CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 13/09
[2009] ZACC 20

WOMEN'S LEGAL CENTRE TRUST	Applicant
versus	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER FOR HOME AFFAIRS	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
together with	
UNITED ULAMA COUNCIL OF SOUTH AFRICA	First Amicus Curiae
WOMEN'S CULTURAL GROUP	Second Amicus Curiae
ASSOCIATION OF MUSLIM LAWYERS AND ACCOUNTANTS	Third Amicus Curiae
ISLAMIC UNITY CONVENTION	Fourth Amicus Curiae
COALITION OF MUSLIM WOMEN	Fifth Amicus Curiae

And in the application for leave to intervene by:

LAJNATUN NISAA-IL MUSLIMAAT
(ASSOCIATION OF MUSLIM WOMEN OF SOUTH AFRICA)

Heard on : 20 May 2009

Decided on : 22 July 2009

JUDGMENT

CAMERON J:

Introduction

[1] This is an application for direct access to this Court. The applicant seeks an order declaring that the President and Parliament have failed to fulfil obligations the Constitution imposes on them. It asks this Court to direct them to fulfil those obligations within 18 months by "preparing, initiating, enacting and implementing an Act of Parliament providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition."[1]

[2] In coming directly to this Court, the applicant asserts that the failure on which it relies falls within the Court's exclusive jurisdiction under section 167(4)(e) of the Constitution.[2] It asserts alternatively that it should in any event be granted direct access under section 167(6)(a).[3] The Chief Justice on 25 March 2009 issued directions inviting preliminary argument to test these assertions. The directions set the matter down for hearing on two issues only:

[1] The interests that the applicant seeks to protect are set out in [9] below.

[2] Section 167(4)(e) provides that "Only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation".

[3] 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". Direct access is further regulated in Rule 18 of the Rules of this Court.

(a) Are the obligations contended for by the applicant obligations within the meaning of section 167(4)(e) of the Constitution?

(b) If not, is it appropriate in all the circumstances for this Court to be the court of first and last instance in the application for direct access under section 167(6)(a)?

[3] At the hearing of the matter, argument was confined to these questions. All parties approached the first question as raising only a jurisdictional question, that is, as inquiring into the competence of this Court and this Court alone to consider and grant the relief sought at this stage (and not asking whether the relief should be granted). This judgment therefore focuses narrowly on the jurisdiction question, and says nothing about the merits of the applicant's claims. The judgment is thus about jurisdiction only and does not deal with any part of the substantive relief claimed. It considers only whether the application in its current form is properly or appropriately before the Court. The answer depends on whether the constitutional obligation the applicant invokes falls within the exclusive jurisdiction of this Court; or, if it does not, on whether the applicant has made out a good case for direct access.

[4] It follows that this judgment does not consider whether Parliament may be under an obligation to enact legislation to recognise Muslim marriages. Nor does it consider whether such legislation is required by, or if enacted would be consistent

with the equality,[4] dignity,[5] freedom of religion[6] or other provisions of the Bill of Rights.[7]

Parties

[5] The applicant is the Women's Legal Centre Trust (the Women's Legal Centre), an organisation established to advance women's rights by conducting constitutional litigation and advocacy on gender issues. The Women's Legal Centre brings the application in the public interest in terms of section 38(d) of the Constitution.[8] It cites the President as first respondent and the Minister for Justice and Constitutional Development (the Minister) as second respondent. The third respondent is the Minister for Home Affairs, with the Speaker of the National Assembly (the Speaker) and the Chairperson of the National Council of Provinces (the Chairperson) cited as the fourth and fifth respondents. The Lajnatun Nisaa-il Muslimaat (Association of Muslim Women of South Africa) (the Association) applied for leave to intervene as a respondent. The Chief Justice directed that its application would be considered at or after argument on the jurisdictional questions. In view of the conclusion this judgment reaches, it is not necessary to consider the Association's application for joinder.

[4] Section 9 of the Constitution.

[5] Section 10 of the Constitution.

[6] Section 15 of the Constitution.

[7] See, for example, section 31 of the Constitution.

[8] Section 38(d) of the Constitution provides that "anyone acting in the public interest" may approach a court alleging that a right in the Bill of Rights has been infringed or threatened.

[6] The Speaker and the Chairperson contended that they should not have been joined as respondents to the application since the responsibility to initiate legislation lay with the executive, and not with Parliament. At the hearing of the matter, however, their counsel abandoned the argument based on misjoinder, contending instead that the application was premature and that direct access was inappropriate.

[7] Five organisations have, with the consent of the parties, been admitted as amici. Three of these organisations, the United Ulama Council of South Africa, the Coalition of Muslim Women and the Association of Muslim Lawyers and Accountants, supported the stance of the Women's Legal Centre on the merits of its application as well as on the question of direct access. The Women's Cultural Group and the Islamic Unity Convention opposed the application. The Chief Justice issued directions allowing the amici as well as the intervening applicant to make submissions on the preliminary questions.

Background

[8] In July 2003 the South African Law Reform Commission submitted a report entitled "Islamic Marriages and Related Matters (Project 59)" to the Minister. The report included a draft Muslim Marriages Bill (the Bill). This was produced after an extensive notice and comment process that included meetings and workshops with various organisations representing sections of the Muslim community. The Bill includes detailed provisions recognising Muslim marriages as valid and regulating

their consequences. However, it proved controversial, and progress on its passage appears to have stalled.

[9] The Women's Legal Centre submits that the Constitution expressly permits legal recognition of a system of personal and family law adhered to by people of a particular religion, but that the executive and the legislature have failed to pass legislation recognising and regulating marriages concluded in terms of Islamic law. Marriages may be solemnised under the Marriage Act 25 of 1961 where the imam is registered as a marriage officer. But marriages solemnised by imams who are not marriage officers are not recognised as marriages. The Women's Legal Centre complains that the Constitution obliges the President and Parliament to prepare, initiate, and enact the legislation envisaged – but that they have taken no meaningful steps to pass such legislation since July 2003. It says their failure to do so breaches, amongst others, the right to equality,[9] the right to dignity,[10] the right to freedom of conscience, religion, thought, belief and opinion,[11] the right to participate in the cultural life of one's choice[12] and the right to enjoy and practise religion.[13]

[10] An affidavit filed on behalf of the President, the Minister and the Minister for Home Affairs contested the merits of the Women's Legal Centre's assertions, and disputed its entitlement to relief. These respondents contended that the application

[9] Section 9 of the Constitution.

[10] Section 10 of the Constitution.

[11] Section 15 of the Constitution.

[12] Section 30 of the Constitution.

[13] Section 31 of the Constitution.

sought "the compression of a complex and necessary process of public debate, government reflection, and legislative enactment" and urged that it be dismissed.

Section 167(4)(e) exclusive jurisdiction: the meaning of "Parliament or the President has failed to fulfil a constitutional obligation"

[11] This Court has previously held that the words "fulfil a constitutional obligation" in section 167(4)(e) must be given a narrow meaning.[14] This is because they are part of a broader distribution of jurisdictional competence in the Constitution. If the words pertained to all the President's constitutional duties, the section would run right across section 172(2)(a), which gives other courts jurisdiction over "conduct of the President". Like reasoning applies to obligations the Constitution imposes on Parliament. Section 172(2)(a) grants other courts jurisdiction over the validity of Acts of Parliament (albeit subject to confirmation by this Court).[15] If all this were subsumed within this Court's exclusive power to pronounce on whether Parliament has failed to fulfil "a constitutional obligation", there would be nothing left for section 172(2)(a), and this would make no sense.

[12] The two provisions must thus be interpreted in tandem. On the one hand, the phrase "failed to fulfil a constitutional obligation" in section 167(4)(e) must be

[14] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 25. The Court held that it was not necessary in that matter to decide what that narrow meaning should be, adding that it may depend on the facts and the precise nature of the challenges to the conduct of the President.

[15] Section 172(2)(a) of the Constitution provides that: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

narrowly construed. The corollary is that section 172(2)(a), which gives other courts competence to scrutinise the constitutionality of presidential and parliamentary acts, must be widely interpreted. This entails recognising a broad category of presidential and parliamentary acts or omissions that are subject to the courts' review, but not on the ground that they constitute a failure "to fulfil a constitutional obligation."

[13] The practical implications of this approach can be seen in decisions so far:

a. This Court has held that the High Court has jurisdiction to scrutinise and review the conduct of the President in appointing a commission of enquiry under section 84(2)(f) of the Constitution.[16]

b. The Supreme Court of Appeal has held that it and the High Courts are precluded from hearing a complaint that a statute is invalid on the ground that the National Assembly failed to "facilitate public involvement" in its legislative processes under section 59 of the Constitution.[17]

c. This Court, endorsing the decision of the Supreme Court of Appeal, has held that it alone has jurisdiction to determine whether Parliament has fulfilled its obligation to facilitate public involvement in passing legislation.[18]

[16] Above n 14.

[17] *King and Others v Attorneys' Fidelity Fund Board of Control and Another* 2006 (1) SA 474 (SCA); 2006 (4) BCLR 462 (SCA).

[18] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[14] Section 167(4)(e) must be read in the setting of the provision as a whole, which determines the powers of this Court, and of subsection (4) specifically, which allocates it exclusive powers. The unifying theme of the Constitution's allocation of jurisdictional competence is that areas of intense political contention are reserved for the exclusive jurisdiction of this Court. Thus subsection (4) empowers this Court, and this Court alone, to (a) determine the status, powers and functions of disputant organs of state; (b) scrutinise bills in defined circumstances; (c) hear a challenge by legislators to newly-assented provincial or national legislation; (d) vet amendments to the Constitution itself; and (f) certify provincial constitutions.

[15] These exclusive competencies draw on the Court's political legitimacy. They reflect its special status as guardian of the Constitution, with exclusively constitutional functions[19] and a specially-determined composition.[20] Any exercise of the judicial function may cause tension with the other arms of government and trigger political contention. Hence the mere fact that a matter is or may become politically fraught

[19] Section 167(3)(b) of the Constitution provides that the Constitutional Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters".

[20] Section 174(4) of the Constitution provides that:

> "The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
>
> *(a)* The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
>
> *(b)* The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
>
> *(c)* The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list."

does not of itself mean that only this Court has jurisdiction to deal with it. More is needed. Dispositive indications may lie in the nature of the obligation, whether its content can be clearly ascertained, whether it is stated unambiguously in the Constitution, how its content is determined, and whether it is capacity-defining or power-conferring.[21]

[16] Section 167(4)(e) itself contains a significant pointer: its agent-specific focus. The provision mentions "Parliament" and "the President", and them alone. This Court has recently observed that the constitutional duties in the provision are "pointedly reserved" for the actors in question.[22] The wording suggests that the exclusive jurisdiction relates to obligations resting on these agents only, in contradistinction to constitutional duties they may bear together with other agents. And agent-specificity runs counter to the scope and substance of the application. Although focusing the relief it seeks on the principal parties it has cited, namely the President and the chief office-bearers of Parliament, the Women's Legal Centre cannot locate its claims inside this Court's exclusive jurisdiction by focusing only on the agents the section mentions. The substance of the obligation the Women's Legal Centre asks this Court to enforce is to enact and implement legislation. It sources that obligation in various

[21] Compare *Doctors for Life*, above n 18 at paras 25-6 (Ngcobo J, for the Court) and para 260 (Yacoob J, dissenting).

[22] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15, Case No CCT 67/08, 5 June 2009, as yet unreported, at para 36. The Court affirmed that section 167(4)(e)—

> "should be construed restrictively in order to give full recognition to the power of the Supreme Court of Appeal and the High Court to determine whether conduct of the President is constitutionally valid. On the other hand, the Constitution does contemplate that certain duties are pointedly reserved for the President. This class of obligations is derived from the Constitution itself or from legislation. It includes specified duties that the President as Head of State and head of the national executive must fulfil." (Footnotes omitted.)

provisions of the Bill of Rights including the right to equality and to dignity, but particularly section 7(2) which provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[17] It is significant that the Constitution imposes the obligation on "the state" to respect, protect, promote and fulfil the rights in the Bill of Rights. The focus on "the state" is sharpened by the terms of section 8(1) of the Constitution. Under that provision, the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state." This indicates that, apart from any other parties to whom the Bill of Rights applies, it is "the state" that is primarily burdened with the duty to secure fulfilment of rights. Thus the Constitution requires "the state" to take reasonable legislative and other measures within its resources to promote access to land,[23] to adequate housing,[24] and to healthcare services, sufficient food and water and social security.[25]

[18] The Constitution nowhere defines "the state". It provides that government "is constituted as national, provincial, and local spheres of government"[26] and defines "organ of state" as meaning—

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution—

[23] Section 25(5) of the Constitution.

[24] Section 26 of the Constitution.

[25] Section 27 of the Constitution.

[26] Section 40(1) of the Constitution.

> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation,
>
> but does not include a court or judicial officer".[27]

[19] These provisions suggest that "the state" includes all those actors who derive their authority from the Constitution, including Parliament, government at national, provincial and local levels, state institutions supporting constitutional democracy created by Chapter 9 of the Constitution,[28] "state departments and administrations"[29] as well as bodies created by statute.

[20] By contrast with this broad assemblage of duty-bearing organs and institutions, section 167(4)(e) is precise in delineating the actors on whom it imposes obligations. They are the President and Parliament. "The state" is not included. Constitutional duties the state and its organs must perform collaboratively or jointly do not fall within its purview. The provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament, and on them alone. It does not embrace the President when he or she acts as part of the national executive,[30] nor Parliament when it is required to act not alone but as part of other constituent

[27] Section 239 of the Constitution.

[28] These are listed in section 181(1) of the Constitution as the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission.

[29] See section 85(2)(c) and section 188(1)(a) of the Constitution.

[30] Above n 22 at paras 37-8.

elements of the state. Were it to be otherwise, it would undermine the jurisdiction of the High Court and the Supreme Court of Appeal envisaged in section 172(2)(a).

[21] This analysis has radical implications for the applicant's case in the form in which it has been brought. For the obligation to enact legislation to fulfil the rights in the Bill of Rights falls upon the national executive, organs of state, Chapter 9 institutions, Parliament and the President. The obligation does not fall on the President and Parliament alone.

[22] Counsel for the Women's Legal Centre rightly conceded this. But this concession is fatal to the proceedings in the form they have been brought. This is because the obligation the applicant invokes – the duty to prepare, enact and implement legislation in fulfilment of the Bill of Rights – cannot be distinguished from other obligations arising from the Bill of Rights, including securing the right to vote and the right to the progressive realisation of socioeconomic entitlements. Over these obligations other courts patently have jurisdiction. By contrast, the obligation that was at issue in *Doctors for Life*,[31] namely, the obligation to facilitate public involvement in its legislative processes, fell pointedly and solely upon Parliament.[32]

[23] The fact that the obligation on which the Women's Legal Centre relies may encompass the President and Parliament amongst other state actors (a matter we do not decide now) is not sufficient to bring it within the exclusive jurisdiction of this

[31] Above n 18.

[32] Section 59 (National Assembly) and section 72 (National Council of Provinces) of the Constitution.

Court. It must fall on the President and Parliament alone. Resisting the applicant's attempt to engage the Court through section 167(4)(e), the respondents pointed out correctly that in terms of section 85 of the Constitution,[33] the President exercises executive authority in collaboration with other members of the national executive. The responsibility for preparing and initiating legislation falls on the national executive as a whole, and not exclusively on the President acting as Head of State.

[24] In trying to save the proceedings in their present form, the Women's Legal Centre and those organisations who supported its stance took recourse to statements this Court made in *Doctors for Life*.[34] The Women's Legal Centre submitted that, on the respondents' own account, the adjudication of the present dispute involved questions that relate to sensitive areas of separation of powers and would require a decision on a crucial political question. It would therefore fall within section 167(4)(e) and this Court's exclusive jurisdiction. But, as indicated earlier, all exercise of judicial power in some way affects the separation of powers and may involve the judicial determination of questions with political overtones. That is not enough for this Court's exclusive competency to be engaged. The obligations invoked must, in addition, entail an agent-specific focus on the President and Parliament alone. That is not the case here.

[33] Section 85(2)(d) provides that: "The President exercises the executive authority, together with the other members of the Cabinet, by preparing and initiating legislation".

[34] Above n 18 at paras 23-6.

[25] It follows that since the application was directed solely to this Court and sought to engage its exclusive jurisdiction, by-passing other courts with constitutional jurisdiction, it was incorrectly conceived.

Direct access

[26] The Women's Legal Centre submitted in the alternative that it was nonetheless in the interests of justice for this Court to hear and determine the application as a court of first and final instance. It urged that it seeks enactment and enforcement of urgent and important legislation, and that the Court should provide certainty about the problems arising from non-recognition of Muslim marriages. It argued that the relief sought does not involve the development of the common law (which would normally require the attention of other courts). In any event, it submitted, this Court has the benefit of past pronouncements that other courts have made on the injurious effects of non-recognition.[35] The Women's Legal Centre also contended that parties to and children of Muslim marriages would suffer from piecemeal adjudication of the issues and that many of the affected parties do not have legal advice or the resources to litigate through other courts.

[27] However, the power to grant litigants direct access outside the Court's exclusive competence is one this Court rarely exercises, and with good reason. It is

[35] The applicant invokes the following cases from the High Court: *Ryland v Edros* 1997 (2) SA 690 (C); 1997 (1) BCLR 77 (C); *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C); *Khan v Khan* 2005 (2) SA 272 (T); *Hassam v Jacobs NO and Others* [2008] 4 All SA 350 (C). From the Supreme Court of Appeal, it cites *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA). It argues that similar views have been expressed in this Court in *Fraser v Children's Court, Pretoria North and Others* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) and *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

loath to be a court of first and last instance, thereby depriving all parties to a dispute of a right of appeal. It is also loath to deprive itself of the benefit of other courts' insights.[36]

[28] In addition, a multi-stage litigation process has the advantage of isolating and clarifying issues as well as bringing to the fore the evidence that is most pertinent to them. This is undeniably a case in which that process would be beneficial not only to the litigants but also for the Court. The application elicited an intense response from a wide range of organisations concerned with the position of women in the Muslim community, the application of Islamic law and the interests of the Muslim community as a whole. Five such organisations secured amicus status, while an application by a further organisation to intervene was held in abeyance pending determination of the preliminary issues. It is clear from these applications that not only the legal issues, but also the factual issues, are much in dispute. They may require the resolution of conflicting expert and other evidence. It is not appropriate for this Court to attempt that task as a court of first and final instance.

[29] The ventilation of the difficult issues the application involves in the High Court, followed possibly by a considered judgment from the Supreme Court of Appeal, will ensure that the views of these organisations, and the evidence that may be germane to their contentions, will be properly considered.

[36] See, for example, *AParty and Another v Minister for Home Affairs and Others; Moloko and Others v Minister for Home Affairs and Another* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at para 30.

[30] The application for direct access cannot be granted.

[31] Accordingly, the application in its present form is misconceived and must be dismissed. In recording this conclusion, it is important to emphasise once again that this outcome does not reflect on the substance of the claim that the President and Parliament are under a duty to enact the legislation in question.

Costs

[32] Counsel for all respondents, though contending that the application was misconceived, left the question of costs in the hands of the Court. The general rule in this Court is that a private litigant who seeks to assert legitimate constitutional entitlements against the state should, even if unsuccessful, not be made to pay the state's costs.[37] That rule is manifestly appropriate here. There should be no order as to costs.

Order

[33] The application for direct access is dismissed. There is no order as to costs.

Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, and Yacoob J concur in the judgment of Cameron J.

[37] See *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138 and *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14, Case No CCT 80/08, 3 June 2009, as yet unreported, at paras 22-5.

For the Applicant:	Advocate AM Breitenbach SC and Advocate N Mangcu-Lockwood instructed by the Women's Legal Centre Trust.
For the First, Second and Third Respondents:	Advocate MTK Moerane SC and Advocate L Gcabashe instructed by the State Attorney, Johannesburg.
For the Fourth and Fifth Respondents:	Advocate N Cassim SC instructed by the State Attorney, Cape Town.