

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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**Moyo v The Minister of Justice and Constitutional Development & others; Sonti v The Minister of Justice and Correctional Services & others [2018] ZASCA 100**

These two cases involved constitutional attacks on the validity of two provisions of the Intimidation Act 72 of 1982. The first by Mr Moyo arose from his being charged with intimidation in terms of s 1(1)(b) of the Act arising out of an incident involving him and policemen stationed at the Primrose police station, when he was seeking to present a petition to the police. He contended that the section contravened his right to freedom of expression in terms of s 16(1) of the Constitution and the limitation it imposed upon his rights was not justifiable.

In a majority judgment by Wallis JA the court upheld the validity of the section. It pointed out that it was the only legislation providing protection against intimidatory conduct abhorrent in any democratic society, such as, sexual harassment falling short of any of the crimes in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, stalking, trolling attacks on social media, cyber attacks and the like. Other examples of conduct falling within the section were

hoax bomb threats and threats to poison water supplies or contaminate food in supermarkets.

The majority judgment held that in terms of s 39(2) the court was obliged to interpret the section in accordance with the spirit, purport and objects of the Bill of Rights and insofar as reasonably possible on the language used to give it a constitutionally compliant interpretation rather than one that infringed constitutional rights. It held that this was possible and that a conviction of intimidation under the section could only occur if the intimidatory conduct was intimidatory in the true sense; was committed with intention and was such that it induced genuine fear in the victim or would reasonably be expected to induce genuine fear in the body of persons to whom the intimidatory conduct was directed. It rejected arguments that subjective fear alone was required; that the offence involved strict liability and did not require the conduct in question to be intimidatory in any real sense.

The majority judgment pointed out that conduct that is specifically rendered lawful by the Constitution and legislation cannot be unlawful for the purposes of a statutory crime such as intimidation. Accordingly, a person exercising their constitutional right to freedom of expression could not be committing the crime of intimidation. Nor could lawful industrial action under the Labour Relations Act constitute intimidation.

The minority judgment by Mbha JA adopted a different construction of the section, holding that it criminalised conduct that was committed without any intention to intimidate and that a conviction could flow from subjective and unreasonable fear being induced in an individual as a result of legitimate political speech. It accordingly held that there was an infringement of s 16(1) of the Constitution that could not be justified.

In the case of Ms Sonti, currently a member of parliament, she is charged with intimidation for allegedly threatening to burn the complainant's house down if she did not withdraw a complaint of criminal conduct against a third party. Ms Sonti denies the truth of these allegations, but contends that s1(2) of the Intimidation Act contains an impermissible reverse onus provision that infringes the presumption of innocence. The court was unanimous in holding that the section is constitutionally invalid although for differing reasons. Wallis JA held that the section is an evidential onus provision that impermissibly places pressure on an accused person to forego their right to silence and infringes their fair trial rights under s 35(3) of the Constitution. Mbha JA held that it reversed the onus or proof and thereby breached the presumption of innocence. The court unanimously held that the section was unconstitutional and referred its order of unconstitutionality to the Constitutional Court for confirmation.

Although, in view of the stage reached in the proceedings, the court held that it was in the interests of justice to hear the appeal, the majority judgment held that the procedure adopted of postponing the criminal trials of Mr Moyo and Ms Sonti had resulted in unsatisfactory delays in resolving their criminal trials. It said that it is generally undesirable for criminal trials to be postponed while litigation takes place in the civil courts over constitutional questions that may in the end have no bearing on the outcome of the prosecution. As a general practice the court seized with the criminal trial should conduct it in accordance with the provisions of the Criminal Procedure Act and the Constitution.