CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/09
[2010] ZACC 9

In the matter between:

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT Applicant

and

MQABUKENI CHONCO AND 383 OTHERS Respondents

Decided on : 8 April 2010

JUDGMENT

THE COURT:

[1] A dispute has arisen about the costs order this Court granted in *Minister for Justice and Constitutional Development v Chonco and Others*[1] (*Chonco 1*). In that litigation, even though the appeal of the Minister for Justice and Constitutional Development (the Minister) succeeded and the relief the applicants for pardon obtained in the North Gauteng High Court, Pretoria (High Court) and the Supreme Court of Appeal was set

[1] [2009] ZACC 25; 2010 (2) BCLR 140 (CC).

aside, this Court held that a "singular approach to the costs of the case" was justified.[2] This was because of the long delay in dealing with the applications for pardon, and the fact that, although they were incorrect, it was "understandable" that the pardon applicants sought to hold the Minister (and not the President) liable in the litigation.[3] The Court therefore concluded:

> "[J]ustice requires that Mr Chonco, the 383 other applicants for pardon and their legal advisors should not be out of pocket because of their recourse to legal proceedings. The successful applicant for leave to appeal, the Minister, should pay the costs of Mr Chonco and the 383 other applicants for pardon."[4]

[2] The Court granted an order in the following terms:

> "1. The application for leave to appeal is granted.
> 2. The appeal is upheld.
> 3. The order of the Supreme Court of Appeal is set aside and replaced by the following order:
> '(a) The appeal is upheld.
> (b) The application in the High Court is dismissed.
> (c) The appellant [the Minister] is ordered to pay the costs of the appeal.'
> 4. The applicant [the Minister] is ordered to pay the respondents' costs in this Court."

[2] Above n 1 at para 47.

[3] The favourable costs award in *Chonco 1* was, in part, the basis on which the applicants were denied a favourable costs award when they later brought proceedings against the correct party, the President, in *Mqabukeni Chonco and 383 Others v President of the Republic of South Africa* [2010] ZACC 7, Case No CCT 94/09, 16 March 2010, as yet unreported (*Chonco 2*).

[4] *Chonco 1* above n 1 at para 47.

[3] The dispute is about whether this order covers the pardon applicants' costs in the High Court and in the Supreme Court of Appeal. The pardon applicants contend that the order, read together with the portions of the judgment cited above, plainly covers all their litigation costs in the High Court, in the Supreme Court of Appeal as well as in this Court. However, when they prepared and served their bills of costs in all three courts on the State Attorney, full payment was not forthcoming. They record that they were informed that in the view of the State Attorney, "the costs order was applicable only to the case before the Constitutional Court". Their attorney thereupon wrote to the Registrar of the Court, requesting that the Chief Justice issue a ruling. The Court treated that letter, dated 8 March 2010, as an application, and referred it to the State Attorney for comment on 18 March 2010, but no response was received. It is therefore appropriate for the Court to finalise the issue.

[4] Before determining the dispute, it must be observed that the composition of the Court has changed since *Chonco 1* was handed down on 30 September 2009. Shortly after that date, four members of the Court (Langa CJ, Mokgoro, O'Regan and Sachs JJ) ceased to hold office, their 15 year terms of office having come to an end.[5] Four new members were appointed to replace them: Froneman, Jafta, Khampepe and Mogoeng JJ.

[5] Section 176(1) of the Constitution provides that:

> "A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge."

Section 4(1) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 provides that a Constitutional Court judge whose 12 year term of office expires before he or she has completed 15 years' active

[5] Does the Court, as presently constituted, with its four new members, have power to decide the dispute about the meaning and effect of the order that the Court, as previously constituted, granted in *Chonco 1*? The answer is Yes. The Constitution provides that "[t]he Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges."[6] It also provides that a matter must be heard "by at least eight" of the Court's eleven judges.[7] It has special provisions for the appointment[8] and terms of office of the Court's members.[9] It is this Court, as constituted from time to time and sitting *en banc* with a minimum of eight of its members, to which the Constitution ascribes a specified jurisdiction and specified powers.[10] The Court's jurisdiction and powers must be exercised over matters and causes falling for decision before it, regardless of changes in its composition from time to time.[11]

[6] In any event, the dispute about the *Chonco 1* costs order is a separately justiciable dispute, which the Court as presently constituted is required to decide.[12] It arises from a previous decision of the Court, but the dispute requires that the meaning and effect of the

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service must in certain circumstances continue to perform active service until he or she has completed 15 years' active service.

[6] Section 167(1) of the Constitution.

[7] Section 167(2) of the Constitution.

[8] Section 174(4)-(5) of the Constitution.

[9] Section 176(1) of the Constitution.

[10] Section 167(3)-(7) and sections 172-3 of the Constitution.

[11] Section 167(3)-(5) and section 172(1) of the Constitution.

[12] *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 13.

order then granted be determined, without regard to the accident of individual incumbency or the contingency of the subjective intentions of the then-members of the Court. In interpreting the costs order in *Chonco 1*, the Court must be guided by the basic principle that a court's order must be read together with its reasons to ascertain its meaning.[13]

[7] It therefore follows that the Court as presently constituted has the power and duty to determine the meaning and effect of the order granted in *Chonco 1*.

[8] On this approach, the pardon applicants' contention that the *Chonco 1* order covers the costs incurred in the High Court seems plainly correct. This is because it was expressly stated in the original judgment that the pardon applicants and their legal advisors "should not be out of pocket because of their recourse to legal proceedings."[14] This cannot but cover the costs in the High Court as well as in the Supreme Court of Appeal.

[9] However, the order failed to make that explicit. It makes clear that the Minister is to pay the pardon applicants' costs in this Court and in the Supreme Court of Appeal.

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[13] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304E-F. Trollip JA said:

> "Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it."

See also *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715F-716C.

[14] *Chonco 1* above n 1 at para 47.

But, while upholding the appeal against the order of the High Court, and dismissing the application there, it orders the Minister only to pay "the costs of the appeal",[15] while not stating explicitly who should pay the costs in the High Court.

[10] Against this background, the State Attorney's reported contention that the order does not cover costs in the Supreme Court of Appeal is somewhat surprising. About that, the order lacks no explicitness. This Court substituted the order granted in the Supreme Court of Appeal with one that expressly ordered the Minister to pay "the costs of the appeal". That plainly covers costs in the Supreme Court of Appeal.

[11] It is only the costs in the High Court that the order does not expressly mention. The dispute makes it necessary for the Court to remedy this. It has power to do so under Rule 29 of its Rules. This provides that, with such modifications as may be necessary, Rule 42 of the Rules of the High Court apply to proceedings in this Court.[16] Rule 42

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[15] *Chonco 1* above n 1 at para 49.

[16] Rule 42 of the Uniform Rules provides:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
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> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
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> (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
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> (c) an order or judgment granted as the result of a mistake common to the parties.
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> (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

provides in relevant part that, in addition to any other powers it may have, "the Court" may, of its own accord or on application, rescind or vary "an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission".[17] In view of the Constitution's requirement that "at least eight judges" of this Court must hear a matter before it, and this Court's practice of sitting *en banc*, with all available judges, it is appropriate to read "the Court" in this Rule as referring to the quorate Court, as constituted from time to time.

[12] Whether the failure in *Chonco 1* to stipulate expressly that the Minister was to pay the applicants' costs in the High Court can or should strictly be classified as an omission or an ambiguity does not matter. The Rule covers both cases.[18] It is worth noting that in many cases – such as the present – there may be an overlap between an omission and an ambiguity. Indeed, it is the omission in the order that gives rise to the ambiguity, and hence the dispute.

[13] The fact that Rule 42 applies to the proceedings of this Court makes it unnecessary to consider the question, which arises from time to time in the Supreme Court of Appeal, where Rule 42 does not apply, in what circumstances a court of final appeal may at

[17] Rule 42(1)(b).

[18] See *University of Witwatersrand Law Clinic v Minister of Home Affairs and Another* [2007] ZACC 8*;* 2008 (1) SA 447 (CC), where Rule 42(1)(b) was applied to correct a patent error in a judgment, which wrongly attributed a submission reflecting negatively on it to the applicant.

common law vary its orders,[19] or the related question that may arise in this Court under its inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests of justice.[20] It is also not necessary to consider the question whether section 172 of the Constitution[21] confers additional powers on this Court to correct its own orders, which this Court has previously left open.[22]

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[19] See *Firestone South Africa (Pty) Ltd v Genticuro AG* above n 13 at 306-8, adopted in *Minister of Justice v Ntuli* above n 12 at paras 22-4 and *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC).

[20] Section 173 of the Constitution provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[21] Section 172 of the Constitution provides:

> "(1) When deciding a constitutional matter within its power, a court—
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including—
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
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> (2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
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> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
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> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
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> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[22] See *Minister of Justice v Ntuli* above n 12 at para 27 and *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* above n 19 at para 7.

Order

[14] In the result, the pardon applicants are entitled to have the order in *Chonco 1* varied. The following order is granted:

The order in *Minister for Justice and Constitutional Development v Chonco and Others* (CCT 42/09) [2009] ZACC 25 is replaced with the following:

1. The application for leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced by the following order:

   "(a) The appeal is upheld.

   (b) The application in the High Court is dismissed.

   (c) The appellant, the Minister for Justice and Constitutional Development, is ordered to pay the respondents' costs incurred in the High Court as well as the costs of the appeal."
4. The applicant, the Minister for Justice and Constitutional Development, is ordered to pay the respondents' costs in this Court.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J.