



CONSTITUTIONAL COURT OF SOUTH AFRICA

Legal Aid South Africa v Mzoxolo Magidiwana and Others

CCT 188/14

Date of hearing: 14 May 2015

Date of judgment: 22 September 2015

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the provision of State funds for legal representation before a commission of inquiry.

In August 2012, respondents who were employees (miners) of Lonmin Plc Mine in Marikana, Rustenburg went on strike for wage increases. During the strike, the miners were part of a group either arrested or injured after the shooting of a number of people by the police. Following the incident, the President established the Marikana Commission of Inquiry (Commission) to investigate and make recommendations on the role of various state and private parties as well as individuals, in promoting the situation of conflict and confrontation which gave rise to the events at Marikana.

The miners secured private funding for legal representation for the first few months of the Commission. They applied to the applicant, Legal Aid South Africa (Legal Aid), for funding for the remaining duration of the proceedings. Legal Aid refused the application on the grounds that the legal aid system was not intended to cover commissions of inquiry. Additionally, it said that it had agreed to fund the legal representation of 23 families of deceased miners (families) at the Commission. It explained that, in the light of budgetary constraints, it could not also fund the miners who were either arrested or injured.

The first respondent, Mr Mzoxolo Magidiwana, on behalf of, and together with, the miners approached the North Gauteng High Court, Pretoria (High Court) to compel the President, the Minister of Justice and Constitutional Development, and Legal Aid, to provide the miners with adequate state-funded legal representation for the remainder of the Commission. The High Court granted the application, finding that Legal Aid's

refusal to fund the miners was irrational and constitutionally invalid as it violated the miners' rights to equality before the law, protection from unfair discrimination, and their right of access to a fair public hearing. Legal Aid appealed to the Supreme Court of Appeal but reached an agreement with the miners to provide the requisite funding. The Supreme Court of Appeal dismissed the appeal on the basis that the decision would have no practical effect because the position of the parties would remain unaltered by the outcome of any appeal, since the funding had been advanced, and Legal Aid had agreed not to claim a refund in the event the appeal was in their favour.

Before this Court, Legal Aid contended that the High Court laid down incorrect principles of law that would negatively impact on the work of Legal Aid, and limit the ambit of its CEO's discretion. The respondents argued that after the High Court decision, the legislative scheme governing Legal Aid's funding decisions had changed and the current funding guide made specific provision for funding legal representation at commissions of inquiry in certain instances. As such, any decision regarding the constitutional validity of the funding decision was irrelevant to future cases. The respondents also argued that the right of access to a fair public hearing imposed a duty on Legal Aid to provide state-funded legal representation to the miners; that the decision to fund all other state parties as well as the families, but not the miners, was irrational and constituted unfair discrimination.

In the majority judgment, written by Theron AJ (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Molemela AJ, and Tshiqi AJ concurring), this Court dismissed Legal Aid's application for leave to appeal, finding that the matter was moot, as an appeal from the decision of the High Court would have no practical effect on any of the parties. The Court found that the High Court's interpretation of the right to a fair public hearing did not affect the discretionary power of Legal Aid, and imposed no obligation on it to fund legal representation at commissions of inquiry in the future.

In a dissenting judgment, Nkabinde J held that although the matter was moot, it was in the public interest for this Court to decide it. In her view, the High Court judgment rested on a novel and expansive interpretation of section 34 that would have practical effect on the operations of Legal Aid. That was so because the principles laid down by the High Court meant that the interests of participants in commissions of inquiry are prioritised above those of the indigent and vulnerable people who are expressly entitled, under statute and the Constitution, to have access to state-funded legal representation. She would have held that, a proper interpretation of the constitutional right of access to courts did not oblige Legal Aid to fund the miners' legal representation before the Commission. The dissent concluded that the High Court erred in its finding that Legal Aid had acted irrationally and breached the miners' right to equality.