

SOUTH AFRICA / JUDGMENT

S v Thunzi and Another (CCT 81/09) [2010] ZACC 27 (2 December 2010)

[2010] ZACC 27

COURT

Constitutional Court

BEFORE

Froneman, Ngcobo, Moseneke, Brand, Cameron,
Jafta, Khampepe, Mogoeng, Nkabinde, Skweyiya,
Yacoob

CASE / FILE NUMBER

CCT 81/09

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CONSTITUTIONAL COURT OF SOUTH AFRICA

Case

CCT 81/09

[2010]

ZACC 27

In

the matter of:

THE
STATE
versus
KHOLEKILE WITNESS THUNZI
and
SIYABULELA MLONZI
with
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
SPEAKER OF THE NATIONAL ASSEMBLY
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES
Heard
on : 11 November 2010
Decided
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Heard on : 11 November 2010

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JUDGMENT

FRONEMAN J:

Introduction

This is a matter that stems from a referral to this Court for confirmation of an order made by the Eastern Cape High Court, Mthatha (High Court). The High Court declared the “applicability” of section 4 of the Dangerous Weapons Act (Transkei)¹ (DWA (Tk)) unconstitutional. This was on the basis that it unfairly discriminated against perpetrators of crime in the

erstwhile Transkei who were subject to its harsher sentencing regime. In the majority judgment² Skweyiya J found that in declaring the “applicability” of section 4 of the DWA (Tk) to be unconstitutional, rather than the provisions themselves, the order of the High Court was not subject to confirmation by the Constitutional Court in terms of sections 167(5) and 172(2)(a) of the Constitution. However, because the High Court had confined its order of invalidity to cases where the accused had not yet pleaded, leaving the order intact would perpetuate an injustice against those who had already pleaded in terms of section 4 of the DWA (Tk). The Court exercised its inherent power under section 173 of the Constitution³ to correct the High Court’s order to the extent that it perpetuates an injustice. While considering the matter, it transpired that there was

also parallel legislation regulating the use of dangerous weapons in the former homelands of Venda,⁴ Bophuthatswana⁵ and Ciskei.⁶ Unlike the DWA (Tk), none of these Acts created differential sentencing regimes for persons sentenced. The Court raised the

question whether there was a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous

weapons. The issue whether there was a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons, especially considering that 16 years had passed since South Africa became a constitutional democracy, was alluded to in the following terms by Skweyiya J: “Parliament has not established a uniform system of law governing the use of dangerous weapons. Instead, it has retained the former TBVC states’ laws, and amended them to replicate the terms of the DWA (SA). The result is that the different laws governing dangerous weapons have, for all apparent purposes, been deliberately retained by the legislature. If the constitutional rationale for retaining old order legislation was limited and sought only to facilitate an orderly transition to a new constitutional order, then the question is whether the Constitution contemplates that old order legislation could serve any other purpose. More specifically, if the transitional provisions contemplated that the DWA (Tk) and its counterparts in

Bophuthatswana, Venda and Ciskei would continue to exist only until Parliament establishes a uniform system of law governing the use of dangerous weapons, does it not follow that there is a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons? If the transitional provisions create such an obligation, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons? And, if so, what is the appropriate relief?”⁷ Skweyiya J found that these issues call into question the constitutionality of the very existence of the multiple Dangerous Weapons Acts that continue to operate in South Africa. That issue had, however, not been adequately argued. Relying on *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1),⁸ he considered it necessary to adopt an approach similar to that adopted in that matter: “. . . where, on the papers before it, there is doubt as to whether a particular law or conduct is consistent with the Constitution, this Court may be obliged to investigate the matter. This would be particularly so where, as here, an important constitutional issue is involved. In the *Executive Council, Western Cape Legislature and Others v President of Republic of South Africa* this Court, subsequent to the hearing, realised that there were questions regarding section 235(8) of the interim Constitution that had not been addressed by counsel in their written or oral argument. Because of the importance of these questions, the Court considered it necessary to afford the parties an opportunity to make submissions on those questions and the Court the benefit of debating them. The parties’ legal representatives were therefore invited urgently to canvass the particular issues at a further hearing which was set down at fairly short notice. This is the course that must be followed in this case. It is in the interests of justice that these important issues . . . be investigated.” (Footnote omitted.) Directions were issued calling on the parties to address the following: Do the provisions in item 2 of Schedule 6 to the Constitution⁹ impose a constitutional obligation on Parliament to rationalise the laws governing the use of

dangerous weapons in the territories

of the former Transkei, Bophuthatswana, Venda and Ciskei?

If so, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons throughout the Republic of South Africa?

If question (ii) above is answered in the affirmative, what order, if any, should this Court make?

Is the continued operation of the Dangerous Weapons Act 71 of 1968 (Transkei), Dangerous Weapons Act 71 of 1968 (Bophuthatswana), Dangerous Weapons Act 71 of 1968 (Venda) and Dangerous Weapons Act 71 of 1968 (Ciskei) unconstitutional and should these statutes be struck down on any other basis? The Court directed that the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (Parliament) be joined as parties to the proceedings and that they file submissions together with the Minister for Justice and Constitutional Development (Minister). Submissions were filed on behalf of all of them. Mr Thunzi, Mr Mlonzi and the Director of Public Prosecutions, Mthatha, were invited to make submissions if they so wished. At the hearing Parliament accepted, and it was common cause, that it had an obligation to effect rationalisation in order to have uniform national legislation regulating the use of dangerous weapons. The Minister indicated that the process of rationalisation had begun and that the necessary legislation would be introduced in Parliament in the 2011 legislative programme. Notices triggering the operation of the offending clauses in the different pieces of legislation, which provided for differential sentencing regimes, had been withdrawn.¹⁰ The factual situation is thus that parallel legislation exists regulating the use of dangerous weapons in the former homelands,

but that none of the provisions are operational. In these circumstances it is not in the interests of justice for us to consider whether this Court has exclusive jurisdiction to consider Parliament's obligations in relation to the impugned legislation.¹¹ It is also not in the interests of justice to consider whether the mere existence of parallel legislation regulating the use of dangerous weapons is unconstitutional or to make any order invalidating that legislation with immediate effect and making a further order in terms of section 172(1)(b) of the Constitution. We have a solemn undertaking from the other two arms of government that the process of rationalisation will be given effect to in the 2011 parliamentary session.¹² That undertaking is formally noted here. The offending legislation is not presently in operation in any part of the country and will thus not adversely affect any person. In these circumstances, I consider it appropriate to postpone this matter until 29 November

2011. The Minister and Parliament will be directed to file affidavits by 8 November 2011, indicating the steps they have taken in pursuance of the undertaking. If the matter is finalised before then, this date can be anticipated. This matter concerns only one aspect of the rationalisation of transitional measures in the Constitution. Given that this matter will be before Parliament, there is no reason not to expect that similar speedy consideration will be given to other laws that might owe their existence merely to the transition from the old to the new order. Order The following order is made:

- (a) The matter is postponed to Tuesday, 29 November 2011.
- (b) The Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister for Justice and

Constitutional Development are required to notify this Court by Tuesday, 8 November 2011 of the legislative steps taken to fulfill

the undertaking to rationalise the laws that are the subject of this litigation. Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Froneman J.

FRONEMAN J:

Introduction

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While considering the matter, it transpired that there was also parallel legislation regulating the use of dangerous weapons in the former homelands of Venda,⁴ Bophuthatswana⁵ and Ciskei.⁶ Unlike the DWA (Tk), none of these Acts created differential sentencing regimes for persons sentenced. The Court raised the

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“Parliament has not established a uniform system of law governing the use of dangerous weapons. Instead, it has retained the former TBVC states’ laws, and amended them to replicate the terms of the DWA (SA). The result is that the different laws governing dangerous weapons have, for all apparent purposes, been deliberately retained by the legislature.

If the constitutional rationale for retaining old order legislation was limited and sought only to facilitate an orderly transition to a new constitutional order, then the question is whether the Constitution contemplates that old order legislation could serve any other purpose. More specifically, if the transitional provisions contemplated that the DWA (Tk) and its counterparts in Bophuthatswana, Venda and Ciskei would continue to exist only until Parliament establishes a uniform system of law governing the use of dangerous weapons, does it not follow that there is a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons? If the transitional provisions create such an obligation, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons? And, if so, what is the appropriate relief?”⁷

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the undertaking to rationalise the laws that are the subject of this litigation.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Froneman J.

For the State: Advocate S Mbewu instructed by the Director of Public Prosecutions, Mthatha. For Mr Thunzi and Mr Mlonzi: Advocate E Crouse instructed by Legal Aid South Africa, Port Elizabeth Justice Centre. For the Minister for Justice and Constitutional Advocate PJJ De Jager SC and Development, the Speaker of the National Advocate Holland-Müter Assembly and the Chairperson of the National instructed by the State Attorney, Council of Provinces: Johannesburg.

For the State: Advocate S Mbewu instructed by the Director of Public Prosecutions, Mthatha.

For Mr Thunzi and Mr Mlonzi: Advocate E Crouse instructed
by Legal Aid South Africa, Port
Elizabeth Justice Centre.

For the Minister for Justice and Constitutional Advocate PJJ De Jager SC and
Development, the Speaker of the National Advocate Holland-Müter
Assembly and the Chairperson of the National instructed by the State Attorney,
Council of Provinces: Johannesburg.

1 71 of 1968.

2 S v Thunzi and Another, Case No CCT 81/09, as yet unreported, 5 August 2010.

3 Section 173 states that: “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.”

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4 Act 71 of 1968.

5 Act 28 of 1982.

6 Act 71 of 1968.

7 Above n 1 at paras 65-6.

8

[2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 68.

9 Item 2 of Schedule 6 to the Constitution states: “(1) All law that was in force when the new Constitution took effect, continues in force, subject to—

- (a) any amendment or repeal; and
 - (b) consistency with the new Constitution.
- (2) Old order legislation that continues in force in terms of subitem (1)—
- (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
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10 See Government Gazette 9414, GN R1047, 10 November 2010 and Government Gazette 9414, GN R1048, 10 November 2010.

11 Section 167(4)(e) of the Constitution. See also *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* [2009] ZACC 20; 2009 (6) SA 94 (CC).

12 Compare President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 8, where this Court postponed sine die the confirmation of a declaration of invalidity pending the enactment of new legislation that would regulate the matter.

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