



CONSTITUTIONAL COURT OF SOUTH AFRICA

*The Residents of Industry House, 5 Davies Street New Doornfontein, Johannesburg
and Others v Minister of Police and Others*

CCT 136/20

Date of hearing: 24 November 2020

Date of judgment: 22 October 2021

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.

On Friday, 22 October 2021 at 12h00, the Constitutional Court handed down judgment in an application for confirmation of an order of invalidity issued by the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court), that section 13(7)(c) of the South African Police Service Act (SAPS Act) is unconstitutional and thus invalid. The judgment also dealt with an application for leave to appeal directly to this Court against the part of the High Court's order that dismissed the constitutional challenge against paragraphs (a) and (b) of section 13(7) of the SAPS Act, the applicants' claim for constitutional damages, and an application for a final interdict against future warrantless searches.

Between 2017 and 2018, the applicants, who are residents of various buildings in the inner city of Johannesburg, were subjected to a series of raids and searches of their homes and possessions by SAPS officials, who were often accompanied by officials of the Johannesburg Metropolitan Police Department (JMPD) and/or immigration officials from the Department of Home Affairs. All but two of the searches were conducted in terms of section 13(7) of the SAPS Act. The applicants were instructed to go outside whilst their homes were searched, sometimes during the early hours of the morning. They were searched, fingerprinted, and ordered to produce their identity documentation.

The applicants launched an application in the High Court for an order declaring section 13(7) unconstitutional in its entirety because it permits warrantless searches of a person, their home and property, as well as the seizure of their possessions. They argued that this infringed on the constitutional right to privacy. The High Court disagreed that section 13(7) was unconstitutional. It reasoned that paragraphs (a) and (b) of section 13(7),

passed constitutional muster and were an important legislative mechanism enabling the police to discharge their constitutional mandate effectively. However, the High Court held that the language and import of paragraph (c) of section 13(7), which permits warrantless searches of private homes, intruded on the most protected inner sanctum of the person and was overbroad insofar as it had no predetermined safeguards to minimise the intrusion on the right to privacy. The High Court declared that the portion of section 13(7)(c), which permitted warrantless searches of a person's home, or person inside the home, was constitutionally invalid. The declaration of invalidity was prospective and suspended for 24 months. The High Court ordered an interim reading-in of the section which had the effect of excluding warrantless searches in any private home and/or of any person inside such private home from the ambit of section 13(7)(c) unless the warrantless search complied with section 22 of the Criminal Procedure Act (CPA).

The High Court held that the written authorisations did not comply with section 13(7) as such authorisations could be granted only "where it is reasonable to restore public order or to ensure the safety of the public in a particular area". The High Court also held that the written authorisations were issued for an ulterior purpose, namely to arrest "illegal immigrants" and survey the occupants in the so-called "hijacked" buildings. This fell afoul of section 6(2)(e)(ii) of the Promotion of Administrative Justice Act (PAJA). Consequently, the written authorisations were set aside.

Regarding the prayer for an interdict, the High Court held that the interim relief was sufficient to protect the applicants from further unconstitutional searches. It thus refused to grant a final interdict. The claim for constitutional damages was also dismissed on the basis that there was insufficient evidence to grant a blanket order for these damages.

The applicants approached the Constitutional Court for confirmation of the declaration of invalidity and for leave to appeal directly. Before this Court, the applicants made three submissions. First, that section 13(7) is unconstitutional in its entirety as paragraphs (a) and (b) provide a framework for the warrantless searches in paragraph (c), and, if paragraph (c) is unconstitutional, so too are paragraphs (a) and (b). Second, the High Court erred in not granting the final interdict. The applicants argued that once the requirements for an interdict had been met, the High Court did not have the discretion to refuse the interdict. Finally, the applicants submitted that they are entitled to constitutional damages of R1 000 each for the breach of their rights to privacy and dignity.

The first, sixth, seventh and tenth respondents (the respondents) did not oppose the confirmation of the declaration of invalidity but opposed the application for leave to appeal. The respondents argued that section 13(7) serves a broader purpose than just authorising warrantless searches of private homes. It also applies to other spaces within buildings and land, and a declaration of invalidity would eviscerate this purpose. They further submitted that the limitation of rights is reasonable and justifiable and that the High Court was correct in limiting its order of constitutional invalidity to a portion of paragraph (c). The respondents supported the High Court in its dismissal of the application for an interdict and the claim for constitutional damages.

The first judgment (majority), penned by Mhlantla J (Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Theron J and Tshiqi J concurring), held that the confirmation application and the issues in the application for leave to appeal directly to this Court were so interlinked that leave to appeal should be granted. The appeal against the High Court's refusal to grant an interdict and constitutional damages also engaged this Court's jurisdiction as the disputes concern constitutional issues.

The majority held that the High Court did not consider the full scope of the right to privacy as set out in section 14 of the Constitution. In applying the limitation analysis, the majority held that section 13(7)(c) is broad in that it not only provides for warrantless searches of a person's home – their inner sanctum, central to their right to privacy – but also their person, vehicle and personal items. The section permitted warrantless searches even in situations where the threat to public order or safety is not urgent or pressing, and where obtaining a warrant would not defeat the purpose of the search. The majority further accepted that the section is rationally connected to its purpose, which is the restoration of public order and safety; however, less restrictive means are available to the members of the police to achieve that purpose. The first judgment, therefore, held that the unconstitutional part of section 13(7)(c) should be severed, and a reading-in be granted providing for searches within the cordoned-off area in terms of sections 21 and 22 of the CPA.

The majority held that paragraphs (a) and (b) of section 13(7), pass constitutional muster and serve as mechanisms that are meant to enable the police service to fulfil its constitutional obligations. Authorisations in terms of section 13(7)(a) and (b) can give effect to lawful search and seizure operations to restore public order and safety where reasonably necessary in the circumstances. With the reading-in provision, search and seizure operations under section 13(7) can only be conducted lawfully in terms of sections 21 and 22 of the CPA, which provide the necessary safeguards.

In considering an appropriate remedy, the majority held that the confirmation of constitutional invalidity will be prospective. Nonetheless, further relief can be granted to the applicants as the unlawfulness of the warrantless searches emanates from the fact that the written authorisations themselves were not compliant with section 13(7) even before the declaration of constitutional invalidity.

Insofar as the claim for an interdict was concerned, the Court distinguished the actions of the officials of the Department of Home Affairs and officers of the JMPD from those of the members of the police. This was because before the constitutionally repugnant part of section 13(7)(c) was declared unconstitutional, searches under the SAPS Act followed without safeguards. Under the new legal regime, searches have to comply with the provisions of sections 21 and 22 of the CPA. Therefore, the majority held that there was insufficient evidence to justify an interdict against the police. However, the JMPD and Department of Home Affairs officials conducted the raids and searched the homes of the seventh and eleventh applicants without the involvement of members of the police and without any authorisation to do so under the SAPS Act. An interdict was consequently granted in favour of the seventh and eleventh applicants restraining the officials of the Department of Home Affairs and officers of the JMPD from unlawfully interfering with

them and their homes, except on the authority of an order of court, or a warrant granted in terms of any applicable law or in terms of section 22 of the CPA. Finally, as regards compensatory relief, the majority held that an award for constitutional damages was not appropriate in this case because the applicants had two alternative remedies available to them, that is, a delictual claim against the first to third respondents and a claim for compensation under section 8(1)(c)(ii)(bb) of PAJA. These remedies are effective and more appropriate.

The Constitutional Court thus issued a declaration of invalidity of a portion of section 13(7)(c) of the SAPS Act, dismissed the appeals on the constitutional challenge of section 13(7)(a) and (b), the claims for constitutional damages and the interdict save for the claims by the seventh and eleventh applicants. The Court ordered the Minister of Police to pay the costs.

The second judgment, penned by Jafta J (Mogoeng CJ, Madlanga J, Mathopo AJ, Mhlantla J and Tshiqi J concurring), agreed with the majority judgment on all the issues, and was only written separately to underscore the point that a claim for constitutional damages was not justified in this matter. The second judgment held that since the violation of a constitutional right affects the general public and not specific members of the public, it was difficult to see how an award of constitutional damages would have been appropriate relief. Furthermore, an award of damages may not be made purely because it is asked for, the award must be necessary for purposes of enforcing the Bill of Rights. A distinction must be drawn between damages awarded for compensating the claimant for the loss he or she has suffered and damages awarded for enforcing the Constitution. If the common law or statutory law provided adequate and effective protection of rights in the Bill of Rights, there was no need for allowing constitutional damages over and above these protections, and the claimant must make use of those remedies. In this matter, the second judgment held that there were a number of alternative remedies available to the applicants against the police in the form of common law or statutory remedies, including a delictual claim or an interdict.

The third judgment, penned by Victor AJ, agreed with the first and second judgments that paragraph (c) of section 13(7) of the SAPS Act is unconstitutional. However, the third judgment further found that paragraphs (a) and (b) of section 13(7) are also unconstitutional and invalid. The third judgment held that the three paragraphs, which are interlinked, are overbroad, clearly disproportionate to their purpose of crime prevention, and insufficiently tailored to justify the egregious violation of the rights to privacy and dignity that they enable. It also held that the discriminatory ends to which the impugned provisions can, and have been, used can be interpreted as a textbook example of racialised policing, which is contrary to the state's international obligations to ensure substantive racial equality in the criminal justice system. On the question of constitutional damages, it agreed with the first and second judgments, and particularly with the point emphasised in the second judgment that constitutional damages are not appropriate in this matter where other forms of relief can be granted.