CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/00

SIAS MOISE Plaintiff

versus

TRANSITIONAL LOCAL COUNCIL OF
GREATER GERMISTON Defendant

Delivered on : 21 September 2001

JUDGMENT

KRIEGLER J:

[1] On 4 July 2001 this Court confirmed an order made in the Witwatersrand High Court declaring invalid section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 (the section). Shortly after the judgment and confirmatory order were handed down, an organisation that had been an *amicus curiae* in the confirmation proceedings[1] lodged an application for a variation of the order. It submitted that instead of merely confirming the order, this Court ought to have added a provision making the order retrospective so as to apply to all extant actions that were not already time-barred when the Interim Constitution came into force on 27 April 1994. The absence of such a qualification was, so it was alleged in a supporting affidavit, a "patent error or omission" in the

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[1] The Women's Legal Centre, a non-governmental organisation that had submitted helpful written and oral argument supporting confirmation of the order of invalidation.

order which (a) created "uncertainty as to its effect upon actions instituted but not finally determined at the time that the order was made" and (b) could be rectified by the Court under rule 28 of the Constitutional Court Rules read with rule 42(1)(b) of the Uniform Rules of Court.

[2] The President of the Court invited the *amicus* to file written argument in support of its contentions and this has now been done. No other representations have been received.

[3] The *amicus* is to be commended for conscientiously raising in the public interest a perceived error in need of correction. The Court is also indebted to Mr Breitenbach and Ms Cowen of the Cape Bar for the careful argument they prepared on behalf of the *amicus*. Reconsideration of the order in the light of the application for variation and the argument filed in support thereof, however, demonstrates no need for any addition to the order.

[4] In the first place it is doubtful whether it would be competent for this Court to amend the order, whether merely for purposes of clarification or to make additions. Courts are generally not empowered to reopen their own cases once they have been finally concluded. In *Minister of Justice v Ntuli*[2] Chaskalson P cited with approval the well-known passage in the judgment in the *Firestone* case[3] dealing with the principles of our common law regarding subsequent alteration of judgments or

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2 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at paras 22, 23 and 24.

3 *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F — G, per Trollip JA. See also *S v Wells* 1990 (1) SA 816 (A) at 819J — 820F, where Joubert JA analyses the Roman Dutch Law authorities and comes down on the side of Voet (42.1.27) whose view seems to be in general conformity with that expressed by Trollip JA in the passage cited.

orders. The central proposition is that "once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it." As explained in the *Firestone* judgment,[4] there are four categories of exceptions to this general principle. Of these, two are relevant here. The first is that if a court is approached within a reasonable time it has the power to correct, alter or supplement its own judgment or order "in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant." The second is that a court "may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain".

[5] Foundational to the first category of circumstances in which a court is empowered to correct, alter or supplement its own judgment is that something had been overlooked or inadvertently omitted in the formulation of the judgment and/or the order. Here, however, there was no such oversight or error. Although the *amicus* argued in this Court that the declaration of invalidity should be couched under the interim Constitution,[5] the plaintiff's cause of action arose in 1998 and his challenge to the constitutionality of the section was quite clearly framed under the 1996 Constitution. The plaintiff's replication to the defendant's special plea (raising as a defence that there had been no timeous written notice as required by the section) concluded with an averment that if indeed there had been no such notice "the Plaintiff alleges that Section 2(1)(a) of the Act is inconsistent with section 34 of the Constitution . . . and that such inconsistency is neither reasonable nor justifiable . . .". Section 34, of

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4 At 306H — 307H.

5 The argument was that the section was inconsistent with sections 8 and 22 of the Constitution of the Republic of South Africa, Act 200 of 1993, which was superseded by the Constitution on 4 February 1997.

course, is the provision in the Bill of Rights guaranteeing the right of everyone "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court . . .". That is the challenge that was debated in the High Court and although the order of that Court does not expressly spell it out in so many words,[6] that is the contention that was ultimately upheld. It follows that the declaration of invalidity that served before this Court for confirmation under section 167(5) of the Constitution was that the section was fatally inconsistent with section 34 of the Constitution.

[6] Notwithstanding the detailed and helpful argument presented on behalf of the *amicus* at the hearing, its basic submission that the constitutional validity of the section ought to be gauged according to its consistency with sections 8 and 22 of the interim Constitution and that the order of invalidity should be couched under the interim Constitution was not, strictly speaking, in point and was not accepted. Nor, more pertinently, was its consequential submission that the order of invalidation should be backdated to 27 April 1994, when the interim Constitution came into force. Neither inconsistency with that constitution nor retrospectivity to its inception had been raised or canvassed in the court below. They had also not been addressed in the affidavits by and written argument on behalf of the Minister of Justice and Constitutional Development and the Director-General of Justice that had been filed in opposition to confirmation. This Court focused on the question whether the section was indeed invalid on the ground identified by the High Court. Having answered that question in the affirmative, a designedly unqualified order was made confirming the declaration of invalidity made in the High Court. The case can therefore not be reopened on the ground that there was an inadvertent error in the

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[6] The relevant part of the order reads as follows: "The special plea is dismissed with costs, on the basis that the provisions of [the section] are unconstitutional."

formulation of the order. It reads as it was intended to read.

[7] Before leaving the discussion of judicial oversight as a basis for reopening a case to supplement a judgment or order, one further point should be stressed. That is that nothing in this judgment should be understood as expressing any view on the question whether an order under section 98(6) of the interim Constitution or under section 172(1)(b) of the Constitution regulating the retrospectivity or any other aspect of an order invalidating a statutory provision falls within the purview of the "accessory or consequential matters" that can subsequently be added in cases of inadvertent omission. That question is one of considerable complexity and general importance on which the Court did not have the benefit of argument and should therefore be slow to venture an opinion. In the light of the conclusion that the application under the rubric of inadvertent omission must fail on the facts, it is however not necessary to pursue this line of enquiry.

[8] The alternative basis upon which the *amicus* seeks to found its application for reopening in order to vary the order is, as it was put in the *Firestone* case,[7] because the order is "obscure, ambiguous or otherwise uncertain". The *amicus* lays considerable stress on this aspect, saying that the absence of any order regulating the retrospective effect of the declaration of invalidity will lead to uncertainty in three ways:

- it is not clear whether the order operates retrospectively or prospectively;
- if the order operates prospectively, it is not clear whether it operates from the date of the order

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7 Above n 3 at 307A.

in the High Court or from the date of the order in this Court;

- if it operates retrospectively, it is not clear whether it operates from 4 February 1997 or 27 April 1994.

[9] Is that indeed the case? Does the order really leave room for the three possible constructions put on it by the *amicus* — and possibly for others? In seeking the answer to these questions the logical starting point must be to interpret the order. That would also accord with the precondition to the ambiguity exception identified by Trollip JA in *Firestone*[8] — "if, on a proper interpretation, the meaning . . . remains obscure . . .". In conducting such an interpretation exercise the context is of course crucial. The context here is that the order to be interpreted was issued in proceedings for the confirmation of an order issued by another court, which latter order specified neither the constitution nor the specific section under which the declaration of constitutional invalidity was being made. Yet the High Court's order was not ambiguous. It quite unequivocally related to the Constitution, from which that Court derived its power to invalidate and which was alleged in the replication — and found in the judgment — to be inconsistent with the section. This order of invalidation by the High Court was confirmed without qualification in the order of this Court. It is therefore clear that neither the order in the High Court nor the confirmatory order in this Court was in any way related to the interim Constitution.

It also follows that the date of inception of the interim Constitution, namely 27 April 1994, is irrelevant

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8 Id.

in this case.

[10] It should next be noted that the plaintiff's replication specifically targeted the absolute requirement of the section that no legal proceedings could be instituted unless the prescribed written notice had been served. The validity of the plaintiff's cause of action was not in issue; nor was the case concerned with prescription or the statutory time-barring of that cause of action. The defendant had raised a special statutorily created procedural bar to the institution of the action and it was that impediment and that impediment alone that was held to be inconsistent with the right to access to the courts guaranteed by section 34 of the Constitution. The case therefore involved and resolved a purely procedural issue. So much for the factual context in which the order falls to be interpreted.

[11] Proper interpretation of an order of court also entails determining the legal context within which the words in the order were used. The order in question here related to invalidation in terms of the Constitution of a statutory provision that had been on the statute book before the Constitution came into force. Upon examination that pre-constitutional provision was found to be inconsistent with the Constitution. That brought into play a principle of law known as the principle (or doctrine) of objective invalidity. In the context of declaring a statutory provision invalid for its inconsistency with a constitution that means that the declaration proclaims the finding that the inconsistency exists. It also means that the inconsistency is proclaimed to have arisen and subsisted since first it arose. Thus, in the case of an inconsistent statute antedating the Constitution, the inconsistency arose on 4 February 1997, when the Constitution came into force and its norms were superimposed on the existing legal system. If a statute

enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution. As will be shown in the next two paragraphs, however, courts are given the power to qualify this effect of their orders of invalidation.

[12] This was made plain in the judgment of Ackermann J in the case of *Ferreira v Levin*,[9] where the objective theory of constitutional invalidity was first discussed by this Court. Although there was some disagreement on other issues traversed in the judgment, this particular aspect enjoyed the support of the majority of the Court and has not been doubted since. It does not matter that *Ferreira v Levin* was written at a time when the interim Constitution applied; the underlying legal principle remains. Nor is the principle affected by a difference between the governing provisions of the two constitutions. While, both constitutions are premised on this principle and both leave room for orders of invalidation to be accompanied by appropriate supplementary orders regulating their retrospectivity, there is a significant difference between their respective points of departure in that regard. Under the interim Constitution[10] an order of invalidity could be ordered to be retrospective but if nothing was said it

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9 See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 25 — 30.

10 Section 98(6) of the interim Constitution reads as follows:
"Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof —

> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or

would, in the case of pre-constitution legislation such as the section, operate prospectively only.

[13] That position has been reversed under the 1996 Constitution. The current position is that the Constitution assumes the full retrospective effect of constitutional invalidation and empowers the court declaring the invalidation to limit its retrospective effect. Section 172(1) of the Constitution provides as follows:

> "(1) When deciding a constitutional matter within its power, a court —
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including —
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Because the order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.

[14] To sum up: the order designedly and unequivocally operates retrospectively to 4 February 1997. It is not possible to delineate the effect of such an order in other cases. That will have to be

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> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof."

done on a case by case basis. There is therefore no reason to amend the order.

Order

[15] The application for variation of the order issued in this matter on 4 July 2001 is refused.

Chaskalson P, Langa DP, Ackermann J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Kriegler J.