

REGAL TREASURY PRIVATE BANK LTD ("Regal Bank")

3 October 2001

RULING (4)

- 1 During the hearing of the application referred to in ruling (3), Mr Jammy, representing Business Report, raised a concern his client had with the in camera hearings which had taken place in terms of the directions issued on 23 August 2001. In terms of those directions any witness who wished the whole or part of his or her evidence to be heard in camera was entitled to make application to that effect and the application itself could be held in camera on good cause shown.

- 2 Two witnesses who have testified so far, Messrs Lubner and Lopes, had their evidence heard in camera. In each case a similar procedure was followed. The attorney representing the witness applied for the application for the evidence to be heard in camera to be held in camera on the ground that otherwise the purpose of hearing the evidence in camera would be defeated. Having heard submissions and evidence in camera in support of each application, it was ruled that the evidence would be heard in camera. In retrospect, having gained insight into each application, I am satisfied that it would have been inappropriate to have heard the application in public.

3 The Business Report's legitimate concern is that because both the application and the evidence are heard in camera, the media has no way of knowing if it was appropriate for the evidence to be heard in camera.

4 How then must one reconcile conflicting rights:

- the right of freedom of expression contained in the Bills of Rights in the Constitution;
- the right of a witness to give evidence in camera in appropriate circumstances;
- and the right (and obligation) of the commissioner to conduct a proper and effective investigation in terms of s69 A of the Banks Act, 94 of 1990?

The dilemma is illustrated by an entirely hypothetical example of what might occur. A witness believes that if he gives evidence in public, he will antagonise someone who will then, in some way, harm him and his family. If that fear were to be disclosed in open in the application to hear evidence in camera, the witness believes that that mere allegation will enrage the person whom he fears will harm him and his family.

5 The one way it seems to me that the media's concern and the conflicting rights may be reconciled is to allow the media to have a lawyer present during the application in camera (to hear the evidence in camera). If the application is unsuccessful, the evidence will be heard in public. If the application is successful, and the evidence is to

be heard in camera, the lawyer can report to the media on the application. I expect, and trust, that the lawyer will use his or her discretion in what information is conveyed to the media. I also expect the media to act responsibly. In the hypothetical example which I have given, I would expect the media to respect the ruling in order to avoid the risk of harm befalling the witness and his family.

- 6 If the witness objects to the presence of a lawyer representing the media, the objection and the media's response to the objection, if any, will have to be considered on an *ad hoc* basis.

J F MYBURGH SC