

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/98

SUSARA ELIZABETH MAGDALENA JOOSTE

Applicant

versus

SCORE SUPERMARKET TRADING (PTY) LIMITED

Respondent

THE MINISTER OF LABOUR

Intervening Party

Heard on : 10 November 1998

Decided on : 27 November 1998

JUDGMENT

YACOOB J:

Introduction

[1] On 27 December 1995 the applicant fell and was injured in the respondent's supermarket where she worked as a cashier. On 29 April 1997 she began an action in the Eastern Cape High Court claiming, inter alia, general damages resulting from her injuries, which she alleged were a direct result of the negligence of one or more employees of the respondent during the course and scope of their employment.

[2] In its special plea the respondent took the point that the applicant's claim was barred by section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("the Compensation Act").¹ This special plea elicited a replication which advanced the proposition that section 35(1) was inconsistent with the interim Constitution² in that its provisions violated the right to equality before the law and to equal protection of the law and the right not to be unfairly discriminated against, the right of access to courts and the right to fair labour practices, enshrined in sections 8(1) and (2),³ 22⁴ and 27(1)⁵ of that Constitution respectively. The applicant accordingly sought to have the special plea dismissed with costs, alternatively to have the issue of the

¹ Section 35(1) of the Compensation Act provides:
"No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

² Constitution of the Republic of South Africa Act 200 of 1993.

³ Section 8 provides that:
"(1) Every person shall have the right to equality before the law and to equal protection of the law.
(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

⁴ Section 22 provides:
"Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

⁵ Section 27(1) provides:
"Every person shall have the right to fair labour practices."

constitutionality of section 35(1) referred to this Court, presumably pursuant to section 102(1) of the interim Constitution.

[3] No evidence was led at the hearing of the special plea and the matter was argued before, and determined by, Zietsman JP in line with the attitude of the parties that the 1996 Constitution⁶ was applicable to its determination. That Constitution came into force on 4 February 1997, after the applicant was injured but before proceedings were commenced.

⁶ Constitution of the Republic of South Africa, 1996.

[4] The case was decided in the High Court on the basis that it was necessary to determine whether the impugned section was in conflict with the provisions of sections 9(1) and (3)⁷, 34⁸ and 23(1)⁹ of the 1996 Constitution. On that basis, the High Court was empowered by section 172(2) of the 1996 Constitution to make a finding concerning the constitutionality of an Act of Parliament but an order of invalidity would have no force unless confirmed by this Court. Although notice of this constitutional challenge was not given to any organ of state, Zietsman JP found that section 35(1) was inconsistent with the equality provisions of the 1996 Constitution and invalid, dismissed the special plea with costs and referred his order of constitutional invalidity to this Court for confirmation.¹⁰

⁷ Section 9 provides:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

⁸ Section 34 provides:
 “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁹ Section 23(1) provides:
 “Everyone has the right to fair labour practices.”

¹⁰ Reported as *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 (9) BCLR 1106 (E).

[5] The applicant seeks confirmation of the order of the High Court pursuant to section 172(2)(d) of the 1996 Constitution read with Constitutional Court rule 15(4). The respondent opposed confirmation, belatedly filed a notice of appeal and an appropriate application for condonation. The application was not opposed and are now granted. We have accordingly before us both an opposed application for the confirmation of the finding of invalidity of section 35(1) by the High Court and a contested appeal against the whole of the judgment of that court.

Which Constitution?

[6] It has been mentioned that the High Court decided the matter on the basis, firstly, that it was empowered to do so by section 172(2)(a) of the 1996 Constitution and, secondly, that chapter 2 of that Constitution was applicable to the case even though it did not exist at the time the applicant was injured. The High Court now undoubtedly has power under the 1996 Constitution to make a finding of constitutional invalidity of an Act of Parliament in proceedings which are instituted after that Constitution came into force.¹¹

However, the constitutionality of an Act or statutory provision is ordinarily to be determined by the substantive constitutional provisions in force at the time the cause of

¹¹ Section 172(2)(a) of the 1996 Constitution.

action arose.¹² The interim Constitution was in force when the applicant's cause of action arose and the validity of section 35(1) must, therefore, be determined against sections 8(1) and (2),¹³ 22¹⁴ and 27(1)¹⁵ of the interim Constitution. This judgment proceeds accordingly. This course might have occasioned some difficulty if the conclusion concerning constitutional consistency were to vary depending on whether the interim or 1996 Constitution was to apply. In this case, however, that does not arise as there is no material difference whether the provisions of section 8 of the interim Constitution or

¹² *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at paras 20, 68 and 114, and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* CCT 7/98, an as yet unreported judgment of this Court decided on 14 October 1998, at paras 107 and 113.

¹³ Above n 3.

¹⁴ Above n 4.

¹⁵ Above n 5.

section 9 of the 1996 Constitution are applied.

Joinder

[7] It is undesirable for a court to make an order of constitutional invalidity in relation to an Act of Parliament or Provincial Act unless the relevant organ of state which is not a party to the proceedings has had an opportunity to intervene in those proceedings.¹⁶ Because rule 6(2)¹⁷ had not been complied with, the Minister of Labour, who is the

¹⁶ *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 5.

¹⁷ Rule 6(2) provides:
“In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with

relevant organ of state and who had not been given any opportunity to intervene in the case before the High Court, was notified and given the opportunity to intervene in the proceedings before this Court. The Minister chose to intervene, opposed the confirmation of the finding of the High Court and presented helpful argument in support of that opposition.

[8] It is however necessary to consider the consequences arising from the matter having been determined by the High Court without notice to any organ of state. It was contended on behalf of the applicant that the Minister of Labour had no direct interest in the proceedings and that there was accordingly no need for an opportunity for intervention to have been afforded to that office.

[9] The contention has no substance. The Compensation Act is important social legislation which has a significant impact on the sensitive and intricate relationship

the registrar a document in which such contention is raised for the first time in the proceedings before the Court, serve on the authority concerned a copy of such document and lodge proof of such service with the registrar, and no order declaring such act, conduct or law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with."

amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate. Section 35(1) is an element of that legislation and the Minister, as the representative of the state responsible for the administration of this legislation, clearly had a direct, abiding and crucial interest in the outcome of the litigation. This Court may well have declined to confirm the order solely on the ground that notice of the proceedings in the High Court was not given to the Minister. But there is no need to consider this course of action any further because these proceedings can be disposed of on more substantive grounds without any prejudice to the state.

The Equality and Non-Discrimination Challenge

[10] It was contended in the High Court that section 35(1) infringed both sections 9(1) and 9(3) of the 1996 Constitution. The applicant's equality challenge was based on a contention that employees, by being deprived of the common law right to claim damages against their employers, are placed at a disadvantage in relation to people who are not employees and who retain that right. The challenge was not based on any of the grounds specified either in section 8(2) of the interim Constitution or section 9(3) of the 1996 Constitution. In dealing with these contentions Zietsman JP said:

"The question . . . is whether section 35 of the Act, which denies to employees the right to claim compensation from their employers, has a rational connection to the purpose of

the Act. If not it constitutes unfair discrimination against employees.”¹⁸

[11] This approach is not consistent with the equality jurisprudence that has been developed by this Court in a series of cases over the past two years.¹⁹ The correct approach to cases in which there is alleged to be an infringement of sections 8(1) and 8(2) of the interim Constitution (or sections 9(1) and 9(3) of the 1996 Constitution), but the differentiation is not based on a specified ground, is this:

- a. The first inquiry is whether there is a rational relationship between the differentiation and a legitimate government purpose. If there is no rational relationship, the differentiation in question amounts to a breach of section 8(1) or

¹⁸ Above n 10 at 1111E.

¹⁹ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 27-31, *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41, *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paras 46-9 and *The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* CCT 11/98, an as yet unreported judgment of this Court decided on 9 October 1998, at paras 15-9 and 58-64.

9(1) respectively.

- b. The issue as to whether there is unfair discrimination in terms of section 8(2) or 9(3) would ordinarily arise only if there is such a rational relationship.²⁰ If so, the party challenging the constitutionality of the differentiation must establish that the differentiation amounts to unfair discrimination.
- c. If unfair discrimination is established, the party seeking to support the disputed measure attracts a duty to establish that the measure passes the test for limitation laid down in section 33 of the interim Constitution.

[12] In oral argument before this Court counsel for the applicant rightly accepted that there was no evidence in support of the proposition that the differentiation in issue amounted to unfair discrimination and advanced no contention in this regard. The submission on behalf of the applicant was accordingly that the only issue of relevance to the equality challenge was whether the impugned section was rationally connected to a legitimate government purpose. If there was a rational connection, the applicant should fail because unfair discrimination had not been established; if not, the applicant should

²⁰ There may be cases where the discrimination so clearly constitutes a breach of section 8(2) or 9(3) that there is no need to undertake the first inquiry. See *The National Coalition* judgment above n 19 at para 18.

succeed because no justification was shown in terms of section 33 of the interim Constitution. Whether any such rational connection exists must now be examined, for clearly the section differentiates between persons who are employees and those who are not. Zietsman JP held that there was no rational relationship between the impugned section and a legitimate government purpose on the basis that the purpose as stated in the Compensation Act was for the benefit of employees but that section 35 operated to their disadvantage.

[13] The purpose of the Compensation Act, as appears from its long title, is to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. The Compensation Act provides for a system of compensation which differs substantially from the rights of an employee to claim damages at common law. Only a brief summary of this common law position is necessary for the purposes of this case. In the absence of any legislation, an employee could claim damages only if it could be established that the employer was negligent. The worker would also face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time-consuming litigation to pursue a claim. In addition, there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were

lost. On the other hand, an employee could, if successful, be awarded general damages, including damages for past and future pain and suffering, loss of amenities of life and estimated “lump sum” awards for future loss of earnings and future medical expenses, apart from special damages including loss of earnings and past medical expenses.

[14] By way of contrast the effect of the Compensation Act may be summarised as follows. An employee who is disabled in the course of employment has the right to claim pecuniary loss only²¹ through an administrative process²² which requires a Compensation Commissioner²³ to adjudicate upon the claim and to determine the precise amount to which that employee is entitled.²⁴ The procedure provides for speedy adjudication and for payment of the amount due out of a fund²⁵ established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction.²⁶ Payment of compensation is not dependent on the employer’s negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee’s contributory negligence.²⁷

²¹ Sections 47-64.

²² Sections 38-46.

²³ Section 2.

²⁴ Section 4.

²⁵ Section 15.

²⁶ Section 87.

²⁷ Section 22(1).

The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss.²⁸ An employee who is dissatisfied with an award of the Commissioner has recourse to a court of law which is, however, bound by the provisions of the Compensation Act.²⁹ That then is the context in which section 35(1) deprives the employee of the right to a common law claim for damages.

[15] The Compensation Act supplants the essentially individualistic common law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute. Compensation is payable even if the employer was not negligent. Though the institution of the regime contemplates a differentiation between employees and others, it is very much an open question whether the scheme is to the disadvantage of employees.

²⁸ Section 56(4).

²⁹ Section 91(5).

[16] Counsel for the applicant did not base his contention on a comparison of the position of the worker under the scheme contemplated by the Compensation Act with the position at common law. He submitted instead that section 35(1) had to be viewed independently of the rest of the Compensation Act because it did not have to be an integral part of the scheme, that there was no reason why a negligent employer should not be obliged to pay both the assessed contributions to the fund and common law damages, and that there was accordingly no rational basis for the inclusion of section 35(1) as part of the scheme. He said that the assumption that it was unduly onerous for the employer to be obliged to pay both contributions to the fund and common law damages if negligent was ill founded. Indeed, counsel confessed that his contention concerning the absence of a rational connection amounted to the employee having “the best of both worlds”. In essence, the contention amounted to this: the nature of the balance achieved by the legislature through the Compensation Act tilts somewhat in favour of the employer while requirements of policy and the nature of the relationship between the employee and the employer indicate that a different balance is appropriate. It was contended that the object of the Act is to provide compensation for workers, not to benefit employers. Section 35(1) benefits only employers. It is therefore not rationally related to the purpose of the legislation.

[17] But that argument fundamentally misconceives the nature and purpose of rationality review and artificially and somewhat forcibly attempts an analysis of the

import of the impugned section without reference to the Compensation Act as a whole. It is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the legislature could be improved in one respect or another.³⁰ Whether an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined. The legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee's common law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely, a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.

[18] It may be mentioned in passing that courts in the United States of America, Canada and Germany have found similar legislation providing for worker compensation and

³⁰ *Prinsloo* above n 19 at paras 24-6 and 36.

limiting the right of the worker to claim common law damages not to be irrational or arbitrary.³¹

[19] In so far as the attack on section 8(2) is concerned, there is no evidence of unfair discrimination, no contention in this regard and no apparent basis upon which unfair discrimination could be said to exist. In the circumstances, nothing more need be said on this aspect.

Other Grounds of Attack.

[20] The other bases on which the applicant sought to impugn the section, namely the alleged inconsistency with sections 22 and 27(1) of the interim Constitution, were not

³¹ *New York Central Railroad Company v White* (1916) 243 US 188; *Duke Power Company v Carolina Environmental Study Group Inc.* (1978) 438 US 59; *King v Williams Industries, Inc.* 724 F.2D 240 (1st Cir.1984); *Smith v Gold Inc.* 918 F.2D 1361(8th Cir.1990); *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act, 1983* 44 DLR (4th) 501 (1988). The last-mentioned decision was confirmed by the Canadian Supreme Court, see 44 DLR (4th) 765 (1988). For the German decision see BVerfGE 34, 118 (128, 129, 131-132).

pursued in argument before this Court. A few words should nevertheless be said about each.

[21] The contention in regard to section 22 of the interim Constitution³² was not that the statutory mechanism and tribunal for the speedy determination of compensation created by the Compensation Act violates the right of access to courts. Rather, it was argued that the denial of the right to claim general damages is somehow a denial of the right of access to a court. The section does not deny such access. The fact that the plaintiff cannot go to court to claim damages against the employer really follows from the removal of the right to claim common law damages. Section 22 of the interim Constitution does not call for the retention of all common law rights of action which existed at any stage.

³² Above n 4.

[22] With regard to the alleged infringement of section 27(1)³³ of the interim Constitution, there is also no evidence which establishes that section 35(1) is unfair. Consequently the question whether the provisions of section 35(1) constitute a labour practice can be left alone.

Ancillary Matters

[23] It follows that the order of Zietsman JP that section 35(1) is constitutionally invalid cannot be confirmed, on the basis of the section's inconsistency with either the interim or the 1996 Constitution. It was common cause that this Court should uphold the respondent's special plea if the challenge to the constitutional validity of section 35(1) failed. It is unnecessary to decide whether such an order would have been appropriate if the opposed application for confirmation were the only matter before this Court. There is however no doubt that this order is the competent outcome of the appeal which is properly before this Court.

[24] Counsel for the respondent and the Minister of Labour indicated that neither sought an order that the applicant pay the costs incurred by them before this Court or the High Court. This is both appropriate and fair.

³³ Above n 5.

The Order

[25] The following order is made:

1. The order of constitutional invalidity of section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 is not confirmed.
2. The appeal succeeds.
3. The whole of the order of the High Court is set aside and substituted by the following order:
 - 3.1 The defendant's special plea is upheld.
 - 3.2 The plaintiff's claim is dismissed.
 - 3.3 There is no order as to costs.
4. There is no order as to the costs of the application for confirmation and the appeal before this Court.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Yacoob J.

For the Applicant: Mr TJM Paterson instructed by Netteltons, c/o Smit & Lowndes.

For the respondent: Mr DN Unterhalter instructed by Neville Borman & Botha, c/o Fluxman Rabinowitz - Raphaely Weiner Attorneys.

For the Intervening Party: Mr JP Coetzee instructed by the State Attorney (Johannesburg).