



CONSTITUTIONAL COURT OF SOUTH AFRICA

Democratic Alliance v The Speaker of the National Assembly and Others

CCT 86/15

Date of hearing: 5 November 2015

Date of judgment: 18 March 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.

Today the Constitutional Court handed down judgment in a matter concerning the constitutional validity of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (Act). This provision allows the Speaker of the National Assembly (Speaker) or Chairperson of the National Council of Provinces (Chairperson) to direct the “security services” to arrest and remove a “person” creating or taking part in a disturbance within the Parliamentary precinct.

On 12 February 2015, whilst the President was delivering his State of the Nation Address in Parliament, a member of the Economic Freedom Fighters (EFF) enquired when the President was going to pay a portion of the money spent on security upgrades at his Nkandla private residence, in accordance with findings made by the Public Protector. Members of the EFF were dissatisfied with the manner in which the Speaker dealt with the question and they continued to interject. The Speaker requested that the EFF members leave the Chamber, but this was met with defiance. The Speaker directed police officials to remove the defiant members in terms of section 11 of the Act. When members of the applicant, the Democratic Alliance (DA), learnt that it was police officers that had removed the EFF members, the DA challenged the constitutionality of the action and walked out of Parliament.

The DA filed an application in the Western Cape Division of the High Court, Cape Town (High Court) challenging the constitutional validity of section 11 of the Act on the ground that it was incompatible with members of Parliament’s constitutional privilege of free speech and immunity from arrest. Furthermore, the DA contended that the provision

violated the principle of separation of powers by empowering the Speaker or Chairperson to order members of the security forces to arrest members of Parliament during parliamentary proceedings.

The High Court held that section 11 was constitutionally invalid to the extent that it permitted a member to be arrested for conduct that was protected by the immunity against arrest and the privilege protecting free speech entrenched in sections 58(1) and 71(1) of the Constitution. The Court did not rule on whether section 11 violated the principle of separation of powers. It ordered a “notional severance” to bring the provision within constitutional bounds, subjecting section 11 to a condition such that it would no longer permit violations of the immunity against arrest. It suspended the order of invalidity for a period of 12 months to allow Parliament to remedy the defect.

In this Court, the DA sought confirmation of the High Court’s order. It also sought leave to appeal against the remedy ordered by the High Court, as well as the Court’s decision not to address the separation of powers claim.

The Speaker, together with the Chairperson and the Government of South Africa, sought leave to appeal against the judgment and order of the High Court. They argued that the provision did not infringe members of Parliament’s constitutional privileges, but instead prohibited conduct or speech by members which stops, or threatens to stop, parliamentary proceedings. In their view, this type of conduct and speech is not protected by the Constitution. Additionally, they argued that the provision did not offend the doctrine of separation of powers.

The majority judgment by Madlanga J (Moseneke DCJ, Cameron J, Khampepe J, Van der Westhuizen J and Zondo J concurring) took the view that, if the word “person” in section 11 of the Act includes members of Parliament, the section is constitutionally invalid. It then considered the question whether the word does include members. The judgment observed that throughout the Act “person” preponderantly includes members and held that when interpreted both contextually and purposively, “person” included members of Parliament. Moreover, the judgment found that a consequence of the application of section 11 to members was that members could be deprived of further participation in parliamentary proceedings, thereby limiting their constitutionally guaranteed privilege of free speech in Parliament. The judgment acknowledged that the limitation of members’ free speech may be constitutionally permissible as otherwise Parliament might be incapacitated by unruly members. But the limitation of the members’ privilege of free speech by means of an Act of Parliament was constitutionally impermissible. This was so because in terms of the Constitution parliamentary free speech could be subject only to the rules and orders of Parliament. Thus this Court did not confirm the High Court’s declaration of constitutional invalidity, but found the omission of the words “other than a member” after the word “person” in section 11 to be inconsistent with the Constitution. The majority judgement rectified the constitutional defect by reading-in these words. Accordingly the majority judgment dismissed both the appeal and cross-appeal and ordered the respondents to pay the applicant’s costs, including the costs of two counsel.

The concurring judgment by Nugent AJ agreed with the majority judgment insofar as it emphasised the importance of members' free speech in Parliament and that section 11 of the Act is unconstitutional insofar as it relates to members of Parliament and its committees. Nugent AJ, however, held that "arrest" in section 11 of the Act has a wider meaning to that of the majority judgment. He held that "arrest" is not confined to arrest with the objective of prosecution and that the mere act of seizure or forcible restraint, which is what occurred in this case, for whatever purpose, constituted an arrest, which is constitutionally impermissible.

In a dissenting judgment Jafta J (Nkabinde J concurring) held that the word "person" in section 11 must be interpreted restrictively to exclude members of Parliament. He concluded that if it is so construed, section 11 of the Act is consistent with sections 58(1) and 72(1) of the Constitution. He reached that conclusion on application of the reading-down principle which entails that where it is reasonably possible, a statutory provision must be read in a manner that makes it consistent with the Constitution.