

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Parbhoo and others v Getz and others

Case CCT 16/97

Decided on 18 September 1997

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.

The applicants applied to the Witwatersrand Local Division of the High Court to have certain provisions of the Companies Act declared invalid to the extent of their inconsistency with the right to a fair trial in s 35 of the 1996 Constitution. The High Court granted the application and referred the order to the Constitutional Court for confirmation in terms of s 167(5) of the 1996 Constitution.

The Court first considered the proper procedure to be adopted to obtain confirmation of a declaration of invalidity. In terms of the 1996 Constitution the Supreme Court of Appeal, a High Court or another court of similar status may make an order concerning the validity of an Act of Parliament, a provincial Act or any conduct of the President. However that court's order has no force unless it is confirmed by the Constitutional Court (s 167(5)).

The Constitution requires national legislation to provide a procedure for the referral of an order of constitutional invalidity to the Constitutional Court. Such legislation has not yet been passed. There are also no Rules of Court that deal with the procedure for confirmation. In the absence of direct guidelines, the judge in the High Court referred his judgment to the Constitutional Court for confirmation. The Constitutional Court sanctioned this procedure.

The Constitutional Court also stated that it would be undesirable for any court to declare an Act of Parliament or a provincial Act invalid where a relevant organ of state was not given an opportunity to intervene in the proceedings.

The Court proceeded to examine ss 414 and 415 of the Companies Act 61 of 1973. The sections provide that when a company is being wound up the directors and officers of the company must attend a meeting of creditors where they may be interrogated about the company and its affairs. Section 415(3) of the Companies Act states that no person at such interrogation may refuse to answer any question on the ground that the answer would tend to incriminate him or her. In this case the liquidator wanted the directors of the company to admit to fraud during their interrogation. The applicants were concerned that their testimony could be used against them in subsequent criminal proceedings. This was a substantial risk as s 415(5) provided that any evidence given at the interrogation

shall be admissible in *any* proceedings instituted against the person who gave that evidence or the body corporate of which he or she was an officer.

The Court applied the reasoning used in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 725 (CC) which was decided under the interim Constitution. It held that ss 415(3) read with 415(5) violated the right to a fair trial which includes the right not to be compelled to give self-incriminating evidence. Hence the Court confirmed the order of invalidity made in the High Court. Consequently evidence given by a person at an interrogation (conducted under s 415) can no longer be used against that person in subsequent criminal proceedings. There are however limited exceptions to this rule. For example, the evidence may be used where the person stands trial on a charge relating to the giving of false or unsatisfactory evidence at an interrogation.

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