



CONSTITUTIONAL COURT OF SOUTH AFRICA

Billy Lesedi Masetlha v The President and Manala Elias Manzini

Case CCT 01/07

Decided on: 3 October 2007

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.

This morning, the Constitutional Court handed down judgment in the matter between Mr Masetlha, the former Director-General of the National Intelligence Agency (NIA), and the President of the Republic of South Africa. This Court was called upon to decide whether two decisions taken by the President, one to suspend and the other to terminate Mr Masetlha's employment as head of the NIA, was constitutionally permissible. Mr Masetlha sought a declarator that the President lacked the power to suspend him from his post or to alter unilaterally his terms of employment. In the alternative, he sought the remittal of this matter to the High Court for the hearing of oral evidence.

In a minority judgment in which Madala J concurred, Ngcobo J held that under the Constitution the President has a duty to act fairly and that duty precludes the President from unilaterally altering the term of office of the head of the NIA. He held that this is a requirement of the rule of law which is one of the foundational values of our constitutional democracy. Accordingly, the President was obliged to consult with Mr Masetlha before taking a decision to alter his term of office so as to terminate his appointment prior to its scheduled expiry date. In failing to do so, the President acted in breach of the Constitution. He found, however, that on the objective facts before the Court, there has been an irreparable breakdown of trust between the President and Mr Masetlha. Mutual trust, he held, is fundamental to the relationship between the President and Mr Masetlha. On the facts of this case, it is therefore not appropriate to re-instate Mr Masetlha in his former position. However, Mr Masetlha must be put in the same financial position he would have been in but for the premature termination of his services.

In a separate judgement Sachs J concurred in the order made by the majority, and held that given the loss of the trust that lay at the heart of the specific constitutionally defined relationship between the President and Mr Masetlha, the termination of the appointment was not unlawful. Mr Masetlha was, however, entitled to a fair labour practice. Fairness meant that the offer to pay him out for the balance of the period of

his appointment should not be characterised as an act of grace or compassion, but as compliance with a legal obligation. Fairness further presupposed that appropriate concern be displayed for the reputational consequences of an incumbent who is about to be relieved of a high profile position in public life. Sachs J added that fair dealing could not be separated from civility, which, in a constitutional sense, involved more than just courtesy or good manners and was one of the binding elements of a constitutional democracy.

In a majority judgment, in which Langa CJ, Navsa AJ, Nkabinde J, O'Regan J, Skweyiya J and Van der Westhuizen J concurred, Moseneke DCJ characterised the issues as being: a.) whether leave to appeal should be granted; b.) whether the Presidential decision to amend the applicant's term of office or to dismiss him is constitutionally permissible; c.) whether the decision to suspend the applicant from his post is valid; d.) what the appropriate remedy would be in the circumstances; and e.) whether any aspects of this case should be referred to hear oral evidence.

In relation to the issue around whether leave to appeal should be granted, he held that the matter raises important constitutional issues that fall to be resolved by this Court and that it is in the interests of justice that leave to appeal directly to it be granted.

In relation to the issue whether the President's decision to amend the applicant's term of office is constitutionally permissible, Moseneke DCJ held that the President's power to appoint and dismiss is not exclusively located in the provisions of the Public Service Act, which provides for the manner and form of the service contract, but must be read in conjunction with the prevailing constitutional and legislative scheme, which implicitly confers on the President such power. He concluded that the President had the power to terminate the employment of the applicant under section 209 of the Constitution read with section 3 of the Intelligence Services Act. Given the conclusion he reached that the decision amounted to executive action and not administrative action, he held that it was reviewable only on the grounds of rationality and legality. This does not however mean that there are no legal consequences to the early termination of the fixed term of the underlying contract of employment of the head of the NIA. Under employment law, the state is obliged to place Mr Masetlha in exactly the same position he would have been but for the early termination of his employment.

Moseneke DCJ held further that it was not necessary to decide the suspension dispute that was rendered moot by the decision on the dismissal of the applicant.

In relation to remedy, he held that, given the unique and constitutionally special relationship between the President and the head of the NIA, re-instatement was not an appropriate remedy to be awarded in the circumstances of this case. However, he held additionally that absent an order for re-instatement, Mr Masetlha is entitled to be placed in the same position he would have been in had he served his full term of office.

In regard to the question around referral to oral evidence, Moseneke DCJ concluded that the onus lies on the applicant to seek an order for a referral to oral evidence if he is of the reasonable view that genuine disputes of fact may require resolution through oral evidence.

In the result, the Court made the order that the application for leave to appeal must be granted; but that the appeal against the decision of the High Court must be refused. The Court also ordered the President to pay the applicant remuneration, allowances, pension and other benefits for the period starting on 22 March 2006 up to 1 December 2007, all of which must place the applicant in the same financial position that he would have been in but for the early termination of his term of office. The Court has made no order as to costs.