CONSTITUTIONAL COURT OF SOUTH AFRICA

Print Media South Africa and Another v Minister of Home Affairs and Another

Case CCT 113/11

Date of Hearing: 13 March 2012
Date of Judgment: 28 September 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.

The Constitutional Court today gave judgment about the constitutionality of certain provisions in the Films and Publications Act (Act), which were inserted by the Films and Publications Amendment Act. Following its amendment, the Act required publishers, with the exception of registered newspapers, to submit for prior approval to an administrative body intended publications which contain, amongst other things, sexual conduct that violates or shows disrespect for the right to human dignity, degrades a person or constitutes incitement to cause harm. Failure to submit material of this kind for prior approval amounted to a criminal offence.

The South Gauteng High Court had declared the provisions unconstitutional on certain grounds and had ordered remedies it considered appropriate.

In a majority judgment delivered by Skweyiya J, the Constitutional Court held that the requirement that there must be administrative prior classification before publication limited the right to freedom of expression, vital to a democracy. The Court also held that the limitation was not justifiable in that the system of administrative prior classification, as created by the Act, did not satisfy achieve its purposes in a proportional manner and that there were less restrictive alternatives for achieving the Act's purpose of controlling publications of this kind. Prior restraint through the courts could achieve the purpose by placing less severe restrictions on the right to freedom of expression. Permitting a publisher to approach the board for an advisory opinion on a publication, without being penalised for failure to do so, was also a less restrictive alternative. The law requiring the compulsory submission of publications containing sexual conduct for prior classification was therefore unconstitutional on this ground, and was severed from the Act.

In the circumstances, Skweyiya J found it unnecessary in the circumstances to consider the argument that the criteria for prior administrative classification were vague.

The Court also held that the unequal treatment of magazines compared to newspapers offended the right to equality and the legality principle without justification. In the circumstances the Court severed the offending provision, and read in the words "or magazine" to ensure that both types of publications were treated equally.

Lastly, a drafting error, which effectively criminalises the failure to submit for classification on the request of any person, even if after public dissemination, was corrected to operate only in relation to the failure to submit for prior classification.

In a separate judgment Van der Westhuizen J (with two justices concurring) agreed with the order and most but not all of the reasoning in the main judgment. He concluded that it was necessary to consider the vagueness submission, because the criteria are inextricably intertwined with the Act's scheme of prior restraint. Judicial prior restraint would not be a constitutionally acceptable less restrictive alternative to administrative prior restraint, if based on vague criteria. The provision is thus constitutionally invalid because it embodies a system of prior restraint based on vague and overly broad criteria.