

SOUTH AFRICA / JUDGMENT

Mdodana v Premier of the Eastern Cape and Others (1648/10) [2013] ZAECGHC 66 (13 June 2013)

[2013] ZAECGHC 66

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E Smith

CASE / FILE NUMBER

1648/10

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION –

GRAHAMSTOWN

Case no:1648/10

Date Heard: 22/03/2013

Date Delivered: 13/06/2013

In the matter between:

BENSION MPHITIKEZI MDODANA

.....APPLICANT

AND

PREMIER OF THE EASTERN CAPE

.....1ST

RESPONDENT

PREMIER OF THE WESTERN CAPE

.....2ND

RESPONDENT

PREMIER OF THE NORTHERN CAPE

.....3RD

RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL

FOR

TRADITIONAL LEADERS AND LOCAL

GOVERNMENT

AFFAIRS

.....4TH

RESPONDENT

LUKHANJI MUNICIPALITY

.....5TH
RESPONDENT
KEVIN LIEBRUM
.....6TH
RESPONDENT
ROY CALLAGHAN
.....7TH
RESPONDENT

JUDGMENT

SMITH J:

Introduction

- [1] This matter concerns the constitutional validity of several provisions of the Pounds Ordinance, no 18 of 1938 (“the Ordinance”) which, according to the applicant, put in place a scheme that impermissibly sanctions the impoundment and sale of livestock without judicial supervision, and, in addition, unfairly discriminate against the landless. The applicant, Bension Mphitikezi Mdodana, a blind subsistence farmer from Mgcwangele Location, Lady Frere, contends that several sections of the Ordinance are repugnant to the following provisions of the Constitution:
- (a) section 9; which guarantees the right to equality and prohibits unfair discrimination;
 - (b) Section 25(1); which prohibits the arbitrary deprivation of property;
 - (c) section 33; which guarantees the right to fair administrative action; and
 - (c) section 34; which guarantees the right of access to courts or other impartial tribunals.
- [2] The application was initially brought in two parts. The first part being for urgent interim relief for the release of Mr Mdodana’s impounded livestock and the second part for an order declaring the impugned provisions of the Ordinance to be unconstitutional. The first part was settled out of court and the animals were duly returned to Mr Mdodana. All that now remains for decision is the constitutionality of the impugned provisions.

Mr Mdodana lives on a small homestead at Buffelsfontein, Lady Frere, from where he conducts his subsistence farming. His socio-economic situation is no different from that of many others who struggle daily to eke out a dour existence in an area that remains one of the poorest in the country. He and his wife are both unemployed and rely on monthly disability grants in the sum of R1 080 each. Their three children are unemployed, and the Mdodanas are also responsible for their two grandchildren who still attend school. They receive a child support grant of R250 for each child. Their total disposable monthly income is therefore a paltry sum of R2 660.

In addition they own 90 goats, sheep, cattle and chickens. They are dependent on the goats to supplement their meagre income and are thus compelled, from time to time, to sell some of them in order to make ends meet.

One could thus understand Mr Mdodana's trepidation when during May 2010 a relative who looks after his livestock, told him that his goats had gone missing. After an unsuccessful search which lasted several days, he was informed by the villagers that his goats had strayed onto the property of a neighboring farmer, one Roy Callaghan (the Seventh Respondent), and that they had been taken to the Lukhanji Municipal pound.

Mr Mdodana was unable to make contact with Mr Callaghan and instead eventually spoke to the latter's domestic worker who confirmed that the goats had been taken to the municipal pound.

When he eventually visited the municipal pound on 13 May 2010, he was told that he had to pay pound fees in the sum of R41 157. 20 to secure the release of his animals. That amount comprised trespass fees; trespass mileage fees; subsistence and advertising fees. The poundmaster had apparently levied a sum of R14. 20 per goat for each day of their impoundment.

The Ordinance in context

The Ordinance was enacted during a time when there was scant regard for basic human rights. It is therefore not surprising that its language is embarrassingly redolent of an era when the majority of South African citizens were subjected to discriminatory laws which resulted in their social and economic disempowerment. Nevertheless, there can be little doubt that there remains a compelling social need for legislation that empowers local authorities to deal with the serious problems caused by unattended animals straying onto public roads and commercial farms.

The director of the the Lukhanji Municipality (the Fifth Respondent), Gideon Judeel, states that a substantial portion of the area under the municipality's jurisdiction comprises farm land which is used for livestock farming in particular. Livestock that stray onto public roads pose a serious threat to the safety of motorists. In addition, neglected animals of indifferent breed that stray onto commercial farmland can spread contagious diseases, or cover stud animals which may cause unwanted progeny and resultant economic loss.

Mr Callaghan avers that the success of a commercial farming venture is dependent on a farmer's ability to obtain maximum production from available grazing, to realise optimum reproduction from breeding livestock and sales, and to limit losses. Unattended livestock that stray onto commercial farmland thus compromise all of these commercial priorities. He has also listed, and described with graphic detail, a plethora of contagious animal diseases which should rather not be contemplated by the squeamish before a meal.

Despite the fact that owners of livestock are required (in terms of the Animal Identification Act, 6 of 2002) to mark them in the prescribed manner and to register the identification mark, many owners still fail to do so. According to Judeel, the municipality is put to considerable expense by owners who refuse or fail to mark their animals, or to exercise proper

control over them. The municipality was compelled, by way of example, to resort to the employment of "road rangers" to patrol public roads and drive stray animals off the roads. The relevant provisions of the Ordinance enable the municipality to recover at least some of these costs.

Moreover, section 12 of the Animals Diseases Act, 35 of 1984 compels all owners of farms who find stray animals upon their land, to report their presence and detain the straying animals in isolation.

The justification for these precautionary measures is self-evident. In the recent past the outbreak of swine fever has resulted in the destruction of vast numbers of pigs in most areas of the Eastern Cape. And more recently, vast numbers of livestock were infected with Rift Valley Fever which resulted in the death of not only thousands of animals, but also several human beings.

The legislative scheme of the Ordinance

Mr Ngcukaitobi, who appeared for the applicant, submitted that the Ordinance puts in place a scheme which sanctions the impermissible and arbitrary deprivation of property and sales in execution without judicial supervision. He submitted furthermore that certain provisions of the Ordinance discriminate unfairly against certain portions of the population.

The Ordinance provides for the establishment of municipal pounds and the appointment of poundmasters. Section 23 provides for the impoundment of animals that stray onto private property (in which event the owner of the property may send the animals to the nearest pound), and sections 49 to 52 for the impoundment of animals found unattended upon any road, street, thoroughfare or public place.

In terms of section 14 a poundmaster "who knows the name" of the owner of an impounded animal, must notify the owner in writing "through the post or otherwise" that the animal had been impounded.

Section 63 of the Ordinance provides for the sale of impounded animals after six days' impoundment. The poundmaster must forward a copy of an advertisement containing relevant details, the description of the animals and giving notice that the animals will be sold at the next sale of impounded stock, to the local authority. Section 64 provides that the notice must also be published at least twice in a local newspaper. In terms of sections 66 and 68 animals can only be sold if they had been impounded for at least two weeks before the sale, unless the owner consents to an earlier sale. The sale of livestock must occur every two weeks, or as close to two weeks as possible. Section 67 provides that the poundmaster, or another impartial person authorized by the local authority, must act as sales auctioneer. And in terms of section 70 the local authority may fix a reserve price for any animal, and the sale auctioneer may withdraw any animal from the sale if the highest bid is in his opinion not satisfactory, irrespective of whether there is a reserved price. It is Mr Mgodana's contention that these provisions collectively constitute a scheme which impermissibly sanctions self-help and thus the arbitrary deprivation of property.

Sections 12, 34, 35, 36 and 39 of the Ordinance provide for landowners to act as arbitrators to decide whether diseased animals should be destroyed, or to assess damages where a proprietor considers the amount of trespass money claimable in terms of the schedules to the Ordinance to be inadequate. In terms of section 12 a poundmaster may only destroy diseased animals if, inter alia, “two disinterested landowners” have agreed on the need for their destruction. Sections 34, 35 and 36 provide, inter alia, for an arbitration panel consisting of the nearest justice of the peace, and “two landowners” to assess damages when a proprietor considers the applicable tariff inadequate. Section 39 prescribes a similar regime for the assessment of damages for trespassing by infected sheep or goats. According to Mr Mdodana these provisions unfairly discriminate against the landless.

[19] The question which now falls for decision is whether the under-mentioned provisions of the Ordinance are in conflict with ss. 9; 25(1); 33 or 34 of the Constitution, and if so, whether the limitation of these rights can be justified in terms of s. 36 of the Constitution:

- (a) section 14: to the extent that it enjoins the poundmaster to inform the owner of impounded animals only where he or she knows the name of the owner;
- (b) section 23: to the extent that it allows impoundment of animals (and thus the arbitrary deprivation of property) without judicial supervision;
- (c) sections 63 to 70: to the extent that they allow for the deprivation of property through sales in execution without judicial supervision or sanction; and
- (d) sections 12, 34, 35, 36, and 39: to the extent that they provide for, inter alia, “two landowners” to decide on damages or the destruction of diseased animals, thus unfairly discriminating against the landless.

Constitutional validity of section 14

Mr Ngcoikathobi has submitted that section 14 of the Ordinance, as it stands, requires of a poundmaster to inform the owner of impounded livestock only where the latter’s name is known. He argued that there is therefore no legislative duty upon the poundmaster to establish the identity and whereabouts of the owner through diligent search. The section thus impermissibly purports to sanction the impoundment and (at least potentially) the subsequent sale of the animals without notice to the owner. It therefore constitutes an unjustifiable

limitation of the owner’s constitutional right to fair administrative action, or so the argument went.

Mr de la Harpe, who appeared for the Fifth and Seventh Respondents, submitted that on a reasonable interpretation the section does require of a poundmaster to take reasonable and diligent steps to ascertain the identity and whereabouts of the owner. I agree. In my view such a construction is indeed compatible with the language of the section. In *Zondi v MEC for Traditional Affairs and Local Government Affairs and Others* 2005 (3) SA 589 (CC), Ngcobo J, when interpreting a similar provision in the KwaZulu-Natal Pound Ordinance, held that a construction

that would require of a poundmaster to take all reasonable steps to locate the owner of impounded animals is not inconsistent with the language of the impugned provision. As was the case in Zondi (supra), section 14 of the Ordinance can be in my view be saved by “reading in” the following words after the words “the name of the owner”: “or where the name of the owner could be ascertained with the exercise of reasonable diligence”.

Constitutional validity of sections 23 and 63 to 70

As I have stated earlier, there can be little doubt that there remains a compelling need for legislation that allows municipal functionaries (and in appropriate cases members of the public) to deal urgently and effectively with stray animals without first having to obtain a court order. Mr de la Harpe has argued that for this reason section 23 of the Ordinance, which empowers landowners to impound stray animals without court orders, constitutes a justifiable limitation to the constitutional right of access to courts. Although the section may well be justifiable on this basis, it is however not the end of the enquiry. The question remains whether it, together with the other sections which relate to the sale of impounded stock, provide for a scheme which impermissibly sanctions “self-help” and sales in execution without judicial supervision.

In Zondi (supra) the Constitutional Court, when considering the constitutional validity of a provision in the KwaZulu-Natal Pound Ordinance which also provided for immediate seizure and impoundment of trespassing animals without a court order, held that the provision is

justifiable because “[s]uch animals are a danger to property and human beings. It is therefore necessary to take immediate action against such animals. To require the land owner to first obtain a court order before impounding the trespassing or straying animal may well result in more damage to property or expose human beings and other animals to danger” (at paragraph 67). The learned judge however found that the impugned section could not be viewed in isolation because, together with other provisions of the Ordinance, it puts in place a scheme which results in animals being sold in execution without any judicial supervision or sanction, consequently limiting the right against self-help guaranteed in terms of section 34 of the Constitution.

Referring to its judgment in *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC) (at paragraph 15), the court held that the protection guaranteed by section 34 of the Constitution extends to the circumstances in which property may be seized and sold in execution and includes the control that is exercised over sales in execution.

At paragraph 118 of his judgment Ngcobo J stated that:

“[t]he scheme is triggered by s 16(1), which authorises the landowner to seize and impound trespassing livestock. The scheme permits the sale of impounded livestock to recover impoundment fees and other charges by the poundkeeper, who, in his or her sole discretion, determines the conditions upon which the sale is to be conducted...This scheme violates the right of access to courts guaranteed by s 34 of the Constitution and the right to equality guaranteed in s 9(3) of the Constitution.”

The scheme put in place by sections 23 and 63 to 70 of the Ordinance has a similar effect and is consequently in conflict with section 34 of the Constitution for the same reasons. It is common cause that the impugned provisions allow for the sale of impounded livestock pursuant to the raising of impoundment charges and other fees by the poundmaster, without the involvement of the courts. Though standing on their own some of these provisions may well appear innocuous and impervious to judicial scrutiny, their combined effect is to put in place a questionable scheme that attracts constitutional censure. They are like different tentacles of the same hydra; the one cannot exist without the other. They must therefore either stand or fall together.

The question which now arises is whether the impugned scheme constitutes a justifiable limitation to the right of access to courts guaranteed in terms of section 34 of the Constitution. In my view it does not. Once straying animals had been impounded, the immediate danger to other livestock, members of the public and motorists has been removed. There is therefore no reason why further processes such as the levying of fees, the destruction of diseased animals and sales in execution, cannot be subjected to judicial supervision. To this extent the impugned provisions are therefore overbroad and disproportionate to the social “evil” they seek to remedy. There clearly are several less restrictive means to achieve the intended results. The fact of the matter is that these provisions were conceived at a time when there was no constitutional injunction compelling their originators to consider less restrictive means of achieving the intended objectives. The legislative authority of the state was supreme and the substance of all primary legislation was thus beyond the reach of judicial review.

Constitutional validity of sections 12, 34, 35, 36 and 39

Mr Ngcukaitobi has submitted that these impugned provisions unfairly discriminate against the landless. He argued that they thus unjustifiably limit the right to equality guaranteed in terms of section 9 (1) of the Constitution, and accordingly has no place in an open and democratic society based on human dignity, equality and freedom.

The municipality has conceded that the Ordinance was conceived during a time when legislative authority was supreme. It has accordingly “tempered” enforcement of certain provisions in the spirit of the Constitution, and has consequently not enforced the aforesaid provisions.

Nevertheless, if legislation is unconstitutional for any reason, the court must declare it to be so, and provided that it cannot be saved either by “reading in” or severance, it must be struck down.

The impugned provisions do indeed have disconcerting feudal overtones and are evocative of the regrettable consequences of various laws which have resulted in large scale dispossession of land owned by Africans. Because all the parties were *ad idem* that they cannot be allowed to stand, I will say no more about this issue. Suffice it then to say that in *Zondi* (supra), *Ngcobo J*, in finding that similar provisions in the KwaZulu-Natal Pound Ordinance limit the right to equality guaranteed in terms of section 9(3) of the Constitution and unfairly discriminates against the landless, said the following in this regard (at paragraph 94):

“The alternative qualification for assessment of damages is land ownership. This qualification clearly discriminates against those who are landless. We know that the majority of the landless were, and continue to be, African people who were dispossessed of their land during the apartheid era. The landless are one of the most vulnerable groups.”

And at paragraph 95:

“But the discrimination was not just against the landless; it was against landless black people.”

The learned judge found that the impugned section was consequently “manifestly and fundamentally racist in its purpose and effect” (at paragraph 96).

Summary

In summary then, apart from section 14 of the Ordinance (which can be read in a manner to ensure consistency with the Constitution) the other impugned provisions can neither be saved by “reading in”, nor can the repugnant words be severed from them without destroying their essential contents, thus rendering them meaningless.

In the event, I consider myself bound by the judgment in *Zondi* (supra) where the Constitutional Court held, in respect of similar provisions, that neither “reading in” nor severance was appropriate. At paragraph 123 of his judgment Ngcobo J stated that:

“A court should be reluctant to read in or sever words from a provision if to do so require the court to engage in the details of law making, a constitutional activity that is assigned to legislatures. Similarly, where curing the defect in the provision would require policy decisions to be made, reading in or severance may not be appropriate. So too where there are a range of options open to the Legislature to cure a defect. This Court should be slow to make choices that are primarily to be made by the Legislature.”

The impugned provisions can therefore in my view not be justified in an open and democratic society based on human rights, equality and freedom. They require fundamental reconsideration by the legislature and cannot be saved either by “reading in” or severance. They therefore do not pass constitutional muster and must accordingly fall.

Remedy

Regarding the question of an appropriate remedy, it is indeed a pity that the First, Second and Third Respondents have not made any submissions to the Court regarding the issue of the constitutional validity of the impugned sections, or the time period that they would require to enact remedial legislation. In *Zondi* (supra) a period of twelve months was allowed for this purpose. I am also of the view that such a period would allow the Respondents sufficient time to enact the necessary remedial legislation. It would in any event be open to any of these Respondents to approach the court for appropriate relief if the period is not sufficient to enable them to enact the remedial legislation. The parties have agreed that there should be no order as to costs.

Is the order subject to confirmation by the Constitutional Court?

- [34] In terms of section 172(2)(a) of the Constitution an order by the Supreme Court of Appeal, a High Court or court of similar status concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, is subject to confirmation by the Constitutional Court. Both counsel have, at my request, submitted supplementary heads of argument wherein they argue that an order of constitutional invalidity in respect of any provision of the Ordinance would indeed be subject to confirmation.
- [35] The question regarding the true nature and status of ordinances passed by the defunct provincial councils arises because in 1986 these legislative bodies were abolished by virtue of the Provincial Government Act, 69 of 1986, and their legislative powers transferred to “provincial administrators”. The ordinances could thereafter be amended by these administrators who effectively constituted the executive arm of the provincial government. The question is whether those ordinances could constitute provincial Acts as envisaged in terms of section 172(2)(a) despite the fact that they had lost their legislative status prior to their assignment in terms of the interim Constitution.
- [36] Although this issue came up for consideration in *Zondi* (supra), the court found that it was not necessary to pronounce on it because one of the respondents had in any event appealed against the order. It was again considered in *Weare and Another v Ndebele NO and Others* [2008] ZACC 20; 2009 (1) SA 600 (CC) when the Constitutional Court held that the declaration of invalidity of a provision of the Kwa-Zulu Natal Regulation of Racing and Betting Ordinance, 25 of 1957, was subject to confirmation.
- [37] A decisive consideration in this regard is how a provincial government has treated an ordinance since its assignment in 1994. In *Weare and Another* (supra) the Court found that the impugned ordinance had been treated as a provincial Act because it had been incorporated into the KwaZulu-Natal Gambling Act, and had also been amended by the provincial legislature on three occasions. The Court found that the entire ordinance therefore had to be seen as the “legislative will” of the provincial legislature and must be treated accordingly. Van der Westhuizen J however also held that the fact that there had not been any amendments to a law since its assignment in 1996 could mean that the legislature accepts the law as it stands.
- [38] The Ordinance was enacted by the Provincial Council of the Cape of Good Hope, and was thus one of the laws assigned to the provinces of the Eastern Cape, Western Cape and Northern Cape in terms of section 235(8) of the Interim Constitution. It is however not applicable in the area which comprises the territory of the erstwhile Republic of Ciskei as it was repealed in 1984 by virtue of the enactment of the Pounds Act (Ciskei), 43 of 1984. That Act continues to apply in the territory of the former Ciskei.

[39] The Eastern Cape Provincial Legislature has not amended the Ordinance since 1994, and it continues to operate throughout the province (excluding the territory of the erstwhile Ciskei) in its original unamended form. Significantly the Ordinance is uniformly implemented by all the municipalities in the Eastern Cape (excluding those that fall within the territory of the erstwhile Ciskei). It therefore operates as a provincial Act, in substance and effect.

[40] In any event, I agree with Mr Ngcukaitobi that even if, on a technical construction, the Ordinance is found not to constitute a provincial Act as envisaged by section 172(2)(a), an order of constitutional invalidity in respect of any of its provisions is still subject to confirmation by the Constitutional Court because it is implemented throughout the province, in substance and effect, as a provincial Act. In addition, the Ordinance was assigned to the three provinces which constituted the former Province of the Cape of Good Hope, and continues to apply in all three provinces. In my view it is therefore appropriate that the highest court in the land should make the final authoritative pronouncement regarding its constitutional validity.

Order

[41] In the result the following order shall issue:

- (1) Sections 12; 23; 34; 35; 36 and 63 to 70 of the Ordinance are declared to be inconsistent with the Constitution and therefore invalid.
- (2) The declaration of invalidity made in paragraph (1) above is suspended for a period of 12 months from the date of confirmation by the Constitutional Court in terms of section 172 (2) of the Constitution to enable the First, Second and Third Respondents to remedy the defects that have resulted in the declaration of invalidity; and
- (3) Pending the enactment of legislation contemplated in paragraph (2) above:
 - (a) The notice contemplated in section 14 of the Ordinance shall be given to stock owners who are known or who, with the exercise of reasonable diligence, could be ascertained;
 - (b) All sales pursuant to the provisions of section 63 of the Ordinance shall be authorized by the Magistrates' Courts having jurisdiction over the area where the relevant pound is situated;
 - (c) No sales pursuant to section 63 shall be authorized unless:
 - (i) The poundmaster, after notice to the livestock owner, who is known or who, with the exercise of reasonable diligence can be ascertained, lodges with a Magistrates' Court having jurisdiction over the area where the relevant pound is situated, his statement setting forth all the amounts due under the Ordinance;
 - (ii) The amounts set forth in the statement by the poundmaster are not disputed by the livestock owner within seven days of such notice; and

(iii) The magistrate is satisfied that notice had been given to the livestock owner, or that, with the exercise of reasonable diligence, the identity of the livestock owner cannot be ascertained.

Where the amounts set forth in the statement of the poundmaster are disputed, the magistrate shall summarily enquire into the matter, following such procedure as seems fair to all the parties, and annex such order as the magistrate considers just, including an order for costs.

The order in paragraph (3) (a) above shall come into effect on the date of this judgment.

The matter is referred to the Constitutional Court for confirmation in terms of section 172 (2)

(a) of the Constitution of the Republic of South Africa, 1996.

There is no order as to costs.

J.E SMITH

JUDGE OF THE HIGH COURT

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Date of Hearing : 22 March 2013

Date Delivered : 13 June 2013

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Prepared on 11 October 2026 · Esheria