



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Premier of the Western Cape Province v The Public Protector & Another (771/2020) [2022] ZASCA 16 (7 February 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs including the costs of two counsel, an appeal against the decision of the Gauteng Division of the High Court of South Africa, Pretoria (the high court).

This case concerned certain tweets made by the appellant, the Premier of the Western Cape Provincial Government, Honourable Helen Zille (Ms Zille) about the impact of colonialism on South Africa. The tweets in question were made on 15 March 2017, when Ms Zille was still the Premier of the Western Cape Provincial Government. A complaint about the tweets resulted in the respondent (the Public Protector) conducting an investigation and subsequently compiling and submitting a report in terms of which certain remedial action was recommended. Ms Zille was discontent with the finding of the Public Protector and the consequent remedial action, which then gave rise to the litigation that culminated in this appeal.

The central issue in the matter was whether the alleged tweets on colonialism made by Ms Zille violated the provisions of the Executive Ethics Code and the Constitution as found in the Public Protector's report.

In her report, the Public Protector said that although the tweet could have been made in the context of the Premier's right to freedom of expression as provided in section 16 of the Constitution and in good faith, it was however, offensive and insensitive to a section of the South African population which regarded it as re-opening a lot of pain and suffering to the victims of apartheid and colonialism, particularly considering the position of influence she held. She said that Ms Zille's tweets are likely to cause racial tensions, divisions and violence in South Africa. She further asserted that section 16 of the Constitution was not created to allow anyone, particularly those in positions of influence, to make such statements. She concluded that the conduct of Ms Zille was in violation of the Ethics Code and the Preamble of the Constitution as well as sections 10, 16, 136(1) and s 16(2)(b).

Before this Court, Ms Zille argued that the Public Protector failed to apply the basic principles of interpretation in considering the tweets and fundamentally misconstrued the scope and application of the right to freedom of expression envisaged in s 16 of the Constitution. It was submitted that the report sets a dangerous precedent of limiting the right to freedom of expression, and political speech in particular. It was contended that it is vital to democracy that all persons - and especially those who are elected to hold high public office - should not be deterred from participating in open debate on issues of public interest and importance, even if their views may be considered to be controversial or offensive by some.

The SCA held that, the Public Protector's conclusion that the tweets did not fall under the category of protected speech, and her erroneous finding that s 16(2)(b) was implicated, were factors that pervaded her reasoning and led her to wrongly conclude that the Ethics Code was breached. The court further

held that, there was no evidence showing that the tweets resulted in the office of the Premier being undermined and without those facts, it was difficult to find a basis for concluding that the Ethics Code was breached. In addition, the SCA found that there was no basis for finding that Ms Helen Zille had violated the provisions of s 136 of the Constitution, which enjoins members of the Executive Council to act in accordance with a code of ethics and prohibits them from conducting themselves in a way that was inconsistent with their office. On the whole, the available evidence plainly did not support the Public Protector's findings and remedial action. There was therefore no rational connection between the Public Protector's decision and the reasons for the decision.

The SCA, as a result, upheld Ms Zille's appeal, including costs occasioned by the employment of two counsel.

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