

MEDIA SUMMARY

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

This case concerns the interpretation and application of Section 13 of the Companies Act, 61 of 1973, which vests a court with a discretion to order a company that institutes action to furnish security for costs if there is reason to believe that it will be unable to pay the costs of its opponent. If a company ordered to provide security for costs is unable to do so, it will ordinarily be prevented from proceeding with its action. The question is how a court should approach the exercise of that discretion given that section 34 of the Constitution entrenches the right to have disputes resolved by courts.

The applicant is the liquidator of Sadrema Explorations Ltd. In the Johannesburg High Court he claimed an amount of \$100 million plus interest that the respondent had allegedly received on behalf of Sadrema Explorations Ltd to hold in trust for Sadrema. The liquidator asserts that it is the respondent's breach of trust that resulted in Sadrema's liquidation. At the request of the respondent the High Court ordered the liquidator to furnish security for costs in an amount to be fixed by the Registrar. The liquidator unsuccessfully sought leave to appeal this order to the Supreme Court of Appeal.

O'Regan J in a judgment concurred in by all members of the Court who sat in the matter, held that the case does raise a constitutional issue since an order to furnish security, that cannot be met, prevents an applicant from having a dispute resolved by a court of law. Accordingly it is necessary for a court to take into account the provisions of the Constitution before granting such an order.

The liquidator did not challenge the constitutionality of section 13 of the Companies Act, but merely argued that the order made requiring security to be furnished, infringed the right of access to courts and should be set aside on that ground. O'Regan J held that the rationale behind the rule is to deter indigent would-be plaintiff companies from instituting proceedings vexatiously or in circumstances where their prospects of success are poor. In applying section 13 in a manner consistent with the Constitution, a court is obliged to balance on the one hand, the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim and on the other, the potential injustice to a defendant who successfully defends the claim but who will be unable to recover costs.

O'Regan J held that on appeal the exercise of a discretion by a court in terms of section 13 will only be interfered with if it was not exercised judicially or on the basis of incorrect facts or principles of law. After considering the facts of this case, she concluded that the High Court order could not be interfered with, in that it had been based on the correct facts and principles of law. No order of costs was made, as the liquidator had raised an important constitutional issue and it could not be said that he had acted vexatiously. The appeal was dismissed.