

Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The applicants challenged the constitutionality of ss 417 and 418 of the Companies Act which permit the summoning and examination of any person as to the affairs of a company being wound up. The sections permit the imprisonment of anyone failing to comply with the summons and to submit to examination. In a previous decision (*Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC)) the Court had held that the provisions of the Companies Act were unconstitutional only to the extent that the Act permitted compelled self-incriminating answers given at an ss 417 and 418 examination to be used against such an examinee in subsequent criminal proceedings against him or her. The applicant's attack on the Act in the present case was much broader and sought to strike down the examination mechanism in its entirety on the grounds that it infringed an examinee's rights to freedom and security of the person, to personal privacy and freedom from seizure of private possessions, to fair administrative procedures, to fairness in civil litigation and to equality.

The Court unanimously rejected each of these arguments. It found that, except for the extent of unconstitutionality identified in *Ferreira v Levin NO*, ss 417 and 418 of the Act were not unconstitutional. The constitutionality of these section was considered in the light of the duty of the Supreme Court to prevent the oppressive, vexatious and unfair use of the examination procedures. The examination mechanism furthered very important public policy objectives, such as the honest conduct of the affairs of a company.

Considering first the allegation that the provisions violated the right to freedom, the Court held that the obligation to honour a subpoena was a civic duty recognised in all open and democratic societies and was not an invasion of freedom. Following the interpretation of freedom favoured by the majority in *Ferreira v Levin NO*, the Court held that imprisonment for failing to comply with a subpoena did not infringe upon the right not to be detained without trial, a right related to the freedom right.

Turning to the challenge based on the right to privacy and not to be subject to seizure of private possessions, the Court noted that in terms of the Companies Act an examinee is excused from answering questions if he or she has 'sufficient cause'. The Court held that the relevant section had to be interpreted in such a way that if answering a question would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights, that would constitute 'sufficient cause' for refusing to answer. The same applied to the production of documents. Thus interpreted, ss 417 and 418 were consistent with the Constitution. The majority of the Court expressed the opinion that, on the available facts,

it was in any event difficult to say how there could be an infringement of the right to privacy. The benefits of limited liability brought with them corresponding obligations of disclosure and accountability. Moreover, the right of privacy acknowledged in the truly personal sphere was curtailed in relation to a person's business dealings. The same went for the contention that the obligation to produce documents constitutes an unconstitutional seizure of private possessions.

The majority of the Court expressed doubt, but did not decide, whether a right to a fair civil trial had been constitutionalised. Even assuming the existence of such a right, the only possible basis for a breach thereof by the challenged provisions of the Act would be an infringement of the right to equality applied to such a civil trial. The Court held that there was no such infringement. The sections of the Act were designed to place the company being wound up on an equal footing with directors, officers, debtors and others against whom the company might be obliged to litigate in order to recover its property, and not to secure an unfair advantage.

To the extent that the attack in the present case surpassed the challenge successfully raised in *Ferreira v Levin NO*, the application was dismissed and the constitutionality of the relevant sections of the Act confirmed.

The judgment of the majority of the Court was delivered by Ackermann J. O'Regan J concurred in the order, but dissented from the majority's interpretation of the right to freedom. Kriegler J (with whom Didcott J concurred) concurred in the order, but reserved judgment on certain aspects of the majority judgment.