



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Conrad Stefaans Brümmer and the Minister of Social Development and Others
CCT 25/09

Date of Judgment: 13 August 2009

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 13 August 2009, the Constitutional Court handed down judgment in a case involving the constitutional challenge to section 78(2) of the Promotion of Access to Information Act (PAIA). This statute permits members of the public to request information from the Government. Section 78(2) allows a person who is refused access to information to challenge the refusal in court. The challenge must however be brought within 30 days.

The applicant, Mr Brümmer a journalist, made a request to the Department of Social Development for access to certain information. When his request was refused and an internal appeal was unsuccessful, Mr Brümmer approached the Cape High Court for relief. As his application to court was made well after the 30 day limit, he applied for condonation. In addition, in the event of the court refusing him condonation, he challenged the constitutionality of the 30 day limit. He contended that this time limit violated his rights of access to court as well as access to information guaranteed by the Constitution.

The Minister for Social Development (Minister) and the Director-General of the same Department (DG) opposed the application. They submitted that the High Court should not condone Mr Brümmer's non-compliance with the 30 day limit as Mr Brümmer had not provided a satisfactory explanation for the delay. They contended that Mr Brümmer should have brought the application to court under section 77(5)(c) of PAIA, which allowed him 60 days to bring an application to court and not under section 78(2). In addition, they submitted that the 30 day limit

prescribed by section 78(2) is not unconstitutional. The Minister for Justice and Constitutional Development (Minister for Justice) joined the proceedings to defend section 78(2).

The High Court held that applications to court are governed by section 78(2) and not section 77(5)(c) as argued by the respondents. It accepted that it had the power to condone non-compliance with the 30 day period but refused to condone Mr Brümmer's non-compliance with that period holding, among other things, that Mr Brümmer will not succeed in his application for the request of information. However, the court went on to consider the constitutionality of section 78(2). It held that section 78(2) was unconstitutional in that it does not give a person who is refused information adequate time to approach a court for relief. It therefore declared section 78(2) unconstitutional and referred the matter to the Constitutional Court for confirmation.

Mr Brümmer asked the Constitutional Court to confirm the order declaring section 78(2) invalid, and additionally applied for leave to appeal directly to that Court against the decision of the High Court refusing to condone his non-compliance with the 30 day limit. The Minister, DG and Minister for Justice (respondents) opposed the confirmation of the order of invalidity as well as the application for leave to appeal. The respondents contended that section 78(2) does not limit any of the constitutional rights of the applicant and that, if it did, the limitation was justifiable under the Constitution. In opposing the application for leave to appeal, the respondents submitted that the applicant had not provided a satisfactory explanation for the delay in approaching the High Court for relief.

The South African History Archives Trust (SAHA), a non-governmental organisation which collects, preserves and catalogues materials of historic, contemporary, political, social, economic and cultural significance applied for, and was admitted as *amicus curiae*. It provided the Court with information relating to the difficulties encountered by the requestors of information in complying with the 30 day limit. It joined the applicant in submitting that section 78(2) was unconstitutional. The South African Human Rights Commission also applied for admission as *amicus curiae* shortly before the hearing.

In a unanimous judgment, Ngcobo J held that the Commission is unquestionably an important constitutional body with the task of advancing and protecting human rights in our country, including the right of access to information. In addition, he found that the contentions that the Commission advanced differed from those advanced by the other parties in one fundamental respect, namely, the Commission contended that section 78(2) also limits the right to freedom of expression, which

includes the right to receive and impart information guaranteed by the Constitution. He accordingly concluded that the Commission should be admitted as *amicus curiae*.

On the application for leave to appeal against the refusal of condonation, Ngcobo J held that it was not necessary for the High Court to consider the application for condonation as it held that the provisions of section 78(2) were unconstitutional. He accordingly held that the order of the High Court refusing condonation should be set aside as well as the order for costs against Mr Brümmer.

Next, Ngcobo J considered whether the order declaring section 78(2) should be confirmed. He upheld the conclusion by the High Court that section 78(2) governs applications to court and prescribes 30 days as the period within which an application to challenge the refusal of information must be launched. He held that a person who seeks to challenge the refusal of access to information must be afforded an adequate and fair opportunity to do so.

Ngcobo J found that before a litigant can launch an application to court, the litigant must go through certain steps, including considering the reasons for the refusal of access to information and seeking legal advice on whether an application to court will be successful. Raising funds for litigation may also contribute to the delay in launching an application to court. He held, therefore, the 30 day period limits the right of access to court as well as the right of access to information. He held that this limitation was not reasonable and justifiable and accordingly concluded that the 30 day limit prescribed by section 78(2) was unconstitutional.

He ordered Parliament to enact legislation that prescribes a time limit that is consistent with the Constitution, bearing in mind the right of access to court as well as the right of access to information. He ordered that pending the enactment of this legislation, a person who wishes to challenge the refusal of access to information must lodge an application to court within 180 days of being notified of a decision of an internal appeal refusing access to information. He added that this period of 180 days should be flexible in the sense that courts should be empowered to condone non-compliance with the 180 day time limit where the interest of justice requires it.

Ngcobo J ordered that Mr Brümmer's application should be referred back to the High Court for it to consider his application for access to information, since it had not dealt with the merits of the application previously. In addition, he directed that the application must be heard by a different judge, as the judge who had considered the matter initially had already expressed a view on whether Mr Brümmer's application for access to court was likely to succeed.

