CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 6/02

NORMAN MURRAY INGLEDEW	Applicant
versus	
THE FINANCIAL SERVICES BOARD	Respondent
In re:	
THE FINANCIAL SERVICES BOARD	Plaintiff
and	
JS VAN DER MERWE	First Defendant
NORMAN MURRAY INGLEDEW	Second Defendant

Heard on : 18 February 2003

Decided on : 13 May 2003

JUDGMENT

NGCOBO J:

Introduction

[1] This is an application for leave to appeal against the decision of the Pretoria High Court (the High Court) dismissing an interlocutory application by Mr. NM Ingledew, the applicant herein. In that application, the applicant had sought an order

compelling the Financial Services Board, the respondent herein, to furnish him with certain information before pleading in an action instituted against him by the respondent. The background to this application may be stated briefly.

Factual Background

[2] On 26 May 2000, the Financial Services Board instituted action against the applicant and a certain Mr. JS van der Merwe, alleging a contravention of the provisions of the Insider Trading Act, 1998 (the Act).[1] The gravamen of the complaint was that they, in their respective capacities as directors of a company called Skills Accel (Pty) Ltd ("Skills"), had acquired inside information and on the strength of it purchased and sold shares at a profit. That information related to the appointment of certain individuals as directors of Skills and the acquisition of a distribution licence and business by it. Mr. van der Merwe has pleaded to the summons and we are not concerned with him in this application.

[3] The applicant has yet to plead. After entering an appearance to defend, he served the respondent with a notice in terms of rule 35(14) of the Uniform Rules of Court. That subrule provides:

> "After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

[1] Act 135 of 1998.

[4] In that notice he called upon the respondent to make available to him certain documents, books and transcriptions or tape recordings relating to his interrogation and that of other persons under the provisions of the Act. When the information sought was not forthcoming, the applicant brought an application in the High Court to compel the respondent to comply with the notice.

[5] The applicant claimed that having regard to the powers of the respondent to investigate and interrogate witnesses and thereafter prosecute alleged contraventions of the provisions of the Insider Trading Act, either by way of criminal charges or a civil action, he is entitled to have sight of all witness statements and documents in the possession of the respondent. He alleged that he has a constitutional right to such information in order to defend and protect his right to a fair trial, which he claimed was guaranteed to him by sections 9(1)[2], 34[3] and 35(3)[4] of the Constitution. He claimed that section 32 read with item 23(2)(a) of Schedule 6[5] to the Constitution entitled him to have access to the information he sought.

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[2] Section 9(1) provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[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."

[4] Section 35(3) guarantees every accused person a right to a fair trial.

[5] Item 23(2)(a) of Schedule 6 provides in part:

> "Until the legislation envisaged in [section] 32(2) . . . of the new Constitution is enacted –
> (a) section 32(1) must be regarded to read as follows:

[6] The application was resisted by the respondent on various grounds but principally on the ground that the applicant does not require the information to plead.

[7] The High Court found that the applicable constitutional provision was section 32 of the Constitution and that the Promotion of Access to Information Act[6] (PAI Act) was not applicable. It also found that: (a) section 32 could be constitutionally limited by a law of general application and that rule 35 was such a law; (b) during the course of litigation, a party could exercise the right of access to documents through rule 35 only and not through section 32; (c) the matter therefore had to be considered as an application to enforce rule 35(14); and (d) save for the transcript relating to his interrogation, the applicant had not made out a case that he required the information to enable him to plead. It accordingly dismissed the application with costs.

[8] The present application for leave to appeal is the sequel.

The preliminary matters

[9] The applicant has applied for the condonation of the late filing of his application for leave to appeal, replying affidavit and written argument. He is also

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'(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'".

[6] Act 2 of 2000.

seeking leave to file a replying affidavit.[7] Save for the application for the condonation of the late filing of the application for leave to appeal, the other applications are opposed by the respondent. The reasons for the delay advanced in each of these applications are far from satisfactory. They demonstrate a disregard for the rules of this Court and directions issued by the Court. However, we have already heard argument on the merits of the application for leave to appeal. In these circumstances, it seems to me that the proper course to follow is to grant the applications for the condonation of the late filing of the application for leave to appeal and the written argument and to order the applicant to pay the costs of these applications.

[10] Different considerations, however, apply to the application for the condonation of the late filing of the replying affidavit as well as the application seeking leave to file that affidavit. The attempt by the applicant to file a replying affidavit triggered an opposing affidavit from the respondent. The respondent's opposing affidavit was also used in support of the application by the respondent in which it sought (a) directions to have the entire record of the proceedings in the High Court filed; and (b) the expansion of the issues in this Court to include the question whether section 7 of the PAI Act, or item 23(2)(a) of Schedule 6 of the Constitution applied in this case. The respondent's opposing affidavit precipitated a further application by the applicant to strike out certain paragraphs in the respondent's opposing affidavit.

[7] The application for leave to file the replying affidavit was triggered by the fact that, under rule 18, there is no provision for the filing of a replying affidavit.

[11] Save perhaps for the application to expand the issues, all these documents are related. They deal with the record of the High Court. These documents were apparently filed to supplement the appeal record, because the initial directions did not call for the filing of the record of the proceedings in the High Court. However, once the entire record of the proceedings in the High Court was filed, the need for the replying affidavit, the opposition to it and the application to strike out that the opposition precipitated, fell away. That is the attitude that was adopted by the respondent in argument before us. Indeed, we were not referred to any of those documents in argument. The proper order to make in these circumstances is to refuse the application by the applicant for the condonation of the late filing of the replying affidavit including leave to file that affidavit, as well as the application to strike out, and direct that the parties pay their own costs in relation to these applications.

[12] In the view I take of this matter, the respondent's application to expand the issues which was not persisted with during argument, was unnecessary. However, it was apparently precipitated by the new allegations made by the applicant in the replying affidavit. While that is no basis for bringing an unnecessary application, it is a factor to be taken into consideration with regard to costs. The application must be refused and no order should be made in relation to the costs of that application. The application by the respondent to file the record was part of its application to have the issues extended and only one affidavit was filed on behalf of the respondent in support of both applications. The same affidavit was also used for opposing the filing of the applicant's replying affidavit. The applicant did not oppose the application to file the

record. In these circumstances, the application to file the record is granted and no order is made in relation to the costs of that application.

The application for leave to appeal

[13] The decision whether to grant or refuse leave to appeal is a matter for the discretion of this Court.[8] Leave to appeal will be granted if, firstly, the application raises a constitutional matter[9] and secondly, it is in the interests of justice to grant leave to appeal.[10] Thus, a finding that the application raises a constitutional issue is not decisive. Leave to appeal may be refused if it is not in the interests of justice to hear the case.[11] I therefore proceed to consider whether these two criteria have been met.

The applicant's contention

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[8] *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *NEHAWU v University of Cape Town and Others* 2003 (2) BCLR 154 (CC) at para 25.

[9] Section 167(3) of the Constitution provides:

> "The Constitutional Court –
> (a) is the highest court in all constitutional matters;
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

See also *S v Boesak* above n 8 at para 12.

[10] Section 167(6)(b) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –
> . . .
> (b) to appeal directly to the Constitutional Court from any other court."

[11] *S v Boesak* above n 8 at para 12; *NEHAWU v University of Cape Town* above n 8 at para 25.

[14] In this Court, the applicant advanced two main arguments. Firstly, he contended that he was entitled to information under rule 35(14). He submitted that, in view of the penal nature of the proceedings, the subrule should be construed purposively and in a manner that accords with section 32(1)(a) of the Constitution. Secondly, in the alternative, the applicant contended that he was nevertheless entitled to information sought directly under section 32(1)(a). Both these are constitutional matters.

[15] Both section 32(1)(a) and rule 35(14) confer a right to obtain information. However, section 32 confers a general and an unqualified right to information. By contrast, the subrule confers a limited right. It can only be invoked during litigation by a litigant after appearance to defend an action has been entered and its terms unequivocally limit the nature of the documents and tape recordings covered by the rule to those "relevant to a reasonably anticipated issue in an action" and further limits the documents in question to those required "for purposes of pleading."[12] There is no reasonable constitutional construction of the rule that could broaden such purpose to accommodate the construction of it contended for by the applicant. Accordingly, the subrule grants a right to information that is narrower, to that extent, than the right in section 32(1)(a).

[16] Neither in this Court nor in the High Court, did the applicant seek to have rule 35(14) declared constitutionally invalid. The issue raised in the alternative remains,

[12] *Quayside Fish Suppliers CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) at para 13; *Titus v RNE Holdings* 2002 (2) All SA 331 at paras 5–7.

namely, whether he is nevertheless entitled to obtain the information sought directly under section 32(1)(a).

[17] The central question raised by the applicant's alternative argument is whether the applicant can, during the course of litigation, obtain information directly under section 32(1)(a) without challenging the constitutionality of the subrule.

The obstacles facing the applicant

[18] There are a number of obstacles that have to be overcome by the applicant before leave to appeal can be granted. The first is that access to information for the purpose of litigation is regulated by rules of court. The rules distinguish between information required for the purpose of pleading and information that has to be made available after pleadings have closed. The applicant initiated his claim for information by invoking rule 35(14) contending that he required the information sought by him for the purpose of pleading. The High Court held that the applicant was able to plead without such information and that his claim in so far as it was based on rule 35(14) had to be dismissed. That finding has not seriously been challenged by the applicant, nor could it have been in this Court.

[19] Attempting to avoid the consequences of this finding, counsel for the applicant sought to rely directly on section 32 of the Constitution, contending that in terms of section 32(1)(a) the applicant has an unrestricted right to obtain "any information held by the state". Although the matter commenced as a rule 35(14) application, the

applicant raised a constitutional claim to the information sought in his founding affidavit, and in the High Court argued that he had rights both under section 32(1) of the Constitution and under rule 35(14). That argument was dismissed by the High Court on the ground that rule 35(14) was a law of general application which reasonably and justifiably limited the constitutional right. The applicant argued that he has a concurrent right to the information under section 32(1) regardless of any restriction that rule 35(14) might impose.

[20] This Court has adopted the doctrine of objective constitutional invalidity.[13] The effect of this doctrine is that any law in existence prior to the Constitution coming into effect, and inconsistent with the Constitution, becomes invalid the moment the Constitution comes into operation, and that any constitutionally inconsistent law passed after the Constitution, becomes invalid from the moment it is passed. It is important to appreciate, however, that the doctrine only determines the moment of invalidity - in the absence of any constitutional provision to the contrary - *once the law in question has been declared invalid*. As pointed out earlier, at no stage has the applicant challenged the constitutionality of rule 35 (14). That being so the rule must be taken to be valid.

[21] The central constitutional question raised by the applicant's contention is thus whether he has two rights which are compatible and can be invoked by him at his option - a right under the rules of court and a right under the Constitution.

[13] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 26-29.

[22] In *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others*[14] this Court pointed out that "considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity [of a statutory provision] without any formal declaration of invalidity of that provision." Grave doubts were expressed whether such a procedure was compatible with section 172(1) of the Constitution, which obliges a court to declare a statutory provision which is inconsistent with the Constitution invalid to the extent of the inconsistency.[15] This case is not directly in point. The appellant expressly challenged a statutory provision that, in his submission, was inconsistent with a constitutional provision.[16] He sought a declaratory order to give effect to that constitutional provision, but omitted any prayer for the statutory provision to be declared invalid. There was no suggestion that, as has been argued in the present case, two concurrent rights might exist.

[23] In *NAPTOSA and Others v Minister of Education, Western Cape and Others*[17] the Cape High Court was concerned with the appropriateness or otherwise of granting relief directly under section 23(1) of the Constitution without a complaint that the

[14] 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 61.

[15] Id at para 62.

[16] Id at para 35.

[17] 2001 (2) SA 112 (C); 2001 (4) BCLR 388 (C).

Labour Relations Act[18] was constitutionally deficient in the remedy it provides. The High Court held that it could not "conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes."[19] In *NEHAWU v University of Cape Town and Others*,[20] this Court refrained from expressing any opinion on the correctness of this decision.

[24] These cases cast doubt on the correctness of the proposition that a litigant can rely upon the Constitution, where there is a statutory provision dealing with the matter without challenging the constitutionality of the provision concerned.

[25] There is a line of cases in the high courts which might be understood to support the applicant's contention that in an action against the State, a litigant may, in addition to the right to require discovery in terms of rule 35, seek relief in terms of section 32. These cases include *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*,[21] *Phato v Attorney-General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others*,[22] *Khala v Minister of Safety and Security*,[23] and *Van Niekerk v Pretoria City Council*.[24]

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[18] Act 66 of 1995.

[19] Above n 17 at 123I-J.

[20] Above n 8 at para 17.

[21] 1999 (2) SA 279 (T) at 320 C-D.

[22] 1995 (1) SA 799 (E) at 815G; 1994 (5) BCLR 99 (E); 1994 (2) SACR 734 (E).

[23] 1994 (4) SA 218 (W) at 225F and 226G; 1994 (2) BCLR 89 (W); 1994 (2) SACR 361 (W).

[26] The applicant in the *Van Niekerk* case sought information to enable him to decide whether or not to institute action against the State. His claim was based on section 23 of the interim Constitution, which at that time restricted the right to information from the State to information required for the exercise or protection of the applicant's rights. An argument that the applicant was not entitled to information in terms of section 23, if that information could in any event be acquired by using discovery procedures was rejected. In rejecting this contention, Cameron J held that it would:

> "place an unacceptable constriction upon the operation of s 23. Myburgh J in any event disposed of this point in *Khala*, where it was argued that s 23 was not intended to be used in litigation to obtain discovery from a government department or other organ of government. Myburgh J expressly rejected the argument that s 23 was not to be used 'as an additional aid in obtaining discovery in litigation between a person and a government department', concluding that it was 'particularly apt to use s 23 to obtain discovery of documents from the State'."[25] [citations omitted]

[27] Both *Khala* and *Phato* related to whether the right of access to information under section 23 of the interim Constitution overrode the blanket common law privilege relating to information contained in police dockets. In both cases, the court held that this was the effect of section 23. In *Phato*, a Full Bench of the Eastern Cape High Court held that it was "inevitable . . . that the constitutional right of access to information in terms of s 23 must also apply . . . to both civil and criminal litigation by

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[24] 1997 (3) SA 839 (T) at 850B.

[25] *Van Niekerk v Pretoria City Council* id at 848D-E.

the State".[26] The *Swissborough* case concerned the question of discovery after the close of pleadings in civil litigation against the government. Although the Court held there that a "litigant who engages the State as referred to in s 32(1) has the right to utilise s 32(1) and/or rule 35 in order to obtain access to documentation in the possession of the State,"[27] the applicant had relied on rule 35 and the judgment was directed to the application of that rule in the light of the Constitution.

[28] However, cases such as *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others*[28] and *Alliance Cash & Carry (Pty) Ltd v Commissioner, South African Revenue Service*[29] have cast doubt on the correctness of the *Swissborough* line of cases. In *Alliance Cash and Carry*, the Full Bench of the Transvaal High Court, although finding it unnecessary to decide the point, took the view that the only way in which discovery can be obtained against the State during the course of litigation, is through the rules of court. Similar views were expressed by the Cape High Court in the *Inkatha Freedom Party* case. The High Court, in the present case, adopted this approach, holding that once litigation commences, a litigant may only obtain discovery through the rules.

[26] *Phato v Attorney-General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others*, above n 22 at 815F-G.

[27] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of The Republic of South Africa and Others* above n 21 at 320C.

[28] 2000 (3) SA 119 (C); 2000 (5) BCLR 534 (C) at 135J – 137C.

[29] 2002 (1) SA 789 (T).

[29] While there is much to be said for the view that once litigation has commenced discovery should be regulated by the rules of court, such a view may give rise to certain anomalies. Under the wording of section 32(1)(a), the applicant would *prima facie* have been entitled to all the documents he now seeks until the day before summons was served on him. Moreover, a third party might have approached another for access to those documents during the course of the applicant's litigation. In the present case, however, it is not necessary to deal with these issues or the different views expressed in the decided cases and I prefer to leave those issues open. For the reasons that follow, I am satisfied, in any event, that in the particular and unusual circumstances of this case it is not in the interests of justice to grant leave to appeal.

The interests of justice

[30] A consideration of what is in the interests of justice involves evaluation of all the circumstances of a particular case. The exercise involves the weighing up of a number of factors.[30] In *Khumalo and Others v Holomisa*,[31] this Court summed up some of the factors that are relevant in considering the interests of justice, albeit in the context of an application for leave to appeal against an order dismissing an exception, and said:

> "The next question is whether it is in the interests of justice for leave to be granted to the applicants to appeal against the order dismissing the exception before the trial had

[30] *NEHAWU v University of Cape Town and Others* above n 8 at para 25; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 10; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 15; *MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others* above n 14 at para 32.

[31] Id at para 10.

> started. In answering this question, it is necessary to take into account, amongst other things, the following considerations: the nature of the exception and, in particular, the effect that upholding the exception may have upon the trial proceedings in the High Court; the extent to which the exception raises the question of the development of the common law in which case a decision by the Supreme Court of Appeal on the matter may be desirable before the case is heard by this Court; whether the matter is appealable to the Supreme Court of Appeal; the stage of the proceedings in the High Court; the importance of a determination of the constitutional issues raised by the exception; and the applicants' prospects of success upon appeal."[footnotes omitted].

[31] In deciding what is in the interests of justice in this case it is necessary to take into account, amongst other things, the following factors: the effect that the refusal of the application may have upon the trial, in particular, whether the applicant will be prejudiced in the conduct of the trial if he does not get the information sought at this stage; the desirability of deciding the issues raised; the importance of a determination of the constitutional issues raised by the application; the fact that the issues raised arose during a hiatus period before the coming into operation of the PAI Act; and the stage of the proceedings in the High Court. In the view I take of the other factors, I do not consider the prospects of success to be decisive in this application. This Court has held that though the prospects of success is an important factor in an application for leave to appeal, it is not decisive in every case.[32]

(a) Prejudice to applicant if the application is refused.

[32] In the first place, we are concerned with an order made at a very early stage of pleading, a stage prior to the delivery of a plea. It is patently clear from the record

[32] *S v Boesak*, above n 8 at para 12.

that the applicant is able to formulate and articulate his defences, in particular, if regard is had to the nature of the allegations against him. The matter must therefore be approached on the footing that even if the applicant were to be refused the information sought, he would be able to plead. The order made by the High Court does not prejudice the applicant in any way in the future conduct of the case. This immediately distinguishes it from other orders, which might well influence how a litigant conducts the case.

[33] The applicant seeks information for use in his pending insider trading trial. He will not be prejudiced if leave to appeal is refused. Once the pleadings are closed, the issues will become crystallised and the issues for trial will be defined. If the applicant feels that the information presently sought is relevant to the issues for trial, he can utilise the pre-trial discovery procedures set out in the rest of rule 35. It was contended on behalf of the applicant that there is potential prejudice in obtaining the information later. As I understand the submission, such prejudice derives from the fact that pre-trial discovery is limited to issues for trial and such information will not only be narrow but it will come too late for him to broaden the issues for trial.

[34] The submission rests on the assumption that the information held by the respondent might yield further defences of which the applicant might not be aware. If regard is had to the nature of the allegations against the applicant, it is difficult to fathom what other possible defences, of which the applicant himself has no knowledge, could emerge from information held by others. The complaint against

him is that at the material time he used inside information, which he had obtained as a director to make profit out of buying the securities of Skills. Whether that is so is a matter that is manifestly within his subjective knowledge. He does not require information about what other interrogatees said in order to determine his defence. Counsel for the applicant was invited to indicate the type of defence she had in mind, but not surprisingly, she was unable to suggest any.

[35] Finally, the papers in the High Court show that the respondent intends to claim privilege in respect of some or all of the documents sought by the applicant. The High Court did not address this issue. We did not hear argument on this issue either. Therefore, even if we were to uphold the appeal, we would have to refer the matter back to the High Court for it to decide the question of privilege. Having regard to the fact that the applicant is able to plead and that he can renew his right to information at the time of pre-trial discovery, the application serves little purpose other than to delay the proceedings.

(b) The importance of deciding the constitutional issues raised.

[36] The constitutional issues that are raised in this application arose during what was referred to in argument as "the hiatus period", that is, the period between the passing of the PAI Act on 2 February 2000 and its coming into operation on 9 March 2001.[33] Our ruling on the issues raised in this application will therefore affect those

[33] The PAI Act was assented to and signed by the President on 2 February 2000 and published on 3 February 2000 but came into effect on 9 March 2001. In terms of section 81 of the Constitution, a Bill becomes an Act of Parliament once it is assented to and signed by the President, but "takes effect when published or on a date determined in terms of [its provisions]."

applications for discovery made during the hiatus period and would in all likelihood have been disposed of by now. The latter group will be governed by the PAI Act while, in the other group, the issue will not arise. The resolution of the constitutional issues raised in this application will not therefore be likely to have implications beyond the immediate needs of the applicant, who, as I have already found, will suffer no prejudice if the application is refused.[34]

Conclusion

[37] For all these reasons, it is not in the interests of justice to grant leave to appeal in this matter. It follows that the application for leave to appeal must be refused.

Costs

[38] Counsel for the applicant submitted that if the application fails, there should be no order for costs. I am not persuaded.

[39] As a general matter, this Court adopts a cautious approach towards unsuccessful litigants who assert their fundamental rights against the State. This approach derives from the reluctance to discourage individuals from asserting their constitutional rights in the fear that if they do so and fail, they might be saddled with costs.[35] It is however not an inflexible rule. In the present case the costs order is justified. What distinguishes the present case and justifies the costs order is the fact

[34] *NEHAWU v University of Cape Town* above n 8 at para 28.

[35] *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 51; *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at para 30.

that it must at all times have been clear to the applicant and his legal advisers that the order of the High Court, against which the appeal is sought to be brought, could cause him no prejudice in the conduct of the action, for the reasons given in this judgment. The application is therefore purely dilatory. By ordering the applicant to bear the costs of this futile application, we take no risk of "chilling" prudent and reasonable litigants seeking to invoke their constitutional rights.

[40] In these circumstances, there is good reason why the applicant should be ordered to pay the costs of the abortive proceedings.

[41] Finally, I consider it necessary to comment on the state of the record. Paragraph (c) of the directions issued on 12 July 2002 directed the parties to lodge only those portions of the record that are not common cause and on which they intended to rely. Instead the entire record was lodged. During the course of argument, we were referred to very few pages of the record. It was therefore completely unnecessary to file the entire record. The record itself was not properly prepared as required by the rules. In future, such conduct will not be tolerated and this Court will consider a special order for costs. Since the applicant prepared the record and has been ordered to pay the costs of the application, there is no need for such an order in this case.

Order

[42] In the event, the following order is made:

(a) The applications by the applicant for the condonation of the late filing of the application for leave to appeal and the late filing of the written argument are granted. The costs of these applications are to be borne by the applicant.

(b) The applications by the applicant for the condonation of the late filing of the replying affidavit and the application for leave to file that affidavit are refused. There will be no order for costs.

(c) The application to strike out by the applicant is refused and there will be no order for costs.

(d) The application by the respondent to expand the issues is refused and there will be no order for costs.

(e) The application by the respondent that the record of proceedings in the High Court be lodged is granted and there will be no order for costs.

(f) The application for leave to appeal is dismissed with costs, such costs to include costs consequent upon the employment of two counsel.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J, Moseneke J and Yacoob J concur in the judgment of Ngcobo J.

For the applicant:	MM Jansen SC and I Ellis instructed by Hannes Gouws & Partners Inc., Pretoria.
For the respondent:	BS Spilg SC and A Freund instructed by Noko Inc., Johannesburg.