IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER CCT 5/95

In the matter of

Ferreira, Clive Applicant

and

Levin, Allan NO 1st Respondent

Wilkens, Andrew David 2nd Respondents
Cooper, Brian St Clair
Van Der Merwe, Schalk Willem NO
In their capacities as the joint provisional liquidators of Prima Bank Holdings Limited

The Master of the Supreme Court 3rd Respondent

and

Vryenhoek, Ann 1st Applicant
Vryenhoek, Luke John 2nd Applicant
Vryenhoek, Andrew 3rd Applicant

v

Powell, Oliver NO 1st Respondent
Brett, JJ NO 2nd Respondent
Avfin Industrial Finance (Pty) Ltd 3rd Respondent

(No. 2)

Heard on: 9 May 1995

Delivered on: 19 March 1996

JUDGMENT

[1] **ACKERMANN J:** On 6 December 1995 this Court declared section 417(2)(b) of the Companies Act invalid to the extent indicated in the order.[1] No order was made as to costs but the parties were afforded an opportunity of pursuing this matter further.[2] Only the applicants in the *Ferreira* and *Vryenhoek* matters have availed themselves of this opportunity.

[1] *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* 1996 1 BCLR (CC) 1 para 157(1).

[2] Id para 157(3) and see also para 155.

[2] The following are the salient facts relating to costs. The applicants' applications to the Witwatersrand Local Division of the Supreme Court for interdicts pending the determination by this Court of the constitutionality of section 417(2)(b) of the Companies Act ("the Act") were dismissed by Van Schalkwyk J. The appeals of all the applicants to the Full Bench of the Witwatersrand Local Division against such dismissals were upheld with costs, that Court ordering that the costs of the applications in the court of first instance were to be "costs in the cause in the matter before the Constitutional Court."[3] The predominant reason for the applicants' approach both to the Witwatersrand Local Division and to this Court was their objection to answering questions which might tend to incriminate them and the coercive features of section 417(2)(b) of the Act which not only compelled them to answer such questions but expressly provided that such evidence, though self-incriminating, could subsequently be used in proceedings against the applicants (which by implication included criminal proceedings). Van Schalkwyk J referred five issues to this Court in terms of section 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 (as amended)("the Constitution"). The first related to the constitutionality of the subsection of the Act referred to; the other four related to declaratory orders relating to the admissibility of evidence in subsequent criminal and civil proceedings against the applicants and the correct procedures to be followed at enquiries in terms of section 417 of the Act. There is nothing to suggest that the respondents opposed any of these referrals. This Court held that none of these matters had been correctly referred but, in the exceptional circumstances of the case, heard the

[3] *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* 1995 2 SA 813(W) 845G.

first matter by way of direct access in terms of section 100(2) of the Constitution.[4]

[4] *Ferreira v Levin* supra note 1 paras 9 to 19.

[3] The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer[5] and the second that the successful party should, as a general rule, have his or her costs.[6] Even this second principle is subject to the first.[7] The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties,[8] the conduct of their legal representatives,[9] whether a party achieves technical success only,[10] the nature of the litigants[11] and the nature of the proceedings.[12] I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional

[5] *Kruger Bros. and Wasserman v Ruskin* 1918 AD 63 at 69.

[6] *Fripp v Gibbon* & Co 1913 AD 354 at 357; *Merber v Merber* 1948 1 SA 446 (A) 452.

[7] *Union Government (Minister of Railways and Harbours) v Heiberg* 1919 AD 477 at 484; *Mofokeng v General Accident Versekering Beperk* 1990 2 SA 712 (W) 716D.

[8] Cilliers *Law of Costs* (1972) 40-51.

[9] Id 51.

[10] Id 52.

[11] Id 178-206.

[12] Id 228-242.

litigation.

[4] Mr. *Unterhalt*er in the heads of argument filed on behalf of the applicants submitted that the applicants had no choice but to seek relief from the courts and that their complaint, namely that section 417(2)(b) of the Act infringed their right against self-incrimination, was upheld by this Court. The fact that they were unsuccessful in respect of four of the matters referred did not detract from the fact that their success in having section 417(2)(b) struck down to the extent indicated in the order was substantial. In this regard reliance was placed on the *dictum* in *Giuliani v Diesel Pump Injector Services (Pvt) Ltd* to the effect that

> [t]he fact that defendant succeeded in reducing the amount claimed by plaintiff does not, in my view, alter the fact that in these circumstances the plaintiff is the successful party in considering the question of costs, because he had to come to court in order to succeed to the extent that he did. (See *Fripp v Gibbon & Co* 1913 AD 354 at 361).[13]

[5] In relation to section 417(2)(b) of the Act the issue between the applicants and the respondents was whether the former were obliged to answer self-incriminating questions at the section 417 enquiry. The respondents wanted the applicants' evidence in this regard; the applicants refused. The order granted by this Court does not assist the applicants in their real dispute with the respondents on this part of the case. They are still obliged to answer self-incriminating questions. The fact that such answers can no longer be used against the applicants in any criminal proceedings that might be brought against them in no way concerns or affects the dispute between them and the respondents. The applicants are still obliged to answer all the questions put to them as they would have

[13]1966 3 SA 451 (R) 452H.

been obliged to do if the constitutional challenge had not been raised. It is of no concern to the respondents that self-incriminating evidence extracted at the enquiry cannot be used against the applicants in criminal proceedings against them. That would be a matter between the applicants and the Attorney-General which would arise only if the applicants were charged and such evidence tendered. This consequence in no way affects the conduct of the section 417 enquiry, was never a substantive issue between the respondents and the applicants at the enquiry, and was not an issue over which the respondents had any control. They had neither the interest nor the power to "consent" to the evidence not being used against the applicants in subsequent criminal proceedings.

[6] Mr *Unterhalter* referred in his written argument to certain Canadian authorities in support of the applicants' claim for costs.[14] These cases do not assist the applicants because they are, on the facts, not comparable to the present case. In *Big M Drug Mart* the Crown had twice appealed unsuccessfully against a finding that a statute was unconstitutional and the Supreme Court ordered it to pay the costs of the second unsuccessful appeal.[15] In *Operation Dismantle*, the cruise missile testing case, the plaintiff organisation had successfully pursued a Charter challenge against an agreement between Canada and the United States and obtained an injunction to prevent the testing of the cruise missile. This was set aside on appeal to the Federal Court of Appeal. The plaintiff's appeal to the Canadian Supreme Court was dismissed and plaintiff ordered to

[14]*Regina* v *Big M Drug Mart Ltd* [1985] 18 DLR (4th) 321; *Operation Dismantle Inc et al v The Queen et al* [1985] 18 DLR (4th) 481; *Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd* [1986] 33 DLR (4th) 174 and *Re Lavigne & Ontario Public Service Employees Union et al (No 2)* [1987] 41 DLR (4th) 86.

[15]Supra note 14 at 369.

pay the costs.[16] In *Dolphin Delivery* the defendant union had unsuccessfully invoked a Charter right against the granting of an injunction. The defendant union's appeals to both the British Columbia Court of Appeal and the Canadian Supreme Court were dismissed and the Supreme Court ordered it to pay the plaintiff's costs.[17] In *Lavigne* the appellant had successfully invoked a Charter right and succeeded on appeal. The issue on costs was whether the fact that the Charter point successfully raised by the appellant constituted a so-called "novel issue" was sufficient to deprive the successful appellant of its costs. There were cases going both ways. The appellant was awarded 60% of its costs (the reason for the partial award not being relevant to the present issue), the Court exercising its discretion on the basis that:

> [i]ndividual Canadians, who would otherwise find the costs of Charter litigation beyond their means, should not be discouraged from asserting their Charter rights simply because, if they accept third party financial assistance, they will be deprived of the costs of the litigation.[18]

[16]Supra note 14 at 494.

[17]Supra note 14 at 199.

[18]Supra note 14 at 129 per White J.

[7] The applicants have not been successful in substance in their dispute with the respondents. A further relevant consideration is the fact that even if the respondents had offered no opposition to the applicants, the applicants would in any event have been obliged to come to this Court to obtain the relief in respect whereof they were successful. Even if the respondents had conceded the unconstitutionality of section 417(2)(b) of the Act to the extent found by this Court, the applicants would still have been obliged to come to this Court for relief, inasmuch as the striking down of an Act of Parliament falls within its exclusive jurisdiction in terms of section 98(2)(c) of the Constitution. I have little doubt that the Court would still have required full argument, would have admitted the *amici curiae* that it did admit and would have solicited the memoranda it did solicit. It has not been demonstrated that the applicants incurred any more costs than they would have incurred if the matter had not been opposed by the respondents. The parties could have conferred jurisdiction on the Witwatersrand Local Division in terms of section 101(6) of the Constitution but this was not a matter in issue or debated before us. There is in any event nothing to show that ultimately this Court would not have been approached for a definitive order on section 417(2)(b). A further relevant consideration is the fact that we have found that none of the issues was properly referred to us and only decided to hear the section 417(2)(b) issue by way of direct access as an indulgence and in view of the exceptional circumstances of the case.[19] In all these circumstances it appears just and equitable not to award the applicants their costs.

[8] The remaining issue is whether the respondents are entitled to their costs. None of the respondents filed any written argument, as they were entitled to do. No good reason

[19] *Ferreira v Levin* supra note 1 para 10.

suggests itself why, in the present case, the second general rule as to costs, namely that the successful party is entitled to his or her costs, should not be the point of departure for considering whether the respondents are entitled to their costs in this Court, inasmuch as they have in substance been successful in opposing the relief sought by the applicants.

[9] One is left with the strong impression, however, that the respondents were as anxious as the applicants to obtain a definitive ruling on the issues which Van Schalkwyk J referred to us. Had the respondents opposed more critically the matters which were referred to this Court and, in particular, applied their minds more carefully to the question whether such matters passed section 102(1) scrutiny, it may well be that the matters would not have been referred to us at all, or at least not all of them. Parties, and respondents in particular, should not be encouraged to consent supinely to matters being referred to this Court in the mistaken belief that an applicant's failure to achieve substantial success on referral will automatically entitle the respondents to their costs. It has been pointed out in several judgments of this Court[20] that the power and duty to refer under section 102(1) of the Constitution only arises when three conditions are fulfilled:

(a) there is an issue in the matter before the court in question which may be decisive for the case;

(b) such issue falls within the exclusive jurisdiction of the Constitutional Court; and,

(c) the court in question considers it to be in the interests of justice to refer such issue to the Constitutional Court. For this third leg of the test to be satisfied there must

[20]For example *S v Mhlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para 59; *S v Vermaas, S v Du Plessis* 1995 3 SA 292 (CC); 1995 7 BCLR 851 (CC) paras 7-12 and *Ferreira v Levin* supra note 1 paras 6-8.

be a reasonable prospect that the relevant law or provision will be held to be invalid and the court must also be satisfied that the referral is being made at the appropriate stage in the proceedings.

If parties are of a mind to oppose the relief being sought in a referral they should in the first place be astute to prevent matters being incorrectly referred and should oppose inappropriate referrals at the time when they are sought; they should not sit back and raise their opposition for the first time in this Court after the referral has been made.

[10] Mr *Unterhalter* referred in his argument, albeit in a somewhat different context, to the "chilling effect" which an adverse order as to costs would have on private individuals who wish to, and have a constitutional right to, invoke their constitutional rights against the state. This is a very important policy issue which deserves anxious consideration, but it does not arise in the present case and must properly be left to the appropriate case and occasion. Whatever the ultimate view may be, however, it does not necessarily follow that the same approach should be adopted in litigation between private persons.

[11] Justice and fairness in the present case would, in my view, best be served if all parties were ordered to pay their own costs. I believe that to be in harmony also with the approach that would be adopted in the Supreme Court.[21] It is unnecessary to make any explicit order regarding the costs referred to in the judgment of the Full Bench of the Witwatersrand Local Division; those costs were ordered to be costs in the cause of the matter before this Court and will, as an order of the Full Bench, automatically follow the order made by this Court.

[21]See, for example, *Isaacs v Minister van Wet en Orde* [1996] 1 All SA 343 (A) 352f-h.

[12] The parties were informed yesterday that judgment in this matter would be given today. After they had been so informed, the attorneys for the applicant in the *Ferreira* matter filed with the Registrar of this Court a document purporting to be a "Notice of Withdrawal" intimating that the applicant in the *Ferreira* matter "hereby withdraws" his application for costs against the second respondent "the matter having been settled between the parties." There is no indication on the notice lodged with the Registrar that it had been served on the second respondent or on any other party. Constitutional Court Rule 30 provides as follows:

> Whenever all parties, at any stage of the proceedings, lodge with the registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the registrar of any fees that may be due, the registrar shall without further reference to the Court enter such withdrawal.

In the absence of compliance with rule 30 or service of any notice on the other parties, a matter in this Court cannot validly be withdrawn. Nothing accompanied the so-called "Notice of Withdrawal" to indicate when the matter had been settled nor why the Court had not been informed earlier of any such settlement. We consider this to be a discourtesy to the Court.

[13] It is accordingly ordered that all parties are to pay their own costs.

Chaskalson P, Mahomed DP, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J, Sachs J and Trengove AJ concurred in the above judgment of Ackermann J.

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