CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Home Affairs and Others v Emmanuel Tsebe and Others; Minister of Justice and Constitutional Development and Another v Emmanuel Tsebe and Others

Case CCT 110/11 and CCT 126/11
[2012] ZACC 16

Date of Hearing: 23 February 2012
Date of Judgment: 27 July 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.

On Friday 27 July 2012, the Constitutional Court handed down a judgment in two similar cases dealing with the issue of whether the South African government (Government) is entitled to deport or extradite a person, charged with a capital offence in a country seeking his extradition, after having sought and been refused a written assurance from the extraditing state that the death penalty will not be imposed, or, if imposed, will not be executed.

Mr Tsebe and Mr Phale both faced charges of murder in Botswana, where it is a capital crime. They applied to the South Gauteng High Court (High Court) for an order preventing the Government from extraditing or deporting them to Botswana to stand trial for the charges of murder of their respective romantic partners, unless Botswana provided South Africa with a written assurance that the death penalty would not be imposed. The Government had, in fact, sought and been refused that undertaking. Before the High Court could hear the matter, Mr Tsebe passed away. The High Court nevertheless granted the order, relying on an earlier judgment of this Court, *Mohamed v President of the Republic of South Africa* (*Mohamed*), which held that a person may not be surrendered to a country where he or she faces the death penalty without first seeking an assurance that the death penalty would not be imposed.

The Minister of Home Affairs and the Minister of Justice both appealed directly to this Court against the decision of the High Court. The Minister of Home Affairs argued that the High Court incorrectly treated the *Mohamed* case as laying down an absolute principle that operated regardless of the facts of the case and as a result, she was unsure how to exercise her obligations under the Immigration Act.

The Minister of Justice argued that when he performs his duties in terms of the Extradition Act, he performs an act of state, and asked for an opportunity to resolve the matter through international forums. Further to this, the Minister argued that the judgment of the High Court failed to consider the rights of people other than Mr Tsebe and Mr Phale, and that the executive should be free to decide how best to handle the matter.

Lawyers for Mr Tsebe and Mr Phale opposed the appeal. They argued that the High Court had correctly applied the principles in *Mohamed*, which, they noted, neither of the applicants claimed was wrongly decided. They were supported by the Society for the Abolition of the Death Penalty and Amnesty International, which was admitted as an amicus curiae.

Writing for the majority, Zondo AJ (Mogoeng CJ, Jafta J, Khampepe J, Maya AJ and Nkabinde J concurring) dismissed both appeals. He found that because none of the parties argue that *Mohamed* was wrongly decided, and because there were no good reasons to distinguish this case, the principle in that case had to be applied. In this judgment the Court went further than Mohamed to require not only that the South African Government seek assurance, but also obtain that assurance, failing which extradition could not be granted. By adopting the Constitution, South Africa affirmed its commitment to upholding the human rights of every person in everything that it did, and could not deport or extradite any person, where doing so would expose him or her to the real risk of the imposition and execution of the death penalty. This was further justified by the extradition treaty between Botswana and South Africa and the SADC Protocol on Extradition (SADC Extradition Protocol).

Cameron J concurred (with whom Froneman J, Skweyiya J and Van der Westhuizen J agreed) with the majority of the judgment, save for a few paragraphs.

In a judgment dissenting on the form of the order, Yacoob J would have concluded that the decision of the High Court was clear and persuasive and that leave to appeal should have been refused.