

Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and others

Case CCT 17/96

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The applicants applied for direct access to the Constitutional Court and for an order declaring s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 unconstitutional. Section 20(7), read with other sections of the Act, permits the Committee on Amnesty established by the Act to grant amnesty to a perpetrator of an unlawful act associated with a political objective and committed prior to 6 December 1993. As a result of the grant of amnesty, the perpetrator cannot be criminally or civilly liable in respect of that act. Equally, the state or any other body, organisation or person that would ordinarily have been vicariously liable for such act, cannot be liable in law.

The Court upheld the constitutionality of the section. It acknowledged that the section limited the applicants' right in terms of s 22 of the interim Constitution to 'have justiciable disputes settled by a court of law, or . . . other independent or impartial forum'. However, in terms of s 33(2) of the Constitution, violations of rights are permissible either if sanctioned by the Constitution or if justified in terms of s 33(1) of the Constitution (the limitation section). The Court held that the epilogue ('National Unity and Reconciliation') to the Constitution sanctioned the limitation on the right of access to court.

The Court held that amnesty for criminal liability was permitted by the epilogue because without it there would be no incentive for offenders to disclose the truth about past atrocities. The truth might unfold with such an amnesty, assisting in the process of reconciliation and reconstruction. Further, the Court noted that such an amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. It found that the amnesty provisions were not inconsistent with international norms and did not breach any of the country's obligations in terms of public international law instruments.

The Court held that the amnesty for civil liability was also permitted by the epilogue, again because the absence of such an amnesty would constitute a disincentive for the disclosure of the truth.

The Court held that the epilogue permitted the granting of amnesty to the state for any civil liability. The Court said that Parliament was entitled to adopt a wide concept of reparations. This would allow the state to decide on proper reparations for victims of past abuses having regard to the resources of the state and the competing demands thereon. Further, Parliament was authorised to provide for individualised and nuanced reparations taking into account the claims of all the victims, rather than preserving state liability for provable and unprescribed delictual claims only.

The Court held that the epilogue authorised the granting of amnesty to bodies, organisations or other persons which would otherwise have been vicariously liable for acts committed in the past. The truth might not be told if these organisations or individuals were not given amnesty. Indeed, according to the Court, the Constitution itself might not have been negotiated had this amnesty not been provided for.

The judgment of the Court was delivered by Mahomed DP and was concurred in by the other members of the Court. Didcott J delivered a separate concurring judgment.