CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 16/97

JAINTILAL PARBHOO	First Applicant
KANIYALAL KISHORBHAI PARBHOO	Second Applicant
CHUNILAL PARBHOO	Third Applicant
NAVNITLAL PARBHOO	Fourth Applicant

versus

ARNOLD GETZ NO	First Respondent
THE MASTER OF THE HIGH COURT	Second Respondent

Decided on: 18 September 1997

JUDGMENT

ACKERMANN J:

[1] Sitting in the Witwatersrand Local High Court, Southwood J, in an application not opposed by either respondent, granted the following order at the instance of the four applicants:

> "1. The provisions of section 415(3) read with section 415(5) of the Companies Act 1973 are declared invalid, to the extent only that the words in section 415(5):
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> > 'any evidence given under this section shall be admissible in any proceedings instituted against the person who gave that evidence'
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> apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than

proceedings where the person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily.

2. No incriminating answer given pursuant to the provisions of section 415(3) of the Companies Act shall be used against the person who gave such answer, in criminal proceedings against such person, other than proceedings referred to in 1 above and described after the words 'other than proceedings'.

3. The registrar of this Court is directed to refer this judgment and order together with the entire record of this application to the Constitutional Court pursuant to the provisions of section 167(5) of Act 108 of 1996."

[2] Under section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 (the "1996 Constitution")[1] read with section 172(1)[2] Southwood J was competent to make

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1 Section 172(2)(a) provides:

"The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

2 Section 172(1) enacts:

the order in paragraphs 1 and 2 quoted above. However, section 167(5) of the 1996 Constitution provides that

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

"When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including -
    (i) an order limiting the retrospective effect of the declaration of invalidity; and
    (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Section 172(2)(c) stipulates that national legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court. Such legislation has not yet been enacted, nor have rules or procedures been provided for the Constitutional Court under section 171.[3] The interim Constitution,[4] contained no provisions comparable to sections 172(2) and 167(5) of the 1996 Constitution and the current rules of the Constitutional Court provide no direct guidance for the procedure to be adopted to obtain confirmation by this Court of a declaration of invalidity. Section 172(2)(d) provides that

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[3] The applicants could have brought an application directly to this Court for the confirmation of Southwood J's order, as could, for example, the Minister of Trade and Industry or the Minister of Justice. The learned judge in the court below was no doubt concerned about leaving his order hanging in the air with no assurance that the applicants or any other interested party would seek confirmation speedily or at all. This would have led to legal uncertainty. Adopting a cautious approach, Southwood J followed the

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3 Section 171 prescribes:

"All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation."

4 The Constitution of the Republic of South Africa, Act 200 of 1993.

practical and sensible course of directing the Registrar of the Witwatersrand Local High Court to refer his judgment (together with the entire record of the application) to this Court for confirmation.

[4] Section 173 of the 1996 Constitution confers on the Constitutional Court the inherent power to protect and regulate its own process. In *S v Pennington and Another*[5] this Court decided the following:

> "Section 173 of the 1996 Constitution gives this Court an 'inherent power' to 'protect' and 'regulate' its process. It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as 'the inherent reservoir of power to regulate its own procedure in the interests of the proper administration of justice' which vested in the Appellate Division prior to the passing of the 1996 Constitution. Even if it is subject to such constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power."[6]

The present situation, which is at least as extraordinary as the one in *Pennington's* case, also warrants the exercise of this power. The procedure followed by Southwood J should accordingly be sanctioned and the confirmation of the learned Judge's declaration of invalidity should be dealt with on the record transmitted to us.

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5 CCT 14/97, decided at the same time as the present case.

6 Id, per Chaskalson P writing for the Court, at para 22 (footnotes omitted).

[5] Pending the enactment of legislation under section 172(2)(c) and promulgation of the relevant rules, this Court should adopt a procedure which follows as closely as possible the intended purpose of sections 167(5) and 172(2). Despite the fact that an order of constitutional invalidity has no force unless it is confirmed by this Court, it appears undesirable for any court to make an order under section 172(2)(a) concerning the invalidity of an Act of Parliament or a provincial Act, where a relevant organ of state is not a party to the proceedings, unless that organ has had an opportunity to intervene in such proceedings.[7] It might be necessary for the court first seized of the matter to hear evidence for purposes of deciding the issue of invalidity. That is the appropriate stage for the relevant organ of state to be afforded an opportunity of adducing such evidence, otherwise the issue might only arise when the order of invalidity is before this Court for confirmation. This would cause unnecessary delay and inconvenience.

[6] No organ of state was a party to the proceedings before Southwood J. The Master of the High Court was, but such officer cannot be equated with an organ of state in a matter of constitutional invalidation. The Ministers of Trade and Industry and of Justice are aware that the confirmation of the order of invalidity is before the Constitutional

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[7] This was also the case under section 102(10) of the interim Constitution which provided that

"If the validity of a law is in dispute in any matter, and a relevant government is not a party to the proceedings, it shall be entitled to intervene as a party before the court in question, or shall be entitled to submit written argument to the said court."

Court and both Ministers have indicated that they abide by this Court's decision and do not wish to be heard. The same attitude has been adopted by the two respondents.

[7] The relevant provisions of sections 414 and 415 of the Companies Act 61 of 1973 read as follows:

> "414. Duty of directors and officers to attend meetings.-
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> (1) In any winding-up of a company unable to pay its debts, every director and officer of the company shall-
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> *(a)* attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorized him in writing to absent himself from that meeting;
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> *(b)* attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.
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> (2) The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person-
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> *(a)* who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or
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> *(b)* who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph *(a)*, to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.

(3) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

415. Examination of directors and others at meetings.-

(1) The Master or officer presiding at any meeting of creditors of a company which is being wound up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414 (2) *(a)*, and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

(2) ...

(3) No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him.

(4) The Master or officer presiding at any meeting aforesaid shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section, has made to the liquidator or his agent a statement which has been reduced to writing, or has delivered a statement in writing to the liquidator or his agent, that statement may be read by or read over to that person when he is called as a witness under this section and, if then

adhered to by him, shall be deemed to be evidence given under this section.

(5) Any evidence given under this section shall be admissible in any proceedings instituted against the person who gave that evidence or the body corporate of which he is or was an officer.

(6) ...

(7) ...

(8) ...."

[8] Southwood J's order is to be evaluated against the following background: The applicants are the former directors of Plymouth International (Pty) Limited ("Plymouth") which was wound up on 15 October 1996. The first respondent is the liquidator of Plymouth. Commercial Union Trade Finance (Pty) Limited ("Cutfin") was one of Plymouth's creditors. In terms of sections 417 and 418 of the Companies Act ("the Act") a commission of enquiry was held into the affairs of Plymouth. From the record of that enquiry, it appeared that the liquidator was attempting to establish that the directors of Plymouth committed fraud in that they falsely inflated the value of Plymouth's outstanding debtors in order to induce Cutfin to make payments to Plymouth in excess of what would otherwise have been payable in terms of their discounting agreement. It also appeared that the liquidator and Cutfin intended to use this evidence for the purpose of a criminal prosecution. During December 1996 the applicants were advised that they would be obliged to attend the meeting of creditors and that they would be subjected to interrogation in terms of sections 414 and 415 of the Act respectively. The applicants

undertook to attend these meetings subject to their rights under the Act and the Constitution. Before the impending interrogation, the applicants launched their application in the Witwatersrand Local High Court. They alleged that the first respondent intended to extract admissions from them to the effect that they fraudulently overstated the value of Plymouth's debtors to the detriment of Cutfin and other creditors. The applicants alleged that they were in substantial peril of being required to give incriminating testimony. They were concerned that their testimony might be used in a subsequent criminal prosecution in violation of section 35 of the 1996 Constitution. Southwood J rightly concluded that the applicants' assessment of the risk they would run if they testified at the interrogation was well founded.

[9] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[8] this Court considered the constitutionality of section 417(2)*(b)* of the Act which, in relation to persons compelled to testify at an enquiry under section 417 into the affairs of a company in the course of winding-up, provided that any such person

> "may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him."

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8 1996(1) BCLR 1 (CC); 1996(1) SA 984 (CC).

With one dissent[9] the Court held that the provision was invalid

> "*to the extent only* that the words:
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> > 'and any answer given to any such question may thereafter be used in evidence against him'

9 Kriegler J, id at para 207, who considered that the application for such a declaration was premature.

> in s 417(2)*(b)* apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily."[10]

A substantial majority of the Court[11] based their finding of invalidity on the inconsistency of this provision with the right to a fair trial guaranteed by section 25(3) of the interim Constitution.[12]

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10 Id at para 157. See also paras 186, 208, 214 and 269.

11 Chaskalson P, Mahomed DP, Didcott J, Langa J, Madala J, Mokgoro J, O'Regan J and Trengove AJ.

12 Above n 8 at para 186 per Chaskalson P and the concurrences immediately following at paras 208 and 244.

[10] The relevant fair criminal trial guarantees of section 35(3) of the 1996 Constitution,[13] with which Southwood J was concerned, do not differ in any material respect from those of the interim Constitution considered in *Ferreira v Levin.*[14] In fact section 35(3)(j) of the 1996 Constitution now explicitly guarantees an accused the right not to be compelled to give self-incriminating evidence. The relevant provisions of section 415(3) read with section 415(5) of the Act are, leaving aside for the moment the provisions of section 416(1) of the Act read with section 65(2A)*(a)* of the Insolvency Act (which will be dealt with below), materially the same as those of section 417(2)*(b)*.

[11] Accordingly the reasoning of the majority in *Ferreira v Levin* concerning the inconsistency of section 417(2)*(b)* of the Act with the fair criminal trial guarantees of the interim Constitution is equally applicable to the inconsistency of section 415(3) read with section 415(5) of the Act with the corresponding provisions of the 1996 Constitution. This is the conclusion which Southwood J correctly reached. In *Ferreira v Levin* Chaskalson P, writing for the majority, stated the following:

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13 The relevant provisions of section 35(3) are:

"Every accused person has a right to a fair trial, which includes the right-

. . . .

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

. . . .

(j) not to be compelled to give self-incriminating evidence".

14 The relevant provisions of section 25(3) were:

"Every accused person shall have the right to a fair trial, which shall include the right-

. . . .

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

(d) . . . not to be a compellable witness against himself or herself".

"Ackermann J has demonstrated that the rule against being compelled to answer incriminating questions is inherent in the right to a fair trial guaranteed by s 25(3).[The footnote refers to paragraph 79 of the judgment alluded to]. . . . The reasoning that led him to conclude that section 417(2)*(b)* is inconsistent with s 11(1) would also have led him to conclude that it is inconsistent with s 25(3). It seems to me to be clear that this is so. To some extent his reasons are shaped by the fact that the issue is treated as one implicating freedom and not the right to a fair trial. In substance, however, they can be applied to a s 25(3) analysis and I have nothing to add to them . . ."[15]

In paragraph 79 of the judgment, referred to and approved in the above passage, the following is stated:

" I would, more specifically and in the context of this case, apply the above interpretative approach to the rights enumerated in s 25(3)*(c)* and *(d)* respectively of the Constitution, namely the right of an accused person 'to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial' and 'not to be a compellable witness against himself or herself'. In *Zuma* Kentridge AJ, writing for the Constitutional Court, pointed out that South African Courts have over the years recognised the origins and the importance of the common-law rule placing the *onus* of proving the voluntariness of a confession on the prosecution. In this context he quoted with approval the following passage from *R v. Camane and Others* 1925 AD 570 at 575:

> 'Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history. Wigmore, in his book on *Evidence* vol IV s 2250, traces very accurately the genesis, and indicates the limits of the privilege. And he shows that, however important the doctrine may be, it is necessary to confine it within its proper limits. *What the rule forbids is compelling a man to give evidence which incriminates himself.'*

(Emphasis added.) After tracing the history of the embodiment of this rule in South

15 Above n 8 at para 186.

African legislation, Kentridge AJ concluded that

> 'the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's "golden thread" - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt (*Woolmington's* case (*supra*)). Reverse the burden of proof and all these rights are seriously compromised and undermined. I therefore consider that the common-law rule on the burden of proof is inherent in the rights specifically mentioned in s 25(2) and 3*(c)* and *(d)*, and forms part of the right to a fair trial.'

Even if it were not otherwise sufficiently clear from the wording of s 25(3)*(c)* or *(d)* that these rights include the right of accused not to be compelled to give evidence which incriminates themselves, the aforementioned approach unquestionably does. I conclude that the right of a person not to be compelled to give evidence which incriminates such person is inherent in the rights mentioned in s 25(2) and (3)*(c)* and *(d)*." (Footnotes omitted).

[12] The present case has one additional feature. Section 416(1) of the Act provides, amongst other things, that

> "the provisions of section 65 of the Insolvency Act, 1936, shall, in so far as they can be applied *and are not inconsistent with the provisions of this Act, mutatis mutandis* apply in relation to . . . the interrogation of any person under section 415 of this Act, as if such person . . . were being interrogated under the said section 65 of the Insolvency Act, 1936." (Emphasis supplied)

Section 65(2A)*(a)* of the Insolvency Act 24 of 1936 obliges a person giving evidence in terms of the provisions of section 65 to answer questions "which may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial". Section

65(2A)*(b)* provides that no evidence regarding any such questions and answers

> "shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, and in criminal proceedings contemplated in section 139 (1) relating to a failure to answer lawful questions fully and satisfactorily."

[13] In *Ferreira v Levin* the following was stated regarding the proper construction of and interrelationship between these two provisions:

> "When these two provisions are read in conjunction with one another they leave open no possible construction other than that the testimony of persons interrogated under s 415, even though it might tend to incriminate them, is admissible against such persons in subsequent proceedings against them, even in subsequent criminal prosecutions. The expression '. . .admissible in any proceedings instituted against the person who gave that evidence' is too wide and unqualified to admit of any other construction. The direct use immunity, provided for in s 65(2A)*(b)* of the Insolvency Act, is therefore clearly inconsistent with the combined effect of these provisions in s 415 and to that extent is inapplicable."[16]

Southwood J, expressing agreement with the above view, concluded that an order similar to that made in *Ferreira v Levin* should be made, which he then proceeded to issue.

[14] Paragraphs (1) and (2) of Southwood J's order, although embodying slight linguistic deviations from the corresponding order in *Ferreira v Levin*, are in substance identical. I accordingly agree with the order made by Southwood J.

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16 Id at para 121.

[15] It is accordingly ordered that :

The following order made in this matter by Southwood J be confirmed:

"1. The provisions of section 415(3) read with section 415(5) of the Companies Act 1973 are declared invalid, to the extent only that the words in section 415(5):

> 'any evidence given under this section shall be admissible in any proceedings instituted against the person who gave that evidence'

apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where the person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily.

2. No incriminating answer given pursuant to the provisions of section 415(3) of the Companies Act shall be used against the person who gave such answer, in criminal proceedings against such person, other than proceedings referred to in 1

above and described after the words ‘other than proceedings’.”

Chaskalson P, Langa DP, Kriegler J, Goldstone J, Madala J, Mokgoro J, O’Regan J and Sachs J concur in the judgment of Ackermann J.