CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 1/98

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| ELMARIE MADELYN BRUCE | First Applicant |
| BABY ANGEL CC | Second Applicant |
| versus | |
| FLEECYTEX JOHANNESBURG CC | First Respondent |
| THE LIQUIDATOR OF BABY ANGEL CC | Second Respondent |
| THE MASTER OF THE HIGH COURT, PRETORIA | Third Respondent |

Decided on: 24 March 1998

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JUDGMENT

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CHASKALSON P:

[1] This is an application for direct access brought in terms of Rule 17 of the Constitutional Court Rules in a matter in which the applicant seeks an order declaring that the provisions of section 150(3) of the Insolvency Act are unconstitutional.[1]

[2] Rule 17(1) provides:

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[1] Section 150(3) of Act 24 of 1936 provides:

> "When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned."

> "The Court shall allow direct access in terms of section 100(2) of the [interim] Constitution 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."

This rule was adopted under the provisions of section 100(2) of the interim Constitution[2] which stipulated:

> "The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction."

[3] Section 167(6) of the 1996 Constitution[3] now provides:

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

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

3 The Constitution of the Republic of South Africa, 1996.

Section 167(6) was considered by this Court in *S v Pennington and another*[4] at a time when the legislation and rules contemplated by the 1996 Constitution had not yet been passed. Although legislation making provision for the adoption of rules for the Constitutional Court has now been passed,[5] it is not yet in force, and for practical purposes the situation is the same as it was at the time of the decision in *Pennington*. Pending the coming into force of the relevant legislation and the adoption of rules in terms of its provisions, the rules adopted under the interim Constitution remain in force subject to their being consistent with the 1996 Constitution.[6]

[4] According to Rule 17 direct access to the Court is permissible in "exceptional circumstances only". Different words are used in section 167(6) of the 1996 Constitution which permits such access in "the interests of justice and with leave of the Constitutional Court". The interests of justice will ordinarily be satisfied if the requirements of Rule 17 are met. Whether there are circumstances beyond those contemplated by Rule 17 which would justify the granting of direct access under section 167(6) need not be decided in the present case, which in my view is clearly one in which this Court ought not to exercise its

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4 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

5 Section 3 of the Constitutional Court Complementary Act Amendment Act 79 of 1997.

6 Items 2 and 16 of schedule 6 of the 1996 Constitution.

power under section 167(6) to permit direct access. The reasons for my decision are as follows.

[5] In terms of the 1996 Constitution the President, Premiers, Members of Parliament and Members of Provincial Legislatures are entitled to bring certain matters directly to this Court.[7] There are also certain matters in respect of which this Court has exclusive jurisdiction.[8] But subject to these exceptions the 1996 Constitution recognises that there should not ordinarily be an unqualified right to approach this Court directly.

[6] This applies to both the Court's appellate jurisdiction and its original jurisdiction to hear matters as a court of first instance. In dealing with applications for leave to appeal against a decision of the Supreme Court of Appeal this Court has held that the prospects of success are of fundamental importance.[9] Such an appeal is the only remedy left to the applicant and if there are reasonable prospects that the appeal will succeed there are compelling reasons for granting the leave that is necessary. As yet no decision has been given on the circumstances in which it would be appropriate to note an appeal directly to this Court from a court other than the Supreme Court of Appeal. In such matters, however, the relevant considerations may well be different for the aggrieved litigant has

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7 Sections 79, 80, 121 and 122 of the 1996 Constitution.

8 Section 167(4) of the 1996 Constitution.

9 *Pennington* above n 4 at paras 27 and 44.

other remedies which can be pursued before approaching this Court for its decision on the matter.

[7] Whilst the prospects of success are clearly relevant to applications for direct access to this Court,[10] there are other considerations which are at least of equal importance. This Court is the highest court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. These factors have been referred to in decisions given by this Court on applications for direct access under the interim Constitution,[11] and are clearly relevant to the granting of direct access under the 1996 Constitution.

[8] It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In

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10 *Transvaal Agricultural Union v Minister of Land Affairs and another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 46.

11 See, for instance, *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at paras 11-14, *Transvaal Agricultural Union* above n 10 at para 18, and *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at para 15.

such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.

[9] Under the 1996 Constitution, High Courts as well as the Supreme Court of Appeal have constitutional jurisdiction including the jurisdiction to make an order concerning the validity of the provisions of an Act of Parliament.[12] Although an order made by such Courts declaring an Act of Parliament to be invalid has no force unless confirmed by this Court,[13] the court making the order may grant a temporary interdict or other temporary relief pending the decision of this Court.[14] The procedure contemplated by the 1996 Constitution is that such orders of constitutional invalidity will be referred to this Court for confirmation, and that appropriate procedures in such cases will be provided for by national legislation.[15] This Court has held that pending the enactment of such legislation it has the competence to give directions as to the procedures to be followed in respect of such referrals.[16] Bearing in mind the jurisdiction of the High Courts and the Supreme Court of Appeal, and the matters referred to in paragraphs 7 and 8 of this judgment,

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

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

14 Section 172(2)(b) of the 1996 Constitution.

15 Section 172(2)(c) of the 1996 Constitution.

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

compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access and sit as a court of first instance.

[10] The background to the present application is as follows. The first applicant (Bruce) is the sole member of a close corporation (Baby Angel) which was placed in liquidation on 4 December 1997 by an order of the Witwatersrand High Court. On the same day an application for leave to appeal against the liquidation order was noted. A liquidator appointed pursuant to the winding up order sought to proceed with the winding up of Baby Angel but Bruce objected to this. She contended that in terms of Rule 49(11) of the Uniform Rules of Court[17] the winding up order had been suspended by the noting of the application for leave to appeal, and that as sole member of Baby Angel she was still entitled to control its affairs. On 23 January 1998 Bruce brought an urgent application in the High Court in the name of Baby Angel for an interdict restraining the liquidator from proceeding with the winding up.

[11] The liquidator opposed the application contending that section 150(3) of the Insolvency Act is applicable to the winding up of close corporations, and that the

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17 Rule 49(11) provides:

> "Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."

provisions of the winding up order were accordingly not suspended by the noting of the application for leave to appeal. The liquidator's contention was upheld by Wunsh J and the application for an interdict was dismissed with costs.

[12] On 29 January 1998 Bruce applied urgently to this Court for an order declaring that section 150(3) of the Insolvency Act is invalid in that it

> ". . . deprives individuals, companies and Close Corporations who appeal against sequestration or liquidation orders of the right of access to the Court in terms of Rule 49(11) which is part of section 20 of Act 59 of 1959 and which gives an individual and/or a company and/or a Close Corporation the right of access to the Court pending an Appeal against a Sequestration Order or a Liquidation Order, in conflict with [section] 34 of the [1996] Constitution."

In the alternative an order of invalidity was sought on the grounds that the section

> ". . . deprives an individual and/or a company and/or a Close Corporation of the right to exercise its trade or profession freely pending an Appeal . . ."

against a sequestration or liquidation order.

[13] Apart from a reference to the importance to her of a decision on the constitutionality of the section, the only ground advanced by Bruce in support of her contention that the case was one in which direct access should be permitted was that the delay caused by following the ordinary court procedures would prejudice her. She stated in her application:

> "[I]f I had to wait for some Higher Court, including the Appeal Court, to decide whether Wunsch J [sic] was right or wrong in applying section 150(3), which he was bound to apply as it stands as part of an Act of Parliament, then the whole purpose of the appeal will be defeated . . . ."

[14] If the constitutionality of the section had been raised before him, Wunsh J would not have been bound to apply section 150(3) of the Insolvency Act. He would have been entitled in terms of section 172(2) of the 1996 Constitution to consider that question, and if he was of the opinion that the section was inconsistent with the 1996 Constitution, to declare it to be invalid, and to grant the applicant interim relief pending a decision by this Court in the confirmation proceedings. I express no opinion on whether there is any substance in the applicant's contention that the section is invalid and nothing in this judgment should be construed as indicating support for such a proposition. What is important as far as this judgment is concerned is that the High Court has jurisdiction to consider the constitutionality of Acts of Parliament and to deal with the matters raised by the applicant in her application for direct access.

[15] The constitutionality of section 150(3) of the Insolvency Act was apparently not raised in the hearing before Wunsh J. The application for direct access contains no explanation for this omission, nor does it say why it was considered necessary to approach this Court directly instead of applying to the High Court for the relief that is claimed in the notice of motion. The application seems to have been launched on the

incorrect assumption that this Court is the only court with jurisdiction to deal with the matter.

[16] A direction was given by the President of the Court calling upon the applicant to make written submissions as to why direct access should be granted, having regard in particular to the provisions of section 172(2) of the 1996 Constitution and the decisions of this Court, inter alia, in *Transvaal Agricultural Union* and *Besserglik v Minister of Trade, Industry and Tourism and others (Minister of Justice Intervening)*.[18]

[17] In *Transvaal Agricultural Union* it was said that:

> ". . . jurisprudential policy dictates, that this Court should ordinarily not deal with matters as both a Court of first instance and as one of last resort."[19]

And in *Besserglik* it was held that in applications for direct access one of the relevant considerations will be:

> ". . . whether an applicant can show that he or she has exhausted all other remedies or procedures that may have been available."[20]

[18] In the written argument submitted pursuant to the direction, counsel contended that the relief sought could not be secured through the use of ordinary procedures, and that the

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18 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC).

19 Above n 10 at para 18.

20 Above n 18 at para 6.

matter was of such urgency and of such public importance that direct access should be granted. He also contended that a failure to follow the correct procedures was not necessarily fatal to an application for direct access, and sought to rely on the decision of this Court in *Besserglik* for that proposition.

[19] It was pointed out in *Transvaal Agricultural Union* that the mere fact that the validity of a provision of an Act of Parliament is in issue does not in itself justify an application for direct access.[21] There must in addition be sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government, to justify such a procedure. There is no greater importance in securing a definitive ruling on the constitutionality of section 150(3) of the Insolvency Act than would ordinarily exist in securing a ruling on the constitutionality of provisions of other Acts of Parliament, and there is no substance in the contention that the matter is of such public importance that direct access should be allowed. The relief claimed in the present case is within the jurisdiction of the High Court. If Bruce had followed the normal procedures she could have pursued her claim in that court, and if successful, she could have secured effective relief there. There was no need for her to launch an urgent application in this Court for that purpose.

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21 Above n 10 at para 18.

[20] The reliance on *Besserglik* is also misplaced. In that case the applicant had sued the Minister of Justice for damages alleging that he had been wrongfully prosecuted. His claim was dismissed and he then sought leave to appeal to the Appellate Division (as it then was). That application and a subsequent petition to the Chief Justice for leave to appeal were also dismissed. He then applied to this Court for an order declaring that section 20(4)(b) of the Supreme Court Act,[22] which prescribes the requirement that leave to appeal be obtained in such matters, be declared unconstitutional on the grounds that it infringed his rights under section 22 of the interim Constitution to have justiciable disputes settled by a court of law. He raised this issue only after his attempts to secure leave to appeal had failed and at a time when he had exhausted all other remedies open to him. He did so, however, without following the procedures prescribed by section 102 of the interim Constitution. It was against this background that O'Regan J who delivered the judgment of the Court said:

> "The applicant's failure to follow the correct procedures may have been influenced by the novelty of the [interim] Constitution and its procedures. At this stage, the applicant has almost no further recourse available to him. Should we refuse to hear his application

22 Act 59 of 1959.

for direct access, it is unlikely that he will obtain relief elsewhere."[23]

[23] Above n 18 at para 7.

[21] The circumstances of the present case are different. At the time of *Besserglik* the Constitutional Court was the only court which had jurisdiction to determine matters in which the constitutionality of provisions of an Act of Parliament were in issue.[24] This is no longer the position.[25] If Bruce is entitled to any relief she can obtain it from the High Court. In effect what she is now seeking to do through the application for direct access is to appeal against the decision of Wunsh J on an issue that was not raised in the proceedings before him, and to avoid the normal appeal procedures by launching proceedings for direct access to this Court.

[22] Kentridge AJ made it clear in his judgment in *S v Zuma and others*[26] that applications for direct access are to be entertained only in exceptional circumstances and not merely to avoid the consequences of incorrect procedures that have been followed. If, notwithstanding the pending appeal, Bruce is entitled to raise the constitutionality of section 150(3) of the Insolvency Act in separate proceedings, she can initiate such proceedings in the High Court; but if she is not entitled to do so, she cannot avoid the consequences of her earlier omission by applying to this Court for relief.

[23] I am satisfied that grounds for direct access have not been established and that this

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24 Section 98(3) of the interim Constitution.

25 See para 9 above.

26 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 11.

is not a proper case for the granting of such relief. The application for direct access is accordingly dismissed.

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: AS Van der Spuy SC instructed by CA Schoeman Attorney.