



CONSTITUTIONAL COURT OF SOUTH AFRICA

Democratic Alliance v President of the Republic of South Africa and Others

Case CCT 122/11

Date of Hearing: 8 May 2012

Date of Judgment: 5 October 2012

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.

On Friday 5 October 2012, the Constitutional Court gave judgment in a case about whether the appointment of Mr Simelane as National Director of Public Prosecutions (NDPP) by the President of the Republic was constitutionally valid. In an application brought by the Democratic Alliance (DA), the North Gauteng High Court had held that the President's decision was indeed valid, but the Supreme Court of Appeal set aside the decision as having been irrational. The Minister for Justice and Constitutional Development (Minister) sought to appeal against this decision.

Mr Simelane had given evidence before the Ginwala Commission of Enquiry concerning the conduct of the then NDPP, Mr Vusi Pikoli. The Report of the Ginwala Enquiry had severely criticised Mr Simelane's approach to and evidence before that Enquiry and the Public Service Commission (PSC) had recommended that disciplinary proceedings be instituted against him. The Minister rejected the recommendations of the PSC and advised the President to ignore the findings of the Enquiry and Mr Simelane's evidence before the Enquiry in the process of appointing Mr Simelane as NDPP. The President did not take these matters into account in making his decision to appoint Mr Simelane.

In a unanimous judgment (subject to a qualification by Zondo AJ in relation to one paragraph of the judgment), Yacoob ADCJ reached a number of legal conclusions:

- a. The requirement that the National Director of Public Prosecutions must be a fit and proper person for appointment with due regard to his conscientiousness and integrity was not a matter to be determined according to the subjective opinion of the President. It was rather a jurisdictional pre-requisite to be determined objectively.

- b. The requirement of rationality obliges courts to engage in an evaluation of the relationship between the means employed to reach a decision on the one hand, and the purpose for which the power to make the decision was conferred, on the other.
- c. Each and every step in the process of reaching the decision must be rationally related to the outcome.
- d. A failure to take into account relevant material that colours the entire process with irrationality will render the decision irrational.
- e. The rationality test is the least invasive form of legal scrutiny and its applicability in respect of Executive decisions flows from an acceptance and recognition of the separation of powers, not the converse.
- f. The purpose of the conferral of the power to appoint the National Director of Public Prosecutions on the President was to ensure that the appointee was sufficiently conscientious and had the integrity required to be entrusted with the responsibilities of the office.
- g. Dishonesty is inconsistent with the conscientiousness and integrity required for the proper execution of the responsibilities of a National Director of Public Prosecutions.

The Constitutional Court evaluated Mr Simelane's evidence at the Ginwala Enquiry and concluded that the evidence was contradictory and, on its face, indicative of Mr Simelane's dishonesty and raised serious questions about Mr Simelane's conscientiousness, integrity and credibility. The failure to take this into account would, absent acceptable reasons for not doing so, not be rationally related to the achievement of the purpose of appointing a person of conscientiousness and integrity as NDPP. The Constitutional Court held further that the reasons the Minister had provided for withholding this evidence from the President was insufficient, and that the failure by the President to take into account this evidence without more was irrational in the sense of not being rationally related to and inconsistent with the purpose of appointing, as NDPP a fit and proper person with due regard to his conscientiousness and integrity.

The President's decision was set aside and the Minister was ordered to pay the costs of the DA, including costs of two counsel.

In a short concurring judgment, Zondo AJ agreed with the conclusion, most of the reasoning and order in the main judgment. However, he took the view that, on the facts, it was not necessary to express a definitive view on whether or not a statutory body such as the PSC was required to have given Mr Simelane an opportunity to be heard before it reached its conclusions and made its recommendations to the Minister. This was because the Minister, who was the authority in whom the power to institute a disciplinary hearing into Mr Simelane's conduct vested, did give Mr Simelane the opportunity to be heard.