CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 81/09
[2010] ZACC 27

In the matter of:

THE STATE

versus

KHOLEKILE WITNESS THUNZI

and

SIYABULELA MLONZI

with

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

SPEAKER OF THE NATIONAL ASSEMBLY

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES

Heard on : 11 November 2010

Decided on : 2 December 2010

JUDGMENT

FRONEMAN J:

Introduction

[1] This is a matter that stems from a referral to this Court for confirmation of an order made by the Eastern Cape High Court, Mthatha (High Court). The High Court declared the "applicability" of section 4 of the Dangerous Weapons Act (Transkei)[1] (DWA (Tk)) unconstitutional. This was on the basis that it unfairly discriminated against perpetrators of crime in the erstwhile Transkei who were subject to its harsher sentencing regime.

[2] In the majority judgment[2] Skweyiya J found that in declaring the "applicability" of section 4 of the DWA (Tk) to be unconstitutional, rather than the provisions themselves, the order of the High Court was not subject to confirmation by the Constitutional Court in terms of sections 167(5) and 172(2)(a) of the Constitution. However, because the High Court had confined its order of invalidity to cases where the accused had not yet pleaded, leaving the order intact would perpetuate an injustice against those who had already pleaded in terms of section 4 of the DWA (Tk). The Court exercised its inherent power under section 173 of the Constitution[3] to correct the High Court's order to the extent that it perpetuates an injustice.

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[1] 71 of 1968.

[2] *S v Thunzi and Another*, Case No CCT 81/09, as yet unreported, 5 August 2010.

[3] Section 173 states that:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[3] While considering the matter, it transpired that there was also parallel legislation regulating the use of dangerous weapons in the former homelands of Venda,[4] Bophuthatswana[5] and Ciskei.[6] Unlike the DWA (Tk), none of these Acts created differential sentencing regimes for persons sentenced. The Court raised the question whether there was a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons.

[4] The issue whether there was a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons, especially considering that 16 years had passed since South Africa became a constitutional democracy, was alluded to in the following terms by Skweyiya J:

> "Parliament has not established a uniform system of law governing the use of dangerous weapons. Instead, it has retained the former TBVC states' laws, and amended them to replicate the terms of the DWA (SA). The result is that the different laws governing dangerous weapons have, for all apparent purposes, been deliberately retained by the legislature.
>
> If the constitutional rationale for retaining old order legislation was limited and sought only to facilitate an orderly transition to a new constitutional order, then the question is whether the Constitution contemplates that old order legislation could serve any other purpose. More specifically, if the transitional provisions contemplated that the DWA (Tk) and its counterparts in Bophuthatswana, Venda and Ciskei would continue to exist only until Parliament establishes a uniform system of law governing the use of dangerous

[4] Act 71 of 1968.

[5] Act 28 of 1982.

[6] Act 71 of 1968.

> weapons, does it not follow that there is a *constitutional obligation* on Parliament to establish uniform legislation on the use of dangerous weapons? If the transitional provisions create such an obligation, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons? And, if so, what is the appropriate relief?"[7]

[5] Skweyiya J found that these issues call into question the constitutionality of the very existence of the multiple Dangerous Weapons Acts that continue to operate in South Africa. That issue had, however, not been adequately argued. Relying on *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1),*[8] he considered it necessary to adopt an approach similar to that adopted in that matter:

> ". . . where, on the papers before it, there is doubt as to whether a particular law or conduct is consistent with the Constitution, this Court may be obliged to investigate the matter. This would be particularly so where, as here, an important constitutional issue is involved. In the *Executive Council, Western Cape Legislature and Others v President of Republic of South Africa* this Court, subsequent to the hearing, realised that there were questions regarding section 235(8) of the interim Constitution that had not been addressed by counsel in their written or oral argument. Because of the importance of these questions, the Court considered it necessary to afford the parties an opportunity to make submissions on those questions and the Court the benefit of debating them. The parties' legal representatives were therefore invited urgently to canvass the particular issues at a further hearing which was set down at fairly short notice. This is the course that must be followed in this case. It is in the interests of justice that these important issues . . . be investigated." (Footnote omitted.)

[7] Above n 1 at paras 65-6.

[8] [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 68.

[6] Directions were issued calling on the parties to address the following:

i. Do the provisions in item 2 of Schedule 6 to the Constitution[9] impose a constitutional obligation on Parliament to rationalise the laws governing the use of dangerous weapons in the territories of the former Transkei, Bophuthatswana, Venda and Ciskei?

ii. If so, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons throughout the Republic of South Africa?

iii. If question (ii) above is answered in the affirmative, what order, if any, should this Court make?

iv. Is the continued operation of the Dangerous Weapons Act 71 of 1968 (Transkei), Dangerous Weapons Act 71 of 1968 (Bophuthatswana), Dangerous Weapons Act 71 of 1968 (Venda) and Dangerous Weapons Act 71 of 1968 (Ciskei) unconstitutional and should these statutes be struck down on any other basis?

[7] The Court directed that the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (Parliament) be joined as parties to the proceedings and that they file submissions together with the Minister for Justice and Constitutional

[9] Item 2 of Schedule 6 to the Constitution states:

"(1) All law that was in force when the new Constitution took effect, continues in force, subject to—

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1)—

(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and

(b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution."

Development (Minister). Submissions were filed on behalf of all of them. Mr Thunzi, Mr Mlonzi and the Director of Public Prosecutions, Mthatha, were invited to make submissions if they so wished.

[8] At the hearing Parliament accepted, and it was common cause, that it had an obligation to effect rationalisation in order to have uniform national legislation regulating the use of dangerous weapons. The Minister indicated that the process of rationalisation had begun and that the necessary legislation would be introduced in Parliament in the 2011 legislative programme. Notices triggering the operation of the offending clauses in the different pieces of legislation, which provided for differential sentencing regimes, had been withdrawn.[10] The factual situation is thus that parallel legislation exists regulating the use of dangerous weapons in the former homelands, but that none of the provisions are operational.

[9] In these circumstances it is not in the interests of justice for us to consider whether this Court has exclusive jurisdiction to consider Parliament's obligations in relation to the impugned legislation.[11] It is also not in the interests of justice to consider whether the mere existence of parallel legislation regulating the use of dangerous weapons is unconstitutional or to make any order invalidating that legislation with immediate effect

[10] See Government Gazette 9414, GN R1047, 10 November 2010 and Government Gazette 9414, GN R1048, 10 November 2010.

[11] Section 167(4)(e) of the Constitution. See also *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC).

and making a further order in terms of section 172(1)(b) of the Constitution. We have a solemn undertaking from the other two arms of government that the process of rationalisation will be given effect to in the 2011 parliamentary session.[12] That undertaking is formally noted here. The offending legislation is not presently in operation in any part of the country and will thus not adversely affect any person.

[10] In these circumstances, I consider it appropriate to postpone this matter until 29 November 2011. The Minister and Parliament will be directed to file affidavits by 8 November 2011, indicating the steps they have taken in pursuance of the undertaking. If the matter is finalised before then, this date can be anticipated.

[11] This matter concerns only one aspect of the rationalisation of transitional measures in the Constitution. Given that this matter will be before Parliament, there is no reason not to expect that similar speedy consideration will be given to other laws that might owe their existence merely to the transition from the old to the new order.

Order

[12] The following order is made:

(a) The matter is postponed to Tuesday, 29 November 2011.

[12] Compare *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 8, where this Court postponed *sine die* the confirmation of a declaration of invalidity pending the enactment of new legislation that would regulate the matter.

(b) The Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister for Justice and Constitutional Development are required to notify this Court by Tuesday, 8 November 2011 of the legislative steps taken to fulfill the undertaking to rationalise the laws that are the subject of this litigation.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Froneman J.

For the State:	Advocate S Mbewu instructed by the Director of Public Prosecutions, Mthatha.
For Mr Thunzi and Mr Mlonzi:	Advocate E Crouse instructed by Legal Aid South Africa, Port Elizabeth Justice Centre.
For the Minister for Justice and Constitutional Development, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces:	Advocate PJJ De Jager SC and Advocate Holland-Müter instructed by the State Attorney, Johannesburg.