CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 226/16 Psychological Society of South Africa v Qwelane and Others

CCT 226/16

Date of judgment: 14 December 2016

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 14 December 2016, the Constitutional Court handed down judgment in an application for leave to appeal against an order of the High Court of South Africa, Gauteng Local Division, Johannesburg.

On 20 July 2008, Mr Dubula Jonathan Qwelane published an article in the *Sunday Sun*: Call me names but Gay is NOT okay,in which he likened gay and lesbian people to animals. He claimed that they were responsible for the rapid degeneration of values in society and other ills.

In December 2009, the South African Human Rights Commission (SAHRC) filed a complaint in the Equality Court sitting at the Johannesburg Magistrate's Court (equality proceedings). In the complaint the SAHRC sought an order directing Mr Qwelane to apologise for his article on the grounds that its contents constitute prohibited hate speech in terms of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). The SAHRC also asked for an order directing Mr Qwelane to pay R100 000 to a gay and lesbian organisation and perform community service.

In March 2011, the Equality Court found Mr Qwelane guilty of hate speech. It ordered him to pay R100 000 to the SAHRC and also to write an unconditional apology to the lesbian, gay, bisexual, transsexual and intersex (LGBTI) community. However, in September of that year, Mr Qwelane successfully applied for the judgment to be rescinded.

In June 2012, after he had responded in the equality proceedings, Mr Qwelane launched a constitutional challenge in the High Court against the relevant provisions of the Equality Act. Mr Qwelane then withdrew the constitutional challenge – only to launch it afresh 15 months later. In the constitutional challenge, he contended that sections 10(1) and 11 of the Equality Act should be declared inconsistent with the Constitution because the sections infringe on his right to freedom of expression.

The parties agreed to transfer the equality proceedings to High Court. Then the SAHRC successfully applied for the constitutional challenge and the equality complaint to be consolidated. The consolidated matter was set down for hearing from 29 August to 9 September 2016.

But on Thursday, 25 August 2016, Mr Qwelane's attorneys wrote to the SAHRC, the Minister of Justice and Constitutional Development (Minister) and the *amici curiae* (the Freedom of Expression Institute and Psychological Society of South Africa (PsySSA)), requesting a postponement. He said he was unable to attend the trial because of a progressively degenerative medical condition.

The SAHRC and PsySSA objected to the postponement. They asked that Mr Qwelane should make himself available for an independent medical examination to confirm the veracity of his claimed illness. He refused. He noted that, since the Minister had agreed to his request for a postponement, he sought only SAHRC's assent – since it was the complainant. Not PsySSA's. PsySSA was only an *amicus curiae* (friend of the Court).

A series of postponements and objections made by either party then ensued, culminating in the High Court (Moshidi J) refusing SAHRC's and PsySSA's objections. He granted the postponement, and did so without specifying any date for resumption of the hearing (*sine die*).

In a judgment delivered on the same day, the Court reasoned that giving these parties the chance to respond was unnecessary. The Court was not convinced that any answering affidavit would change Mr Qwelane's physical condition.

PsySSA did not first seek leave to appeal from the High Court and thereafter from the Supreme Court of Appeal (SCA). Instead it lodged an application for leave to appeal to the SCA. When the Registrar of that Court advised it to first seek leave in the High Court, it abandoned that application and turned to the Constitutional Court for leave to appeal directly to this Court.

Before the Constitutional Court, PsySSA submitted that by postponing the matter *sine die*, the High Court caused PsySSA and the LGBTI persons, whose interests it seeks to advance, an injustice. And that a postponement *sine die* in effect amounted to a permanent stay, because Mr Qwelane's condition, on his own showing, is chronic and likely to deteriorate. So it was in the interests of justice for the hearing to be expedited. PsySSA also complained that the High Court denied it an opportunity to file opposing papers. This was procedurally unfair.

Mr Qwelane opposed the application. First, he said that PsySSA, an *amicus curiae*, had no standing to appeal against the postponement. Its role was to assist the High Court by making submissions on issues of law the other parties have not made. It was not entitled to seek its own relief. Second, the impugned order was not appealable. Lastly, the matter was moot since a date for resuming the trial had already been set.

The Constitutional Court decided the application in a short judgment without oral argument or further written submissions.

In a unanimous judgment, the Constitutional Court held that when considering an application for a postponement a court has to exercise its discretion. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot interfere simply because it disagrees.

In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.

The Court found that in this case the High Court omitted fully to weigh these considerations. And the High Court wrongly adopted the "no difference" approach: it took the attitude that receiving answering affidavits from SAHRC and PsySSA would have made "no difference" to the result, since Mr Qwelane was going to get his postponement anyhow. The Court held this was wrong.

The Court thus found that it may have been warranted to interfere with High Court's exercise of discretion in granting the postponement, because it was not judicially exercised and resulted in a procedural injustice.

However the matter had since been set down for hearing on specified dates in March 2017. The postponement PsySSA objects to is no longer indefinite. Hence it was not in the interests of justice for the Constitutional Court to intervene.

The application for leave to appeal was dismissed with no order as to costs.