



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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City of Cape Town v South African National Roads Authority Limited & others (20786/14) [2015] ZASCA 58 (30 March 2015)

The Supreme Court of Appeal (SCA) today handed down judgment in a matter relating to access to court records and whether such records should be open to the public.

The appeal to the SCA by the City of Cape Town (the City) was against the judgment of the Western Cape Division of the High Court, Cape Town that held, in favour of the South African National Roads Authority Limited (SANRAL), that the publication of all information from the rule 53 record, including 'the non-confidential record' was prohibited until the review application was called.

Proceedings began in the Western Cape Division of the High Court, when the City launched a review application in terms of rule 53 of the Uniform rules of court, seeking to review SANRAL's decision to award the tender to Protea Parkways Consortium as the preferred bidder and Overberg Consortium as the reserve bidder in respect of what has been described as the N1/N2 Winelands Paarl Highway Toll Project. SANRAL furnished the City with the administrative record in terms of Uniform rule 53(1)(b) in two parts, marked respectively as, the 'non-confidential record' and 'the confidential record'. That created a dispute between the parties as to precisely what constituted the rule 53 record. Having found that SANRAL had failed to make out a case in respect of each of the specified categories, the Western Cape Division dismissed SANRAL's application. However, the court a quo went further to issue an order holding that the record disclosed by SANRAL is subject to the 'implied undertaking rule' (the rule) which meant that unless authorised by SANRAL or by the court, the administrative record was not to be disseminated or published before the review application.

The SCA found that the rule had not been raised by SANRAL in its affidavit and that the City had thus not been called upon to answer that case in the court a quo. The SCA also found that the court below prohibited the publication of all information from the rule 53 record, including the non-confidential record, whereas SANRAL's case was that: all such information, apart certain specified portions, could be made public immediately, while other parts of the information must be kept secret only until SANRAL filed its answering papers, not until the hearing.

The SCA held that the rule is not part of South African law. The notion of 'open justice' and the 'open court principle' which has been part of the South African law since the eighteenth century and other foreign jurisdictions is now constitutionally entrenched in section 34 of the Constitution.

The SCA further held that courts are open in order to protect those who use the institution and to secure the legitimacy of the judiciary, not to satisfy the prurient interests of those who wish to examine the private details of others. Without openness, the judiciary loses the legitimacy and independence it requires in order to perform its function. Accordingly, held the SCA, court proceedings should be open unless a court orders otherwise. The logical corollary must therefore be that departures should be permissible when the dangers of openness outweigh the benefits. And by extension, the right of open justice must include the right to have access to papers and written arguments which are an integral part of court proceedings.

The SCA held that the right to freedom of expression lies at the heart of democracy, and is one of a web of mutually supporting rights that hold up the fabric of the constitutional order. The media hold a key position in society. They are not only protected by the right to freedom of expression, but are also the key facilitator and guarantor of that right and thus, the media's right to freedom of expression is thus not just for the benefit of the media, but it is for the benefit of the public. The Court held that both the rule and the court a quo's interpretation of the rule 53(1)(b) thus impinge on open justice by preventing the public and media from being able to scrutinise court proceedings before a matter is heard, whereas there is a strong default position in our law against prior restraints on publication.

The SCA found that demand for accountability arose with particular force because of what was in issue in the review proceedings in the court below; and that secrecy is the very antithesis of accountability which prevents the public from knowing what decision was made, why it was made, and whether it was justifiable.

The SCA accordingly upheld the appeal with costs and the judgment of the Western Cape Division was set aside and replaced with an order dismissing SANRAL's application with costs.

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