
EXPLANATORY NOTE

The following explanation 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 judgment delivered today concerns the validity of section 72(4) of the Criminal Procedure Act. This subsection provides for summary proceedings when an accused person fails to appear in court at the time and on the date fixed by a warning so to appear; unless the accused then satisfies the court that the failure was not due to his or her fault, a fine or imprisonment may be imposed. The Constitutional Court had to consider confirming an order by the Venda High Court declaring the provision inconsistent with the Constitution and therefore invalid.

The Constitutional Court examined three questions: (1) does the summary nature of the procedure limit the right to a fair trial and does the requirement that the accused establish the absence of fault, limit the right to be presumed innocent and the right to remain silent; (2) if there is a limitation, is it justifiable under s 36 of the Constitution; (3), if not, what relief is appropriate?

In a unanimous decision written by Ngcobo J, the Court found that the requirement that the accused must satisfy the court, limits both the rights mentioned. The accused is forced to speak because, absent an explanation, a conviction follows. In addition, an accused may be convicted despite the existence of a reasonable doubt, thus limiting the presumption of innocence.

As regards justification, the Court found that the summary procedure serves the useful purpose of dealing quickly and effectively with conduct that hinders the smooth running of the court's trial process. Also, the reasons for non-compliance can best – if not exclusively – be supplied by the accused and therefore the limitation on the right to remain silent is justifiable. The limitation on the right to be presumed innocent, however, is not justifiable. This is an important right and the state can achieve its objective by merely requiring the accused to raise a reasonable doubt as to the question of fault, avoiding the risk of a conviction despite a reasonable doubt. The Court consequently found section 72(4) as it stands to be inconsistent with the Constitution.

As regards remedy, however, the Court decided not to confirm the striking down of section 72(4) but to order that it be read as requiring the accused to raise a reasonable possibility that the failure to comply with the warning was not due to his or her fault.