CONSTITUTIONAL COURT OF SOUTH AFRICA

LAFRAS LUITINGH Plaintiff

versus

MINISTER OF DEFENCE Defendant

Heard on 21 November 1995 Case CCT 29/95

Decided on 4 April 1996

J U D G M E N T

DIDCOTT J:

[1] Section 113(1) of the Defence Act (No 44 of 1957) ordains, in its parts which matter now, that:

> "No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

A ruling on the constitutional validity of the sub-section is sought from us in the present case, a civil action pending before the Transvaal Provincial Division of the Supreme Court during the course of which that question has been raised.

[2] The pleadings in the action have closed. What we see from them is this. The plaintiff, a former member of a military unit then engaged in clandestine activities but now disbanded, is suing the defendant for a large amount of money claimed under a contract which governed his service in it. The defendant disputes the claim. In addition, and by means of special plea filed by him, he has lodged two preliminary objections to the litigation, both taken under section 113(1) which regulated it, so he says, because the action fitted the bill of one instituted "in respect of" something "done or omitted to be done in pursuance of" the statute. He maintains, firstly, that the requisite notice was never given and, secondly, that the proceedings were started too late, the cause of action having arisen more than six months earlier. That has all been denied by the plaintiff in his replication to the special plea. The case was not the sort, according to him, which the sub-section described and thus covered. He did send a notice to the defendant, he has asserted in any event, alluding to it as a written and timeous one which complied with the sub-section but neither producing the document nor alleging its date and terms. The lateness of the proceedings appears to have been put in issue as well, on the footing that the sub-section hit the litigation, a denial hard to understand in the light of the chronology. The exact date when the cause of action arose, or is said at any rate to have arisen, does not emerge from the pleadings. But that seems to have occurred on the plaintiff's case during 1990. Yet the summons was issued on 29 April 1994. Our interim Constitution (Act 200 of 1993) had come into force by then, indeed two days previously. Its entry into the picture prompted the last

answer to the special plea which the replication advanced, the contention that the sub-section was unconstitutional.

[3] The lawyers acting for the parties agreed when the pleadings were closed that our decision on the constitutional point should be obtained before the litigation proceeded any further. The plaintiff then applied to the Transvaal Provincial Division, with the concurrence of the defendant, for an order referring to us the issue whether section 113(1) was incompatible with various provisions of the Constitution that were listed. In the affidavit which supported the application the plaintiff's attorney spoke of the unlikelihood that the action would go to trial if we struck down the sub-section. In that event, he explained, the parties would probably submit the dispute on the merits of the claim to the Ombudsman for his determination instead. The application came before Curlewis DJP. He granted the order that both sides wanted, saying this in a short judgment which he delivered at the time:

> "It has now been agreed between the parties that the matter be referred to the Constitutional Court ... Far be it for me to suggest that the agreement binds me, and I prefer that matters should be concluded here first, but I am satisfied that in this particular case it will be advisable at the outset to have the opinion of the Constitutional Court on this matter. I have been told ... that, if the plaintiff should be successful in what he hopes to achieve, that is to persuade the Constitutional Court that the section of the Act which protects the Minister of Defence is unconstitutional, then in all probability ... he will go to the Ombudsman ...It will be

> of course decisive, and Mr Bertelsmann says that it is a matter of importance because, if the plaintiff does not persuade the Constitutional Court, then he is non-suited."

The person mentioned in that last sentence was the plaintiff's counsel.

[4] The referral purported to be sought and ordered under section 102(1) of the Constitution, which stipulates that:

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court ..., the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court."

No provision is made, one notices, for referrals requested by consent. Curlewis DJP was therefore right in the view he took that the agreement which the parties had reached did not bind him. Before granting the order he had to satisfy himself, independently and regardless of their attitude, that all three requirements were met for a competent referral of the issue raised. They were the requirements that it lay within our exclusive jurisdiction, that it might be decisive of the case, and that its referral

would be in the interests of justice. The first of those was undoubtedly fulfilled , an Act of Parliament having come under fire. Whether the same went for the second and third is, however, another matter.

[5] Rule 22(2) of our Rules directs the judge or judges ordering any referral in terms of section 102(1) to -

> "... formulate in writing ... the reason why he or she or they consider it to be in the interest of justice that the matter be referred."

The only reason given by Curlewis DJP for the referral that he ordered was the one furnished in the passage which I have quoted from his judgment. It is not clear to me why the parties planned to deal in a manner so unorthodox with the dispute over the merits of the claim if that had to be resolved because of a ruling on section 113(1) which put paid to the special plea. For nobody has explained to us why a private ventilation of the dispute before the Ombudsman was preferred in that event to its public adjudication by the Transvaal Provincial Division. The case was the type, after all, where the defendant at least might have been expected to value the store which the Constitution set by the concept of an open society. Nor do I know what the parties have in mind now that, since the referral, the post of Ombudsman has been abolished and replaced by the office of the Public Protector whose functions are not quite the same as those of his predecessor. I am uncertain about something else too, Page 6.

the answer to an underlying question that occurs to me. It is whether section 102(1) catered in the first place for a referral on such grounds. That it did was apparently taken for granted in the Court below. But the supposition may have been wrong. The purpose which section 102(1) was designed to serve is obvious. It enables provincial and local divisions to seek rulings on issues of the kind encompassed which they need for, and on obtaining must apply to, the matters handled by them. Here the referral had no such aim. The point was neither argued, however, nor even put to counsel. So we had better leave it undecided at present and assume the referral not to have been objectionable on that particular count.

[6] The proceedings in the Court below call for some comment elsewhere. Curlewis DJP seems not to have applied his mind to, and he certainly said nothing about, the prospects of success that the attack on the validity of section 113(1) was thought likely to attract on its referral to us. Those prospects were plainly pertinent to the interests of justice which he had to consider. He was therefore required to evaluate them. A general rule to that effect is implicit in section 102(1), we have held already, and governs every referral ordered under it. Kentridge AJ enunciated the rule in *S v Mhlungu and Others*[1], where he rated "(t)he reasonable prospect of success" which the constitutional challenge appeared to enjoy as "*a sine qua non* of

[1] Paragraph [59]: 1995 (3) SA 867 (CC) at 895 A - C; 1995 (7) BCLR 793 (CC) at 821 C - E.

a referral". The judge who decides to order a referral must consequently explain, in canvassing the interests of justice, why he or she thinks that the challenge may succeed. That corollary was added by Ackermann J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[2] . Neither judgment had yet been delivered, it is true, at the time when Curlewis DJP dealt with the matter. But the rule and its corollary surely spoke for themselves even then. For it had gone without saying all along that the interests of justice could never be served by the referral of points with no visible substance. The need for care in appraising those taken is illustrated by the order which Curlewis DJP granted. It identified four sections of the Constitution as the parts believed to be relevant to the issue referred because of the impact that they might have on section 113(1). They were sections 8, 22, 26, and 27. Section 22 bestows on everybody the right of access to courts of law or separate but suitable tribunals for the resolution of justiciable disputes. That section 113(1) encroaches on the right looks, to be sure, like an arguable proposition. So perhaps is the suggestion of a conflict with section 8, the one guaranteeing equality before the law and its equal protection, since section 113(1) differentiates in the restrictions that it imposes between the general run of plaintiffs and those whose cases it affects, to their

detriment, and also between the State when sued and in suing. The topics of sections 26 and 27, on the other hand, are the rights to engage freely in economic activity and to the benefit of fair labour practices. It is hard to see and difficult to imagine what

[2] Paragraph [8]: 1996(1) SA 984 (CC) at 999 E - F; 1996 (1) BCLR 1 (CC) at 14 A - B.

bearing either has or could be supposed to have on section 113(1). We should have been told why they were mentioned in the order.

[7] Nor does the trouble that we have with the referral end there. It was ordered when five material questions raised by the special plea and the replication to it had been left unanswered. They were these, an affirmative response to question (a) posing questions (b) to (e) in turn.

(a) Was the action instituted "in respect of" something "done or omitted to be done in pursuance of" the statute, with the result that section 113(1) covered it?

(b) Was the action preceded by a notice given to the defendant which complied with the sub-section in its form, terms and time?

(c) Did the plaintiff's cause of action arise earlier than six months before the litigation started?

(d) If it did, was his claim extinguished once and for all by the failure to start the litigation within six months after the cause of action had arisen?

(e) In that event could any subsequent invalidation of the sub-section revive a claim that was extinct by then?

Some parts of those were questions of fact, some of law, and others of fact mixed with law. All fell within the jurisdiction of the Transvaal Provincial Division, where they

could have been resolved. In listing the five I have not overlooked the prediction ventured by the plaintiff's counsel in the Court below that his client would be "non-suited" if section 113(1) stood. The prediction may have implied that the denials precipitating questions (a) to (d) were tactical ones which could not be substantiated, ones that would therefore not matter in the long run. But, whatever counsel meant to convey, he did not formally withdraw the denials or admit the allegations which they had put in issue. So on the pleadings those four questions remained in dispute. Nothing was said, in any event, touching question (e). That, apart from the rest, has undoubtedly stayed alive and kept its importance, an affirmative answer being essential there to the plaintiff's case on the constitutional point.

[8] The proviso to section 102(1) dictates that the judge who orders a referral must, before doing so, hear and make findings on any evidence that is necessary "for the purposes of deciding" the issue referred. I am not sure about the scope of the evidence which the proviso encompasses, whether it envisages testimony pertaining to the issue that is about to be referred, testimony relating to other issues which furnish the setting for the enquiry into that one, or both categories. The interpretation of the proviso was not debated before us, and we have had no prior occasion to consider it. I shall assume that it did not, in itself, oblige Curlewis DJP to hear evidence on the factual components of the questions in dispute. Whether he ought to have done so in any event, and then to have decided the questions themselves in accordance with

his findings of fact and conclusions of law, depends on the effect of the second and third requirements for a referral that I mentioned earlier, those of prospective decisiveness and the interests of justice.

[9] The phraseology of the second requirement is not altogether clear. It poses two problems. The one concerns its allusion to "the case" in respect of which the issue referred may be decisive. The requirement is obviously met whenever a ruling on that issue may dispose of the entire case with no further ado. Often, however, only some individual and self-contained part of the case will be directly affected. Then too the requirement is satisfied, I believe, once the ruling given there may have a crucial bearing on the eventual outcome of the case as a whole, or on any significant aspect of the way in which its remaining parts ought to be handled. That goes indeed for the present matter, where the plaintiff will be barred from pursuing his claim on the merits if section 113(1) stands and the upshot is the success of the special plea. The other problem looks more puzzling. The words that raise it are "may be decisive". What they seem to connote is the possibility of decisiveness rather than the certainty of that. One would otherwise have expected "will" to appear there instead of "may". That nothing stronger was evidently envisaged does not sound surprising. For a verdict of constitutionality returned by this Court on the issue referred will seldom dispose of a case with additional issues. And, since such a verdict is always on the cards, the prospect that the referral will produce a result decisive of the case can never

amount to more than a possibility. But a question still remains, the question whether that is the sole possibility postulated. Another presented by a case with multiple issues, as most cases happen to be, is the possibility that the resolution of the issues which are not referred will prove instead to be the decisive factor. It may then be suggested that, unless and until that further possibility is eliminated, the referred issue cannot emerge as a real one, let alone become rateable as possibly decisive. To examine the suggestion, couched in those general terms, is unnecessary now. It suffices for the purposes of this judgment to draw a distinction, in contemplating the determination of such extra issues, between decisions with two different effects. The one kind dispenses with the need for the referred issue to be resolved, thus rendering it irrelevant in the end. The other means that the issue referred can never even arise because the particular constitutional provision on which it turns is held not to apply to the case. An issue falling into that latter category can hardly be regarded as potentially decisive while the constitutional basis for it has not yet been established. Its referral in the meantime, on my appraisal of that, is therefore incompetent.

[10] The referral in this matter was defective on that very score. I shall confine my attention, in explaining why I say so, to questions (d) and (e) of the five formulated above that were not answered in the Court below. The legal truth may well be that, by the time when the plaintiff instituted the action, his claim was extinct already and incapable of revival. Whether such was the case is highly important. Page 12

special plea may be invulnerable to attack in that event, even if the Constitution

invalidated section 113(1) when it came into operation afterwards. Either an answer in the negative to question (d), or an affirmative one to question (e) were question (d) answered likewise, was therefore imperative in order to raise the constitutional issue put to us. In the absence of both answers the issue was neither here nor there, and by no means potentially decisive of the case.

[11] Nor, in my opinion, did the interests of justice call for the referral while those two questions at least stood unanswered. In *S v Mhlungu and Others*[3] Kentridge AJ wrote:

> "It is convenient ... to say something about the practice of referrals to this Court under section 102(1) of the Constitution. The fact that an issue within the exclusive jurisdiction of this Court arises in a provincial or local division does not necessitate an immediate referral to this Court ... It is not always in the interest of justice to make a reference as soon as the relevant issue has been raised. Where the case is not likely to be of long duration it may be in the interests of justice to hear all the evidence or as much of it as possible before considering a referral ... Moreover, once the evidence in the case is heard it may turn out that the constitutional issue is not after all decisive. I would lay it down as a general principle that where

> it is possible to decide any case ... without reaching a

[3] See footnote 1: Paragraph [59] at 894 I - 895 E in the first report cited there and 820 J - 821 G in the second one.

> constitutional issue, that is the course which should be followed."

Chaskalson P reiterated that principle in *Zantsi v Council of State, Ciskei, and Others* [4], declaring it to be -

> "... a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised."

The point which Kentridge AJ made about the duration of trials is pertinent to the present matter. Separately from and in advance of the trial on the claim itself, evidence and argument could have been heard, and a decision could then have been reached, on all the issues but the constitutional one which the special plea and the replication had raised. Rule 33(4) of the Supreme Court Rules permitted such preliminary proceedings. They could scarcely have lasted for longer than a day or two.

[12] Section 102(1) empowers and obliges "the provincial or local division concerned" to order a referral which is otherwise competent "if it considers it to be in the interest of justice to do so". The wording had the effect, counsel contended, that where the interests of justice lay for those purposes was the business of the judge ordering the referral, whose evaluation of them we could not overrule once he or she had found

that they told in favour of the order. I disagree. The words "it considers", as I read

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[4] Paragraphs [3] and [5]: 1995(4) SA 615 (CC) at 618 B and E - F; 1995 (10) BCLR 1424 (CC) at 1428 D - E and 1429 C.

them, do not import the idea of a discretionary decision on the part of the referring Court, in the narrow sense of one that can be upset only in the exercise of a power to review it and which is unimpeachable in the absence of conventional grounds for such a review. They simply recognise that, unlike the criteria of exclusive jurisdiction and prospective decisiveness which are objectively measurable, what appears to be in the interests of justice or not falls within the field of a value judgment. Deference is due and usually paid, whenever a value judgment comes under the scrutiny of a higher court, to the advantages that were enjoyed in the lower court by the judicial officer who reached it there. That seldom means, however, that it binds the higher court. The same surely goes in any referral for the value judgment passed on the interests of justice by the referring judge, especially one emanating from a heavy trial which he or she is busy hearing, a trial where he or she has become steeped in its atmosphere and better equipped than we can ever be for an assessment of the most beneficial, expedient and convenient stage at which to put to us an issue calling sooner or later for our determination. We are nevertheless free in a suitable case, I believe, to prefer our own opinion on the interests of justice to the one formed by the referring judge and, having taken the opposite view, to give effect to it by ruling the referral out of order. That construction which I place on the wording of the section is supported, moreover, by the sensible result that it produces. It would be most unfortunate if we could be compelled to decide a issue which we considered not to be ripe for resolution at that

particular juncture. The strict control by us of our adjudication is essential to the work that we have to perform. Much the same policy has been adopted and implemented by the Appellate Division towards appeals presented to it piecemeal. The policy was declared, amongst other occasions, in *R v Adams and Others*[5]. All that remains to be added is this, which I emphasise. In declining to deal with an issue sent here on a referral, we do not refuse to exercise the jurisdiction entrusted to us over it. We merely rule that the recourse then had to our jurisdiction is premature, and defer its exercise until the arrival of a time more propitious for that.

[13] Curlewis DJP was no better placed to assess the interests of justice associated with the present referral than we now are. Its history and handling were not the sort that gave him any such advantage. Nor did the extent of his involvement in the case, which seems to have been relatively brief and slight. All that being so, I need not hesitate on deferential grounds before dissenting, as I do, from his belief that the referral served those interests.

[14] The conclusion to which I have accordingly come is that the referral was ordered wrongly for want of compliance with both the second and third requirements, and that we should therefore not entertain it.

[5] 1959 (3) SA 753 (A) at 763 B - C.

[15] Counsel requested us, if we took that view, to allow the parties direct access to this Court on the issue referred so that it might nevertheless be determined now. Rule 17(1) of our Rules provides for the channel of direct access, but in -

> "... exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

That route, as Kentridge AJ mentioned in *S v Zuma and Others*[6] , was "certainly not intended to be used to legitimate an incompetent reference". We have accepted that it may be followed in place of a bad referral, however, once exceptional circumstances are found to be present. One such circumstance is the pressing need for a definite and final decision on a controversial point springing up throughout the country daily, or very frequently at any rate, and affecting countless other cases[7]. Another is the problem of the long and complicated trial which may be aborted in the end by an infringement of the Constitution first established on appeal, and the

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[6] Paragraph [11]: 1995 (2) SA 642 (CC) at 650 B; 1995 (4) BCLR 401 (CC) at 409 H - I.

[7] *S v Zuma and Others*: see footnote 6: paragraph [11] at 649 I - 650 B in the first report cited there and 409 F - I in the second one; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others:* see footnote 2: paragraph [10] at 1000 1000 C - F in the first report cited there and 14 G - 15 A in the second one.

consequent wastage of time, effort and money that an early ruling could have avoided[8]. What I said a moment ago about the swift and brief adjudication on the special plea that was feasible distinguishes the circumstances of this case from the second set. They differ from the first lot too. The constitutional validity of section 113(1) is an issue likely to be resolved in another matter where it was referred to us, properly so that seems, the one of *Mohlomi v Minister of Defence* which we heard together with this case and have under consideration at present. None of the circumstances encountered here are, as I see them, exceptional. In my judgment direct access ought not to be granted.

[16] Counsel agreed that, if the proceedings had the outcome which is about to ensue, no order for costs should be made. That would be fair, I believe, since the parties are equally responsible for the course matters have taken.

[17] In the result the referral is struck off the roll, the application for direct access is refused, and the case is remitted to the Transvaal Provincial Division.

Chaskalson P, Mahomed DP, Ackermann J, Kentridge AJ, Kriegler J, Langa J,

[8] Paragraph [13] of *S v Vermaas; S v du Plessis* 1995(3) SA 292 (CC) at 297 H - 298 H; 1995 (7) BCLR 851 (CC) at 857 G - 858 H.

Madala J, Mokgoro J, O'Regan J and Sachs J all concur in the judgment of Didcott J.

Plaintiff's counsel:	E. Bertelsmann SC, instructed by Wilsenach, Van Wyk, Goosen and Bekker.
Defendant's counsel:	J.L. van der Merwe SC, with him P.J.J. de Jager, instructed by the State Attorney.