CONSTITUTIONAL COURT OF SOUTH AFRICA

Wybrand Andreas Lodewicus du Toit v Minister for Safety and Security and Another

CCT 91/08
[2009] ZACC 22

Date of Judgment: 18 August 2009

MEDIA SUMMARY

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

Today, the Constitutional Court handed down a judgment that deals with the reach of the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act).

The applicant, Mr du Toit, was formerly employed as the National Commanding Officer, Technical Support Services in the South African Police Service (SAPS). While employed by the SAPS, he was convicted and sentenced to 15 years' imprisonment for the murder of the "Motherwell Four". As a consequence of the conviction and sentence, in terms of section 36(1) of the South African Police Service Act 68 of 1995 (SAPS Act), Mr du Toit was deemed to have been discharged from his employment with the SAPS.

Mr du Toit was subsequently granted amnesty in respect of all four counts of murder. He applied to the North Gauteng High Court for an order compelling the SAPS to reinstate him to his previous position on three grounds. First, he argued that, in terms of section 20(10) of the Reconciliation Act, the grant of amnesty resulted in the record of his conviction and sentence being deemed to be expunged. This meant that his discharge from the SAPS was also expunged and that he was entitled to reinstatement or compensation. Second, he argued that the grant of amnesty ought to be equated to "appeal or review" as referred to in section 36(2) of the SAPS Act which provides for reinstatement from the date of discharge in the case of success on appeal or review. Finally, Mr du Toit had written to the National Commissioner of the SAPS (National Commissioner) before the grant of amnesty, suggesting his reinstatement upon being granted amnesty. The National Commissioner agreed to Mr du Toit's reinstatement should he be granted amnesty. The latter thus argued that this constituted a contract that was binding on the SAPS. The High Court dismissed the application and the Supreme Court of Appeal dismissed his appeal against the judgment of the High Court, which was brought on the same three grounds.

Mr du Toit approached this Court on the said grounds.

Writing for a unanimous Court, Langa CJ held that section 20(10) of the Reconciliation Act must be interpreted in its historical context, taking into account the purpose of the Reconciliation Act, being the achievement of national unity and reconciliation by the development of a collective memory through truth-telling. In order for the truth to be told, perpetrators of crimes committed with a political purpose were granted amnesty. This was meant to lift the burden of the crime from the shoulders of the perpetrator, while giving a measure of closure to victims. Because of the tensions and strains that amnesty imposes on the rule of law, it was important that the benefits accorded to perpetrators did not outweigh those enjoyed by the victims. The interplay of benefit and disadvantage was, and is, vital to the success of the process.

Langa CJ held that the statutory context of section 20(10) is also helpful in ascertaining its meaning. Section 20(7) to (10) of the Reconciliation Act deals with the consequences of the grant of amnesty. Read together, these sub-sections lay out a scheme in terms of which the grant of amnesty does not render unlawful steps lawfully taken before amnesty was granted, nor do the sub-sections undo legal consequences which were already complete by the time amnesty was granted. The sections make a distinction, in relation to pending proceedings and past liability, between civil and criminal liability. The effect of amnesty on criminal liability is both prospective and retrospective so that criminal liability in respect of the acts for which amnesty is granted is extinguished and where there has been a conviction it is deemed not to have taken place. This is a simple process as the criminal effect of the grant of amnesty relates primarily to an entry in official records and affects only those involved in the amnesty process. By contrast, the effect of granting amnesty on civil liability that has already been determined is prospective only. This is because civil or administrative liability tends to affect those outside of the amnesty process and have far-reaching consequences. Decisions taken may have been acted upon and decision-makers may have organised their affairs in accordance with the decision already taken. Undoing civil judgments or administrative decisions already lawfully taken would have disruptive consequences and result in uncertainty.

In the light of its historical and the statutory context, the Court concluded that section 20(10) of the Reconciliation Act ought to be interpreted so as to operate prospectively on the civil and administrative consequences of the grant of amnesty. This approach is in line with the presumption against retrospectivity that provides that where, as in this case, there is an indication of retrospectivity, its extent must be limited unless there is direct indication to the contrary. While the Reconciliation Act seeks to advance reconciliation and national unity, it cannot undo what has happened in the past. The aim of the legislation is not to restore to the victims what they have lost – an impossible task – and equally it does not seek to restore the perpetrator in every respect to his or her position prior to the commission of the offence. To seek to undo all the consequences of the conviction would be an endless task and would place an undue burden on the state and third parties.

The Court held that the grant of amnesty could not be equated to appeal or review because if the legislature intended to include in the ambit of section 36(2) the granting of amnesty, it would have done so. Appeal and review are judicial processes, whereas amnesty is an administrative process. The argument based on Mr du Toit's communication with the National Commissioner was also not upheld. The National Commissioner did not intend to bind the SAPS by his remarks and was not asked to do so. Therefore, no contract was entered into.

In the result, the appeal was dismissed. The costs order in the High Court and the Supreme Court of Appeal were set aside and, in accordance with this Court's practice that a litigant approaching the Court with important and complex constitutional issues should not be burdened with costs, no order as to costs was made.