CONSTITUTIONAL COURT OF SOUTH AFRICA

Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another

CCT 201/19

Date of Hearing: 18 February 2020
Date of Judgment: 27 November 2020

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 Friday, 27 November 2020 at 10h00, the Constitutional Court handed down judgment concerning issues decided by the High Court of South Africa, Gauteng Division, Pretoria. These were whether: (i) the High Court's order declaring section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 constitutionally invalid, should be confirmed; (ii) section 18(2)(b) of the Riotous Assemblies Act is inconsistent with the right to free expression, as enshrined in section 16(1) of the Constitution, by reason of its overbreadth; and (iii) section 1(1) of the Trespass Act 6 of 1959, properly interpreted, is inapplicable where the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) applies.

The genesis of this matter is statements attributed to Mr Julius Sello Malema, the President of the Economic Freedom Fighters, allegedly encouraging people at several gatherings to occupy any land they like, presumably without lawful permission or reason. The National Prosecuting Authority preferred criminal charges against him. They were essentially about inciting other people to commit trespass in contravention of section 18(2)(b) of the Riotous Assemblies Act read with section 1(1) of the Trespass Act. Mr Malema and the EFF challenged the constitutional validity of section 18(2)(b) in the High Court. The Court concluded that section 18(2)(b) was unconstitutional because it compelled a court to impose the same punishment on the inciter as on the actual perpetrator of the offence. It however dismissed the contention that section 18(2)(b) was overbroad and that the Trespass Act was not applicable. Aggrieved by this outcome, Mr Malema and the EFF approached the Constitutional Court.

In the majority judgment written by Mogoeng CJ, in which Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, and Victor AJ concurred, the Constitutional Court dismissed the application to confirm the High Court's order declaring the punishment regime of section 18(2)(b) unconstitutional. It held that the fact of the inciter being "liable" to punishment in this section means that the imposition of the same punishment on the inciter as on the actual perpetrator is not mandatory but discretionary. It also held that the criminalisation of inciting others to commit "any offence" is overbroad and inconsistent with the right to freedom of expression in section 16(1) of the Constitution.

In order to provide effective interim relief it was considered necessary that the word "serious" be inserted between the words "any" and "offence" in section 18(2)(b), pending Parliament's more enduring intervention. Additionally, the order of constitutional invalidity was suspended for a period of two years to allow Parliament to correct the defect.

The Court dismissed the application to interpret section 1(1) of the Trespass Act in a manner that effectively renders it impermissible for one to face criminal charges where PIE applies. It did so on the basis that the issue was not properly pleaded.

The minority judgment penned by Majiedt J (Jafta J and Tshiqi J concurring) agreed with the majority judgment on section 1(1) of the Trespass Act. With regard to section 18(2)(b) of the Riotous Assemblies Act, the minority agreed that by criminalising the incitement of others to commit "any offence", the impugned section limits freedom of expression. However, the minority judgment disagreed with the majority judgment in two fundamental ways. First, the majority judgment's outlook on the crime of incitement and how it should be treated in a robust, democratic Republic like ours and, second, its approach to the justification analysis.

Ultimately, the minority judgment held that based on a global proportional assessment (as envisaged by section 36(1) of the Constitution), the legitimate and important purpose of crime prevention underscoring the impugned provision, coupled with the existence of a rational connection between the means and ends, the limitation strikes at the penumbra of a constitutionally cherished right, and the overbreadth of the impugned provision can be cured by existing countervailing factors to guard against its misuse (these include, amongst others, the stringent requirements for a crime to constitute incitement and the principle that the law does not concern itself with trivialities). A further consideration is that the curtailment of free speech by the impugned provision is minimal. All of these coalesced considerations evince a proportionate effect on the right and thus tip the scales towards a reasonable and justifiable limitation of the right in section 16(1) of the Constitution.

The minority judgment noted that the criminalisation of incitement is vital in the country's fight against the pervasive crime wave and serves to protect the rule of law and the rights of others in our constitutional democracy. The minority judgment observed that robust public debate and heated political discourse about the land question must be afforded its deserved space in our vibrant, nascent democracy. It emphasised that the extensive political process currently underway in respect of land reform, must be allowed to take its course and orderly land reform must occur within the bounds of the Constitution. In terms

of the majority judgment's interim reading-in, the minority judgment held that while it may cure the overbreadth of section 18(2)(b), it ushers in problems such as the real risk of vagueness.