



CONSTITUTIONAL COURT OF SOUTH AFRICA

Gary Walter van der Merwe and Another v Inspector Taylor and Others

Case CCT 45/06

Decided on: 14 September 2007

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.

This morning, the Constitutional Court handed down judgment in this matter. Mr van der Merwe and the company he ran had made an application for leave to appeal to this Court against the judgment of the full court of the Cape High Court which dismissed their appeal against the judgment of the High Court, the latter Court having held in favour of the State. Mr van der Merwe was arrested at the Cape Town International Airport, having been found in possession of €130 000 and US\$21 249 allegedly in excess of his permissible travel allowance. He explained to the authorities that he was holding the money on behalf of a group of people with whom he was travelling overseas, and who had left the country two days earlier. Most of the members of the group were members of his family, including his children.

In this Court Mr van der Merwe sought the return of the €130 000. He argued that he owned the currency and that the State officials had no legal basis to hold it. During argument the parties agreed that the currency was lawfully seized in terms of section 20 of the Criminal Procedure Act, 1977 (the CPA) and that the criminal trial had not yet been concluded. The State contended that in order to succeed in a claim for the return of the currency under *rei vindicatio*, Mr van der Merwe ought to have established that he was the owner of the currency. The State further contended that the full court had correctly found that the applicants had failed to establish ownership of the currency.

In a minority judgment setting out the full background of the case, Mokgoro J granted leave to appeal. She found that the first applicant proved his ownership of €20 865 and that the full court erred in holding otherwise. This finding is based on the fact that he purchased this currency with his credit card and that the customer receipts of the bank showed that this amount was issued to him personally. With regard to the rest of the Euros, the €109 135, Mokgoro J found that the currency was bought with the funds standing to the credit of his Nedbank account and that there was no evidence that he had

intention to transfer ownership to members of the group he was travelling with, nor is there any evidence that any of the members of the group considered themselves owners of the currency. Consequently, she held that the first applicant was the owner of the €109 135.

On the basis that the respondents failed to inform the Court as to whether the currency was needed for purposes of a criminal trial, she held that she would have ordered the State to return the foreign currency to Mr van der Merwe and would have ordered the respondents to pay the applicants' costs.

Sachs J agreed with the majority to the extent that Mr van der Merwe had purported to carry the bulk of the foreign exchange on behalf of the other members of the group, and could not lawfully backtrack on that. As far as Mr Van der Merwe's quota was concerned, however, he agreed with Mokgoro J that the State had not established a legal basis for continuing to hold it.

In a separate judgment in which Van Heerden AJ concurred, O'Regan J held that it was not in the interests of justice for this Court to grant the application for leave to appeal. She pointed that one of the key constitutional issues identified in the application for leave to appeal had fallen away by the time the application in this Court was heard. On the remaining issues, she concluded that the application for leave to appeal raised difficult questions of fact and law not properly canvassed on the papers and in argument, which it was undesirable for this Court to determine as a court of first and final instance. She also noted that the applicants had another remedy to recover the currency. In the circumstances, she would have dismissed the application for leave to appeal.

In the majority judgment concurred in by Langa CJ, Kondile AJ, Madala J, Van der Westhuizen J, and Yacoob J, Moseneke DCJ and Nkabinde J elected not to express an opinion on whether the case raised a constitutional matter but assumed, without deciding, that it does. They agreed with Mokgoro J regarding Mr van der Merwe's ownership of the €20 865 but disagreed that he established ownership of the balance of the foreign currency. This finding was based on the fact that the first applicant disavowed ownership of the amount and that documentary evidence in the form of customer receipts issued by Nedbank unequivocally reflected that the currency was issued to each member of the travelling group and not to him. The majority concluded that the intention to pass and acquire ownership of that amount had not been established, and that the applicants' vindicatory claim on that amount should fail. The majority also found that there was no legal impediment preventing seizure of unauthorised foreign currency under section 20 of the CPA and that there was no evidence that the currency would not be required for purposes of criminal proceedings against the first applicant. The majority made an order granting leave to appeal and dismissing the appeal with no order as to costs.