CONSTITUTIONAL COURT OF SOUTH AFRICA

Reflect-All 1025 CC and Others v Member of the executive Council for Public Transport, Roads and Works, Gauteng Provincial Government

Case CCT 110/08
[2009] ZACC 24

Date of Judgment: 27 August 2009

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.

Today, the Constitutional Court delivered a judgment concerning the constitutional validity of section 10(1) and (3) of the Infrastructure Act 2001 and the corresponding Notices 2625 and 2626, pertaining to the planning of provincial roads. The primary issue is whether the impugned legislation arbitrarily deprives owners of their property contrary to section 25(1) of the Constitution.

The impugned provisions allow the provincial authorities to subject route determinations and preliminary designs of provincial roads, which have been approved under the previous regulatory scheme, to the regulatory measures under the Act. All consultations and environmental investigations required by the Act are deemed to have occurred once the Gauteng Member of the Executive Council for Public Transport, Roads and Works (MEC) has published the route determination or preliminary design in the Government Gazette. The Act prohibits the granting of applications for establishment of townships, subdivision of land and any change of land use as well provision of services such as telephone lines within the land that falls within determined routes and designs, unless an application to that effect is submitted by a concerned property owner.

The applicants are landowners in the Gauteng Province. Portions of their properties are affected by the road network because such portions fall within the "road" or "rail reserve" of the road network which constitutes the full width of a road intended to be used for traffic. The landowners applied to the South Gauteng High Court, Johannesburg, complaining that the impugned provisions arbitrarily deprive owners of their land in violation of section 25(1) of the Constitution; amount to expropriation without just and equitable compensation; fail to facilitate co-operative governance; and that the conduct of the MEC contemplated in the impugned provisions constitutes unjust administrative action. The MEC and the Premier for the Province of Gauteng (respondents) took issue with all the landowners' contentions. They maintained that the impugned provisions are constitutionally valid.

The High Court declared section 10(3) of the Infrastructure Act invalid and set aside its corresponding Notice 2626. It found that the restrictions invoked under section 10(3) arbitrarily deprived property owners of their properties and were invalid. The High Court, however, refused to declare section 10(1) invalid. It found that the restrictions invoked by section 10(1) were not excessive and that even though section 10(1) deprived the applicants of their property, such deprivation was not arbitrary. It ordered the respondents to pay the landowners' costs.

The declaration of constitutional invalidity was referred to this Court for confirmation and the landowners applied for leave to appeal against the High Courts refusal to declare section 10(1) and its

corresponding Notice 2625 unconstitutional. The respondents opposed the applications for confirmation and leave to appeal and cross appealed against the High Court costs order.

A majority judgment written by Nkabinde J was concurred in by Moseneke DCJ, Mokgoro J, Ngcobo J and Skweyiya J. She stressed that though the protection of the right to property is a fundamental human right, property rights in our new constitutional democracy are not absolute; they are determined and afforded by law and can be limited in light of a greater public interest. The long-term planning of a strategic road network is for the benefit of the public but inadequate transport system could stifle economic growth and lead to expensive re-routing especially if planning is done piecemeal and in build-up areas. Furthermore, she found that the expenses incurred by the province in relation to determinations and designs prior to the Act were based on fundamentally sound planning policy. A mass review of the designs at the instance of the state would, in her view, both cripple the state financially and be extremely burdensome to implement.

Nkabinde J held that whilst both provisions do deprive the landowners of portions of their land that fall within the road reserve, neither deprivation was arbitrary. In making provision for a mechanism that enables affected landowners to apply the MEC for an amendment of routes and designs, she found that the Act strikes a balance between the province's legitimate interests in protecting the hypothetical road network which is for the public good on the one hand, while ensuring that the interests of landowners are protected on the other. None of the applicants applied for such amendment before challenging the impugned provisions. She concluded that neither of the impugned provisions is either procedurally or substantively arbitrary.

In rejecting the contention that section 10(3) amounts to expropriation without just and equitable compensation, Nkabinde J held that the provincial government has not acquired any rights in the affected land. She found that the Act does not offend the constitutional principles of co-operative governance; the Constitution vests provincial road planning with the provincial government. Finally, Nkabinde J found that any interpretation suggesting that the publication of the notices constituted administrative action under PAJA would defeat the purpose of the Act which seeks to provide a transitional measure whereby existing route determinations and basic designs can be deemed to have been adopted.

In the result, the majority declined to confirm the order of constitutional invalidity made in favour of the landowners by the High Court and dismissed their application for leave to appeal. They upheld the respondents' cross-appeal, set aside the High Court's costs order and replaced it with one that each party should pay its own costs. Regarding the costs of the applications in the Constitutional Court, the majority also ordered each party to pay its own costs.

O'Regan J, with whom Cameron J and Van der Westhuizen J concurred, dissented on the narrow issue whether section 10(3) of the Act is inconsistent with the Constitution. She found that the effect of section 10(3) in indefinitely restricting the rights of landowners whose land falls within the preliminary design of a road reserve is disproportionate: The restriction on rights may continue despite the fact that the province has decided never to build the roads in question. In such a case, there is little public purpose achieved by the restriction. She concluded that this disproportionate effect could be removed were the legislation to provide for a periodic public review of preliminary designs. The order she would have proposed would have been to declare section 10(3) invalid for this reason but to suspend the order of invalidity for eighteen months to give the Gauteng legislature time to amend the legislation by introducing a process of periodic review.