CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 100/13
[2013] ZACC 27

In the matter between:

MZOXOLO MAGIDIWANA AND OTHER INJURED AND ARRESTED PERSONS	First Applicant
FAMILIES OF DECEASED PERSONS	Second Applicant
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	Third Applicant
LEDINGOANE FAMILY	Fourth Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
LEGAL AID SOUTH AFRICA	Third Respondent
MARIKANA COMMISSION OF INQUIRY	Fourth Respondent
NATIONAL COMMISSIONER OF POLICE	Fifth Respondent
LONDON MINING COMPANY PLC	Sixth Respondent
SA HUMAN RIGHTS COMMISSION	Seventh Respondent
and	

BLACK LAWYERS ASSOCIATION Amicus Curiae

Decided on : 19 August 2013

CORAM: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J

JUDGMENT

THE COURT:

[1] The first applicants (applicants) are members of a class of persons who were arrested or injured after the shooting of a number of people by members of the South African Police Service at the Marikana mine during August 2012. The Marikana Commission of Inquiry (Commission) was established by the President to investigate and report on "matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana".[1] The Commission commenced its work on 1 October 2012 and at the time when the applicants approached the North Gauteng High Court, Pretoria (High Court) its term had been extended to 30 October 2013.

[2] To cover the legal and other expenses incurred by their participation in the Commission's proceedings, the applicants procured funding from a non-governmental entity, the Raith Foundation. However, this funding was only secured for the six-month

[1] Proclamation 50 of 2012, published in *Government Gazette* 35680 of 12 September 2012. The details regarding the appointment and terms of reference are available on the Commission's website, http://www.marikanacomm.org.za/.

period from October 2012 until March 2013. The applicants have been unable to secure funding for the period April 2013 until October 2013. Neither have they been able to secure contingent funding should the Commission's term be extended once again.[2]

[3] The record before us indicates that the applicants approached the Minister of Justice and Constitutional Development (Minister) to fund the costs of their continued participation in the Commission's proceedings. The request was declined on the basis that the Minister could find "no legal framework through which government can contribute to the legal expenses of any of the parties who participate in the commission of inquiry."

[4] The applicants also sought funding from Legal Aid South Africa, a statutory body whose function is to "render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution".[3] This request was also denied, on the bases that (a) Legal Aid South Africa was under severe budgetary constraints and (b) its policy documents did not make provision for it to fund legal expenses incurred at commissions of inquiry.

[5] The applicants brought an urgent application before the High Court seeking relief in two parts: urgent temporary relief in Part A of the notice of motion and final relief in

[2] The Commission was originally intended to run for four months.

[3] Section 3 of the Legal Aid Act 22 of 1969.

the main application in Part B. The relief sought in both parts was of the same nature, namely that the first, second and third respondents – the President, the Minister and Legal Aid South Africa – must provide or ensure legal aid at state expense to the applicants in the proceedings before the Commission. Initially, an order was also sought to interdict the Commission from proceeding with its work pending final determination of the relief sought in the main application, but this was abandoned and the notice of motion was amended to seek for the temporary provision of legal aid at state expense instead.

[6] What was at issue in the High Court was the first part of the relief sought. Raulinga J dismissed the urgent application for temporary relief. The applicants now seek leave to appeal urgently and directly to this Court "against those portions of the judgment and order . . . which dealt with the merits of Part A and/or Part B of the relevant application". This is a rather strange way of putting things. What may be appealed against is the order made by the High Court. The only relevant part of the order that needs consideration is the dismissal of the application for the temporary relief sought in Part A.[4]

[7] The application for leave to appeal must be refused for the reasons that follow.

[4] The full order reads:

> "(a) The application is urgent.
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> (b) The class action is certified.
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> (c) The main application in Part A is dismissed.
>
> (d) There is no order as to costs."

[8] This Court is not well-equipped to deal with urgent matters in general.[5] Where an appeal relates to a temporary order, this difficulty becomes even more acute. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[6] Moseneke DCJ stated:

> "It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule.
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> . . .
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> This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is 'the interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances.
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> . . .
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> A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review, except perhaps where the review has no prospects of success whatsoever.
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> . . .
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> A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and

[5] *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) at para 39.

[6] [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*National Treasury*).

> assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."[7] (Footnotes omitted.)

[9] The High Court, in rejecting the applicants' claim for relief, referred to these principles:

> "Although in this case, the court dealt with a temporary restraining order, the principle applied is the same. I need therefore to ask myself not only whether an interim interdict against an authorised state functionary is competent, but rather whether it is constitutionally appropriate to grant the interdict. The funds allocated to the second and third respondents is a result of an executive decision about ordering of public resources, over which the government disposes and for which it, and it alone has the public responsibility. The duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive government function domain. I can only grant such an order if there is proof of unlawfulness or fraud or corruption. I do not find any in this case. Therefore, I will not interfere with the power and the prerogative to formulate and implement policy on how to finance public projects and even how the applicants must be funded. That power resides in the exclusive domain of the national executive subject to budgetary . . . inevitably call for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order – *National Treasury* supra. There are also other competing interests, such as, food-security, education, health and human-settlement."[8]

[10] This was a prudent and appropriate course to adopt. There is indeed no fraud or corruption claimed here and the High Court's finding, that there was no unlawfulness

[7] Id at paras 24-6 and 66.

[8] *Magidiwana and Another v President of the Republic of SA and Others* [2013] ZAGPPHC 220 at para 44.

either, is a conclusion that must be treated with deference in an appeal against an interim order. As stated in *National Treasury*, "another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review, except perhaps where the review has no prospects of success whatsoever".[9]

[11] With that caution in mind, we nevertheless consider it appropriate, in the light of the clear countervailing public interest in the Commission's work and the outcome of this matter, to consider the High Court's finding that the respondents' refusal to provide legal aid did not justify the granting of the interim relief sought by the applicants. Our consideration of the High Court's finding must not, however, be seen as anticipating the outcome of the main review application and the final relief sought there.

[12] There are only three provisions in the Bill of Rights that explicitly entitle someone to claim legal representation at state expense. One provides that a child has the right to have a legal practitioner assigned to him or her by the state at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result.[10] Another is that everyone who is detained has the right to have a legal practitioner assigned to him

[9] *National Treasury* above n 6 at para 26.

[10] Section 28(1)(h) of the Constitution.

or her by the state at state expense, if substantial injustice would otherwise result.[11] The third is that every accused has a right to a fair trial, which includes the right to have a legal practitioner assigned to him or her by the state and at state expense, if substantial injustice would otherwise result.[12] These do not apply here. The applicants are neither children nor detained persons, and the proceedings that are the subject-matter of this application are not a civil or criminal trial.

[13] The applicants sought further succour for their claim for state-funded legal representation by alleging infringements of section 34 (access to courts)[13] and section 9 (equality)[14] of the Constitution, and by relying on general considerations of fairness. It

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[11] Section 35(2)(c).

[12] Section 35(3)(g).

[13] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[14] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
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> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

suffices for the limited purpose referred to above, to state that none of these arguments warrants our intervention in the order granted by Raulinga J.

[14] Section 34 deals with disputes "that can be resolved by the application of law". The Commission's findings are not necessarily to be equated to a resolution of legal disputes by a court of law.

[15] It may be that it would be commendable and fairer to the applicants that they be afforded legal representation at state expense in circumstances where state organs are given these privileges and where mining corporations are able to afford the huge legal fees involved. The power to appoint a commission of inquiry is mandated by the Constitution.[15] It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who should be heard by it. Absent a fair

[15] Section 84(2)(f) provides:

> "The President is responsible for appointing commissions of inquiry".

opportunity, the search for truth and the purpose of the Commission may be compromised.

[16] This means that unfairness may arise when adequate legal representation is not afforded. But this does not mean that courts have the power to order the executive branch of government on how to deploy state resources. And whether the desirable objective of 'equality of arms' before a commission translates into a right to legal representation that must be provided at state expense is a contestable issue. A consideration that comes into play is that it is the object of the Legal Aid Act[16] to render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution.[17] Its provisions have not been challenged as constitutionally invalid, nor has the refusal by Legal Aid South Africa to grant the applicants legal aid been challenged on review.

[17] In the result the application for leave to appeal should be dismissed, both because there are no reasonable prospects of success in relation to challenging the dismissal of the application for interim relief in the High Court, and because it is not in the interests of justice to grant leave in the particular circumstances of this case where the disputed issues still have to be determined in the main review application.

[16] 22 of 1969.

[17] Id at section 3.

[18] It hardly needs stating that a costs order is not called for.

Order

[19] In terms of rule 19(6)(b) the application for leave to appeal is dismissed.

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