

SACHS J ABRIDGED JUDGMENT (CONCURRING)

Van der Walt v Metcash Trading Limited

[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.