Ferreira v Levin NO and others

Case CCT 5/95

Explanatory Note

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 had applied to the Witwatersrand Local Division of the Supreme Court for interdicts pending the determination by the Constitutional Court of the constitutionality of section 417(2)(b) of the Companies Act (the Act). The applications were dismissed by Van Schalkwyk J. The appeals of all the applicants to the Full Bench of the Witwatersrand Local Division against such dismissals were upheld with costs, the Full Bench ordering that the costs of the applications in the court of first instance were to be costs in the cause in the matter before the Constitutional Court. Van Schalkwyk J referred five issues to the Constitutional Court in terms of s 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993. The first related to the constitutionality of s 417(2)(b); the other four related to declaratory orders relating to the admissibility of evidence in subsequent criminal and civil proceedings against the applicants and the correct procedures to be followed at enquiries in terms of s 417 of the Act. There was nothing to suggest that the respondents opposed any of these referrals. The Constitutional Court held in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others (1)* that none of the five issues had been correctly referred but, in the exceptional circumstances of the case, heard the first issue by way of direct access in terms of section 100(2) of the Constitution. The Court declared section 417(2)(b) of the Companies Act invalid to the extent indicated in the order. No order was made as to costs but the parties were afforded an opportunity of pursuing the matter further. The applicants in the *Ferreira* and *Vryenhoek* matters duly availed themselves of this opportunity.

Held that the approach to costs developed by the Supreme Court over the years offers a useful point of departure to the question of costs in constitutional litigation. This approach proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. The second principle is subject to the first, and to a large number of exceptions where the successful party is deprived of his or her costs. The principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.

Held further that relevant factors in relation to whether the applicants were entitled to their costs were that the applicants had not been successful in substance in their dispute with the respondents, and that even if the respondents had offered no opposition to the applicants, the applicants would in any event have been obliged to come to the Constitutional Court to obtain the relief in respect whereof they were successful, inasmuch as the striking down of an Act of Parliament falls within the exclusive jurisdiction of the Constitutional Court. It had not

been demonstrated that the applicants incurred any more costs than they would have incurred if the matter had not been opposed by the respondents. A further relevant consideration was that the Court found that none of the issues was properly referred to it and only decided to hear the section 417(2)(b) issue by way of direct access as an indulgence and in view of the exceptional circumstances of the case. In all these circumstances it appeared just and equitable not to award the applicants their costs.

Held further, that no good reason suggested itself why the second general rule as to costs, namely that the successful party is entitled to his or her costs, should not be the point of departure for considering whether the respondents were entitled to their costs, inasmuch as they were in substance successful in opposing the relief sought by the applicants. However, had the respondents opposed more critically the matters which were referred to the Court and, in particular, applied their minds more carefully to the question whether such matters passed s 102(1) scrutiny, it may well be that the matters would not have been referred to us at all, or at least not all of them. Parties, and respondents in particular, should not be encouraged to consent supinely to matters being referred to the Constitutional Court in the mistaken belief that an applicant's failure to achieve substantial success on referral will automatically entitle the respondents to their costs. If parties are of a mind to oppose the relief being sought in a referral they should in the first place be astute to prevent matters being incorrectly referred and should oppose inappropriate referrals at the time when they are sought; they should not sit back and raise their opposition for the first time in this Court after the referral has been made.

Held accordingly that justice and fairness would best be served if all parties were ordered to pay their own costs.

The judgment of the Court was delivered by Ackermann J and was concurred in by the other members of the Court.