CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 21/97

HEKPOORT ENVIRONMENTAL PRESERVATION SOCIETY	First Applicant
WILLEM LOUW	Second Applicant

versus

THE MINISTER OF LAND AFFAIRS	First Respondent
THE MINISTER OF DEVELOPMENT PLANNING, ENVIRONMENT & WORKS FOR THE PROVINCIAL OF GAUTENG	GOVERNMENT Second Respondent
THE MINISTER OF WATER AFFAIRS & FORESTRY	Third Respondent
HEKPOORT FOODS CC	Fourth Respondent

Decided on: 8 October 1997

JUDGMENT

ACKERMANN J:

[1] The first applicant ("the Society") is an environmental society whose members reside in Hekpoort, a small agricultural district at the foot of the Magaliesburg. The second applicant, Mr Willem Louw ("Louw"), is an agricultural worker on the farm of the Society's chairman. The first three respondents are, respectively, the Minister of Land Affairs, the Minister of Development Planning, Environment and Works for the Provincial Government of Gauteng and the Minister of Water Affairs and Forestry. The fourth respondent is Hekpoort Foods CC ("Hekpoort Foods") which owns and operates a factory which manufactures sorghum beer on a property in Hekpoort.

[2] In March 1996 the Society launched an application (the "High Court application") in the Transvaal Provincial Division of the Supreme Court seeking various forms of relief aimed at preventing Hekpoort Foods from continuing its activities. The application was set down irregularly for 30 July 1996 and subsequently struck off the roll (or postponed indefinitely), the Society having to pay the wasted costs on the attorney-and-client scale. The Society was also barred from proceeding until it had furnished security for Hekpoort Foods' costs of the application. A consequent attempt to join Louw as a second applicant was dismissed, as was an application for leave to appeal.

[3] The Society thereupon applied to the court of first instance for the necessary certificate under Constitutional Court Rule 18(e) to appeal to this Court against the refusal of joinder and, when that failed, sought our leave. That, too, was refused. The Society and Louw have now applied for direct access to this Court under Constitutional Court Rule 17 "in order [for the Constitutional Court] to hear the substantive issues of Case No. 5261/96 (hereinafter 'the TPD action') currently before the Supreme Court of South Africa (Transvaal Provincial Division), Pretoria, between the same parties as are referred to supra." They allege that environmental pollution by Hekpoort Foods constitutes exceptional circumstances and that the delay caused by their having to follow the ordinary procedures gives rise to urgency, with consequent prejudice to the public interest, the ends of justice and good government. It is further contended that:

> "the Respondents have effectively prejudiced the ends of justice by delaying and

> avoiding a hearing on the substantial issues of the abovenamed case for close on one and a half years and further that the Respondents will continue to do so. Consequently Application for Direct Access to the Constitutional Court is made, inter alia, on the grounds that the TPD action will never be concluded if the Applicants are compelled to resume litigation in the TPD. In light of the fact that the above action relates to an environmental matter where the primary allegation is one of irreversible pollution to underground water, it is contended that such further delays will irrevocably damage the environment and thereby prevent the Constitutional Court from being able to be in a position to exercise justice and equity in the interests of preservation of the environment for the current community and for posterity."

[4] Apart from a bald statement that "the Constitutional issues with which" the Constitutional Court will be required to deal relate to sections 24, 32, 33, 34 and 38 of the Constitution[1] as well as "the appropriate prior Sections" of the interim Constitution,[2] no indication is given of what constitutional jurisdiction this Court is being asked to exercise. In a supporting affidavit by the applicants' legal representative he contends that the successful application for security for costs referred to above-

> "effectively prevent[s] Applicants from exercising their rights on their own behalf as well as on behalf of the general public - in violation of Section 34 of the Constitution of

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1 The Constitution of the Republic of South Africa, 1996 ("the Constitution").

2 The Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim Constitution").

1996"[3]

and that

> "[a]s a result of the Applicants' inability to raise the necessary funds to put up security and pay the costs order against it, the substantive issues of this matter which are of national importance remain unresolved and will continue to do so unless the Constitutional Court hears the TPD action or, alternatively, unless the Constitutional Court intervenes and instructs the TPD to hear this Court [presumably "case" is meant] without requiring the Applicants to put up security for costs."

[5] The founding papers in the High Court application are voluminous, running to nearly 400 pages and include various experts' reports in support of the Society's complaints. In its answering affidavit, itself comprising more than 400 pages, Hekpoort Foods has traversed the allegations in the founding papers fully and has also made use of expert testimony pertinently and comprehensively to challenge and deny the Society's contentions. There are consequently sharp disputes of fact on all the major relevant issues, none of which can be decided without the hearing of oral evidence.

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3 Section 34 provides:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[6] In *Transvaal Agricultural Union v Minister of Land Affairs and Another*[4] this Court emphasized that rule 17(1) permits direct access only in exceptional circumstances and that in the absence of such circumstances applicants in such matters should follow the procedures laid down by section 102(1) of the interim Constitution and apply to the Supreme Court for the referral of the disputed issues to this Court.[5] The Supreme Court will determine whether the issue is in fact within the exclusive jurisdiction of the Constitutional Court, and if it is, whether a decision thereon may be decisive of the case, and whether there is sufficient merit in the contention to justify a referral.[6] The mere fact that the issue here is an environmental one does not bring the matter within the purview of rule 17, any more than where the issue is one of statutory invalidity.[7] The requirements of rule 17 are stringent.[8]

[7] Moreover, the predicament in which the Society finds itself is largely of its own

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4 1996 (12) BCLR 1573 (CC); 1997 (2) SA 621 (CC).

5 Id at para 16.

6 Id.

7 Compare the remarks of Chaskalson P, above n 4 at paras 18 and 23.

8 Id at para 18.

making. Although Hekpoort Foods' activities which allegedly threaten the environment must have been public knowledge by not later than mid 1994, it was not until March 1996 that the High Court application was launched. When the High Court application was eventually launched, it was not brought as one of urgency and the Uniform Rules regarding set down were ignored, even after the respondents drew the attention of the Society's legal advisor to this fact. The Society's accusation that the respondents have effectively prejudiced the ends of justice by delaying and avoiding a hearing on the substantive issues is simply not substantiated. Had the Society not persisted in ignoring the relevant Rules of Court, the respondents would probably not have obtained the special costs order. Furthermore, the Society did not oppose the application for security for costs, nor did it make any tender in that regard. Under the circumstances the Society cannot castigate the respondents for doing no more than protect their own interests in conformity with the law.

For pr [8] esent purposes one can accept that the Society is genuinely concerned with the preservation of the environment, that its belief that the environment in question is in danger is held in good faith and that in bringing these proceedings it is motivated solely by the public interest. But even the most public spirited of litigants cannot simply ignore those procedural rules which are designed to regulate the fair and orderly dispatch of court business and the protection of the rights of all. Nor can it rely on its own failure to invoke remedies available to it.

[9] Foundational to the Society's claim for direct access to this Court is the complaint that the order for security for costs effectively denies them access to the courts in order to protect the environmental public interest. If the Society regards such complaint as a viable constitutional issue, a matter on which we express no opinion, it could and should have raised it in the court of first instance when the application for security for costs or the application for the stay of proceedings was brought.

[10] Moreover, the very basis on which the Society contends that its and the public's rights have been infringed, that the issue is of public importance and that the public interest is prejudiced, is vigorously in dispute and cannot be resolved on the papers. The basic factual contentions on which the Society relies are strenuously and comprehensively contested. It would ordinarily be most inappropriate for this Court to resolve disputed issues of fact by the hearing of oral evidence in order to determine whether it should grant direct access or, indeed the relief sought by means of direct access. There may be cases where the circumstances are so exceptional and the public interest, or the ends of justice or good government, are of such overriding importance, that the Court might be disposed to grant direct access under rule 17, notwithstanding material disputes of fact which cannot be resolved without hearing oral evidence. The present is manifestly not such a case.

[11] Lastly, the High Court application is still pending before that Court. The orders made in those proceedings stand, until they have been set aside by a competent court

having jurisdiction to do so. What the Society is in effect asking this Court to do, is to ignore the fact that the High Court is seized of the matter and to take it over and dispose of it as though it were the court of first instance. This Court does not have the power to do so.

[12] The application for direct access is refused.

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