

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 05/10
[2010] ZACC 24

In the matter between:

TATIANA MALACHI

Applicant

and

CAPE DANCE ACADEMY INTERNATIONAL
(PTY) LTD

First Respondent

HOUSE OF RASPUTIN PROPERTIES (PTY) LTD

Second Respondent

ADDITIONAL MAGISTRATE, DISTRICT OF
CAPE TOWN

Third Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Fourth Respondent

MINISTER FOR HOME AFFAIRS

Fifth Respondent

COMMANDING OFFICER,
POLLSMOOR PRISON

Sixth Respondent

Decided on : 25 November 2010

JUDGMENT

MOGOENG J:

Introduction

- 1] The main judgment in this matter was delivered on 24 August 2010.¹ A provisional order was made by this Court on its own accord directing the Minister for Justice and Constitutional Development (Minister) on the one hand, and Cape Dance Academy International (Pty) Ltd as well as House of Rasputin Properties (Pty) Ltd (jointly referred to as the “employers”) on the other, to each pay half of the applicant’s (Ms Malachi’s) costs in this Court.
- 2] These parties were afforded the opportunity to make written representations on whether the proposed order was just and equitable. Representations have been made. It is time to determine whether or not the provisional order should be made final. A synopsis of the representations is necessary and follows.

Representations

- 3] The Minister stated that he had nothing new to add and had no objection to the provisional order being made final.
- 4] Likewise, Ms Malachi has no objection to the provisional order being made final. She, however, asks that the final order be just and equitable and provide for the recovery of all her costs on a party and party scale including costs occasioned by the employment of two counsel.

¹ *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] ZACC 13; Case No CCT 05/10, 24 August 2010, as yet unreported (*Malachi CC*).

5] The employers' representations were filed one month after the date set by this Court. They applied for condonation and explained that they did not have funds readily available to engage counsel. They had to raise funds first, hence the delay in filing their representations. Condonation should be granted and the employers' representations should be considered.

6] The employers made the following detailed representations:

6.1 When they approached the Magistrates' Court, Cape Town for an order in terms of section 30(1) and (3) (the impugned provisions) of the Magistrates' Courts Act² (Act), the law permitted them to do so. The order which authorised the arrest and detention of Ms Malachi was made by a court of law in terms of a section which was still applicable and available to the employers.

6.2 As soon as the employers were made aware that the impugned provisions may be unconstitutional, they agreed to the release of Ms Malachi from Pollsmoor Correctional Centre forthwith.

6.3 Again, recognising that the subsections they relied on for the order to incarcerate Ms Malachi may be unconstitutional, they decided not to oppose her efforts to have the impugned provisions declared unconstitutional but to

2 32 of 1944.

rather abide the decision of the Western Cape High Court, Cape Town³ (High Court) and of this Court.

6.4 The agreement was reached with Ms Malachi that she would not ask for costs against her employers.

6.5 The litigation in this matter was not between Ms Malachi and the employers but rather between her and the Minister.

6.6 The government should bear the costs of litigation which relate to challenges to the constitutionality of statutes because of its obligation to ensure that statutes are in line with the Constitution.⁴ This Court's decision in *Biowatch*⁵ should apply to this matter.

Should the provisional order be made final?

7] We are satisfied that it will not be just and equitable for the employers to be required to pay any of Ms Malachi's costs. While it is true that they set the ball rolling by causing Ms Malachi's arrest, we must also have regard to what happened after that. The employers agreed to her release and, after securing an agreement that Ms Malachi will not require them to pay her costs, took no further part in the proceedings. The position would have been different had the employers insisted on Ms Malachi's further detention and defended the

3 *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC).

4 *Gory v Kolver NO and Others (Starke and Others Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 65.

5 *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 56.

constitutional validity of the proceedings.

8] The Minister has the duty to ensure that any provision or statute within his functional area which offends the provisions of the Constitution is suitably amended or repealed without unnecessary delay. This applies to the impugned provisions. As noted in the main judgment,⁶ he has not done so for the past 15 years into the new constitutional dispensation.⁷ There is, therefore, merit in the employers' contention that the challenge to the constitutionality of the impugned provisions is a contest not between Ms Malachi and her employers but between her and the Minister. It is therefore just and equitable that the Minister should pay Ms Malachi's costs in this Court.

9] For these reasons, I am satisfied that the provisional order for costs should be discharged. The Minister alone must be ordered to pay Ms Malachi's costs in the main application.

10] In the result, the following order is made:

1. The application for condonation for the late filing of Cape Dance Academy International (Pty) Ltd and House of Rasputin Properties (Pty) Ltd's representations on the

⁶ *Malachi CC* above n 1 at para 50.

⁷ This is computed from the commencement of the interim Constitution of the Republic of South Africa Act 200 of 1993 to the launch, in 2009, of the application in the High Court.

provisional order for costs is granted;

2.The provisional order for costs is discharged; and

3.The Minister for Justice and Constitutional Development is ordered to pay Ms Malachi's costs in this Court.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Mogoeng J.

For the Applicant:

Advocate A Katz SC and Advocate R Garland instructed by Eisenberg & Associates.

Advocate N Bawa instructed by Adams and May Attorneys.

For the First and Second Respondents:

Advocate P Bezuidenhout instructed by the State Attorney, Cape Town.

For the Fourth Respondent: