

SCA overturns decision on silk

The Supreme Court of Appeal (SCA) has overturned a North Gauteng High Court order declaring that the President had no power in terms of s 84(2)(k) of the Constitution to confer senior counsel (SC), or 'silk', status on advocates.

The court, in a decision delivered on 15 March (*General Council of the Bar and Another v Mansingh and Others* (SCA) (unreported case no 417/2012, 15-3-2013) (Brand JA)), found that 'there is nothing in the broader context which compels a meaning of "honours" that deviates from the one clearly indicated by the historical background of the provision. ... [T]he power to confer honours bestowed upon the President by s 84(2)(k) includes the authority to confer the status of senior counsel on practising advocates.'

Section 84(1) of the Constitution provides that the President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of head of state and head of the national executive, while subs (2)(k) provides that the President is responsible for conferring honours.

The respondent, Johannesburg advocate Roshnee Mansingh, has, however, told *De Rebus* that she had applied to the Constitutional Court for leave to appeal the SCA decision.

Background to the matter

The above order was the result of an application to the High Court by Ms Mansingh, who was of the opinion that the President's power to confer honours in terms of s 84(2)(k) did not include the power to grant advocates SC status, and that there was no other legal source for such power.

Six respondents were cited in the application, namely the President, the Justice Minister, the General Council of the Bar, the Johannesburg Society of Advocates, the Independent Association of Advocates of South Africa and the Law Society of South Africa (LSSA) because of the interest they may have in the matter. All of the respondents, bar the LSSA, opposed the application. The LSSA stated that it would abide by the court's decision.

The High Court granted the order requested by Ms Mansingh and declared that the President had no such power to confer SC status.

The SCA

The General Council of the Bar and the Johannesburg Society of Advocates approached the SCA to appeal the High Court judgment. The respondents in the court *a quo*, save for the LSSA, stated that they would abide by the SCA's decision.

The appellants' argument was that the power to confer SC status on practising advocates fell in the ambit of s 84(2)(k); alternatively, even if it could not be accommodated under the honours power in s 84(2)(k), it was authorised by s 84(1) as an auxiliary power necessary to carry out a function of the President as head of state.

The court noted that, in the appeal, the LSSA was 'no longer content to abide the decision of the court, but actively supported Mansingh's case'.

The narrow issue before the SCA was whether the President had the power to confer the status of silk on practising advocates under the Constitution, which the court noted turned 'exclusively on the interpretation of s 84 of the Constitution'.

The court emphasised that it was not called on to decide questions relating to whether the institution of silk is a 'good thing or a bad thing', whether it should be abolished or retained, whether or not it is worthy of protection, and whether or not the President should or ought to have such a power.

Interpretation of s 84(2)

The court therefore approached the matter from the perspective of a proper interpretation of s 84(2) and considered a number of Constitutional Court decisions on constitutional interpretation.

It noted that the first step was to establish the literal meaning of 'honours'. In this regard, the court held that 'on a purely linguistic basis', the concept of honours bears a meaning wide enough to include the conferral of silk.

Historical context

The court then undertook an in-depth examination of the historical context of awarding SC status in South Africa.

The court noted that, while s (1)82 of the interim Constitution made no express reference to prerogative powers, it specifically bestowed powers on the head of state 'which clearly owed their origin to the royal prerogative', such as the power to pardon and relieve offenders and the power to confer honours .

'The cardinal difference is, however, that unlike its predecessors, s 82(1) of the interim Constitution did not contain a catch-all provision which preserved unlisted prerogative powers. This approach, as we know, has also been adopted in s 84(2) of our Constitution,' the court said.

It held that the drafters' intention seemed to be plain – the intention was not to abolish prerogative powers or to diminish the function of the head of state previously derived from the royal prerogative but, insofar as executive powers derived from the royal prerogative were not incompatible with the new constitutional order, they should be codified and maintained.

As a result of this finding, the court held that the historical context 'therefore seems to support the appellants' argument that the power "to confer honours" contemplated in s 84(2)(k) of the Constitution must be afforded its traditional content, which included the power to appoint silks'.

Broader context

In considering whether there was anything in the broader context that indicated a meaning of s 84(2)(k) that was inconsistent with that provided by the historical perspective, the court pointed out a number of incorrect findings by the court *a quo*. These included the High Court's finding that the historical perspective was of lesser, if any, importance as the Constitution represented a clean break from the past in order to avoid adopting concepts into the Constitution that were not based on the will of the people of South Africa. The SCA held that this reasoning departed from the 'wrong premise' and therefore led to the 'wrong conclusion':

'Although it can be accepted as a general principle that the Constitution intended a break with the unacceptable features of the past, that principle can hardly find application in a case where the very language used indicates an intent to preserve past practices' (at para 28), adding:

'The fact that s 84(2) confers some of the former royal prerogative powers on the President and that they include the power to confer honours, is beyond debate.'

The only question, the court stated, was whether the codified prerogative power to confer honours included the power to appoint silks. The answer did not depend on the court's abstract perception of 'the will of the people', but on the proper interpretation of 'honours', *inter alia*, against its historical background.

Another finding of the court *a quo* that the SCA dismissed was that the absence of awarding SC status on the presidency's website meant that it was not an honour in terms of s 84(2). In this regard, the SCA found:

'The mere fact that silk is not included in the national orders on the website of the presidency plainly does not in itself exclude silk from "honours". President [Jacob] Zuma ... deposed to the fact that he regards silk as an honour; that the website of the presidency is created and managed by his administrative personnel; and that his administrative personnel cannot possibly define the contents of his constitutional powers to confer honours.'

The court added that there was no reason in principle why the term 'honours' in s 84(2)(k) should be limited to national orders: '[T]he meaning of honours is wide enough to take many forms. Once this is accepted, the inquiry whether silk constitutes honours cannot be answered with reference to the characteristics of national orders. One cannot answer the question whether apples and pears are both fruit by looking at the characteristics of an apple, which is a fruit, and conclude that a pear is not a fruit because it does not share the characteristics of an apple.'

Finally, the SCA disagreed with the High Court's reasoning that, as the President does not award honours akin to SC status on members of other professions, SC status is not an honour in terms of s 84(2)(k):

'While the historical context supports the appointment of senior counsel as being included in the President's power to confer honours, the same cannot be said of other professions. The reason for this historical distinction is probably that the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice, which in turn is properly the concern of the head of state' (at para 31).

The SCA dismissed a further argument raised by Ms Mansingh during the appeal proceedings, that the institution of silk infringed the rights of non-silks contained in s 9 (equality) and s 22 (freedom of trade, occupation and profession) of the Constitution. The SCA noted that this argument was 'devoid of any basis of fact' and seemed to demonstrate 'confused reasoning'.

SCA's finding

The court thus concluded that the power to confer honours bestowed on the President by s 84(2)(k) includes the authority to confer the status of SC on practising advocates and the appeal was upheld.

- The full judgment can be found at www.derebus.org.za under 'Documents'.
- See 2012 (Aug) *DR* 44, 2012 (Mar) *DR* 5 and 2011 (June) *DR* 8.

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