CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 34 / 95

Oded Besserglik	Applicant
and	
The Minister of Trade, Industry and Tourism and others	Respondents
The Minister of Justice	Intervening Party

Delivered on: 14 May 1996

JUDGMENT

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[1] **O'REGAN J:** In this application for direct access in terms of rule 17, the applicant seeks an order declaring section 20(4)(b) of the Supreme Court Act, 59 of 1959 ("the Act") to be inconsistent with the Constitution and therefore invalid. Section 20(4) reads as follows:

> No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except -
>
> (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the Appellate Division;
>
> (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the Appellate Division.

[2] The provision thus sets as a precondition for the prosecution of a civil appeal, leave from the provincial or local division against whose judgment an appeal is sought, or if such leave should not be granted, leave from the Appellate Division. Without such leave, a litigant may not prosecute an appeal. The applicant contends that, in setting this precondition for civil appeals from local and provincial divisions, section 20(4)(b) of the Act is in breach of chapter 3 of the Constitution and, in particular, is in breach of section 8 (the equality clause) and section 22 (the clause protecting the right of access to courts).

[3] The relevant events in the current proceedings are these. On 16 August 1994, Curlewis J dismissed the applicant's action for damages for wrongful prosecution, with costs. Thereafter the applicant sought leave to appeal against the judgment. When that application came before the Transvaal Provincial Division of the Supreme Court on 15 May 1995, the applicant sought the postponement of the application for leave pending an application to this court. Curlewis J refused the application for a postponement, as well as the application for leave to appeal. On 31 May 1995, the applicant petitioned the Appellate Division. The relief sought in the petition was that the Appellate Division grant him 'a postponement of the filing of the petition' to enable the applicant to approach this court. The petition was refused. Thereafter, on 18 September 1995, the applicant applied to this court for direct access in terms of section 100(2) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Constitution"), read with rule 17 of the rules of this court.

[4] Section 100(2) reads as follows:

> 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.

Rule 17(1) provides:

> The Court shall allow direct access in terms of section 100(2) of the 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 ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.

[5] Upon receipt of the application for direct access, the applicant and respondents were requested to provide written argument on the following questions:

1. Whether the application for direct access was the proper procedure in the circumstances and in particular whether the applicant should have sought the referral of the issue in terms of section 102(1) or section 102(6) of the Constitution;

2. The grounds upon which the applicant alleged that section 20(4)(b) of the Act was invalid and the form of order sought by the applicant.

Full written submissions on both points were duly lodged and oral argument was considered unnecessary.

[6] In several judgments, we have noted that an application for direct access is an extraordinary procedure to be followed in exceptional circumstances only. (See *S v Zuma* 1995 (2) SA 642 (CC)*;* 1995 (4) BCLR 401 (CC) at paragraph 11; *Executive Council, Western Cape and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paragraphs 15 - 17*; Ferreira v Levin and others; Vryenhoek and others v Powell and others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paragraph 10*; S v Mbatha; S v Prinsloo* 1996 (3) BCLR 293 (CC) at paragraph 29; *Luitingh v Minister of Defence* CCT 29/95, unreported judgment of this

court dated 4 April 1996 at paragraph 15.*)* One of the considerations relevant to a grant of direct access will be whether an applicant can show that he or she has exhausted all other remedies or procedures that may have been available.

[7] It seems from the record of this matter that the applicant did not seek at the proper time to have his constitutional challenge referred to this court. No application was made to the Provincial Division at the time of the application for leave to appeal for the constitutionality of section 20(4)(b) to be referred to this court, although it seems that at that stage already the applicant was seeking to come before this court by way of direct access. It seems clear that two of the requirements for a referral in terms of section 102(1) of the Constitution would have been present at that stage: the issue fell within the exclusive jurisdiction of this court and the determination of that issue may have been decisive of the case before the Provincial Division. In addition, it may be that the Provincial Division judge would have considered such an application to be in the interest of justice. Secondly, the petition to the Appellate Division might have invoked the procedure contemplated by section 102(4), (5) and (6) of the Constitution. In the event, neither of these procedures was followed. The applicant's failure to follow the correct procedures may have been influenced by the novelty of the Constitution and its procedures. At this stage, the applicant has almost no further recourse available to him. Should we refuse to hear his application for direct access, it is unlikely that he will obtain relief elsewhere. In all the circumstances of this case, we consider it appropriate to grant direct access.

[8] The grounds upon which the applicant challenges the constitutionality of section

20(4)(b) are that the section is inconsistent with section 8 and section 22 of the Constitution. I will deal with the challenge concerning section 22 first. It provides that:

> Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

The applicant argues that the right of access to a court entrenched in this section must, by necessary implication, include a right of appeal and that the leave to appeal procedure provided for by section 20(4)(b) is in breach of that right.

[9] In *S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC), this court was concerned with a challenge to section 316 of the Criminal Procedure Act, 51 of 1977, which contains a similar leave to appeal procedure for criminal appeals from provincial and local divisions. In that case, the applicant challenged the constitutionality of the provision on the basis of section 25(3)(h) of the Constitution which provides that:

> Every accused person shall have the right to a fair trial, which shall include the right -
> ...
> (h) to have recourse by way of appeal or review to a higher court than the court of first instance.

The court unanimously rejected this argument. Madala J held that:

> In my view the petition procedure which is available to every accused whose application for leave to appeal has been refused by the supreme court in which he or she was convicted, allows such accused recourse to a higher court to review, in a broad and not a technical sense, the judgment of the trial court. The procedure involves a re-assessment of the disputed issues by two judges of the higher court, and provides a framework for that reassessment, which ensures that an informed decision is made by them as to the prospects of success. (At para 26.)

See also *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at paragraph 17. Of course, section 25(3), which governs criminal appeals and which was relevant therefore to *Rens'* case, is not of any application to civil appeals or to the case currently before us.

[10] The applicant's argument was that the purpose of section 22 was to ensure that persons have the right to have their disputes determined fairly by a court of law until final determination, which includes a right of appeal. In *Bernstein v Bester* (CCT 23/95, unreported decision of this court dated 27 March 1996 at paragraphs 102 - 106) considerable doubts were expressed about the correctness of such an approach to section 22, although it was unnecessary for any firm decision to be made on that point. In my view, whatever the purpose and scope of section 22, it cannot be that the considerations relied upon by Madala J in *S v Rens* would not equally be applicable to civil appeals. Even were the applicant correct in his characterisation of the scope of section 22, therefore, a matter about which there is some doubt, he would still have to persuade this court that the leave to appeal procedure, coupled with the petition procedure as provided for in section 20(4)(b), fails to provide potential appellants with an adequate right of appeal. The applicant has failed on that score. Whatever the scope of section 22, it cannot be said that a screening procedure which excludes unmeritorious appeals is a denial of a right of access to a court. As long as the screening procedure enables a higher court to make an informed decision as to the prospects of success upon appeal it cannot be said to be in breach of section 22.

[11] The second argument raised by the applicant was that section 20(4)(b) constituted a breach of section 8 of the Constitution. The applicant based his argument on the fact that procedures governing appeals from the supreme court are different from those applicable to appeals from magistrates' courts. In particular, he noted that litigants before magistrates' courts have an automatic right of appeal to a higher court and it is not necessary to obtain leave to appeal prior to lodging an appeal. A similar argument was

levelled in *Rens'* case. In response to that argument, Madala J held that:

> In my view, section 8 does not assist the applicant in this matter. The principle that there be equality before the law and equal protection of the law does not require identical procedures to be followed in respect of appeals from or to different tiers of courts. As long as all persons appealing from or to a particular court are subject to the same procedures the requirement of equality is met. It was not suggested that the distinction between people tried in the superior courts and those tried in the inferior courts resulted in unfair discrimination, either direct or indirect, on any of the grounds listed in section 8(2) of the Constitution or any other analogous ground. Nor was any cogent reason suggested as to why cases tried in the superior courts must follow identical procedures to those applicable in the lower courts.(At para 29.)

This reasoning applies with equal force to the question of civil appeals. The argument that section 20(4)(b) of the Act is in breach of section 8 cannot therefore be sustained.

[12] After the Registrar had given notice on 13 May 1996 that judgment in this matter would be handed down on 14 May 1996, a letter was delivered by the applicant's attorneys to the Registrar. In it the applicant's attorneys requested that the court withhold judgment on 14 May 1996, stating that the applicant wished to file written argument in reply. Shortly thereafter, the applicant's reply was delivered to the Registrar. The reply was dated 2 May 1996. In the court's directions given on 9 October 1995, the applicant was given one week from the filing of the respondent's argument to file any written reply. The respondent filed argument on 4 December 1995. Prior to 13 May 1996, no communication was received by the Registrar from the applicant's attorneys indicating that the applicant wished to file written argument in reply. The applicant is five months out of time. No application for condonation of this considerable delay has been lodged. Nor has any explanation been given for the fact that, although the reply is dated 2 May 1996, it was only delivered on 13 May 1996. The applicant's attorneys have shown blatant disregard for the directions of this court and its rules. In the circumstances, the court refuses the informal application for the judgment in this matter to be postponed and declines to accept the written argument in reply.

[13] For the above reasons, the following order is made:

> It is declared that the provisions of section 20(4)(b) of the Supreme Court Act, 59 of 1959 are not inconsistent with the Constitution of the Republic of South Africa, Act 200 of 1993.

C. M. E. O'REGAN

Judge of the Constitutional Court

CHASKALSON P, MAHOMED DP, ACKERMANN J, DIDCOTT J, KRIEGLER J, LANGA J, MADALA J, MOKGORO J and SACHS J concur in the judgment of O'REGAN J.

Case No	:	CCT 34/95
Counsel for Applicant:	:	B K Pincus SC
		ECD Bruwer
		GJ Marcus
Instructed by	:	Moss Morris Incorporated
Counsel for First Respondent	:	F H Terblanche SC
		L J Bekker
Instructed by	:	State Attorney
Counsel for Intervening Party	:	E M Patel
Instructed by	:	State Attorney