CONSTITUTIONAL COURT OF SOUTH AFRICA

City of Tshwane Metropolitan Municipality v Afriforum and Another

CCT 157/15

Date of hearing: 19 May 2016
Date of judgment: 21 July 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 its judgment concerning an order of the Full Court of the Gauteng Division of the High Court, Pretoria which restrained the Tshwane Metropolitan Municipality (Municipality) from removing old street names and directing it to restore those already removed. This was to be done, pending the finalisation of review proceedings concerning the validity of the Municipality's decision to alter the street names.

The Municipality's underlying reason for removing those names was to pave the way for street names that recognised the heroes and heroines of previously disadvantaged people. Afriforum challenged the removal in the High Court, before Prinsloo J, on the basis that the Municipality failed to facilitate a proper public participation process and to observe the principle of legality. Afriforum's review challenge was accompanied by an application for an interim interdict to suspend the removal of street names pending the review challenge. This was prompted by the need to protect the constitutional right of the Afrikaner people to enjoy their culture and to avert the irreparable harm that could flow from the removal of the old street names. Afriforum also submitted that the failure to grant the interim order would harm their environmental rights. Prinsloo J granted the interim interdict.

On appeal before the Full Court, Jordaan J (with Pretorius J and Molefe J concurring) not only endorsed the order of Prinsloo J, but also granted punitive costs against the Municipality. The Supreme Court of Appeal dismissed an application for leave to appeal with costs.

A majority judgment by Mogoeng CJ, concurred in by Moseneke DCJ, Bosielo AJ, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J, upheld the appeal and set aside the orders made by Prinsloo J and Jordaan J.

Leave to appeal was granted on the basis that the interim order was appealable. The Court held that unlike before, appealability is to be determined in terms of the constitutionally-prescribed interests of justice standard. The common law standard of appealability, that required an interim order to be final in effect and dispositive of a substantial portion of the issues, is but

one of the factors to be considered in determining appealability. The latter test should under no circumstances be directly or indirectly elevated to the level of the constitutional interests of justice standard. The majority concluded that it was in the interests of justice that leave to appeal be granted.

This conclusion was, among other things, supported by the other Courts' failure to have proper regard for considerations of separation of powers and the Municipality's very strong prospects of success on appeal.

On the merits, the majority held that Afriforum had failed to demonstrate that irreparable harm would ensue should the interim order not be granted. The reinstatement of the old street names could still be ordered by the review court should it decide in favour of Afriforum. Furthermore, the majority held that Afriforum had failed to show that the balance of convenience favoured the grant of the interim order. On the contrary, the Municipality has demonstrated that its constitutional and statutory powers to rename streets and determine the use of its budget had been unjustifiably encroached on by the Full Court. This is constitutionally permissible only in the clearest of cases, where an applicant had made a strong case for the interim order or where bad faith or fraud or corruption have been shown to underlie the impugned decision of an institution like the Municipality. This was not the case here.

In a dissenting judgment, Froneman J and Cameron J disagreed with the judgments written by Mogoeng CJ (first judgment) and Jafta J (third judgment). Their judgment started by appreciating that the wounds of colonialism, racism and apartheid run deep and that the insensitivity to the continuing wounds by those who were not subject to these indignities could only exacerbate the fraughtness. However, they felt compelled to dissent for two reasons.

The first was that the correction of the injustices of the past was not best served by attenuating well-established and sensible rules and principles for hearing appeals against the grant of temporary interdicts. They held that granting leave to appeal in this case extends existing doctrine considerably and this extension is not justified by the facts or the law. The Municipality suffered no irreparable harm, the separation of powers was not breached and it is not in the interests of justice to allow a dispute about a temporary order to drag on for more than three years, involving nineteen judges, with the main review still undecided.

The second reason was the implication that any reliance by white South Africans on a cultural tradition founded in colonial history finds no recognition in the Constitution, because that history is inevitably rooted in oppression. The oppressive history is there. But the constitutional discountenancing of a cultural history many continue to treasure has momentous implications for a substantial portion of our population. It invited deeper analysis than it received in this case. Froneman J and Cameron J noted that there are many cultural, religious or associational organisations that have roots in our divided and oppressive past and questioned whether they all were now constitutional outcasts, merely because of a history tainted by bloodshed or racism. If that is what the Constitution demands, their judgment would wish to see a longer, gentler and more accommodating debate than what was had in this case. Their judgment doubts that the transformation of our society under the Constitution would be endangered if Afriforum were given space to pursue their objections. It may merely suggest the growing power of our democracy.

For these reasons they would have refused leave to appeal with costs.

In a concurring judgment Jafta J while persuaded by the reasons advanced by Mogoeng CJ added his own reasons in support of the order. He held that an unquestionably transformative Constitution could not be expected to recognise cultural traditions rooted in the racist past. He contended that such an expectation was misplaced and the fact that an oppressive racist history existed at the level of fact did not mean that it deserved any recognition in the Constitution. He disagreed that the granting of leave attenuated "well-established and sensible rules and principles for hearing appeals against the grant of temporary interdicts" or that it extended existing doctrine considerably as suggested in the second judgment.

In the result the appeal was upheld and the orders of the High Court and the Supreme Court of Appeal were set aside and no order for costs was made.