CONSTITUTIONAL COURT OF SOUTH AFRICA

Thint Holdings (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd versus National Director of Public Prosecutions; Jacob Gedleyihlekisa Zuma versus National Director of Public Prosecutions

CCT 90/07
CCT 92/07
Medium Neutral Citation [2008] ZACC 14

Date of Judgment: 31 July 2008

MEDIA SUMMARY

The following media summary is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in two applications concerning the lawfulness of a letter of request from the National Director of Public Prosecutions (NDPP) to the Attorney-General of Mauritius, asking the latter to transmit to South Africa 14 documents in his possession.

In the first application the two applicants are Thint Holdings (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd. Both companies are subsidiaries of Thales International Africa Ltd (Thales). In the second application the applicant is Mr Jacob Gedleyihlekisa Zuma. The respondent in both cases is the NDPP.

In 2001, the Directorate of Special Operations, a unit within the office of the National Prosecuting Authority (NPA), applied to the Mauritian Supreme Court for an order permitting them to search the offices of Thales and of Mr Alain Thétard, a director of Thales and of both Thint companies, and to seize certain specified documents. On 5 October 2001, the order sought was granted and the search and seizures were carried out. Copies of documents seized were made and taken to the NDPP in South Africa.

In 2006, the NPA decided to charge Mr Zuma and the Thint companies with certain offences, including corruption. The NDPP sought the original documents in order to prevent the admissibility of the copies being challenged in court. The NDPP thus applied to the Durban High Court for the issue of a letter of request in terms of section 2(1) of the

International Co-operation in Criminal Matters Act 75 of 1996 (the Act). The letter requested the Mauritian authorities to furnish the originals of the seized documents, as well as proof of their authenticity.

On 22 March 2006 the Durban High Court referred the matter to the trial court. However, on 20 September 2006, the trial court per Msimang J refused the state's application for a postponement and struck the matter from the roll.

On 12 December 2006, the NDPP launched a new application in the High Court for the issue of a letter of request, this time under section 2(2) of the Act. Whereas under section 2(1) a letter of request may be issued by a court during a criminal trial, section 2(2) may be used as soon as an investigation is underway. The High Court found that the requirements of section 2(2) of the Act had been met, and issued the letter of request on 2 April 2007.

The applicants appealed to the Supreme Court of Appeal (SCA). Dismissing the appeal, the SCA held that the applicants had no standing to appeal against the decision to issue the letter of request. Furthermore, the SCA held that even if they did have standing, the applicants would have failed on the merits as the jurisdictional requirements of section 2(2) had clearly been met.

The applicants appealed to the Constitutional Court and were heard on 11-13 March 2008. This Court declined to decide whether the applicants had standing, leaving that question open. Instead each of the arguments of the applicants was addressed on the merits.

The first argument concerned whether the state could use section 2(2) of the Act to procure original documents of which it already had copies. The applicants argued that since the Act referred to both "evidence" and "information", the two words must have distinct and different meanings. "Information", they contended, meant unknown knowledge, which in this case is the content of the seized documents. However, since the NDPP already had copies of the seized documents, he would not obtain any new "information" from the originals. Thus, the applicants concluded, the NDPP's actions were not covered by section 2(2) of the Act and were unlawful. This Court, however, found the applicants' argument to be based on a false distinction between "evidence" and information". An investigation is not broken into two components, one seeking "information" and the other separately seeking "evidence". There is one process, conducted by the NDPP in accordance with his constitutional duty to combat crime. As a result, this Court rejected this argument.

The second argument concerned the state's use of section 2(2) of the Act despite the fact that the applicants had previously been charged. The applicants contended that they were for all practical purposes accused persons at all material times, even though the criminal case against them had been struck from the roll. As such, they argued, the state should not have been allowed to use section 2(2) of the Act, and instead should have used the section 2(1) procedure, in which the applicants would have had a right to participate.

This Court rejected this argument on two grounds. First, once the original criminal case had been struck from the roll, the trial ended and there was no certainty that it would be reinstated. Thus the applicants were objectively not accused persons. Secondly, the argument put forward by the applicants would have greatly delayed the administration of justice. This would have denied many people, including the applicants, of their constitutional right to a speedy and fair trial.

The third argument, advanced on behalf of Mr Zuma alone, was that the issue of the letter of request infringed his right to human dignity. He submitted that when a judge issues such a letter, that judge effectively endorses the allegations contained therein. This Court held that it was not an infringement of Mr Zuma's dignity, noting that Mr Zuma's right to be presumed innocent remained untrammeled. All that the NDPP had done was communicate the objective fact that Mr Zuma was a suspect in a criminal matter. There is no right not to be named as a suspect in a criminal matter.

The fourth argument was advanced solely on behalf of Mr Zuma. It was submitted that his constitutional right to a fair trial had been infringed, and that in particular he would not be afforded an opportunity to challenge the evidence contained in the Mauritian documents. This Court held that this was manifestly not so. No evidence could be tendered in the eventual trial court without the applicants being afforded a full opportunity to engage with and challenge such evidence. If the trial court failed to ensure that the applicants received a fair trial, then they would have grounds for a valid appeal. No prejudice would have been suffered by any of the applicants.

The final argument concerned Mr Zuma's right of access to courts. The Court held that this right had not been infringed, as Mr Zuma would be entitled to a full hearing before the appropriate forum, namely the trial court. Furthermore, the Court held that the purpose of section 34 was not to grant standing to all applicants with disputes, but instead to ensure that litigants who have suffered violation of their rights are not barred by procedural, legal or other obstacles from approaching a court.

This Court therefore granted leave to appeal in both cases, but dismissed the appeals with costs.