CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/98

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
MINISTER OF SPORT AND RECREATION	Second Applicant
DIRECTOR GENERAL OF SPORT AND RECREATION	Third Applicant
versus	
SOUTH AFRICAN RUGBY FOOTBALL UNION	First Respondent
GAUTENG LIONS RUGBY UNION	Second Respondent
MPUMALANGA RUGBY UNION	Third Respondent
DR LOUIS LUYT	Fourth Respondent

Heard on : 24 November 1998

Decided on : 2 December 1998

JUDGMENT

CHASKALSON P:

[1] On 22 September 1997 the President of the Republic of South Africa, purporting to act under the powers conferred on him by section 84(2)(f) of the Constitution,[1] appointed

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[1] Section 84(2), in so far as is relevant, provides:
"The President is responsible for -
(f) appointing commissions of inquiry".

a commission to inquire into certain financial and administrative aspects of the South African Rugby Football Union ("SARFU") and related matters. Notice of the appointment of this commission, together with a proclamation by the President declaring that the provisions of the Commissions Act[2] would be applicable to the commission, was published in the Government Gazette on 26 September 1998.

[2] SARFU, the Gauteng Lions Rugby Union, the Mpumalanga Rugby Union and Dr Louis Luyt[3] objected to the appointment of the commission. On 20 October 1997 they launched proceedings in the Transvaal High Court for the review and setting aside of the appointment of the commission and the making of the proclamation, alternatively for an order declaring that the appointment of the commission was null and void. The President, the Minister of Sport and Recreation and the Director General of Sport and Recreation were cited as respondents in the application.

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2 Act 8 of 1947.

3 Dr Luyt was a party to the proceedings in his personal capacity. He was also president of the first and second respondents when the application to the High Court was brought.

[3] The application was treated as one of urgency. After affidavits had been filed the matter was set down for hearing on 26 January 1998 before De Villiers J. This was during the court recess. After hearing argument on the merits of the dispute De Villiers J referred the application for the hearing of oral evidence in terms of Uniform Rule of Court 6(5)(g)[4] and required the President and other deponents to affidavits to give evidence. On two occasions, counsel for the President objected to the order that the President be required to give evidence, but the judge affirmed his order and the President complied with it. During the course of the hearing the judge was also required to give rulings on various interlocutory matters which need not now be specified.

[4] On 6 April 1998, after the hearing of evidence and the final arguments had been completed, De Villiers J reserved judgment. On 17 April 1998 he made an order reviewing and setting aside the decision of the President to appoint the commission of inquiry and also setting aside the proclamation which had been made by the President in terms of the Commissions Act. At the time he gave no reasons for the order but indicated that he would give them later. The reasons were given on 7 August 1998 in a judgment

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[4] Uniform Rule of Court 6(5)(g) provides:

> "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

running to more than 1000 pages.[5]

[5] Although reasons for judgment had not yet been given, the President and the other respondents in the proceedings before De Villiers J lodged an application in the High Court on 15 May 1998 for leave to appeal to the Supreme Court of Appeal. That application has not yet been heard.

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5 An abridged version of this judgment is reported as *SARFU and Others v President of the RSA and Others* 1998 (10) BCLR 1256 (T).

[6] On 11 September 1998 the President, the Minister and the Director General, to whom I will refer as the applicants, lodged a notice of appeal in this Court and simultaneously applied for an order condoning the late filing thereof. They gave an explanation for their delay in noting the appeal to this Court, with which I will deal later. Paragraph 1.1 of the notice of appeal referred to the orders made by De Villiers J setting aside the appointment of the commission and the proclamation under the Commissions Act; and paragraph 1.2 referred to a number of decisions given by De Villiers J in the course of the proceedings.[6]

[7] On the same day the applicants lodged an application in the High Court for a certificate in terms of Constitutional Court Rule 18. In that application the applicants stated that they had been advised that they might not be entitled to appeal against the decisions referred to in paragraph 1.2 of the notice of appeal without leave of the Constitutional Court and that the certificate was required for such purpose. They stated that they would only proceed with their application for leave to appeal to the Supreme Court of Appeal if the Constitutional Court declined to consider their appeal, but reserved their right to do so in respect of any matter which this Court might refuse to consider.

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6 Below n 33.

[8] SARFU, the Gauteng Lions Rugby Union, the Mpumalanga Rugby Union and Dr Luyt opposed the application for condonation of the late noting of the appeal to this Court. Various grounds of opposition were advanced. Central to them all was the contention that any appeal against the orders made by De Villiers J should be brought to the Supreme Court of Appeal and not to this Court.

The relevant provisions of the Constitution

[9] Section 167 of the Constitution deals with the jurisdiction of this Court and section 172(2) with the procedure to be followed if a court, other than this Court, makes an order of constitutional invalidity concerning the conduct of the President.

[10] In so far as is relevant, section 167 provides:

> "(3) The Constitutional Court -
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> (a) is the highest court in all constitutional matters;
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> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
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> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
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> (4) Only the Constitutional Court may -
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> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
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> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or

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(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

[11] According to section 172(2):

"(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

The failure to comply with the rules

[12] The Constitutional Court Complementary Act Amendment Act,[7] which makes provision for the matters referred to in section 172(2) of the Constitution to be dealt with in accordance with the rules of this Court,[8] was promulgated on 28 May 1998. New rules of this Court were promulgated on the following day. These rules are applicable to "proceedings of and before the Constitutional Court with effect from 29 May 1998."[9]

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7 Act 79 of 1997.

8 Section 8 of the Constitutional Court Complementary Act 13 of 1995, as inserted by section 2 of the Constitutional Court Complementary Act Amendment Act.

9 Government Notice R 757 promulgated in Government Gazette 18944 of 29 May 1998.

[13] Rule 15 sets out the procedure to be followed in respect of the confirmation of or appeal against an order of constitutional invalidity which is subject to section 172. The procedure for confirmation is as follows. The registrar of the court which has made such an order must lodge a copy of the order with the registrar of this Court within 15 days of the order having been made.[10] A person or organ of state wanting to have the order of constitutional invalidity confirmed may lodge an application for confirmation with the registrar within 21 days.[11]

[14] A person or organ of state wishing to appeal against an order in terms of section 172(2)(d) must lodge a notice of appeal with the registrar within 21 days of the order.[12] The notice of appeal must

> "set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and what order it is contended ought to have been made."[13]

If an application for confirmation is not made and an appeal is not noted within the time prescribed

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10 Rule 15(1).

11 Rule 15(4).

12 Rule 15(2).

13 Rule 15(3).

"the matter of the confirmation of the order of invalidity shall be disposed of in accordance with *directions* given by the *President* [of the Constitutional Court]."[14]

[14] Rule 15(5).

[15] When the orders were made by De Villiers J, neither the legislation contemplated by section 172(2)(c) of the Constitution nor the rules of this Court dealing with the procedure to be followed in respect of appeals against orders referred to in section 172(2), had yet been promulgated. There was no comparable provision in the then-existing rules of Court which could have been relied upon[15] since the procedure prescribed by section 172 had no counterpart in the interim Constitution.[16] The applicants could possibly have approached this Court for directions, but such directions might not have been possible until De Villiers J had given reasons for the orders that he made.

[16] When the Constitutional Court Complementary Act Amendment Act and the new rules of this Court were promulgated on 28 and 29 May 1998 respectively, the applicants could also possibly have lodged a formal notice of appeal to this Court. They would however have been unable then to meet the requirements of rule 15 which obliged them to set out clearly the grounds of appeal and to indicate which findings of fact and law were being appealed against.

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15 *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at paras 22 and 23.

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

[17] According to the Minister's affidavit it was only after the reasons had been given that the applicants were advised that they were entitled to appeal directly to this Court. Instructions were then given for the appeal to be noted. The notice of appeal runs to 99 pages. According to the applicants' attorney she intended to lodge the notice within 21 days of the date on which the reasons for judgment were given but failed to do so.[17] In her affidavit she says that this was due to an error made in calculating the period of 21 days.

[18] In *Parbhoo and Others v Getz NO and Another*[18] this Court decided that, pending promulgation of the necessary legislation or rules, an application for confirmation of an order of invalidity could be brought directly to this Court. Nothing was however said about appeals in terms of section 172(2)(d) and the difference between a confirmation and an appeal[19] was by no means clear. This Court had not yet given a decision on the meaning of section 172(2)(d), on the meaning of the phrase "issues connected with decisions on constitutional matters" in section 167(3)(b), or on the characterization of issues in which facts, common-law issues, and constitutional issues are intertwined.

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17 Constitutional Court Rule 15(2) required the notice of appeal to be lodged within 21 days of the making of the order. Unlike Uniform Rule of Court 49(1)(b) it makes no provision for cases in which an order is made but reasons are only provided later.

18 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC).

19 Below paras 26-38.

Some, but not all, of these difficulties have now been clarified in the judgment of this Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*.[20]

[19] The applicants first knew the reasons for the decision when they were made public on 7 August 1998 and it was only then that they could consider the findings of fact and law against which they might wish to appeal. The appeal involves issues of considerable importance. In the light of the importance of the case, the strangeness of the procedure and the uncertainties that existed prior to the judgment in *Fedsure* concerning the jurisdiction of this Court to deal with issues of legality, condonation could have been granted in terms of rule 10(4), without setting the application down for hearing, had other matters not been raised by the respondents in their answering affidavits.

[20] The respondents contended, firstly, that any appeal against an order made by De Villiers J should be brought to the Supreme Court of Appeal and not to this Court and, secondly, that the applicants had waived their right to appeal to this Court.

[21] The record and judgment in this matter run to some thousands of pages and it is

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20 CCT 7/98, an as yet unreported judgment delivered on 14 October 1998.

important that the question of the proper forum should be determined before the record and detailed arguments on the merits are prepared. The answer to the jurisdictional question depends upon the proper construction of sections 167 and 172 of the Constitution and is therefore a matter which this Court should resolve. For the same reason it was considered necessary to determine the issue of waiver. The application was accordingly set down for hearing before this Court to enable it to decide these issues.

The issues relating to the proper forum

[22] The following directions were given in respect of the hearing:

> "The parties must not address the merits of the appeal in their arguments save in so far as they may be relevant to the issue of the proper forum. The arguments should be directed to the following issues only:
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> (a) (i) Whether the order made by the High Court declaring the President's Proclamation appointing the Commission of Enquiry be set aside, is an order of constitutional invalidity within the meaning of section 172(2)(a) and (d) of the Constitution and rule 15 of the rules of this Court.
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> (ii) Whether the order made by the High Court declaring that the President's Proclamation be set aside is a decision that the President failed to fulfil a constitutional obligation within the meaning of Section 167(4)(e) of the Constitution;
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> and if the answer to either (a)(i) or (a)(ii) is yes,
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> (b) Whether the orders referred to in paragraph 1.2 of the notice of appeal attached to the founding affidavit in the application for condonation are "constitutional matters" or "issues connected with decisions on constitutional matters" within the meaning of section 167(3)(b) of the Constitution, and if they are, whether

they should be determined first by the Supreme Court of Appeal before an appeal against the order referred to in (a) above is dealt with by this Court.

(c) Whether the lodging of an application for leave to appeal to the Supreme Court of Appeal on 15 May 1998 constituted an election not to appeal directly to this Court.

(d) Any other issue relevant to the proper forum."

[23] After the directions had been given, SARFU and the Mpumalanga Rugby Union indicated that they would not be represented at the hearing of the matter and would abide by the decision of the Court. The Gauteng Lions Rugby Union and Dr Luyt adhered to their opposition and were represented by counsel at the hearing. I will refer to these two parties as the respondents.

[24] The respondents' contention that an appeal in this matter should be noted to the Supreme Court of Appeal and not to this Court can be summarised as follows.

(a) Section 167(4)(e) of the Constitution[21] does not apply to all conduct of the President alleged to be inconsistent with the Constitution; it applies only to conduct which involves a failure by the President to fulfil a positive constitutional obligation. The issues raised on appeal do not involve such a failure.

(b) Section 172(2)(d) of the Constitution[22] should be interpreted as relating only to constitutional matters of substance. The issues raised in paragraph 1.1 of the

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21 Above para 10.

22 Above para 11.

notice of appeal depend in the main on findings of fact made by De Villiers J and do not call for a consideration of constitutional matters of substance.

(c) The relief claimed by the respondents in the High Court was also founded on matters which are not constitutional matters and which, on the view De Villiers J took, did not have to be dealt with. If any of those matters were to be decided in the respondents' favour, it would be decisive of the case. In that event it would not be necessary to deal with the "limited" constitutional matters raised in paragraph 1.1.

(d) Paragraph 1.2 of the notice of appeal[23] includes decisions on interlocutory orders made by De Villiers J which are not constitutional matters.

(e) The applicants elected to appeal to the Supreme Court of Appeal by lodging an application for leave to appeal to that court alone, thereby waiving any right they might have had to appeal to this Court.

(f) The question of bias which is raised in the notice of appeal, if established, would vitiate the proceedings in the High Court and "result in a situation in which the matter no longer involves a single constitutional issue".

I will deal with each of these issues in turn.

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23 Below n 33.

Section 167(4)(e)

[25] Counsel were in agreement that section 167(4)(e) of the Constitution is not applicable to the questions decided by De Villiers J. If the section were to be construed as applying to all questions concerning the constitutional validity of conduct of the President it would be in conflict with section 172(2)(a) which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of any conduct of the President. It seems to be correct that when the two sections are read together a narrow meaning should be given to the words "fulfil a constitutional obligation" in section 167(4)(e). The problem is, what should that narrow meaning be? In the view I take of this matter, it is not necessary to decide that question in this application. It may depend on the facts and the precise nature of the challenges to the conduct of the President, which are not before us at this stage.

Section 172(2)

[26] Section 172(2)(d) of the Constitution confers on any person with sufficient interest an unqualified right of appeal to this Court against an order of constitutional invalidity concerning the conduct of the President.[24] By contrast section 167(6) permits appeals to

[24] See also section 8(1)(b) of the Constitutional Court Complementary Act, as amended, which provides: "Whenever any person or organ of state with a sufficient interest appeals or applies

this Court directly from decisions of the High Court only if it is in the interests of justice to do so and the leave of this Court has been granted.

[27] Counsel for the respondents contended that "sufficient interest" pertains not merely to the standing to bring an appeal; it also includes an interest to have this Court decide the appeal which would exist only if the appeal raised constitutional issues of substance. The present appeal, so they contended, will be concerned largely with issues of fact and common law, and will not raise constitutional issues of substance.

[28] The language of section 172(2)(d) is not capable of the interpretation placed on it by the respondents. The words "sufficient interest" qualify the persons who are entitled to appeal or apply for confirmation, and not the subject matter of the appeal or application. The only requirement as far as subject matter is concerned is that the appeal or application should be in respect of an order of constitutional invalidity of an Act of Parliament, a provincial Act or any conduct of the President. It was not suggested that the setting aside of the President's decision to appoint a commission did not constitute an

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directly to the Court to confirm or vary an order of constitutional invalidity by a court, as contemplated in section 172(2)(d) of the Constitution, the Court shall deal with the matter in accordance with the rules."

order concerning the constitutional validity of conduct of the President. In the light of the decision of this Court in *Fedsure* it would not have been open to the respondents to make such a suggestion. I deal later with the challenge to the proclamation, but it too is based on the principle of legality and thus raises constitutional issues.

[29] Counsel for the applicants submitted that the effect of section 172(2) is to give this Court exclusive jurisdiction to make orders of invalidity that are binding upon Parliament, Provincial Legislatures and the President. The purpose of these provisions, so it was contended, is to preserve the comity between the judicial branch of government on the one hand and the legislative and executive branches of government on the other, by ensuring that only the highest court in constitutional matters intrudes into the domains of the principal legislative and executive organs of state. In my view this submission correctly reflects the purpose of section 172(2). Our Constitution makes provision for the separation of powers and vests in the judiciary the power of declaring statutes and conduct of the highest organs of state inconsistent with the Constitution and thus invalid. It entrusts to this Court the duty of supervising the exercise of this power, and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done.[25] This Court has a duty to assume this supervisory role.

[30] Counsel for the respondents acknowledged that section 172(2) does not expressly

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[25] Section 167(5), above para 10.

state that an order of constitutional invalidity has to relate to a constitutional matter of substance. They contended, however, that this qualification is implicit in the language of the section because it is a requirement of all direct appeals to this Court.

[31] It is not correct to say that the Constitution limits direct appeals to this Court to "constitutional matters of substance". The Constitution distinguishes between direct appeals under section 167 and direct appeals under section 172. Section 167(6) requires national legislation or the rules of this Court to make provision for direct appeals to this Court from decisions of any other court, when such an appeal is in the interests of justice and leave of this Court has been granted. Section 172(2) deals with the special case of appeals against orders of constitutional invalidity of Acts of Parliament, provincial Acts, or any conduct of the President. Neither section refers to constitutional matters of substance.

[32] The phrase "constitutional matter of substance" is not used in any of the provisions of the Constitution dealing with the jurisdiction of the courts. It is taken from rule 18(6)(a)[26] which deals with the certificate which has to be obtained by a litigant who

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[26] Rule 18(6)(a) provides:

> "If it appears to the court hearing the application made in terms of subrule (2) that -
> (i) the constitutional matter is one of substance on which a ruling by the *Court* is desirable; and
> (ii) the evidence in the proceedings is sufficient to enable the *Court* to deal with and dispose of the matter without having to refer the case back to the court concerned for further evidence; and
> (iii) there is a reasonable prospect that the *Court* will reverse or materially alter the judgment if permission to bring the appeal is given,

wants to appeal directly to this Court in terms of section 167(6) of the Constitution. One of the questions which such a certificate is required to address is whether the constitutional matter in respect of which leave to appeal is sought is one of substance on which a ruling by this Court is desirable. The certificate is for the benefit of this Court in deciding whether or not to grant leave for direct appeals under section 167(6). Where this Court has to exercise a discretion whether or not to grant leave to appeal directly to it, the importance of the constitutional matter is a relevant consideration.

[33] Section 172(2), which deals with appeals against particular orders of constitutional invalidity, does not require leave of the Court. It declares that orders of that type made by any court other than the Constitutional Court have no validity unless confirmed by this Court. A special procedure is therefore prescribed for dealing with matters where such an order has been made. The court making the order must refer the order to the Constitutional Court for confirmation, and interested parties are given the right to appeal against such orders directly to this Court.

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such court shall certify on the application that in its opinion, the requirements of subparagraphs (i), (ii) and (iii) have been satisfied or, failing which, which of such requirements have been satisfied and which have not been so satisfied."

[34] The rules of this Court follow the scheme of the Constitution. Rule 18 deals with appeals under section 167(6) and rule 15 with appeals under section 172(2)(d). Rule 18, which makes provision for a certificate where leave to appeal is required, states specifically that its provisions do not apply to appeals under section 172(2).[27] Rule 15, which deals with section 172(2) appeals, does not require a certificate to be furnished or leave to appeal to be obtained. Consistent with the Constitution and the Constitutional Court Complementary Act, it permits a person or organ of state entitled to appeal under section 172(2)(d) simply to lodge a notice of appeal, prescribing only the form and content of the notice and the time within which it has to be lodged.

[35] The present matter falls to be dealt with in terms of rule 15. There is nothing in this rule, nor in the Constitution or the Constitutional Court Complementary Act, which supports the respondents' contention that section 172(2)(d) applies only if an order of constitutional invalidity relates to a constitutional matter of substance. Indeed, the Constitution itself points to a contrary conclusion. The fact that orders of invalidity under section 172(2) have no force and effect unless confirmed by this Court shows that the

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[27] Rule 18(1) provides:

> "The procedure set out in this rule shall be followed in an *application* for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of *the Constitution*, has been given by any court other than the Supreme Court of Appeal irrespective of whether the Chief Justice has refused leave or special leave to appeal."

Constitution treats such orders as being of particular importance. No court other than this Court may effectively invalidate such Acts or conduct. Hence there is a constitutional obligation to refer such orders of invalidity to this Court for confirmation.

[36] What counsel for the applicants referred to as the "limping invalidity" of an order of invalidity not yet confirmed by this Court, is brought to a head by the confirmation procedure. But confirmation may not be sufficient. An appeal may permit more issues to be examined than would be the case in an application for confirmation. That is presumably why the Constitution makes specific provision for appeals as well as referrals. In so doing, however, it identifies this Court as the court to which the appeal should be noted. Because an order of constitutional invalidity may affect persons who are not parties to the litigation the Constitution also permits parties with a "sufficient interest" to participate in the referral or the appeal.

[37] This is the only court with jurisdiction to deal with a referral of an order of invalidity. There is much to be said for the view that on a proper construction of the Constitution it is also the only court competent to deal with appeals against such orders. It would be an unusual procedure which requires an order to be referred to this Court for confirmation and at the same time permits an appeal against the order to be made to another court, particularly where such order has no force or effect unless confirmed by this Court. That would contemplate two courts being seized of the same issues at the

same time - one of them with authority only to reverse the order but with no power to make a binding order of confirmation, and the other with authority to confirm, vary or refuse to confirm the order. It is, however, not necessary to decide this question in the present case. It is sufficient to say that the Constitution identifies this Court as the court which will ordinarily deal with appeals against such orders of invalidity and empowers persons and organs of state with a sufficient interest to note such appeals directly to this Court. It is not disputed, nor could it be, that in the present case the President and the other applicants are such persons.

[38] In any event the issues raised by the appeal are clearly matters of substance. Matters such as the calling of the President to give evidence and the findings that his evidence was not reliable, that he misdirected himself in appointing the commission, that he "rubber stamped" the Minister's decision, and that he failed to observe procedural fairness are constitutional issues of great moment. So too is the basis on which a court might review the exercise by the President of his powers under section 84(2) of the Constitution. The fact that some of those issues may depend on findings made by the judge on the evidence given does not alter this. This Court has a duty to consider that evidence and to decide whether or not the findings are justified.

Issues not dealt with by the High Court which may be relevant to the outcome

[39] Counsel for the respondents drew attention to the fact that in the High Court the respondents also relied on grounds which were not dealt with by De Villiers J in his judgment, and which, so it was contended, did not raise constitutional issues. They are that the terms of reference of the commission did not relate to a matter of "public concern" as required by the Commissions Act, that those terms of reference were void for vagueness and that the President had failed to consult the Deputy President before appointing the commission, as the Constitution required him to do. All three of these contentions fall within the scope of the doctrine of legality and are, in the light of the decision of this Court in *Fedsure*,[28] constitutional issues. The contention concerning the absence of consultation with the Deputy President raises the question whether the requirement of consultation is a constitutional obligation within the meaning of section 167(4)(e), an issue on which we heard no argument. If it does, it would fall within the exclusive jurisdiction of this Court.

The allegation of bias

[40] It was contended on behalf of the respondents that the allegation of bias raised in the notice of appeal might, if successful, lead to a situation in which the entire proceedings in the High Court would be set aside. If this were to happen, so it was argued, there would be no constitutional matter left for adjudication.

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[28] Above n 20 at paras 53-59.

[41] The notice of appeal does not contend that there was actual bias on the part of the judge in the High Court. The averment made is that -

> "The court's conduct, calculated to create an impression of bias in favour of the applicants, violated the respondents' right to a fair hearing at common law and in terms of section 34 of the Constitution."

The question of bias may be relevant to the factual issues which will have to be dealt with in the appeal and which are clearly relevant to the question whether the orders of invalidity were correctly made. These factual issues are inextricably related to the constitutional issues. They are issues connected with decisions on constitutional matters within the meaning of section 167(3)(b), and as such fall within the jurisdiction of this Court.

[42] If the allegation of bias is established it does not necessarily mean that the entire proceedings will be vitiated.[29] In any event, the issue is a constitutional issue since the applicants rely on section 34 of the Constitution. Other provisions of the Constitution that may be relevant are section 165(2),[30] and section 1(c)[31] which includes the principle of the

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29 *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A) at 590H and *S v Rall* 1982 (1) SA 828 (A) at 834E-F.

30 Section 165(2) provides that:
"The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

rule of law amongst the founding values of the constitutional order.

[43] If the alleged bias results in the setting aside of the proceedings, the result will be that the orders will not be confirmed. Bias is therefore an issue within the jurisdiction of this Court, and is relevant to the question whether the order of invalidity was correctly made.

Waiver

[44] The respondents contend that the applicants elected to appeal to the Supreme Court of Appeal and in so doing lost their right to appeal to this Court. I have already indicated that it is at least doubtful whether the Supreme Court of Appeal has jurisdiction in this matter. But even if it has, I am satisfied that the alleged waiver has not been established.

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[31] Section 1(c) provides that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (c) Supremacy of the constitution and the rule of law."

[45] It is competent for a litigant to apply at the same time both for leave to appeal to the Supreme Court of Appeal and for a certificate to appeal directly to this Court.[32] The applicants are not legally entitled to note an appeal to the Supreme Court of Appeal against the orders made by De Villiers J unless and until they receive leave of the High Court or of the Chief Justice. In the present case the application for leave to appeal to the Supreme Court of Appeal has not been heard, leave has not been given and an appeal has not been noted to the Supreme Court of Appeal. The applicants have stated clearly that if they are permitted to pursue their appeal in this Court, they will abandon their application for leave to appeal to the Supreme Court of Appeal.

[46] The respondents contend that the failure to note an appeal timeously in terms of section 172(2)(d) has resulted in delay and additional costs which have caused them prejudice. The section 172(2)(d) appeal may have been delayed, but far greater delay will result if the matter is dealt with according to a procedure which will not necessarily bring finality to the matter because of the inability of the Supreme Court of Appeal to make a binding order of constitutional invalidity. An early date for hearing can be allocated by this Court and the matter can be finally resolved within a comparatively short space of time. The costs occasioned by the hearing on the question of the appropriate forum result from the respondents' decision to raise that question as an issue in the application for confirmation. If they were serious in that contention it would have been raised by them

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32 *Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party and Others* 1998 (7) BCLR 855 (CC).

even if the notice of appeal had been lodged timeously. In that event the issue would in all probability have been set down for hearing in advance of the appeal for precisely the same reasons as those which have led to the present hearing. The costs occasioned by the lodging of the notice of application for leave to appeal to the Supreme Court of Appeal are trivial. The matter has not been set down for hearing and any wasted costs can adequately be compensated for by requiring the applicants to pay the costs of that application. If the applicants do not tender to make payment of such costs when they withdraw their application, the High Court can require them to do so.

[47] The applicants deny that they made an election not to appeal to this Court, or that they waived their rights to do so. Their conduct is consistent with their having been uncertain whether this Court had jurisdiction to deal with the appeal, and having resolved that uncertainty only after the reasons for judgment had been given. The lodging of the application for leave to appeal to the Supreme Court of Appeal has caused no prejudice to the respondents. In my view the alleged election or waiver has not been established, and the applicants are entitled to rely on their constitutional right to appeal to this Court.

The matters dealt with in paragraph 1.2 of the notice of appeal

[48] The respondents contend that paragraph 1.2 of the notice of appeal[33] raises

[33] Paragraph 1.2 of the notice of appeal reads as follows:

"1.2 All the orders connected with or incidental to the order of constitutional

interlocutory decisions which do not fall within the scope of section 172(2)(d). It is not clear that all of the matters raised in this paragraph of the notice of appeal are indeed appealable. They are all, however, matters likely to be traversed in dealing with the issue of bias. If the matters raised in paragraph 1.2 are indeed appealable in the circumstances

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invalidity including,

1.2.1 the order made on 5 February 1998,
- that certain issues be referred for the hearing of oral evidence and
- that the appellants appear personally to be examined and cross-examined as witnesses;

1.2.2 the order made on 24 February 1998 that the appellants' application for 'absolution' be refused with costs;

1.2.3 the order made on 12 March 1998 that the appellants' application for revocation of the order that the president appear personally to be examined and cross-examined as a witness, be refused with costs;

1.2.4 the order made on 13 March 1998 that the director general produce the documents in respect of which he had claimed privilege, for inspection by the court and that the appellants pay the costs of the application;

1.2.5 the orders made on 3 and 17 April 1998 that the appellants' application to call Mr Hannes de Wet to give evidence, be refused with costs;

1.2.6 the order made on 17 April 1998 that the president's proclamation in terms of the Commissions Act be set aside as invalid;

1.2.7 the order made on 17 April 1998 that the appellants pay the costs of the main application."

of the present case, they would be matters connected with decisions on constitutional matters within the meaning of section 167(3)(b) and, for that reason alone, within the jurisdiction of this Court.

[49] No purpose would be served by attempting to sever these matters from the rest of the appeal. In fact, the respondents accept that if these issues are appealable and within the jurisdiction of this Court, and if condonation is granted, the interlocutory matters should be dealt with as part of the main appeal.

[50] It is correct that the matters referred to in paragraphs 1.2.1 to 1.2.5 of the notice of appeal do not fall directly within the purview of section 172(2)(d). Rule 15, which regulates appeals under section 172(2)(d), vests in the President of the Court the power to give directions as to how such appeals should be disposed of. The obtaining of a certificate under rule 18 is to enable this Court to decide whether or not to hear the matter. That enquiry need not be undertaken in cases where there is an appeal as of right and the matter has to be heard. Rule 18 recognises this and states specifically that it does not apply to section 172(2)(d) appeals. In terms of rule 15 this Court gives directions as to how such appeals are to be disposed of. Such directions can define the issues that are to be argued. There may be cases in which this Court, by means of directions given in terms of rule 15, will decline to permit matters which are not directly related to the issue of constitutional validity to be raised in appeals under section 172(2)(d). But in the

circumstances of the present case, where the record is extremely long and the matters are relevant to issues which will be raised on appeal, there would be no sense in giving such directions. If the issues are appealable, they are issues connected with decisions on constitutional matters and should be dealt with as part of the appeal which has been noted. Nothing in this judgment should, however, be construed as deciding that such issues are in fact appealable. We have heard no argument on that question.

Costs

[51] Ordinarily a party who opposes an application for condonation is entitled to the costs of opposition unless such opposition was frivolous, vexatious or otherwise unreasonable.[34] Counsel for the respondents submitted that in accordance with this principle the applicants should be ordered to pay the costs of the application.

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[34] *Rondalia Versekeringskorporasie van SA Bpk v Viljoen en'n Ander* 1976 (3) SA 410 (A) at 429H and *Maloney's Eye Properties Bk en 'n Ander v Bloemfontein Board Nominees Bpk* 1995 (3) SA 249 (O) at 257G-H.

[52] Rules relating to the award of costs in these and other circumstances are not immutable and, although affording broad guidelines, have to be applied to the facts of each case. In the end the award of costs depends on an equitable weighing up of various factors including the evaluation of success in the particular proceedings, the reasons for bringing them, the circumstances in which they were brought and the nature of the opposition.[35]

[53] The facts of the present case are somewhat unusual. The matter was set down for hearing on the issue of the proper forum, and the parties were directed to confine their argument to this issue, including the question whether the right to appeal to this Court had been waived. If these issues had not been raised the hearing would not have been necessary. As I have previously indicated, the issues raised by the respondents in this application would probably have been the subject of a preliminary hearing had they been raised in response to a timeous notice of appeal. It was for that reason that counsel for the applicants contended that the respondents should be ordered to pay the costs of the application if they failed on both issues.

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35 Compare, for example, *Algoa Milling Co Ltd v Arkell and Douglas* 1917 AD 754; *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Port Shepstone Fresh Meat and Fish Supply (Pty) Ltd v Collett* 1949 (1) SA 460 (N); *Makings v Makings* 1958 (1) SA 338 (A); *Breytenbach v De Villiers NO en Andere* 1961 (2) SA 542 (T); *Nogaya v Shield Insurance Co Ltd* 1977 (1) SA 570 (SE); *Jacobsz v Fall* 1981 (4) SA 871 (C); *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (C) and *Zealand v Milborough* 1991 (4) SA 836 (SE).

[54] This Court adopts a more flexible approach to costs than do other courts. Frequently an unsuccessful party is not ordered to pay costs. I have come to the conclusion that in the particular circumstances of the present case it would be appropriate for the parties to pay their own costs.

Conclusion

[55] Ordinarily an applicant seeking condonation will be required to satisfy this Court that there are reasonable prospects of success on appeal. In the present case, that question could not be traversed without the full record. Had that been necessary, the application for condonation would in substance have become the appeal itself. The appeal raises issues of considerable constitutional importance, and as this Court is required by the Constitution to deal with the matter whether or not there is an appeal, no purpose would have been served by requiring the parties to address us on the prospects of success. We are satisfied that in the special circumstances of this case, condonation should be granted and the merits of the appeal should be left over for debate when the appeal is heard.

[56] The following order is made:

1. The application for condonation is granted.
2. The parties are to pay their own costs of this application.

3. The following directions are given in regard to the appeal:

   3.1 The record of the proceedings is to be lodged by the applicants' attorneys by not later than 11 January 1999.

   3.2 The appellants' written argument is to be lodged with the registrar of this Court by not later than 3 February 1999.

   3.3 Written argument on behalf of those respondents who wish to be heard is to be lodged with the registrar of this Court by not later than 10 March 1999.

   3.4 The matter is set down for hearing before this Court on 23, 24, 25, 26 and 29 March 1999.

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

For the Applicants:	W Trengove SC, A Bham and M Chaskalson instructed by the State Attorney (Pretoria)
For Second and Fourth Respondents:	MC Maritz SC, M Helberg SC and JG Cilliers instructed by Rooth & Wessels