CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 37/01

JAN VAN DER WALT | Applicant
versus
METCASH TRADING LIMITED | Respondent

Heard on : 21 February 2002

Decided on : 11 April 2002

JUDGMENT

GOLDSTONE J:

[1] On successive days in August 2001 the Supreme Court of Appeal (SCA) made contrary orders in two cases which were materially identical. They were made in response to petitions addressed to the Chief Justice for leave to appeal against orders of the High Court in summary judgment applications. In the first order, Mr J van der Walt, the applicant, was refused leave to appeal. In the second, a Mr Kgatle, who is not a party to these proceedings, was granted leave to appeal. The applicant claims that these orders constitute a violation of his rights under the Constitution. He seeks an order from this Court granting him leave to appeal to this Court from the order of the High Court, alternatively for an order permitting direct access to this Court.

[2] The dispute between the parties arises from a franchise agreement between Metcash

Trading Limited, the respondent, and Waltnick CC (the CC). Under the franchise agreement the CC had to buy its stock-in-trade from the respondent. The applicant was a member of the CC and signed the franchise agreement as a surety and co-principal debtor for the obligations of the CC.

[3] The respondent issued a summons out of the High Court at Pretoria against the CC and the applicant for the purchase price of goods sold and delivered to the CC and for franchise fees under the franchise agreement.[1] At about the same time a similar summons was issued by the respondent out of the same court against each of five other franchisees and out of the High Court at Johannesburg against each of six other franchisees, including Mr Kgatle. All of the claims were founded on the identical standard-form franchise agreement.

[4] The franchisees sued by the respondent set up a committee to determine a common policy with regard to resisting the claims. They each entered an appearance to defend the actions and filed similar affidavits resisting applications by the respondent for summary judgment. In order to avoid unnecessary costs it was agreed that the result of the Johannesburg matters would follow the result in the Kgatle-action and in the Pretoria matters that of the applicant. Pursuant to that agreement applications for summary judgment were heard in the respective courts against Mr Kgatle and the applicant. The judge in each of the courts was informed of the agreement between the parties, and after hearing argument, similar orders were made refusing summary

[1] Some time after the issue of summons, the CC was liquidated.

judgment. However, in respect of some of the claims, Mr Kgatle and the applicant were ordered to furnish security, failing which judgment would be entered against them. Sithole AJ who made the order in the case of the applicant furnished no reasons but had been handed the judgment in the Kgatle matter and clearly decided to follow it. Security was not furnished and judgments were entered against Mr Kgatle and the applicant, respectively.

[5] In another action, that between the respondent and Heyneke Food Stores and Others, the defences relied upon were substantially the same as in the present matter. An application for summary judgment in the High Court sitting in Pretoria was granted with costs, in respect of a portion of the claim, and leave to defend granted unconditionally in respect of the balance. The High Court granted the defendants leave to appeal to the Full Bench of the Pretoria Court against the grant of summary judgment.

[6] Both Mr Kgatle and the applicant applied to the respective High Courts for leave to appeal against the judgments, either to a Full Bench of the High Court or to the SCA. Their complaint was directed at the order requiring security to be furnished in respect of some of the claims. That order was made under Uniform Rule of Court 32(8) which provides that:

> "Leave to defend may be given unconditionally or subject to such terms as to security, time for delivery of pleadings, or otherwise, as the court deems fit."

The High Court judges both refused the applications. Both then petitioned the SCA for leave to appeal. The two petitions made reference to the High Court decisions and the similarity between the present matter and the Kgatle and Heyneke cases. There was no

mention in either petition that leave to appeal was being sought in both matters or that they should be considered together by the SCA. It does not appear that the petitions were lodged with the SCA simultaneously. Those petitions led to the result referred to in the opening paragraph of this judgment. The petition of the applicant was refused and that of Mr Kgatle was granted.

[7] In a letter dated 31 August 2001, the applicant's attorney informed the Acting Chief Justice[2] of the unhappy situation in which the applicant and the other defendants in the Pretoria High Court actions found themselves. They were all bound by the decision in the applicant's case and had reached the end of the road, whilst in the High Court at Johannesburg the defendants had been granted leave to appeal. In his reply, the Acting Chief Justice stated that:

[2] Prior to 21 November 2001, the Chief Justice presided over the SCA. In terms of section 20(b)(i) of Act 34 of 2001 the Chief Justice now presides in this Court.

> ". . . Unfortunately nothing can be done to change the result. The Waltnick application was referred to two judges who granted it and the Kgatle application to two others who refused it[3] and, in terms of s 21(3)(d) of the Supreme Court Act, both judgments are final.
>
> I am nevertheless grateful to you for drawing my attention to what has happened. The system which we use in the allocation of application for leave to appeal was designed to avoid results like these but, like other systems, it is not infallible."

[8] Section 21(3)(a) of the Supreme Court Act (the Act)[4] provides that where leave to appeal is refused by the High Court, the leave of the SCA may be sought by petition addressed to the Chief Justice. Subsection (3)(b) provides that the petition shall be considered by two judges of the SCA designated by the Chief Justice, and in the case of a difference of opinion, also by the Chief Justice or any other such judge so designated. As pointed out in the letter from the Acting Chief Justice, subsection (3)(d) provides that the decision of the majority of the judges considering the application to grant or refuse it shall be final. While such finality relates to non-constitutional matters only, it is important to point out that in the present case the constitutional validity of this subsection was not challenged in relation to the jurisdiction of the SCA.

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3 In his letter the Acting Chief Justice has inadvertently confused the outcome of the two applications.

4 Act 59 of 1959.

[9] The applicant now seeks constitutional relief from this Court. He does so either by way of an application for special leave to appeal in terms of rule 20(1) of the Rules of the Constitutional Court,[5] or by way of direct access in terms of section 167(6)(a) of the Constitution.[6] It is submitted on his behalf that the effect of the contrary decisions of the SCA:

(a) is irrational and arbitrary and in conflict with the rule of law which is a founding

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[5] Rule 20(1) reads as follows:

> "An appeal to the Court on a constitutional matter against a judgment or order of the Supreme Court of Appeal shall be granted only with the special leave of the Court on application made to it."

[6] Section 167(6)(a) provides that:

> "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 to bring a matter directly to the Constitutional Court".

value in section 1(c) of the Constitution;[7] or

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[7] Section 1 of the Constitution reads as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> > (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> > (b) Non-racialism and non-sexism.
> > (c) Supremacy of the constitution and the rule of law.
> > (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

(b) violates the applicant's right to equality before the law and his right to equal protection and benefit of the law, all guaranteed by section 9(1) of the Constitution;[8] or

(c) violates the applicant's right of access to the courts which is guaranteed by section 34 of the Constitution.[9]

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8 Section 9(1) of the Constitution reads as follows:

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

9 Section 34 of the Constitution reads as follows:

> "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."

[10] The respondent's counsel correctly conceded that for the purposes of this appeal the two applications should be considered materially identical.[10] They challenged the contention that any of the applicant's constitutional rights were violated by the grant of contrary orders by the SCA.

[11] It is clear that the different outcomes in these two matters is unfortunate. However, the question in this Court is whether that different outcome is unconstitutional. In considering the grounds relied upon by the applicant, I shall for convenience leave the equality provisions of section 9 for last.

Irrationality and arbitrariness

[10] The only difference between the position of the applicant and Mr Kgatle, which is not relevant for present purposes, is that the applicant incurred an accessory obligation as surety and co-principal debtor for the CC whereas Mr Kgatle is a principal debtor.

[12] As appears from the letter of the Acting Chief Justice, each of the applications was considered by a panel of the SCA. Nothing was stated in either of the petitions which would have alerted the Acting Chief Justice, or the judges sitting in the two panels, to the other petition. There is nothing to suggest that they were not conscientiously considered or that each panel did not act in good faith in considering whether there were reasonable prospects of success on appeal. Such a test permits of reasonable difference of opinion on the same facts, as do all discretionary tests. There is no suggestion that this test is unconstitutional.[11]

[13] As O'Regan J pointed out in *Dawood and Another v Minister of Home Affairs and Others*:[12]

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."

It would seriously diminish the efficacy of this role of discretion if a decision made pursuant to its exercise bound other judicial officers in a court at the same level in the later exercise of their discretion in subsequent cases.

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11 In *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC), at para 10, O'Regan J said of the petition procedure now relevant: "As long as the screening procedure enables a higher Court to make an informed decision as to the prospects of success upon appeal it cannot be said to be in breach of s 22."

12 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 53.

Access to the courts

[14] Litigants who dispute the correctness of an order made by the High Court are entitled in terms of section 21(3)(a) of the Act to apply to the SCA for leave to appeal. In terms of the Act the decision of the SCA on the application is final. It was not suggested that this provision is inconsistent with the Constitution. The applicant invoked his right under section 21(3)(a) and applied for leave to appeal. The access to court for this purpose to which all litigants are entitled was therefore accorded to him. There is no suggestion that the judges who dealt with the case acted irregularly in any respect. The complaint is that the outcome of the application was different to the outcome of the application in Mr Kgatle's case. But that does not raise a constitutional question. Even if the decision in the applicant's matter was wrong, and the contrary decision in Mr Kgatle's matter was correct, that would not provide a basis for the relief claimed by the applicant. In *Lane and Fey NNO v Dabelstein*[13] this Court said:

> "The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that s 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled."[14]

[13] 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) para 4.

[14] In *S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) para 29, it was stated that "[a]s long as all persons appealing from or to a particular court are subject to the same procedures the requirement of equality is met." In *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC) para 11, it was held that this dictum applies with equal force to civil appeals.

There is no merit in the reliance upon section 34 of the Constitution.[15]

Equality

[15] Above n 9.

[15] The reliance on the provisions of section 9(1) of the Constitution[16] depends solely on the inequality of outcome of the two applications to the SCA. The question which thus arises is whether those provisions guarantee equality of outcome in litigation based upon materially identical facts and circumstances.

[16] The applicant has not been denied any legal right afforded to other litigants. It was different, for example, in *S v Ntuli*,[17] where the Criminal Procedure Act[18] required a prisoner, who was convicted of a criminal offence by a magistrate and wished to appeal, to obtain a certificate from a High Court judge to the effect that there were reasonable grounds for such an appeal. Such a certificate was not required to enable a person in a similar position to appeal if he or she was not in prison or was legally represented. This Court held that the different treatment was inconsistent with the provisions of section 8(1) of the interim Constitution.[19] Didcott J stated that the guarantee under section 8 "surely entitles everybody, at the very least, to equal treatment by our courts of law."[20]

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16 Above n 8.

17 1996 (1) SA 1207; 1996 (1) BCLR 141 (CC).

18 Act 51 of 1977, section 309(4) read with section 305.

19 Act 200 of 1993. Section 8(1) provided that "Every person shall have the right to equality before the law and to equal protection of the law."

20 Para 18.

[17] In *Ntuli* this Court held that allowing one class of litigant to appeal as of right and the others in the same class only on the grant of a judge's certificate created an inequality which was in violation of the equality provision of the interim Constitution. In the present case, both the applicant and Mr Kgatle were accorded the same right to petition the Chief Justice for leave to appeal. Here the unequal treatment arises from the outcome of the exercise of that right. That difference is inherent in the court system. The "fallibility" to which the Acting Chief Justice refers in his letter[21] results from the respective SCA judges exercising a discretion conferred upon them by statute. The contrary orders are not the consequence of unconstitutional action or omission by them.

[18] The unconstitutional discrimination found to exist in the *Ntuli* case is distinguishable from the difference in outcome in the present case. In the former case the difference in treatment arose directly from an inequality in statutory provisions and the resultant inequality in the appeal process. In the present case, the difference in treatment arises from the consequences of the exercise of a discretion by different panels of judges. Nowhere in the record is there a suggestion that any of the SCA judges acted arbitrarily and no submission to that effect was made by counsel. If one of the SCA panels reached a legally incorrect conclusion, that would not justify the conclusion that it was an irrational decision or was reached in an arbitrary manner.[22]

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21 Above para 7.

22 See H K Saharay, *The Constitution of India: An Analytical Approach* 2 ed (Eastern Law House, Calcutta 1997) at 78 where he writes, "[n]o relief against denial of equality can be claimed against the discretion of [a] judicial officer. The discretion of [a] judicial officer is not arbitrary and the law provides for revision by superior courts of orders passed by the subordinate courts. The remedy

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of a person aggrieved by the decision of a competent tribunal is to approach for redress to a superior tribunal if there be one." [Footnotes omitted.] See also *Sahibzada Saiyed Muhammed Amirabbas Abbasi and Others v The State of Madhya Bharat and Others* [1960] 3 SCR 138, where Shah J held that a claim as to the denial of equality before the law or the equal protection of the law can be made against executive action or against the legislative process but not against the decision of a court of competent jurisdiction. See also *Budhan Choudhry and Others v The State of Bihar* [1955] SCR 1045 and *The Parbhani Transport Co-operative Society Ltd. v The Regional Transport Authority, Aurangabad and Others* [1960] 3 SCR 177.

[19] The remaining question we have to determine is whether the effect of the different outcomes is in itself a violation of the applicant's right to "equal protection and benefit of the law", more particularly, whether, in this case, that right encompasses equality of outcome. It is important to stress that section 21(3)(b) of the Act, that makes provision for the petition for leave to appeal to be heard by two judges in the manner detailed in para 8 above, was not attacked as being constitutionally invalid. Nor was the manner in which the section was applied in the SCA the subject of attack. As this Court held in the *Lane and Fey NNO* case,[23] the Constitution does not and cannot protect litigants from wrong decisions. The judicial system in any democracy has to rely on decisions taken in good faith by judges. As already mentioned, reasonable minds may well differ on the correct outcome of similar or even identical cases.

[20] Clearly the judicial system should avoid, to the extent possible, the kind of result which occurred in this case. It is hardly conducive to confidence in the system that on two consecutive days the highest court in non-constitutional matters should issue contrary orders in substantially identical cases. Where any court sits in panels, this possibility cannot ever be wholly excluded. However, the panel system in the SCA is explicitly envisaged in section 168(2) of the Constitution which provides that:

> "A matter before the Supreme Court of Appeal must be decided by the number of judges determined by an Act of Parliament."

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[23] Above n 13.

As already mentioned,[24] the Act makes provision for petitions for leave to appeal to be heard by two judges of the SCA. As the Acting Chief Justice recognised in his letter, the system should contain procedures designed to prevent, to the extent possible, the kind of unfortunate outcome that occurred in this case.

[21] In the present matter the same attorney acted for the applicant and Mr Kgatle. He failed to lodge the two applications together, or to request that they be heard together. Mr Kgatle's petition was lodged without any indication that there would be another application dealing with the Pretoria claims. There was no reason why the two petitions should not have been brought together. As the two cases were identical the only sensible procedure would have been to have one test case at that stage of the proceedings. If for some quirk the parties decided that there should be two test cases to determine the fate of several identical matters, they should have lodged them together and drawn attention to this. They were lodged without any reference to the extraordinary fact that two identical cases were being processed as a test for other identical cases. I would suggest that the fault for the unfortunate result in this case lies with the manner in which the petitions were drafted and lodged and not with the procedure adopted in the SCA. I would emphasise that if each of the petitions had mentioned that a similar application was being brought in the other, the Acting Chief Justice and the judges in each panel would have been alerted to the fact that the two applications should have been considered together by the same panel.

[24] Above para 8.

[22] In his dissenting judgment at para 43, Ncgobo J states:

> "I am not satisfied that it was unreasonable, in the absence of other publicly stated procedure which suggests otherwise, to have assumed that both petitions would first go to the Chief Justice who will thereafter allocate them as required by the Supreme Court Act."

I would point out that this case was not made by the applicant, either in his application to this Court or in argument. I would add that if Ngcobo J is suggesting that the Chief Justice reads or is obliged to read all petitions for leave to appeal before allocating them to panels of two judges, I respectfully disagree. There are a very substantial number of such petitions each year and it is unlikely that it would be possible for them all to be read and considered by the Chief Justice. In any event this Court cannot make such an assumption without inviting the SCA to inform it of the procedure which is adopted. I must emphasise that in this case neither the system of allocation of petitions in the SCA, nor the manner in which it was applied in this case was under attack and it would be inappropriate to say more about it.

[23] If there is merit in the argument of the applicant, it would follow that the respondent would also have cause for complaint. Whilst it was the successful party in the case against the applicant, it failed in the case against Mr Kgatle. Its case for having the order in the Kgatle case set aside would be no less compelling than that of the applicant in having the order in his case disturbed. This illustrates, in my opinion, the fallacy in the attempt by the applicant to attack the

order made in his case by reference to a later order made in another.

[24] In my opinion, the proper interpretation of the provision in section 9(1) that everyone has "the right to equal protection and benefit of the law", cannot mean that where a final court of appeal properly exercises a discretion, such exercise may be subject to attack under section 9(1). It is clear that the provision means that all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access. In this case both the applicant and Mr Kgatle had the right to petition the SCA and to have their applications heard in the ordinary course. Those rights were duly exercised by both of them. I therefore respectfully disagree with Ngcobo J that the right to equal protection requires equality of outcome in matters where judicial discretion is exercised.[25]

[25] I do not wish to be understood as holding that section 9(1) should necessarily be confined to matters of procedure and not substance. The facts of this case are highly unusual if not unique. They relate to the exercise of a discretion by judges who it is not suggested acted otherwise than in good faith. It is in these circumstances that I have come to the conclusion that section 9(1) of the Constitution has not been violated in this case.

[26] For the foregoing reasons, the application falls to be dismissed with costs. In my opinion this is not a case of such complexity as to justify the losing party being obliged to pay the costs

[25] See dissenting judgment of Ngcobo J, paras 38, 45, 46, 48 and 52 below.

of two counsel.

[27] Before concluding I feel obliged to draw attention to the unsatisfactory and slovenly manner in which the record was prepared by the applicant's attorney. The index is inaccurate and confusing and the record is replete with the duplication of documents. This is not the manner in which appeal records should be placed before this or any other appellate court.

The Order

[28] The application is dismissed with costs.

Chaskalson CJ, Langa DCJ, Ackermann J, Kriegler J, O'Regan J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Goldstone J.

NGCOBO J:

[29] The SCA has given two conflicting orders in two matters involving identical facts and points of law. These orders were given within a space of 24 hours of each other. Both involved applications for leave to appeal against orders of the High Court granting summary judgment. In the one case the SCA refused leave to appeal on 20 August 2001 and, in the other case, it granted leave to appeal the following day, that is, on 21 August 2001. The case that is before us is Appeal case number 259/2001 where leave to appeal was refused and in which Mr Van der Walt, the applicant herein, was the applicant. Mr Kgatle was the applicant in the other case, Appeal

case number 276/2001 which will be referred to as the Kgatle case. That case is not before us.

[30] Once the results in these two cases were known to the applicant's attorney, who happens to be the attorney in the Kgatle case as well, he addressed a letter to the Acting Chief Justice in which he drew attention to the two conflicting orders. He added that "we are at a loss as to how the matter should be approached." The response from the Acting Chief Justice was this:

> "Thank you for your fax of 31 August 2001 in connection with these applications. Unfortunately nothing can be done to change the result. The Waltnick application[1] was referred to two judges who granted it and the Kgatle application to two others who refused it and, in terms of s 21(3)(d) of the Supreme Court Act, both judgments are final. I am nevertheless grateful to you for drawing my attention to what has happened. The system which we use in the allocation of application for leave to appeal was designed to avoid results like these but, like most other systems, it is not infallible."

[31] The applicant is now before us seeking a remedy. The majority of this Court holds that nothing can be done to come to the assistance of the applicant. I am unable to concur in that judgment. The facts are set out in the majority judgment. They need not be repeated here. Only those that matter for the purposes of this judgment will be repeated.

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1 The "Waltnick application" refers to the applicant's case.

[32] For this Court to have jurisdiction, the applicant must bring his complaint within the Constitution. Although this Court is the highest court of appeal, its jurisdiction is nevertheless limited to cases involving "constitutional matters, and issues connected with decisions on constitutional matters".[2] Whether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt.[3] However, as judges who swore to uphold the Constitution, we must accept that such distinction exists and try to make sense of that distinction. It is therefore necessary to determine whether the conduct of the SCA as evidenced by these cases fell foul of the Constitution.

[33] The starting point must be that in our country the Constitution is the supreme law. "[L]aw or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[4] In terms of section 8(1), the Bill of Rights binds the judiciary as it binds the legislature and executive. Judges who are the vanguard of our constitutional democracy are required, by the oath they take, to "uphold and protect the Constitution and the human rights entrenched in it, and . . . [to] administer justice to all persons alike without fear, favour or

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2 Section 167(3)(b) of the Constitution.

3 In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 111, this Court, in the context of common law expressed "grave doubts" as to whether it is possible "to seal hermetically the jurisdiction" of this Court and that of the SCA. Indeed in *Pharmaceutical Manufacturers Association of South Africa and Others: In re Ex parte President of the RSA and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44 we said, "There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."

4 Section 2 of the Constitution.

prejudice, in accordance with the Constitution and the law."[5] These provisions from the Constitution demonstrate that if the conduct of a court results in a breach of the Constitution this Court not only has the power, but it is obliged to intervene and to say so.

[34] The applicant raised three separate constitutional arguments based on the rule of law, the equality clause and the right of access to court. However, during oral argument counsel for applicant focussed on the equal protection clause and contended that the order challenged was arbitrary. He did not press the other constitutional arguments, taking the position that if the applicant failed to demonstrate arbitrariness in relation to the equality clause, the other constitutional arguments cannot succeed either. There is much to be said for this approach. In my view, what has to be decided in this application is whether the equal protection clause has been violated.

[5] Item 6(1) of Schedule 2.

[35] The ideal of equality expresses an aspiration that is fundamental to our constitutional democracy. Equality is one of the founding values of our constitutional democracy - it is indeed a "founding faith". It is one of the pillars on which rests securely the foundation of our constitutional democracy.[6] And therefore it must not be subjected to a narrow approach. This broad approach to the principle of equality is especially significant in our country which has a history of injustice arising from past inequality. In this context the approach of the Indian Supreme Court to the content and reach of equality is persuasive. In *E.P. Royappa v State of Tamil Nadu*,[7] Bhagwati J, for the majority said:

6 *Maneka Gandhi v Union of India* AIR 1978 SC 597 at 624.

7 AIR 1974 SC 555.

> "The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."[8]

[36] What emerges from the above passage is that there is an overlap between the rule of law and equality. Both strike at arbitrariness. In the words of Bhagwati J, "equality and arbitrariness are sworn enemies; [equality] belongs to the rule of law."[9] Thus conduct that is arbitrary may violate both the rule of law and the equality clause.

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8 Id at 583; See also *Maneka Gandhi v Union of India* above n 6 at 624; *Ramana v IA Authority* AIR 1979 SC 1628 at 1642.

9 Above n 7 at 583.

[37] In the context of the administration of justice the principle of equal protection demands equal justice under the law. The provision of equal justice for all regardless of one's station in life is a goal which our constitution hopes and strives to achieve. The principle of equal protection emphasises the central mission of our judicial system, which is expressed in the oath that all judges must take which encompasses the duty to "*administer justice to all persons alike* without fear, favour or prejudice, in accordance with the Constitution and the law."[10] (Emphasis added). This constitutional duty calls for the equal application of legal principles and the adoption of procedures or systems that do not permit similarly situated litigants to be treated differently. At its core, the right to equal protection and benefit of the law expresses the founding value of equality. It gives meaning to the founding value of equality. For the purposes of this judgment it is not necessary to delineate the outer limits of this right. Suffice it to say that at its bare minimum it requires that our courts treat similarly all litigants who are similarly situated. It "entitles everybody, at the very least, to equal treatment by our courts of law."[11]

[38] The problem is one of establishing that individuals who are similarly situated have been treated differently. In some cases it is easy to point to the treatment and establish that the treatment given to one individual is different to the treatment given to the other individual similarly situated. But in other cases it may not be easy, particularly those cases involving decision-making. In such cases the complainant may have to rely on the outcome as evidence of different treatment. Unless there is a principled reason for acting differently, the different

[10] Above n 5.

[11] *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 18.

outcomes point to unequal treatment.[12] Reliance upon the outcome in this context is not to say the one or the other decision is wrong. Nor is it to insist that the outcomes must always be the same. It is merely to use the outcome as a basis of comparison and thus evidence indicating that the complainant was treated differently. This of course may be refuted by showing sufficient reason for treating them differently.

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12 *Desist v United States* 394 US 244, 258 (1969).

[39] From the very nature of law and its function in society, the element of equality is necessary for its success but the power to advance justice must be its primary mission. Hence the duty of the courts is to administer even-handed justice. In order to ensure that similarly situated litigants are treated similarly, the judicial process has developed principles such as *stare decisis* which ensure uniformity in the treatment of cases raising similar factual and legal issues. The principle that similarly situated litigants must be treated similarly is "a fundamental component of *stare decisis* and the rule of law".[13] Similarly, the principle of parity in sentencing

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[13] *James B. Beam Distilling Co. v Georgia* 501 US 529, 537 (1991). It is instructive to refer to the US case law dealing with the question whether a new rule of constitutional law should apply retroactively. In *Desist v United States* above n 12 at 258 Harlan J, *dissenting*, held that ". . . all new rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." He added: "We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. *And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently*. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." (Emphasis added). The comprehensive analysis presented by Harlan J was embraced to a significant extent by the majority in *Griffith v Kentucky* 479 US 314, 322-3 (1987). The majority endorsed the conclusion by Harlan J that the selective application of new rules violate the principle of treating similarly situated defendants the same. In *James B. Beam Distilling Co. v Georgia,* supra, the majority once again endorsed the analysis by Harlan J holding that: "But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally."

expresses the notion that like cases must be treated alike. In *S v Giannoulis*,[14] Holmes JA expressed the principle as follows:

> "No doubt justice is best seen to be done in the matter of sentence if participants in an offence (even if tried separately) who have equal degrees of complicity are punished equally, if there are no personal factors warranting disparity."

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14 1975 (4) SA 867 (A) at 870H.

[40] But what does the principle of equal protection demand where two applications for leave to appeal against decisions of the High Court involving identical issues of fact and law come before the SCA, at about the same time? In approaching this question it is important to bear in mind the following factors: first, the determination of such cases involves the exercise of judicial discretion where judges may differ on what the outcome should be; second, the SCA operates in panels and its authority to do so is derived from the Constitution[15] and the Supreme Court Act;[16] third, the petition must be addressed to the Chief Justice;[17] fourth, an application for leave to appeal is considered by two judges who are designated by the Chief Justice;[18] fifth, given the exercise of discretion, the possibility of different outcomes looms large if such cases are placed before different panels; and sixth, once a decision is given it is that of the SCA and not that of the individual panel of judges who considered the application.

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15 Section 173 of the Constitution.

16 Section 21(3)(b) of the Supreme Court Act 59 of 1959.

17 Section 21(3)(a).

18 Section 21(3)(b).

[41] In these circumstances the equal protection principle required that these cases be placed before the same panel to avoid conflicting and unjust results. Treating these admittedly identical cases similarly required that they be placed before the same panel. The placing of these two identical cases before different panels resulted in two similarly situated litigants being treated differently. The effect of this is that one group of litigants has been allowed access to the appeal court to have the merits of their appeal decided by the appeal court while the other group, which is similarly situated, has been denied this right. Access to an appeal court to have the merits of an appeal considered is an important right in our system of administration of justice. It provides the opportunity to correct errors made by the trial court. To shut the doors of the appeal court to one litigant while opening the doors to another similarly situated litigant is a violation of the equal protection clause. It is even more so when this is a consequence of a system that permits similarly situated litigants to be treated differently.

[42] In response to the enquiry by the applicant as to how the problem could be approached, the Acting Chief Justice explained that the two cases were placed before different panels of judges and added that "[t]he system used in the allocation of applications for leave to appeal was designed to avoid results like these, but like most systems, it is not infallible." In effect what he is saying is that what happened was due to the system that is not infallible. The system is such that it permits similarly situated litigants to be treated differently. It thus permits a violation of the equal protection principle.

[43] The majority suggests that the SCA should have been alerted to the fact that two identical applications for leave to appeal were being brought. I am by no means satisfied that having

regard to the provisions of the Supreme Court Act, viewed against the timing in the filing of the two petitions, the attorney was required to do more. First, in terms of section 21(3)(a) of the Supreme Court Act, the petition is addressed to the Chief Justice and is considered by a panel of two judges designated by the Chief Justice in terms of section 21(3)(b). Second, as the case numbers of these petitions indicate, Appeal case number 259/2001 (applicant's case) and Appeal case number 276/2001 (Kgatle case), were filed with the SCA at about the same time and were about sixteen appeal cases apart. Third, I am not aware of any rule of practice and procedure in the SCA which requires the attorney to do more than what the Supreme Court Act required and what the attorney actually did. In these circumstances, I am not satisfied that it was unreasonable, in the absence of other publicly stated procedure which suggests otherwise, to have assumed that both petitions would first go to the Chief Justice who will thereafter allocate them as required by the Supreme Court Act.

[44] Nor am I satisfied that there was no such indication having regard to the content of both petitions. It is true, neither petition mentioned that leave to appeal was being sought in both matters. However, the procedural history of all three cases was set out in each petition and that history demonstrated that: the franchisees set up a committee with a view to resisting the claims by Metcash; two cases one in Johannesburg (the Kgatle case) and one in Pretoria (the applicant's case) were selected as test cases and that the Johannesburg case was to follow the result in the Kgatle-action and the Pretoria cases, that of the applicant; the issues of fact and law were similar in all these cases, including the Heyneke case; the High Court refused leave to appeal in both the applicant's case and the Kgatle case while leave to appeal was granted in the Heyneke case; in the case of the applicant the High Court indicated that its earlier order refusing summary

judgment had been based upon the legal principles set out in the Kgatle judgment refusing summary judgment and granting conditional leave to defend. Significantly, however, neither petition stated that the efforts to petition the Chief Justice would not be pursued in the other case. In these circumstances, an enquiry into the status of the litigation in each of these cases was called for so as to ensure that if leave to appeal was being sought in both matters, they could be placed before the same panel. This is particularly so because there is no rule that requires the litigants to draw to the attention of the Chief Justice petitions raising similar factual and legal issues.

[45] However, be that as it may, what is significant here is that two similarly situated litigants were treated differently. As a result, two conflicting orders were made resulting in a denial of equal protection and benefit of the law. The effect of these two diametrically opposed orders is this: the fate of all the TPD cases has now been finally decided. Defendants in those cases must now pay their respective judgment debts or face execution against their assets. They have been denied the right to have their cases considered by an appellate court on the merits. By contrast, the WLD defendants have been afforded the right to have their cases considered on their merits by an appellate court. There is a prospect that their defences might be upheld on appeal. Were this to happen, the WLD defendants would finally avoid the payment of the sums claimed by Metcash. Yet the facts and circumstances involved in the two groups of cases as well as the issues they raise are identical. This result, in my view, is manifestly unjust. It is inconsistent with our Constitution.

[46] No one would contend that the SCA could, in a case by one plaintiff against a number of

defendants involving identical factual and legal issues, constitutionally grant leave to appeal in respect of some and not all defendants. Such an order would render the constitutional promise of equal protection and benefit of the law an empty promise. The fact that the plaintiff may have decided to sue the different defendants in different courts and individually, matters not. Once the facts and the issues are identical and involve the same plaintiff, all the defendants are entitled to be treated alike unless there was some distinguishing factor. To treat them differently without sufficient reason is inconsistent with our Constitution which is dedicated to affording equal justice to all and special privilege to none in the administration of justice. There can be no equal justice where the justice which a person gets from the same appellate court depends upon factors such as the panel members that constituted the court or the time when the case came before the court or where the case originated from.

[47] It is true that the question whether leave to appeal must be granted is a matter which calls for the exercise of judicial discretion and that judges may differ on whether there are reasonable prospects of success on appeal. No one would quarrel with these propositions. It is precisely for this reason that these two applications should have been placed before the same panel of judges. Placing them before different panels in these circumstances resulted in them being treated differently. This violated the equal protection principle.

[48] In any event, here we are not concerned with the decisions of the individual panels of judges that decided the cases. Nor are we concerned with the question as to which of these two orders is right or wrong. We are concerned with two conflicting orders made by the SCA on successive days. In my view it matters not that these orders were made by different panels of

two judges each. The fact of the matter is that both are orders of the SCA. The SCA spoke through those judges. These orders were those of the SCA and not of the individual panels of judges who made them. Counsel for the respondent very properly conceded this. That concession was rightly made both in principle and on authority. These conflicting orders must therefore be approached on the footing that they were made by the SCA. Viewed objectively, against the fact that they are orders of the same court, these two orders are arbitrary. That is regrettably how they are viewed. Justice must not only be done but must be seen to be done. This cannot be said of these conflicting orders.

[49] A matter that was debated in argument is the propriety of challenging a decision based on a subsequent decision when at the time it was given it was unassailable. Equality is an inescapably comparative concept. A person is treated unequally only if that person is treated differently to others and those others (the comparison group) must be those who are similarly situated to the complainant. The comparison group may at times, as in this case, become identifiable later on. Thus an unequal treatment may not be obvious until others are treated differently. Here the fact that the applicant was treated differently only became apparent when the SCA gave its decision in the Kgatle case on the following day. This comparison in equal treatment cases is unavoidable.

[50] The majority judgment has expressed the view that the system followed by the SCA is not in issue here. I do not agree. As I understand the letter from the Acting Chief Justice the explanation it advances for the conflicting orders is the system of allocating petitions for leave to appeal which is admittedly not infallible. What has to be determined, therefore, is whether the

system provides sufficient basis for avoiding a constitutional challenge based on equal protection and benefit of the law. For reasons set out above I do not agree. And I would add this.

[51] The SCA is constitutionally permitted to sit in panels[19] and to put in place a system or procedures to regulate the manner in which it would deal with applications for leave to appeal.[20] But once it puts in place such a system, as is the case here, it has the duty to make sure that its system is not applied in a manner that results in similarly situated litigants being treated

[19] Section 168(2) of the Constitution.

[20] Section 173 of the Constitution which confers this authority upon the SCA provides that it has "the inherent power to protect and regulate [its] own process, and to develop the common law, taking into account the interests of justice."

differently with the result that an injustice ensues.[21] If the system permits similarly situated persons to be treated differently, the equal protection principle is violated.

[52] Before concluding this aspect of the judgment, I had better emphasise the obvious. The grounds for my decision are narrow. They are confined entirely to a situation we confront in this application. It is a situation which is extremely unusual indeed where two identical petitions for leave to appeal, raising similar factual and legal issues, come before the appeal court at about the same time and are decided by two different panels of the appeal court resulting in two diametrically opposed orders. In that situation I hold that the demands of equal protection and benefit of the law required that these two cases be placed before the same panel so as to avoid the resulting conflicting orders. The effect of the two diametrically opposed orders given by the

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[21] It may well be that the SCA as an ultimate court of appeal in non-constitutional matters has the power to correct an injustice caused by its earlier decision. See *Ex Parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 at 585 where Lord Browne-Wilkinson said the following in this regard:

> "In principle it must be that your Lordships, as the ultimate court of appeal, have the power to correct an injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered."

However it is not necessary to come to any firm decision on this issue.

SCA on successive days is that the doors of the appeal court in the Pretoria High Court have been firmly shut to the defendants from the TPD while they are open to the defendants from the WLD. One group similarly situated, will have the opportunity to have their appeals considered on their merit by an appeal court while the other group will not have that opportunity. This in my view was a denial of equal protection and benefit of the law. There is no question of justification.

[53] I conclude therefore that section 9(1) of the Constitution was violated.

[54] It now remains to consider the appropriate remedy. The nature of the violation here consists of placing two identical cases involving identical factual and legal issues before different panels of judges of the SCA. If Metcash had complained too, with the result that both cases were before us, the appropriate order to make would have been to refer them back to the SCA and direct that they be considered afresh by the same panel of two judges. Metcash is apparently content with the leave to appeal that was granted in the Kgatle matter. In any event there is the Heyneke appeal which is also pending in the Pretoria High Court and in which Metcash is also involved. Both the Kgatle appeal and the Heyneke appeal will now be considered by the Full Bench in the Pretoria High Court. No prejudice will therefore be suffered by Metcash if leave to appeal to the Pretoria High Court were to be granted so that all these appeals could be consolidated and be heard together. That seems to me to be the just order to make in the circumstances of this case.

[55] Then there is the question of costs. The applicant is here in the pursuit of justice. It may

be elusive at times as this case teaches us. This is an unusual case. Metcash had to defend itself. Justice in this case demands that no costs order be made.

[56] In the event, I would have proposed that:

(a) The order of the SCA refusing leave to appeal be set aside and be replaced by one granting leave to appeal to the Full Bench of the Pretoria High Court.

(b) Costs of the application for leave to appeal in the SCA be costs in the cause of the appeal.

(c) No order for costs is made in relation to proceedings in this Court.

MADALA J:

Introduction

[57] This indeed is a unique case – one that is very unlikely ever to arise again. On 20 August 2001 the Supreme Court of Appeal (SCA) dismissed the applicant's application for leave to appeal an order handed down by the High Court in Pretoria as a result of which the respondent (Metcash) obtained summary judgment against the applicant for payment of the amount of R501 385.08. On 21 August 2001 the day after the SCA refused the applicant leave to appeal against the order of the Pretoria High Court, it granted Mr RE Kgatle, an applicant in circumstances

which were, for practical purposes, identical to those of the applicant, leave to appeal an order of the Johannesburg High Court granting Metcash summary judgment against Kgatle.

[58] The unfortunate circumstances of this case, in my view, strongly suggest that, whatever remedy we may grant to the appellant, if any, it is very unlikely that there will be a recurrence of this coincidence. I say so because although I do not know the systems employed in the allocation of petitions, I would expect the SCA to now put in place such systems as would avoid such a recurrence of incidents like the present.

[59] It is common cause that there was no material feature of the applicant's application for leave to appeal which distinguished it from Kgatle's application. The applicant accordingly challenges the constitutionality of the arbitrary outcome visited upon him in consequence of the two contradictory decisions of the SCA. The facts appear succinctly from the judgment of Goldstone J and are not in dispute and therefore need not be repeated. Clearly it cannot be gainsaid that there has been equality of process in that both the applicant and Kgatle have been given the right to petition the Chief Justice although the outcomes of such petitions are different.

[60] In a letter dated 31 August 2001, the applicant's attorney wrote to the Acting Chief Justice[1] about the situation in which the applicant and the other defendants in the Pretoria High Court actions found themselves. They were all bound by the decision in the applicant's case and had according to the order of the SCA, therefore reached the end of the road, whilst the

[1] Prior to 21 November 2001, the Chief Justice presided over the SCA. In terms of section 20(b)(i) of Act 34 of 200, the Chief Justice now presides in this Court.

defendants in the Johannesburg High Court had been granted leave to appeal. In his reply, the Acting Chief Justice stated that:

> ". . . Unfortunately nothing can be done to change the result. The Waltnick application was referred to two judges who granted it and the Kgatle application to two others who refused it and, in terms of 21(3)(d) of the Supreme Court Act, both judgments are final. I am nevertheless grateful to you for drawing my attention to what has happened. The system which we use in the allocation of application (sic) for leave to appeal was designed to avoid results like these but, like most other systems, it is not infallible."

[61] There is no doubt that the different outcomes in the two identical petitions are unfortunate. But the SCA, correctly so in my view, is now powerless to remedy the situation at this stage. It has said that "[u]nfortunately nothing can be done to change the result", and that the system used in the allocation of applications for leave to appeal "was designed to avoid results like these but, like other systems, . . . is not infallible." Can the Constitutional Court, the guardian of the Constitution, not resolve this matter? Can it not resolve an anomaly in the outcomes that has clearly occurred and which cries out for remedial action and justice when totally disparate judgments have been given in matters which are exactly the same? It would be insufficient, in my view, for us to simply throw up our hands and make an order which does not redress the harm which might flow to the applicant and the other defendants and to the administration of justice in the end.

[62] The SCA is now functus officio in the matter and in terms of section 21(3)(d) of the Supreme Court Act, 1959 the separate judgments of the SCA are final. The applicant has now approached this Court seeking its intervention. I disagree with the findings of Goldstone J who

concludes that nothing can be done to assist the applicant.

[63] Refusal of leave to appeal by the SCA is final in non-constitutional matters.[2] This Court however has the power to hear appeals from the SCA in constitutional matters.[3] Neither of the parties raised a constitutional matter either in the High Court or in the SCA. The disparate orders of the SCA themselves raise the constitutional matter. Where that is the case, this Court does have the power to entertain an appeal against a decision of the SCA.[4]

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2 Section 21(3)(d) of Supreme Court Act, No. 59 of 1959; *Mphahlele v First National Bank of South Africa Ltd* 1999 (3) BCLR 253 (CC); 1999 (2) SA 667 (CC).

3 Section 167(6)(b) of the Constitution read with Rule 20 of the Rules of this Court.

4 *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 7 and 15.

[64] The applicant contends that the disparate treatment given by the SCA is inconsistent with his fundamental rights to equality, access to court and, because of its arbitrariness, is inconsistent with the founding constitutional value of the rule of law.[5] It is to this last aspect that I turn my attention. Section 1 of the Constitution ordains South Africa as a democratic state founded on the supremacy of the Constitution and the rule of law. It is, therefore, axiomatic that as the highest law of the country, anything that is inconsistent with it is invalid.

[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

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[5] Section 1 of the Constitution states:

"**Republic of South Africa**

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
   (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
   (b) Non-racialism and non-sexism.
   (c) Supremacy of the constitution and the rule of law.
   (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
3. the legal protection of certain basic human rights.

[66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:

> "the rule of law excludes arbitrariness and unreasonableness."[6]

I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law.

[67] To my mind a court's first and most important, if not sacred duty, is to administer justice alike to those who seek it, in whatever station of life they may be if they are similarly situated. It cannot be that the administration of justice will countenance the meeting out of unequal justice to similarly placed individuals in society.

[68] A further postulate of the rule of law is the guarantee of equality before the law which is designed to advance the value that all persons be subject to equal demands and equal burdens of the law, and not to suffer any greater disability in the substance and application of the law than

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[6] *Bachan v Singh* AIR. 1982 S.C. 1325 at 1328.

others. This to me is one of the basic precepts of the rule of law, so that no individual or group of individuals is to be treated more harshly than another under the law. Has it not been said that:

> "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[7]

[69] South Africa is a constitutional democracy and as such will not countenance conduct where equality is denied when those who are similarly situated are differently treated.

[70] It is when the administration of justice is likely to fall into disrepute and when the foundational values of the Constitution and the rule of law are threatened that this Court's legitimate role as the protector of those values comes into play. As a society committed to equality we must show to people equal concern and respect. If we contend that no rule of law precept is violated in this case we are in fact shrugging our shoulders and saying unfortunately the applicant together with the other defendants who are in similar situation in the Pretoria High Court must pay up while Mr Kgatle and the others who are similarly placed may prosecute their appeals to finality.

[71] How condemnatory of the rule of law and the system of justice would the reasonable man or woman be to learn that the applicant had been so condemned.

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7 *R v. Sussex Justices* [1924] 1 K.B 256 at 259 per Lord Hewart CJ.

[72] Clearly a terrible anomaly has resulted in that completely opposite judgments have been given in matters that are exactly the same. But can it be said that the different outcomes in these two matters are unfortunate – and nothing else? In my view, not. It seems that this Court is duty-bound to enquire whether the disparate outcomes raise a constitutional matter. We must then decide whether this outcome is unconstitutional or not. If it is unconstitutional we must give appropriate relief to the applicant. In my view the different outcomes raise a constitutional issue. The system employed by the SCA does not put this matter beyond the reach of the Constitutional Court's powers. In the circumstances I conclude that there has been a violation of the provisions of the Constitution.

[73] Like Ngcobo J, and for the reasons he expresses I conclude that an injustice has been perpetrated and this has resulted in a denial or violation of the right to equal protection and equal benefit of the law. In my view the concept "equal protection of the law" does not mean that identically the same law should apply to all persons or that every law must have universal application no matter what the circumstances or differences. What the concept postulates is the application of the same laws without discrimination to all persons who are similarly situated. It denotes equality of treatment in equal circumstances. It means that among equals the law should be equal and equally administered,[8] and that the like should be treated alike without distinction. Equal protection cannot connote unequal benefits.

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[8] *Jagannath Prasad Sharma v Uttar Pradesh,* AIR 1961 SC 1245.

Appropriate remedy

[74] I now turn to the issue of appropriate remedy. In terms of the petition the applicant seeks an order including:

1. Setting aside the order granted by the SCA on 20 August 2001 refusing the applicant leave to appeal against the order of Sithole AJ;

2. replacing the order of the SCA with an order
   - (a) granting leave to appeal against the order of Sithole AJ; and,
   - (b) that the appeal be heard before the full bench of the Pretoria High Court concurrently with the appeal of Kgatle.

[75] One of the unique aspects of our Constitution is that it includes several express provisions[9] dealing with the authority of the courts to remedy violations of the Bill of Rights and

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[9] Section 38 provides:

"**Enforcement of rights**

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
    - (a) anyone acting in their own interest;
    - (b) anyone acting on behalf of another person who cannot act in their own name;
    - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
    - (d) anyone acting in the public interest; and
    - (e) an association acting in the interest of its members."

the Constitution[10]. Section 38 confers a broad discretion on the Constitutional Court to grant such relief as it considers appropriate in the circumstances.

[76] The core value of the rule of law, in my view, is that all people have equal worth. When the legal order that both shapes and mirrors our society treats some people as though they were worth less that bodes ill for the administration of justice. The reality of this situation would be that the applicant must pay up without the benefit of a trial on the merits while the other party who is similarly situated is afforded the opportunity to appeal to the High Court in Pretoria.

[77] The only appropriate resolution of this matter is for this Court as the guardian of the Constitution to fulfil its duty under section 1 and section 38.

[78] In terms of Rule 20(1)(a) appeals to this Court against judgments or orders of the SCA can only be brought with the special leave of this Court. In view of my conclusion that the SCA orders were irrational it seems that special leave should be granted.

[79] The Constitution confers a substantial power on the Constitutional Court to act as its ultimate guardian and as the guardian, promoter and arbiter of the values enshrined therein. That ultimate power must be exercised solely by the Constitutional Court. That ultimate power must not and cannot be exercised by anyone else.

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[10] See also sections 172 and 167.

[80] I would accordingly grant the relief sought by the applicant, set aside the SCA's order and make an order that the appeal be heard in the Pretoria High Court concurrently with the Kgatle appeal and Heyneke appeal.

SACHS J:

[81] What does one do when the judicial system proceeds on twin and parallel tracks in relation to identical pieces of litigation and arrives at totally different destinations? One takes the matter on appeal so that a single authoritative judicial voice gives a single authoritative answer resulting in a single journey's end. If this Court functioned as a general court of appeal from decisions in the Supreme Court of Appeal, the matter would have been brought to our attention to enable us to resolve the incongruous outcomes. Our jurisdiction is limited, however, to hearing constitutional matters. The issues that were litigated upon were not in themselves of a constitutional nature. Can it be said that such incongruity of outcomes in itself raises a constitutional question? Not without hesitation I have come to the conclusion that in the extraordinary, I might say freak, circumstances of the case, it can. Briefly, my reasons are as follows.

[82] As I see it, no question of fault arises. There is no reason to believe that each of the two panels of the SCA, unaware of the proceedings of the other, did not exercise its judicial discretion in an honest and fair manner and quite legitimately come to a different conclusion.

The issue, however, is not one of the integrity of the judicial process but the consistency of the protection provided by the judicial process. Honestly and fairly as the system was applied, it failed. The Acting Chief Justice candidly, and in my view correctly, acknowledged its fallibility. Such failure does not mean that the system itself was unacceptably faulty. All systems carry with them some risk of error. Yet to countenance a system because the degree of risk is of a bearable order, is not necessarily to countenance each and every lapse produced by it. In this case, objectively speaking, the law failed to protect the rights of the petitioners in an equal manner. The one petitioner was permitted to have his case re-opened in the High Court, the other was not.

[83] What was at stake was not a final determination of the substantive issues but whether or not the doors of justice should be kept open or finally shut. In the circumstances I believe that appropriate relief requires that the applicant be equally allowed to have his day in court. If the merits turn out to be on the side of the respondent, the respondent loses nothing except time. If the merits turn out to be against him, then the respondent will have lost an advantage to which he had not been entitled. It is not a matter of a hard case making bad law but of an extraordinary case requiring an extraordinary solution. I believe that the order proposed by Ngcobo J would provide such a solution and join him in his dissent.

For the applicant:	M Chaskalson instructed by David C Feldman Attorneys, Johannesburg.
For the respondent:	C Puckrin SC and J Blou instructed by Fluxman Rabinowitz - Raphaely Weiner Inc, Johannesburg.