CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/98

JOSEPH LEON BEINASH	First Applicant
J B & L NOMINEES CC	Second Applicant
and	
ERNST AND YOUNG	First Respondent
THOMAS ALEXANDER WIXLEY	Second Respondent
PHILLIP WARDEL MOORREES REYNOLDS	Third Respondent

Heard on : 8 September 1998

Decided on : 2 December 1998

JUDGMENT

MOKGORO J:

Introduction

[1] On 12 January 1998 in the Witwatersrand High Court, Fevrier AJ granted the respondents before this Court an order against, among others, Mr Joseph Leon Beinash and J B & L Nominees CC, the applicants in this matter. The order was in the following terms:

> "No legal proceedings shall be instituted by the first, second and third respondents [the first and third respondents are the applicants before this court] against any person in any Provincial or Local Division of the High Court of South Africa or any inferior court,

without the leave of that court or any judge of the High Court."

This order, until the constitutional challenge now before us, brought respite to the respondents and others who had been awash in a sea of litigation launched by the applicants between 7 May 1992 and 12 January 1998. When Fevrier AJ heard the matter the applicants had already launched 45 different proceedings of which 27 had been unsuccessful and only one, an application for leave to appeal, had been successful. Even in this instance, the ensuing appeal was dismissed. The remaining 17 matters had not been completed. A number of these unsuccessful proceedings had been instituted against the respondents but some of them had also been against other parties, including four different individuals, a taxing master, two commercial firms, a firm of attorneys, a firm of accountants, a trust and a bank. All were characterised by Fevrier AJ as being vexatious. Costs were awarded by Fevrier AJ on the attorney and client scale.

[2] Following an unsuccessful application on 27 February 1998 for leave to appeal to the Supreme Court of Appeal against the order of Fevrier AJ, the applicants also unsuccessfully petitioned the Chief Justice for similar relief. The applicants then, without taking the steps required by the rules of this Court to obtain a certificate from the Witwatersrand High Court, and without joining the Minister of Justice, who heads the relevant organ of state, as a party to these proceedings, or giving him notice thereof, applied to this Court for leave to appeal.

[3] The order in the High Court was made in terms of section 2(1)(b) of the Vexatious

Proceedings Act[1] ("the Act") which provides:

> "If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings."

It was argued that this provision infringes the right guaranteed in section 34 of the Constitution. 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."

[4] The application seeks three forms of relief in the alternative: leave to appeal against the whole of the High Court judgment; leave to appeal against the rejection of the petition for leave

[1] Act 3 of 1956.

to appeal to the Supreme Court of Appeal; and an order directing that court to hear the applicants' appeal. In principle however, the matter can be disposed of by considering only the application for leave to appeal against the judgment of the High Court.

[5] Three separate hurdles, which I shall discuss in the course of this judgment, stand in the way of the applicants obtaining leave to appeal from this Court. The first, and in my view the most substantial hurdle, is the requirement that the applicants have a reasonable prospect of success.[2] On this hurdle alone, and for the reasons set out below, I am of the opinion that leave to appeal should not be granted. The second is their failure to comply with former Rule 18 of this Court. The third is their failure to join or give notice to the Minister of Justice. I now proceed to deal with the first hurdle.

Prospect of Success

[6] The applicants mounted their attack on the High Court's judgment on two grounds. Firstly, they sought to impugn the constitutionality of the provision of the Act in terms of which

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[2] See *Member of the Executive Council for Development Planning and Local Government of Gauteng v Democratic Party and Others* 1998 (7) BCLR 855 (CC) at para 32. There, as in the present case, judgment in the High Court had been given under the 1996 Constitution, but before the promulgation of the current Rule 18.

the order was made, and secondly, should they fail to have the provision declared unconstitutional, they sought to have the matter referred back to Fevrier AJ for reconsideration. I will deal with these issues in turn.

[7] The applicants argued that section 2(1)(b) of the Act violates the right of access to courts, protected by section 34, in that the only power it vests in a court is to order an absolute bar against instituting any legal proceedings ". . . against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court. . .".[3] In other words, the statute permits only an absolute order which prohibits all further legal proceedings against all persons in all courts at any time without prior authorisation of the court. The sweeping scope of the provision, they argued, goes further than necessary to deter vexatious litigation, has a chilling effect on potential actions, including those with substantial merit, and is not justifiable. Reading the entire statute, and especially the provisions of sections 2(1)(c)[4] and 2(4),[5] the applicants argued that there were four possible dimensions to an order permitted by the Act and which limit a person's right of access to court. These relate to (i) the parties against whom the litigation is barred; (ii) the court(s) in which the access is limited; (iii) the subject matter to which the prohibition applies; and (iv) the time period for which the bar is applicable.

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3 Section 2(1)(b).

4 Section 2(1)(c) provides :

> "An order under paragraph (a) or (b) may be issued for an indefinite period or for such period as the court may determine, and the court may at any time, on good cause shown, rescind or vary any order so issued."

5 Section 2(4) provides :

> "Any person against whom an order has been made under subsection (1) who institutes any legal proceedings against any person in any court or any inferior court without the leave of that court or a judge thereof or that inferior court, shall be guilty of contempt of court and be liable upon conviction to a fine not exceeding one hundred pounds or to

On the applicants' construction of the provision, a judge has no discretion to tailor the order to suit the particular circumstances of the case, other than the discretion allowed by section 2(1)(c) which relates to the period of the order. The Act, so the applicants contended, creates an instrument by which a litigant's right of access to a court is reduced to a privilege that might be taken away at any time.

[8] Counsel for the respondents submitted that even if the Act has the meaning contended for by the applicants, there are cases, and the present is such a case, in which an order prohibiting a vexatious litigant from instituting any legal proceedings against any person in any court without leave of a court would be appropriate. The fact that there might be cases in which it would not be appropriate to make such an order against a person who has engaged in vexatious litigation does not make the provision unconstitutional. If on the facts of a particular case an order in such terms is not warranted, a court could decline to make an order under the Act. Moreover, he argued that the Act also embodies a power to make a narrower order. He contended that a power to prohibit all proceedings against all persons in all courts necessarily encompasses a power to make a more limited order prohibiting some proceedings against some parties in some courts.

[9] There is much to be said for this contention. In the view that I take of the matter, however, it is unnecessary to decide this issue which can properly be left open for consideration by the High Court should the occasion to do so ever arise. I am prepared to assume in favour of the applicants that the Act has the meaning for which they contend and that the only order that

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imprisonment for a period not exceeding six months."

can be made under the Act is one prohibiting all actions against all persons in all courts without leave of the court.

[10] A High Court has the inherent power to regulate its own process. Under the existing common law, however, an order regulating a vexatious litigant "should not go beyond the immediate requirements of the case."[6] As pointed out in the judgment of Fevrier AJ, the Act was passed in 1956 largely in response to the perceived shortcomings of the common law position that had obtained until then. The position is aptly illustrated in *In Re Anastassiades*[7] decided the previous year. In that case, so the judgment tells us, Mr Anastassiades, an unrehabilitated insolvent, sought to improve his economic position by an ingenious strategy. He routinely sued numerous companies which he alleged were involved in a "conspiracy of association" for substantial damages. Sufficiently impecunious as to make a costs award against him no more than an empty claim, Mr Anastassiades drew his own pleadings and argued his own cases with the hope that one of the defendants cited in his numerous summonses would seek a settlement of the claim. One substantial settlement would make all the effort, and by his own admission, the "harassment", worthwhile.

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6 *Corderoy v Union Government (Minister of Finance)* 1918 AD 512.

7 1955 (2) SA 220 (W) 225 to 226. Ramsbottom J held :

> ". . . that the wide powers conferred by the statute in England [that is, the English legislation later emulated in the Vexatious Proceedings Act] exceeded the inherent power exercised by the Courts under the Common Law, and that in the absence of such statutory powers the South African Courts do not possess inherent power to impose a general prohibition of the kind referred to in the English Statute."

[11] After examining the relevant authorities,[8] Ramsbottom J held that, absent a statutory power, he had no jurisdiction under the common law to make an order that would curtail Mr Anastassiades' power to litigate more than that which would be required by the circumstances and between the parties of the particular case.[9] In direct response to this, the Act was passed the following year. However, this Act did not purport to repeal the common law. It is unnecessary in light of the facts of this case to consider further the effect, if any, the enactment of the statute had on the common law remedy.

[12] In the case before this Court, the order mirrors the terms of the statute; it is the statute that is impugned in these proceedings and not the common law. The question to be decided therefore is whether or not such a statute has a place in a constitutional dispensation where section 34 guarantees the right of access to courts.

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8 *Corderoy*, above note 6, is the principal source. In that case, Innes CJ held at 519 that while the power to make an order to prevent an abuse of the processes of the court by a vexatious litigant undoubtedly existed at common law, such an order "should not go beyond the immediate requirements of the case."

9 Above note 7.

[13] The Act requires the fulfilment of two conditions before a vexatious litigant can institute legal proceedings. A judge has "to be satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings."[10] In other words the applicant is required to show that he or she has a *bona fide* claim and that his or her claim is *prima facie* meritorious. Applicants did not contend that the requirement that the proceedings have *prima facie* merit was unreasonable. They did, however, take issue with the requirement that an applicant would need to demonstrate that the proceedings would not constitute an abuse of the court's process. They argued that it was inescapable that the judge, confronted by an application to proceed by a person bearing the mark of a vexatious litigant, would have regard to the prior history of the applicant, and would be influenced by the propensity that he or she had demonstrated in the past to litigate vexatiously or with some extraneous purpose. It was argued that this would load the dice, so to speak, against the applicant. This kind of propensity-based reasoning, it was submitted, is what our law tries to avoid.

[14] In sum then, the applicants contended that the Act violated section 34. Firstly, it makes provision for a blanket restriction against persons that goes far beyond what is necessary as between the litigants, and secondly, the facts that a vexatious litigant would have to prove in order to obtain leave to proceed, are so onerous as to be unjustifiable in relation to the person who is made the subject of such an order.

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[10] Above note 3.

[15] In order to evaluate the constitutionality of the impugned section, it is necessary to have regard to the purpose of the Act. This purpose is "to put a stop to persistent and ungrounded institution of legal proceedings."[11] The Act does so by allowing a court to screen (as opposed to absolutely bar) a "person [who] has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court".[12] This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.

[16] The effect of section 2(1)(b) of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with section 34 of the Constitution which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under section 2(1)(b) therefore does limit the right of access to court protected in section 34 of the Constitution. But in my view such a limitation is reasonable and justifiable. Section 36 of the Constitution provides:

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11 *S v Sitebe* 1965 (2) SA 908 (N) 911B - C.

12 Above note 3.

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose.
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> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

It is therefore necessary to conduct the limitations analysis required by the section, as explained in the judgments of this Court.[13]

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[13] See *The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* CCT 11/98, as yet unreported judgment of this Court delivered on 9 October 1998, at paras 33-35, and the authorities there cited.

[17] The right of access to courts protected under section 34 is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of section 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection. However, a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the court is under a constitutional duty[14] to protect *bona fide* litigants, the processes of the courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that "[n]o person or organ of state may interfere with the functioning of the courts." The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to section 36(1)(b). It would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation.

[18] When one considers, for purposes of section 36(1)(c), the extent of the restriction permitted by the Act, it seems clear that the restriction itself can only occur through an order of court. The order is then confined to the specific person or persons at whom it is directed; it has no direct effect on the public generally. An order restricting a litigant is only made in circumstances where the court is satisfied that the malfeasant has "persistently and without

[14] This duty flows from a reading of sections 7(2), 34, 35 and 165(4) of the Constitution.

reasonable grounds instituted legal proceedings".[15] If a judge does not make the order in a judicially permissible manner, then there is always the right to appeal.

[15] Above note 3.

[19] While such an order may well be far-reaching in relation to that person, it is not immutable. There is escape from the restriction as soon as a *prima facie* case is made in circumstances where the judge is satisfied that the proceedings so instituted will not constitute an abuse of the process of the court.[16] When we measure the way in which this escape-hatch is opened, in relation to the purpose of the restriction, for the purposes of section 36(1)(d), it is clear that it is not as onerous as the applicants contend, nor unjustifiable in an open and democratic society which is committed to human dignity, equality and freedom. The applicant's right of access to courts is regulated and not prohibited. The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institutions in whose favour it was granted, the easier it will be to prove *bona fides* and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action, or persons, the more difficult it will be to prove *bona fides*, and rightly so, because the greater will be the possibility that the public interest may be harmed. The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which is in harmony with the analysis adopted by this Court, and ensures the achievement of the snuggest fit to protect the interests of both applicant and the public.

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[16] While the judge orders in terms of section 2(1)(b) "that no legal proceedings shall be instituted by [the subject of the order] against any person in any court or any inferior court", leave to institute proceedings are to be granted where a judge "is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings."

[20] Requiring the potential litigant under these circumstances to discharge this evidentiary burden is not unreasonable. It is justifiable when confronted by a person who has "used the procedure [ordinarily] permitted by the rules of the court to facilitate the pursuit of the truth for a purpose extraneous to that objective."[17] Having demonstrated a propensity to abuse the process of the courts, it hardly lies in the mouth of a vexatious litigant to complain that he or she is required first to demonstrate his or her *bona fides*. In this respect, the restriction is precisely tailored to meet its legitimate purpose.

[21] Finally, section 36(1)(e) requires consideration to be given to the presence of "less restrictive means to achieve the purpose" as one of the factors to be considered in the test for a right's limitation. It alone is not the determining factor. Subsection 1(e) is one among several requirements listed in section 36 that aim to strike the appropriate balance of proportionality between means and end. The Act does this. For the reasons stated above, the limitation is reasonable and justifiable. Accordingly, the applicants cannot succeed.

[22] The applicants argued that if the Act had the narrower meaning contended for by respondents' counsel, Fevrier AJ misconstrued the discretion he had to grant a narrowly tailored order, and for this reason this Court should refer the matter back to the High Court for the proper exercise of this discretion.

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17 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734.

[23] I am by no means satisfied that this question raises a matter of constitutionality. But even if it does, and the narrower meaning is the correct one, there is nothing in the circumstances of this case that would suggest that the learned judge erred in granting the order that he did. In doing so, Fevrier AJ expressed himself thus:

> "In so far as section 2(1)(b) of the Act confers a discretion upon the court whether to make an order, I am satisfied that in all the circumstances of this case I ought to make an order. No fewer than 45 different proceedings have been instituted and there is every reason to believe that the institution of further legal proceedings against one or more applicants, and others as well, is contemplated by the respondents. I have already pointed to the fact that the respondents appear to be impervious to their abysmal failures and adverse judicial comment. They remain undeterred. I am satisfied that the facts of this matter demonstrate amply that the respondents have persistently and without any reasonable ground instituted the various legal proceedings referred to herein."[18]

The facts set out in his full and helpful judgment justify the making of such an order and no purpose would be served by referring the matter back to him. In my view therefore, applicants' challenge to the order of Fevrier AJ fails on both grounds, and there is no prospect of success in the appeal. I turn now to address the remainder of the issues.

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[18] Unreported judgment of the Witwatersrand High Court, case no 23230/97 delivered 12 January 1998 at 39-40.

The Certification Procedure

[24] Rule 18[19] requires that an applicant who seeks leave to appeal against a decision of a High Court, other than an application for confirmation of unconstitutionality,[20] must first obtain a certificate from the High Court setting out ". . . clearly and succinctly the constitutional matter raised in the case, the decision against which the appeal is made and the grounds on which such decision is disputed."[21] The purpose of the rule is to provide this Court with assistance in assessing whether to grant leave to appeal. In *Mistry v Interim National Medical and Dental Council of South Africa and Others*[22] this Court described that purpose in the following way:

> "The purpose of the certificate is to assist this Court in the decision that it has to make as to whether or not leave to appeal should be granted. Where the relevant constitutional issues have been fully traversed in the judgment in respect of which the certificate is given, there may be no need for a detailed judgment on the certificate. But where the application for a certificate raises issues which have not been fully canvassed in the judgment, or where the reasoning in the judgment is subjected to challenge which calls for comment, the judgment on the certificate may have to be more comprehensive. Ultimately what is necessary is that the judge or judges in the High Court to whom the

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19 Both in terms of the former and current Rules.

20 Ordinarily brought in terms of current Rule 15.

21 Rule 18(3).

22 1998 (7) BCLR 880 (CC) at para 53.

> application is made, should . . . consider the issues identified in Rule 18(e) and give reasons for the findings made."

[25] A failure to comply with this rule is not necessarily fatal for an application for leave to appeal. If that were to be the case, it would place form before substance. This court may condone a failure to comply with any of its formal rules.[23]

[26] Applicants launched their application on 25 May 1998, under the 1996 Constitution. Since the rules relating to that Constitution were only promulgated on 29 May 1998, the applicants contended that the reason for their failure to obtain the necessary certificate was based on the fact that the new rules were not yet in operation. This contention cannot stand, nor excuse the applicants, as this Court made clear in its decision in *Bruce and Another v Fleecytex Johannesburg CC and Others*[24] that:

> "Pending the coming into force of the relevant legislation and the adoption of Rules in terms of its provisions, the Rules adopted under the interim Constitution remain in force subject to their being consistent with the 1996 Constitution."

In the circumstances of the present case, however, no purpose would be served by

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23 Rule 31.

24 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 3. This decision followed the approach and principles laid down in the earlier decision of *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC), and for which provision is made in items 2 and 16 of schedule 6 of the 1996 Constitution.

requiring the applicants to apply for a certificate. The matter is one in which finality must be reached and for that reason an order should be made which disposes of the applicants' contentions. This is possible as there are, in any event, no prospects of success on appeal.

The Issue of Non-joinder

[27] The last of the triad of obstacles faced by the applicants, was their failure to join or give notice to parties with a direct interest in the matter, in this case the Minister of Justice.[25] In *Parbhoo and Others v Getz NO and Another*[26] this Court held:

> "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 s172(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. 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

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25 Rule 6(2) requires:

> "In any matter, including any appeal, where there is . . . any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the . . . administration of any such law is not a party to the case, the party challenging the constitutionality of such . . . law shall, within five days of lodging with the registrar a document in which such contention is raised for the first time in the proceedings before the Court, serve on the authority concerned a copy of such document and lodge proof of such service with the registrar, and no order declaring such . . . law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with."

The elided portions in the above quote relate to actual or threatened administrative acts or conduct, in respect of which, the same requirements apply. This rule however, was not of application at the time that the application was launched, but its predecessor, rule 4(8) of the former Rules required that the party challenging the constitutionality of a statute inform the executive authority in writing of the challenge.

26 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 5.

> 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." (Footnote omitted).

The Minister of Justice, who is responsible for this legislation, has a direct interest in whether or not this legislation is found to be constitutional. He should be given an opportunity to defend the legislation should he wish to do so. Often the relevant organ of state is best positioned to provide the necessary arguments of justification should the issue of the provision's constitutionality come down to the question of the right's limitation. It is often the only party that can provide this Court with the evidence it will need to enable it to tailor its order in terms of the options available under section 172(1)(b) of the Constitution. Bearing in mind that an order of invalidity may be retrospective in its application, and the potential that this holds for far-reaching disruption to the status quo, courts depend upon the evidence that an organ of state may provide to enable them to make a just and equitable order.

[28] Conceding their failure in this regard, the applicants requested that this Court, were it to find the provision unconstitutional, issue an order in the form of a rule *nisi* with a return date that would allow the organ of state to respond and address the problems that their absence raises. Even if this were permissible, the circumstances of this case do not justify it. The application has no merit and an order dismissing it can be made without hearing the Minister.

Conclusion

[29] The application for leave to appeal against the decision by the Supreme Court of Appeal rejecting the petition, and the application for an order to compel that court to hear the appeal, were not pursued vigorously by counsel for the applicants. This may have been prudent. Without deciding these issues, it would seem that in terms of the legislation[27] governing appeals to the Supreme Court of Appeal a decision refusing a petition for leave to appeal is final.[28] These questions are in any event rendered moot by the findings of this Court in relation to the application for leave to appeal from the order of the High Court: if there are no prospects of success here, there would be no prospects of success there.

[30] Often parties to litigation on a constitutional issue are required to bear their own costs in relation to the proceedings before this Court. The rationale for this has been expressed already in several judgments of this Court.[29] In this case however, by litigating as persistently and

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27 Supreme Court Act 59 of 1959, section 21.

28 Id. Section 21(3)(d) states:

> "The decision of the majority of the judges considering the application, or the decision of the appellate division, as the case may be, to grant or refuse the application shall be final."

29 See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at paras 5 and 7; *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 47.

vexatiously as they did, the applicants placed respondents in the untenable position where they had to respond to such unmeritorious litigation, resulting in unnecessary costs. I am therefore in respectful agreement with Fevrier AJ that it would be unfair for the harassed respondents to bear the costs. In the circumstances, costs should follow the result.

The Order

The application is refused with costs, such costs to include the costs of two counsel.

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

For the Applicants: D Unterhalter and M Chaskalson instructed by Melamed & Hurwitz Inc.

For the Respondents: W Trengove SC and J Suttner SC instructed by Werksmans.