germany, he had gained useful information concerning German bankruptcy practice.

5.15 Dealing first with the position in England, Mr Sackstein said :-

“ I think the situation in England is pretty well-known to all concerned. The Chancery Division has a sub-division which deals with bankruptcy matters and as I understand it, the attitude in England since the introduction of the new Act has been to reduce the onus which previously rested on the State as much as possible and to see to it that the creditors, after all it is their money, involve themselves more in the administration of the estate.”

5.16 In connection with the German system Mr Sackstein gave the Commission the following account :-

“ What they do in Germany is very interesting. They have a system whereby the specialised Bankruptcy Court deals directly with the estate not only in granting the liquidation order as we know it but also in controlling the actual administration of the estate and also it has the right to appoint a creditors committee which certainly would be a dramatic and drastic change to our existing legislation, but it is a good idea.

The little information I have been able to glean is that this has been very successful, this separate Bankruptcy Court in Germany. So too has been the use of the creditors committee. If the creditors are unhappy about the way the liquidator is operating, that committee has direct access to the Judge in Court and they go along and they say look, this is just no good, this fellow is not doing his work or he is doing it dishonestly or he is doing something unsatisfactory.”

5.17 In the course of his oral submissions Mr Sackstein suggested that Bloemfontein might be a good cockpit for a pilot scheme :-

“ The Free State is...the only province where the Side-bar deals with the administration of insolvent estates almost exclusively. I know of very few instances where so-called professional liquidators deal with insolvencies in the Free State. With all due modesty let me say this, that the history of the administration of estates in the Free State is extremely satisfactory. Speaking for myself, I cannot remember an instance where a trustee or a liquidator has been removed and certainly not been prosecuted in this province.

So if one was to have a specialised Bankruptcy Court in the Free State with

relatively few matters, compared of course to Johannesburg or Cape Town, you have got a fairly small pilot project which would be relatively non-disruptive to the Supreme Court as a whole in this division.”

- 5.18 In his opposition to the notion of a specialist insolvency court [at pages 202-205 in VOLUME III] Eloff JP complained of the lack of detail regarding the proposed court :-

“ I have a difficulty which I should like to mention by way of introduction of the sparsity of detail of what this Insolvency Court is to look like, what its jurisdiction is to be ; because in that lies a great deal of the problem which I have with the general notion.”

- 5.19 Eloff JP proceeded to mention the practical problems anticipated by him :-

“ If it is going to be a Court having exclusive jurisdiction, then numerous problems arise. Let me mention a few aspects, which all of you no doubt are aware of : sequestrations, liquidations, winding-up, judicial management orders occur in the division of which I am Judge President every day.

They are normally dealt with by the Motion Court Judges in Johannesburg. Every week there is a new Motion Court consisting of four Judges, all of whom deal with these matters. In Pretoria there are three Judges every week. The Motion Court Judges change for obvious practical reasons. One places a Judge on a Motion Court for a given week and not again for perhaps three, four, five weeks, and then there again.

Very frequently these sequestration applications are brought as matters of urgency, sometimes at night, sometimes an hour before a sale in execution is due to take place. What do you do if that specialist Judge, who has got exclusive jurisdiction, is not available ? Without knowing these things, I have some difficulty in responding to that, and hopefully, if later on things crystallise and perhaps Judge Zulman comes with something concrete, then I can respond to that.”

- 5.20 In the opinion of Eloff JP no conspicuous defects in the present system had been identified ; and such problems as arose subsequent to winding-up could be cured by

appropriate legislation :

“ I was waiting to hear that there are glaring instances where injustices were brought about or matters which were not dealt with competently, but nothing of that sort, no. I make bold to say that all Judges of all divisions are capable of dealing with the sort of problems which arise in relation to sequestrations, liquidations and winding-up...There is no need whatsoever for the creation of a specialist exclusive jurisdiction in...insolvency matters.

Judge Zulman dealt with problems which occur after a winding-up order has been granted, control over the winding-up of the estate. That sort of problem may exist, but the remedy is not to create a specialist Court. The remedy is to change the statute and to grant more extensive powers of review to any Judge and also in regard to the section 417 hearings, if there is a shortcoming there. The remedy, I suggest, is to alter the Insolvency Act and the Companies Act ; but not necessarily to create a specialist tribunal.”

5.21 Eloff JP suggested that most insolvency matters presented no great difficulty :-

“ But insolvency is by and large relatively simple. Why must you have a specialist Judge to hear whether a man should be sequestered or not, whether a company should be wound up ? That is the sort of work that is done by junior counsel in their first two years at the Bar.

I suggest you approach the matter from this way. What is so special about sequestration, bankruptcy ? What is more special about that than for instance administrative law ? There are numerous fields of our law which are...much more complicated than sequestration matters and winding-up and liquidation and...

LEON J : Admiralty.

ELOFF JP : Admiralty is a highly specialised field, thank you.

LEON J : Which we all had to pick up in Natal knowing nothing about it when we became a Court of Admiralty, if I may interrupt, Judge.

ELOFF JP : Thank you, and in the Cape you have a similar position ; but a

feature which arises particularly in Pretoria...is judicial review of administrative action. That is a highly specialised field and few people have adequate knowledge of that. If the rationale here obtains, then we must have a specialist Court dealing also with judicial review of administrative action...”

- 5.22 In his replication [at pages 206-207 in VOLUME III] Zulman JA, while agreeing with the point made by Eloff JP that the proposal was lacking in detail, urged that this was no reason for rejecting out of hand the idea of a specialist insolvency court :-

“ I think it is correct to say one needs to formulate a basis, and certainly would welcome his comments on that, but I think it is quite wrong, with great respect, to condemn the whole idea because we do not have the detail, to say well, the idea is no good because I do not know the detail.

They had a system in Canada for many years which was the same as ours, and they thought it wise to change it. It may well be that we should investigate why. They had a system in England where they did not have specialised Courts, they decided to have a specialised Court. Not because they could not cope with the work before, but because it was not efficient. I think it would be arrogant for us to suggest that our system has been so perfect for the last century that we do not have to worry about any change. I believe there is a need for research.”

- 5.23 As to the nature of insolvency work and how best it might be dealt with, Zulman JA observed :-

“ I believe it is an over-simplification to say as well, with respect, that insolvency is not complex. True, the bulk of it is not complex. But those non-complex matters can be as equally and efficiently dealt with by Judges dealing with that type of work to relieve the other Courts of dealing with that type of matters on a routine basis.

I do not believe, Mr Chairman, that one would delay matters unduly if one were to investigate the matter further and perhaps submit it to the Law Revision Commission for fleshing it out as you say...I agree whole-heartedly that maybe the problem is lack of detail and understanding as to what we are about. But I would urge the Commission not simply to reject the idea as of no need at all and therefore forget about it and not do the research.”

5.24 In his reply to the points raised by Eloff JP, Mr Sackstein [at page 208 in VOLUME III] stressed the hardships suffered, particularly by farmers, as a result of insolvency :-

“ I have seen it myself. More people, I would suggest, are affected by an insolvency or a winding-up than are affected by, say, a motor collision or a problem in the Admiralty Division. If we are going to sit back and allow the status quo to remain, I do not think that anybody is going to have a great deal of confidence in the efforts being made in this country to go ahead and improve things.”

5.25 Mr Sackstein urged upon the Commission that such problems as were presented by the creation of a specialist insolvency court should simply be overcome :-

“ If Judge Eloff really believes that it is going to be such a major difficulty technically, then let us face that difficulty. I think that the advantage of having such a specialised Court perhaps outweighs the administrative problems that he has laid before you. Thank you, Mr Chairman.”

CHAPTER 6

THE COMMISSION'S INVESTIGATION ABROAD INTO A NUMBER OF FOREIGN BANKRUPTCY COURTS

- 6.1 In connection with AIPSA's proposal for a specialist insolvency court for South Africa the Commission paid visits on the North American continent to each of the following courts :-
- 6.1.2 The United States Bankruptcy Court for the Northern District of Illinois at 219 South Dearborn Street, Chicago. Here the Commission was the guest of Chief Judge John D. Schwartz. Prior to the Commission's departure from South Africa on its fact-finding mission Judge Schwartz had been good enough to mail to the offices of the Commission legal literature giving an overview of U S Bankruptcy laws. At Judge Schwartz's Court the Commission had the benefit of instructive consultations both with the Chief Judge himself and a number of the judges of the Northern District.
- 6.1.3 The United States Bankruptcy Court, Southern District of New York, One Bowling Green, New York. Here the Commission was the guest of Judge Burton R. Lifland. He was formerly the Chief Bankruptcy Judge and has since been appointed Chief Judge of the Bankruptcy Appellate Panel for the Second Circuit. In Judge Lifland's chambers the Commission had the benefit of a consultation both with him and with Cecilia J. Morris who is the Clerk of the U S Bankruptcy Court for the Southern District of New York.
- 6.1.4 The Commercial Court of the Ontario Court of Justice (General Division) in Toronto. Here the Commission was the guest of a distinguished Canadian Judge, the Hon Mr Justice James M. Farley. We were received by Judge Farley in his chambers at Osgoode Hall in Toronto. Judge Farley described to us the manner in which the Ontario Commercial Court functions and he provided us with useful literature thereon including the relevant Practice Directions concerning both the Commercial List (effective 1 January 1996) and the Alternative Dispute Resolution Pilot Project (effective 5 September 1995) under which an ADR Centre had been established in Toronto. The Commission later accompanied Judge Farley to Courtroom No 46, at 145 Queen Street

West, Toronto, where in chambers adjoining the courtroom the Judge supervising the Commercial List every morning at 9.30 am receives counsel [Walk-in Judging] to give scheduling directions and to grant urgent orders where necessary in pending commercial cases. The Commission was present when Judge Farley met with two counsel in order to give directions in a pending commercial case. Thereafter the Commission sat for several hours in Judge Farley's Court to hear argument by a number of counsel in an application concerning a very substantial real estate merger with immense financial implications. It might be mentioned that, having reserved judgment at the conclusion of argument on Friday 20 September 1996, Judge Farley delivered judgment in the matter on Monday 23 September 1996.

Judge Farley told us that before his appointment to the Bench he was a solicitor specialising in corporate law work. He had not, however, done much bankruptcy work. He estimated that 25% of the cases on the Commercial List involved bankruptcy law. In connection with the bankruptcy work the Commercial List relied heavily on the services of two Registrars. They despatched many of the motions. The Registrars were appointed from the ranks of practising lawyers, and they received three-quarters of a Judge's salary.

6.1.5 An account of the manner in which the Commercial Court of the Ontario Court of Justice (General Division) came to be formed, the extent of its jurisdiction, and the way in which it functions, is given in paragraph 6.9 hereunder. At this juncture, and before recounting more fully what the Commission saw and heard during its visits to the Bankruptcy Courts in Chicago and New York respectively, it is convenient in 6.2 below very briefly to say something of the U S Bankruptcy Courts ; the main forms of relief available under U S Bankruptcy Laws ; and to mention the significant role of the U S Trustee in bankruptcy matters.

6.2 A NOTE ON U S BANKRUPTCY COURTS ; THE MAIN FORMS OF RELIEF AVAILABLE UNDER U S BANKRUPTCY LAWS ; AND THE ROLE OF THE U S TRUSTEE

6.2.1 The Law of Bankruptcy is Federal Law :

The law of bankruptcy is federal law and is primarily regulated by statute. In 1898 Congress passed the Bankruptcy Act [the Act] which forms the basis

of modern legislation. The Act was superseded by the Bankruptcy Reform Act of 1978 [the Bankruptcy Code] which was amended significantly in 1984, 1986 and 1994.

6.2.2 The Bankruptcy Courts :

Under the Bankruptcy Code the U S bankruptcy court was created in each district as an adjunct of the district court. Pursuant to the 1984 amendments the bankruptcy court is made a unit of the district court consisting of all the bankruptcy judges in regular service. The bankruptcy court is vested with exclusive jurisdiction in respect of all bankruptcy cases under the Bankruptcy Code.

6.2.3 The Bankruptcy Judges :

Under the Bankruptcy Code bankruptcy judges were appointed by the President with advice and consent of the Senate. In terms of the 1984 amendments bankruptcy judges are appointed as judicial officers of the U S district courts for terms of fourteen years by the U S Court of Appeals after consideration of the recommendations of the Judicial Conference.

6.2.4 The General Forms of Bankruptcy Relief available :

The Bankruptcy Code divides the substantive law of bankruptcy into thirteen chapters. Here brief mention will be made only of three of the chapters. There are two general forms of relief available : (1) liquidation and (2) rehabilitation (reorganisation).

6.2.4.1 Automatic Stay :

Immediately upon the filing of a bankruptcy petition an automatic stay prevents the institution or continuation of any action or proceeding against the debtor, and enforcement of any judgment against the debtor or its property.

6.2.4.2 Chapter 7 - Liquidation :

Most bankruptcy cases are Chapter 7 cases. Here the trustee collects the non-exempt property of the debtor, converts it into cash, and effects a distribution

to creditors. The main advantage which the debtor hopes to achieve is a discharge which releases him from any further liability for pre-bankruptcy debts. The discharge is seen as a fresh start enabling the debtor to proceed unhampered by the financial burdens of the past. Only individual debtors may receive a discharge. The trustee is appointed by the U S Trustee from a panel of private trustees who have qualified and undergone an FBI investigation.

6.2.4.3 Chapter 11 : Reorganization :

This is aimed mainly at business debtors but is also used by individual debtors whose debts exceed the limits prescribed in Chapter 13, which deals with debt adjustments of individuals. The purpose of Chapter 11 is to permit the rehabilitation of the debtor's business and the promulgation of a plan for the treatment of claims against the debtor. Apart from the automatic stay an important benefit to a debtor under Chapter 11 is the debtor's ability to retain its assets. Management continues to conduct business as the debtor in possession. The debtor in possession has the powers of a trustee. The most important counterpoise to the operation of the debtor's business is the statutory Creditors Committee. It has critical duties to perform in the supervision of management of the debtor's business. The main purpose of the Creditors Committee is to function as a negotiating body for the formulation of the plan of reorganization. In a case under Chapter 11 or Chapter 13 creditors usually look to future earnings of the debtor and not the property at the time when bankruptcy proceedings are instituted.

6.2.4.4 Chapter 13 :

Chapter 13 can be used only by individuals with a regular income who have unsecured debts of less than \$250 000 and secured debts of less than \$750 000. This Chapter enables an individual debtor to submit a plan to repay his or her debts out of future income for a period of up to three years (or five years if the court approves a longer period). Due performance under the plan may entitle the debtor to discharge.

6.2.4.5 The Trustee :

In every Chapter 7 and Chapter 13 case (and in some Chapter 11 cases) there will be a bankruptcy trustee - generally a private individual and often an

attorney. In terms of the Bankruptcy Code the trustee is the representative of the estate. He sues and may be sued on behalf of the estate. In a Chapter 7 case the trustee's duties include collecting the property of the estate, challenging improper pre-bankruptcy and post-bankruptcy transfers of property from the estate ; objecting to improper claims ; and (in appropriate cases) objecting to the debtor's discharge.

6.3 The United States Trustee :

- 6.3.1 The United States Trustee is a comparatively recent innovation but a significant one.
- 6.3.2 During the debate on the 1978 bankruptcy legislation considerable concern was expressed at the involvement of bankruptcy judges in the administration of bankruptcy cases. While both the House of Representatives and the Senate seemed to agree that a bankruptcy judge should not perform administrative functions, there was disagreement over the question by whom such administrative work should be done.
- 6.3.3 The compromise achieved was an experimental U S Trustee Programme involving parts of seventeen States and the District of Columbia.
- 6.3.4 In 1986, however, Congress passed amendments which made the United States Trustee virtually nationwide.
- 6.3.5 The United States Trustee is a governmental official appointed by the Attorney-General. He undertakes the administrative tasks which bankruptcy judges would otherwise have to perform. The U S Trustee selects and supervises the persons appointed as bankruptcy trustees. Although he is eligible to act as a trustee in a Chapter 7 or 13 case, the U S Trustee is not intended as a substitute for private trustees. Essentially he is a substitute for the bankruptcy judges in respect of supervisory and administrative matters. He monitors bankruptcy cases, and appoints Creditors Committees. He monitors and comments on fee applications of professionals involved in the cases ; and on Chapter 11 disclosure statements and reorganisation plans.

6.4 THE COMMISSION'S VISIT TO THE U S BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

- 6.4.1 The excellent arrangements made by Chief Judge Schwartz, well in advance of the Commission's arrival in Chicago, enabled us to make the most of an extended visit to this Court.
- 6.4.2 Shortly after our arrival Judge Schwartz conducted us to the chambers of an eminent bankruptcy jurist in the person of Judge Robert E. Ginsberg. He is a member of a nine-man Commission which is investigating possible reforms to U S Bankruptcy laws. Judge Ginsberg gave the Commission an informative talk in the course of which he summarised the effect of a number of landmark bankruptcy decisions handed down by the U S Supreme Court. Later the Commission sat in Judge Ginsberg's Court to observe the proceedings in a number of bankruptcy motions.
- 6.4.3 Thereafter the Commission sat in various other Courts which were in session, including the Court presided over by Judge Ronald Barliant. He was engaged in a bankruptcy proceeding involving no less than eighteen parties who stood in a semi-circle before the Bench. They were engaged in a joint conference. An interested party not present in Court participated in the proceedings by a two-way telephonic device. The colloquy terminated when, at the suggestion of Judge Barliant, it was agreed that the point in issue should be referred to mediation. Sitting next to Judge Barliant on the Bench was one of the U S Trustees attached to the Court. Upon the adjournment of his Court the Commission had the benefit of a discussion with Judge Barliant as well as the U S Trustee who had sat with him. It was made clear to us that in U S bankruptcy proceedings it is the debtor himself rather than the creditor who initiates proceedings.
- 6.4.4 Next the Commission proceeded to the Court over which Judge Susan P. Sonderby presided. Here again we observed a large number of motions. Thereafter, and over lunch in a large conference room, the Commission took part in a lively panel discussion in which there took part not only the Judges already mentioned but also Judge Jack B. Schmetterer, Judge Eugene R. Wedoff, Judge Erwin E. Katz, Judge John H. Squires, Judge Thomas James, Judge Richard N. DeGunther and Judge David H. Coar.

6.5 THE COMMISSION'S VISIT TO THE U S BANKRUPTCY COURT, SOUTHERN DISTRICT OF NEW YORK

- 6.5.1 Before his appointment as a judge of the Bankruptcy court Judge Lifland practised as an insolvency attorney at the New York Bar. He is on the Judicial Conference's Sub-Committee of Bankruptcy Case Management. A writer on the law of bankruptcy and the recipient of many merit awards, Judge Lifland has, *inter alia*, made significant contributions to international Bankruptcy jurisprudence. For example, he had recently attended the meeting in Asia of U K and Asian Judges in regard to UNICITRAL's development of model cross-border statutes.
- 6.5.2 In the course of a stimulating conversation with Judge Lifland, during which Cecilia J Morris made useful contributions, the Commission gained some idea of the immense volume of bankruptcy litigation in the Southern District of New York ; and the complexity of the issues in heavy cases. Judge Lifland explained to the Commission what technological advances had been made to expedite hearings ; and he presented to us much useful legal literature on U S bankruptcy law and practice.
- 6.5.3 After a general discussion involving chiefly the ambit of Chapters 7 and 11 of the Bankruptcy Code, Judge Lifland described to the Commission the operation of a recent pilot programme established by the bankruptcy court for the electronic filing, retrieval and service of pleadings known as "The Complex Litigation Automated Docket" [CLAD]. In this system each participating attorney is assigned a password which enables him or her to file and retrieve pleadings and other documents from the CLAD database.
- 6.5.4 Cecilia J. Morris informed the researcher that they were moving towards a paperless court. The documents that are filed by the attorneys are sent in Adobe Portable Document Format³ (PDF). The PDF files, while they can be viewed and printed, cannot easily be altered thereby retaining the integrity of the original. After an attorney has filed a document the system sends a receipt back which can be printed and produced as proof of filing. The Court employs 10 to 12 persons, some of whom have Masters Degrees in Computer Science, to run the Court automation.

³ *Adobe Systems Incorporated*

- 6.5.5 Judge Lifland also described to the Commission a conference of bankruptcy judges convened in 1990 by the Federal Judicial Center to develop resources to help bankruptcy judges in coping with “mega-cases” involving a debtor with assets of at least \$100 million. He explained some of the recommendations adopted at the conference. He stressed that the complexity of mega-cases made it essential for bankruptcy judges to use case-management techniques. He said that although the formulation of a Chapter 11 reorganisation plan was primarily the responsibility of the parties, the court in mega-cases generally plays a continuing role to ensure that the case moves to completion, and that the assets of the estate are not entirely dissipated in unproductive “wheel-spinning”. Given the large number of parties involved, the costs in mega-cases tended to escalate alarmingly. Where negotiations reached a deadlock several bankruptcy courts had found it useful to employ a third party, such as a mediator, to get negotiations for a settlement back on track.

6.6 THE COMMISSION’S VISIT TO THE COMMERCIAL COURT OF THE ONTARIO COURT OF JUSTICE (GENERAL DIVISION)

- 6.6.1 Whereas AIPSA’s proposal is that in South Africa a specialist insolvency court should be created to operate under the wing of the Commercial Court already functioning in Johannesburg, in Toronto the Commercial Court was an innovation grafted onto a bankruptcy court already in existence.
- 6.6.2 Like other Canadian provinces Ontario for many years before 1991 had a bankruptcy court, albeit one of limited jurisdiction. Following a study undertaken by the Canadian Bar Association there was drawn up in 1991 a set of rules for the establishment of a new Commercial List. The Commercial List was to be annexed to the former bankruptcy court. It adopted a number of the latter’s informal procedures, including the practice of appointing a limited number of Judges to sit on these cases. The philosophy was that a select group of Judges and a body of experienced commercial law practitioners could be the kernel of a successful Commercial Court.
- 6.6.3 The Commercial List was established in 1991 for the hearing of certain actions, applications and motions involving commercial law in the Ontario Court (General Division) in the Toronto region. Judge Farley informed the Commission that the special procedures adopted for the hearing of matters on the Commercial List had been successful in practice ; and that the hearing and

determination of such matters had been significantly expedited. In this process education of the practising profession had been an important factor. When the beneficial results became evident opposition to the new system had been broken down.

6.6.4 Voluntary Participation :

According to the Commercial List Practice Direction :

“ The Commercial List remains, in the first instance voluntary, except for bankruptcy matters. Applicants and plaintiffs may continue to set matters that qualify for the Commercial List down for hearing either on the Commercial List or elsewhere. There is, however, provision for any party to have a matter transferred to, or removed from, the Commercial List. ”

6.6.5 Matters Eligible for the Commercial List :

Matters which may be listed on the Commercial List are applications, motions and actions which, in essence, involve the following : (a) Bankruptcy and Insolvency Act ; (b) Bank Act (relating to the realisation and priority disputes) ; Business Corporations Act (Ontario) and Canada Business Corporations Act ; (d) Companies’ Creditors Arrangement Act ; (e) Limited Partnership Act ; (f) Pension Benefits Act ; (g) Personal Property Security Act ; (h) receivership applications and all interlocutory motions to appoint, or give directions to, receivers and receiver managers ; and (i) Securities Act.

6.6.6 The Jurisdiction “Basket Clause” :

By the basket clause the jurisdiction of the Commercial List extends also to :-

“ such other commercial matters as a judge presiding over the Commercial list may direct to be listed on the Commercial List. ”

6.6.7 “Walk-In Judging” :

Judges who sit regularly on the Commercial List make themselves available on a very flexible basis. Walk-in judging is available virtually every morning when at 9.30 am the supervising Judge makes himself available in chambers,

before the open Court proceedings begin, to deal with emergency and *ex parte* matters. The Commission attended such a session in the chambers of Judge Farley [see paragraph 6.1.4 above].

6.6.8 Estimate of Required Time :

When a matter is sought to be placed on the Commercial List a comprehensive Request Form has to be completed and signed by all counsel involved in the case. In the Request Form a realistic estimate of the time required for the hearing of the matter must be stated.

6.6.9 Adjournments :

Counsel are expected to be ready to proceed with matter for which hearing times have been agreed or otherwise set. Adjournments will be granted only in special circumstances and for a material reason.

6.6.10 The Judge hears the Entire Matter :

It is expected that a Judge who determines a substantive proceeding will continue to hear all subsequent substantive proceedings in the matter.

6.6.11 Case Management :

It is expected that most matters of substance and of an ongoing nature on the Commercial List will be subject to a form of case management by a Commercial List Judge. This will apply in particular to those actions which are subject to formal case management as a result of the Toronto Region Civil Case Management Pilot Project which began in December 1991.

6.6.12 The Scheduling Conference :

Where a Commercial List matter is subject to case management a Scheduling Conference will be held with the Case Management Judge not later than one month after the close of pleadings. The purpose of the conference is to determine a plan to process the case in a timely and reasonable fashion and to deal with any matters of a procedural nature which should be addressed at an early stage of the proceedings. The prospects of settlement must also be

explored. The result of the conference is recorded in the Case Timetable. The Case Timetable must be filed together with the Request Form at the start of the matter. Parties may set their own times for the various stages in the progress of the case ; but if counsel are unable to agree, a Judge will determine the schedule.

6.6.13 The Case Conference :

Unless otherwise ordered a Case Conference will be held with the Case Management Judge not later than one month after the completion of discoveries. The purpose of the conference is to monitor progress in the matter ; to canvass the possibility of settlement ; and to provide whatever directions may be necessary.

6.6.14 Alternative Dispute Resolution :

6.6.14.1 The Practice Direction provides that ADR is :-

“ recognised and encouraged ”

and it provides some guidelines for its integration with the Commercial List.

6.6.14.2 The Practice Direction contemplates the referral of issues for ADR to a pre-selected panel of experienced people. Typically these are retired or supernumerary Judges, but also others approved by the Court. Many Commercial List Judges have attended ADR instructional programmes at Harvard and elsewhere.

6.6.14.3 The Court expects periodic reports on the progress of those matters referred to ADR.

6.6.14.4 The Province of Ontario has implemented an ADR pilot project and established an ADR centre in Toronto. It is staffed by dispute resolution officers (some of whom are lawyers). The ADR Centre has established close links with the Commercial List. In an appropriate case Judges from the Commercial List are brought in to deal with disputes scheduled for ADR.

6.6.14.5 The procedure applicable to the ADR pilot project is set forth in a Practice Direction dated 31 July 1995 by the Chief Justice and the Regional Senior Justice of the Ontario Court. In the Practice Direction “ADR” is defined as :-

“ a range of processes designed to aid parties in resolving their disputes outside of a formal judicial proceeding. These processes include but are not limited to mediation, neutral evaluation and mini-trial”.

The same Practice Direction defines “ADR Session” as referring :-

“ principally to a mediation presided over by either a judge of the Court or a dispute resolution officer, and attended by counsel and parties to a dispute to whom this Practice Direction applies ; ”

6.6.15 Witness Statements :

For trials the court will begin by insisting that counsel canvass the situation to see whether sworn witness statements will not be able to replace most, if not all examination in chief. These statements are to be exchanged well in advance of the trial.

CHAPTER 7

THE BROAD GUIDE-LINES ADOPTED BY THE COMMISSION AND ITS MAIN FINDINGS OF FACT IN REGARD TO THE PROPOSAL FOR THE ESTABLISHMENT OF A SPECIALIST INSOLVENCY COURT IN SOUTH AFRICA

- 7.1 Realistically viewed the case for the creation of a specialist insolvency court in South Africa as presented to the Commission really amounts to an appeal that, because much and intensive further research into the subject has yet to be undertaken, it would be wrong, at this stage, without more to jettison the notion of a specialist insolvency court. This approach is understandable ; but by itself it does not provide an answer to the question whether South Africa really needs such a specialist court.
- 7.2 AIPSA's proposal is that a specialist insolvency court be established only where there is a Commercial Court ; and that it should be part of the Commercial Court. The Commission is satisfied that for the foreseeable future no division of the High Court, other than the WLD, is likely to generate enough commercial work to merit the creation of a Commercial Court at its seat. As a matter of practical politics, therefore, AIPSA's proposal is to be construed as a plea for the creation of a single specialist insolvency court in Johannesburg.
- 7.3 In the opinion of the Commission the principles governing the law of insolvency are neither so inaccessible to the ordinary practitioner or Judge nor so difficult to grasp as to be intelligible only to the initiated. It is not, in the view of the Commission, the type of work which requires highly specialised training ; and in litigation insolvency matters do not require an individual treatment insulated from the general body of litigation. Apart from the fact that it regards such treatment as unnecessary, the Commission is opposed in principle to the notion that the adjudication of insolvency matters should be the exclusive preserve of a specialist court. The temptation to create specialised niche areas of the law is an unhealthy one, and it should be resisted.

- 7.4 In the opinion of the Commission the circumstance that in insolvency matters court orders are often sought as a matter of great urgency does not strengthen the case for the creation of a specialist insolvency court. The Commission is satisfied that under the present rules governing the procedure of the High Court urgent orders are readily obtained after ordinary court hours, and whether at night or over week-ends.
- 7.5 The submissions on behalf of AIPSA stress the need for “ dedicated ” judges in the hearing of insolvency cases. On AIPSA’s own showing 90% of the WLD’s insolvency workload consists of relatively simple cases requiring no great legal knowledge, insight or experience. In the light of the totality of the submissions made to the Commission there is no ground for finding that either the simple, or the more complex, insolvency matters are dealt with (whether in the WLD or in any other division of the High Court) otherwise than in a satisfactory and competent manner.
- 7.6 As a matter of principle the Commission takes the view that it is undesirable and wrong that a judge involved in an insolvency case should be required to perform administrative functions.
- 7.7 The Commission agrees with the view expressed by the Hon Mr Justice C.F. Eloff that if in practice liquidators are guilty of malpractices the solution to the problem lies in appropriate legislative amendment of the relevant statutes and not in the creation of a specialist insolvency court.
- 7.8 The Commission further agrees with the view of Eloff JP that problems arising under Sec 417 of the Companies Act should be addressed by appropriate legislative amendments, and not by the creation of a Specialist Insolvency Court.
- 7.9 The Commission is of the opinion that the establishment of a specialist insolvency court in Johannesburg would create administrative problems for the Judge President and that it would tend to disrupt the smooth functioning of the courts.
- 7.10 The Commission agrees with the view expressed to it by the Hon Mr Justice R.H. Zulman that in the field of bankruptcy law the systems of South Africa and the United States are so incompatible as to render the US bankruptcy court an unsuitable model

for South Africa. Whether examined from the angle of the volume and complexity of the litigation, or of the substantive law, or of the procedure, the differences between the two bankruptcy systems are too marked to enable useful comparison.

- 7.11 Leaving aside the critical question whether South Africa needs a specialist insolvency court at all, however, the Commission further agrees with the view expressed by Zulman JA to the Commission that the Canadian model (as exemplified by Ontario's Commercial Court) is highly instructive to South African lawyers. The Commission found its visit to this Court enlightening not only for the fact that its jurisdiction includes complex insolvency matters, but especially because this Court demonstrates the absolute necessity for Case-Management and the use of Alternative Resolution Dispute Techniques in the expeditious hearing and determination of ALL complex commercial cases.

CHAPTER 8

THE COMMISSION'S RECOMMENDATION IN REGARD TO THE PROPOSED SPECIALIST INSOLVENCY COURT

The unanimous recommendation of the Commission is that a specialist insolvency court should NOT be established in South Africa.