



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 48/10

Date of Hearing: 2 September 2010

Date Decided: 17 March 2011

Hugh Glenister v President of the Republic of South Africa & Others

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.

The key question in this case is whether the national legislation that created the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), and disbanded the Directorate of Special Operations, known as the Scorpions (DSO), is constitutionally valid.

The majority of the Court (in a joint judgment by Moseneke DCJ and Cameron J, in which Froneman J, Nkabinde J and Skweyiya J concur) finds that Chapter 6A of the South African Police Service Act 68 of 1995, as amended, is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the DPCI. The Court makes two key findings.

First, it holds that the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. While the Constitution does not in express terms command that a corruption-fighting unit should be established, its scheme taken as a whole imposes a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. This

obligation is sourced in the Constitution and the international law agreements which are binding on the state. The Court points out that corruption undermines the rights in the Bill of Rights, and imperils our democracy. Section 7(2) of the Constitution imposes a duty on the state to “respect, protect, promote and fulfil” the rights in the Bill of Rights. When read with s 8(1) (which provides that the rights in the Bill of Rights bind all branches of government), section 39(1)(b) (which provides that Courts must consider international law when interpreting the Bill of Rights) and section 231 (which provides that an international agreement that Parliament approves “binds the Republic”), this provision places an obligation on the state to create an independent corruption-fighting unit.

A number of international agreements on combating corruption have been approved by Parliament and are binding on the Republic. These require that states create independent anti-corruption entities. Implicit in section 7(2) is the obligation that the steps the state must take to protect and fulfil constitutional rights must be reasonable. To create an anti-corruption unit that is not adequately independent, thereby ignoring binding international law, is not a reasonable constitutional measure.

Second, the Court finds that the DPCI does not meet the constitutional requirement of adequate independence. Consequently the impugned legislation does not pass constitutional muster. The main reason for this conclusion is that the DPCI is insufficiently insulated from political influence in its structure and functioning. This is because the DPCI’s activities must be coordinated by Cabinet – the statute provides that a Ministerial Committee may determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences. This form of oversight makes the unit vulnerable to political interference. Further, the Court holds that the safeguards that the provisions create are inadequate to save the DPCI from a significant risk of political influence and interference.

In addition, the conditions of service of the unit’s members and in particular those applying to its head make it insufficiently independent. Members thus have inadequate employment security to carry out their duties vigorously; the appointment of members is not sufficiently shielded from political influence; and remuneration levels are flexible and not secured. These aspects make the unit vulnerable to an undue measure of political influence.

Hence, the Court upholds the appeal, declares the offending legislative provisions establishing the DPCI constitutionally invalid to the extent that they do not secure

adequate independence, and suspends the declaration of constitutional invalidity for a period of eighteen months to give Parliament the opportunity to remedy the defect.

The minority judgment by Ngcobo CJ, in which Brand AJ, Mogoeng J and Yacoob J concur, holds that section 7(2) of the Constitution, while giving rise to a positive obligation on the state to fight corruption and organised crime, does not specifically impose an obligation on the state to establish an independent corruption-fighting unit. It further holds that, insofar as such a constitutional obligation is found, the structural and operational autonomy of the DPCI is secured through institutional and legal mechanisms that are adequately designed to prevent undue interference and safeguard the independence of the DPCI. The minority judgment therefore concludes that the appeal must be dismissed.

Both the majority and the minority judgments conclude that the legislation that created the DPCI cannot be invalidated on the grounds that it is irrational or that Parliament had failed to facilitate public involvement in the legislative process that led to its enactment. Both judgments further conclude that the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit solely within the National Prosecuting Authority and nowhere else.