
SOUTH AFRICA / JUDGMENT

Democratic Alliance v Zuma and Another (21029/2017) [2017] ZAGPPHC 612 (29 September 2017) [2017] ZAGPPHC 612

COURT

North Gauteng High Court, Pretoria

BEFORE

M A Makume

CASE / FILE NUMBER

21029/2017

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 21029/2017

NOT

REPORTABLE

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

29/9/2017

In the matter between: DEMOCRATIC
 ALLIANCE Applicant
 and
 JACOB
 GEDLEYIHLEKISA
 ZUMA First
 Respondent
 (PRESIDENT
 OF THE REPUBLIC OF SOUTH AFRICA)
 THE
 PUBLIC PROTECTOR OF SOUTH
 AFRICA Second
 Respondent

JUDGMENT

MAKUME.J:

[1] In this matter there are two applications. In the first application the Applicant seeks the following relief:

1.1 Declaring that the remedial action taken by the Public Prosecutor in paragraph 8.4 of the Report titled "State Capture" (the Report) against the President in terms of Section 182 (1) (c) of the Constitution is binding unless and until paragraph 8.4 of the Report is set aside by a court of law.

1.2 Directing the President to comply with the remedial action set out in paragraph 1 above within thirty days of the date of this order;

1.3 Declaring that the President's failure to comply with the remedial action referred to in paragraph 1 is inconsistent with Section 83 (b) read with Section 181 (3) and 182 (1) (c) of the Constitution and is invalid;

1.4 Directing the President to pay the costs of suit including the costs of two counsel; and

1.5 Granting the Applicant such further or alternative relief as this court may deem fit.

[2] In the second application the First Respondent (The President) seeks relief in the following terms:

2.1 Staying the implementation of paragraph 8.4 of the remedial action contained in the State Capture Report number 6 of 2016/2017 published on 2 November 2016 {the Report) pending the finalisation of the review application under case number 91139/16.

2.2 Costs of suit in the event of opposition.

2.3 Further and or alternative relief

[3] The First application is dated the 23 March 2017. The second application is dated the 12th June 2017. It is convenient at this

stage to briefly set out the facts and events that led to the two applications.

[4] On the 2nd November 2016 the Public Protector released a report about a complaint laid by the Applicant and others in connection with the

relationship between the President and the Gupta Family including other person connected to institutions controlled by the Government.

The report is titled "The State of Capture". It needs mentioning that the release of that report itself was not without

difficulties the process was finally resolved when a court order was granted to the Public Protector to release the report.

[5] In the report the Public Protector directed the President to appoint a commission of inquiry within 30 days to be headed by a judge selected by the Chief Justice and in any case only one name of the incumbent judge would be provided to the President for appointment.

[6] On the 25th November 2016 the office of the President announced that the President intended to institute review proceedings against the remedial action prescribed by the Public Protector. On the 28th November 2016 the Applicant's attorney is responding to that announcement addressed a letter directly to the President and said the following in paragraph 6 and 7 thereof:

"[6] The Democratic Alliance notes your intention to review the Public Protector report and remedial action as is your right. However you are required to comply with it within 30 days. Neither an intention to launch a review nor launching the review itself will absolve you of the obligation to comply with the Public Protector's remedial action. Unless you obtain an interim interdict staying the Public Protector's remedial action pending the outcome of your review, you are obliged to comply notwithstanding any attempt to review her remedial action."

[7] I therefore write to advise you that unless you obtain an interim interdict entitling you not to comply with the Public Protector's remedial action by 2 December 2016, the DA will approach the appropriate court on an urgent basis to compel you to comply. In addition, the DA will seek a declarator that you have, again failed to comply with your constitutional obligation in terms of section 83(b) of the Constitution read with Sections 181 (3) and 182 (1) (c). If you intend to obtain such an interdict, please inform me at your earliest convenience."

[7] On the 1st December 2016 the State Attorney advised the Applicant attorneys that the President will launch his review application by the 2nd December 2016 and will cite all relevant and interested parties. On receipt of that letter, Applicant's Attorney wrote back to the State Attorney and in that letter the following was said:

"[2] You indicated that your instructions are that the President will be launching his review on 2 December 2016 to all relevant parties.

- [3] Your attention is drawn to the matter of *City of Tshwane Metropolitan Municipality v Afriforum and Another* (157115)[2018] ZACC 19; 2016 (a) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016).
- [4] It is not sufficient to merely launch a review of the Public Protector's report but your client must obtain a court order determining the review application prior to 2 December 2016 in order to suspend his obligation to comply with the Public Protector's remedial action."
- [8] As promised the President launched his review application on the 2nd December 2016 and cited all the relevant and interested parties it is common cause that the review application is set down for hearing in this court on the 23 and 24 October 2017.
- [9] Notwithstanding service of the application to review the Applicant opted to launch their own application on the 5th December 2016 seeking exclusive and direct access to the Constitutional court with the aim to ask the Constitutional Court to declare that the President had violated his obligations in terms of the Constitution by failing to comply with the Public Protector's

remedial action in not appointing a commission of inquiry as set out in paragraph 8.4 of the Public Protector report.

- [10] The President opposed that application. The Second Respondent being the Public Protector filed a notice to abide. On the 8th February 2017 the Constitutional Court dismissed that application. The order of the Constitutional Court reads as follows:

"The Constitutional Court has considered the application for direct access. It has concluded that the application should be dismissed as it is not in the interest of justice to hear the matter at this stage."

- [11] It was shortly after the dismissal of the application in the Constitutional Court that the Applicant launched their application to compel compliance with paragraph 8.4 of the Remedial action taken by the Public Protector. It is the application that I have referred to as the first application in paragraph 1 above.
- [12] Pleadings became closed in the President's review application case no 91139/2016 as well as in the first application. The applications were case managed by the Deputy Judge President and directives issued.
- [13] It was on the 12th June 2017 when it became clear that the Applicants were not conceding that the launching of the review application

suspends the operation of the Public Protector's remedial action that the President on advise launched the conditional counter application. It is the application that I refer to as the second application in paragraph 2 above.

[14] The Public Protector is not opposing the application by the Democratic Alliance to compel compliance with the remedial action, a notice to abide was filed on the 18th May 2017.

However, on receipt of the President's conditional counter application (the second application) the Public Protector filed a Notice to Oppose and has duly filed an Answering Affidavit as well as Heads of Argument.

THE REMEDIAL ACTION

[15] The full text of the Public Protector's remedial action which she argues was taken In pursuit of Section 182 (1) (c) of the

Constitution of the Republic of South Africa read as follows:

To The President

8.4 The President to appoint within 30 days a commission of enquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President.

8.5 The National Treasury to ensure that the commission is adequately resourced.

8.6 The judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.

8.7 The commission of enquiry to be given powers of evidence collection that are no less than that of the Public Protector.

8.8 The commission of enquiry to complete its task and to present the report with findings and recommendation to the President within 180 days. The President shall submit a copy with an indication of his/her intention regarding the implementation to Parliament within 14 days of releasing the report.

8.9 Parliament to review within 180 days the Executive Members Ethics Act to provide better guidance regarding integrity, Including avoidance and management of conflict of interest. This should clearly define responsibilities of those in authority regarding a proper response to whistle blowing and whistle blowers. Consideration should also be given to a transverse code of conduct for all employees of the state.

8.10 The President to ensure that the Executive ethics code is updated in line with the review of the Executive Members Ethics Act.

8. 11 The Public Protector in terms of Section 6 (4) (c) (i) of the Public Protector Act brings to the notice of the National Prosecuting Authority and the DPCI those matters identified in his report where it appears crimes have been committed.

[16] The remedial action taken by the Public Protector as set out in 8.5, 8.6 and 8.8 are all dependant on remedial action 8.4. If 8.4 falls away the rest follow. However, it would seem to me that the remedial action taken in 8.9, 8.10 and 8.11 have nothing to do with the appointment of a commission of enquiry they are independent remedial actions to be dealt

with by different institutions. It is therefore not surprising that the Applicant in the first application is seeking primarily an order directing the President to comply with remedial action 8.4 Prayers 2 and 3 of the Applicants notice of motion are inseparable and represent the main order that the Applicant seeks. In the conditional counter application the President seek a stay of the implementation of the remedial action set out in paragraph 8.4 of the report.

THE ISSUE

[17] The crisp and sharp points of dispute between the parties are the following:

17.1 Whether the President's application in case no. 91139/16 to review the Public Protector's remedial action has the automatic effect of staying implementation of the remedial action.

17.2 In the event that this court finds that the review application does not have the effect of automatically putting on hold or suspending implementation of the remedial action whether the President is entitled to the relief in the conditional counter application for a stay of the implementation of the remedial action pending the outcome of the review application.

[18] At the centre of the dispute in the review application are the Constitutional powers and obligations of the President vis-a-vis the Constitutional court findings in the matter of Economic Freedom Fighters vs Speaker of the National Assembly and Others 2017(3) 580 CC. In short the Applicants argue that, that decision referred to as the Nkandla decision concluded that remedial actions by the Public Protector are binding and should be implemented. The Applicant also relied to a large extent on the decision of the Constitutional Court in the matter of Tshwane City vs Afriforum and Another 2016 (SA) 279 CC in its contention that an application for review does not result in the automatic suspension of the remedial action. The Applicant says that what is required is an interdict or a stay application. It is not surprising that prayer 2 in the Applicants notice of motion is worded in precisely the same terminology as the order granted by the Constitutional Court in the Nkandla decision which reads as follows:

"(3) The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of S 182(1) (c) of the constitution is binding."

Prayer 4 of the Application also mirrors the wording in the order of the Nkandla decision which reads as follows:

"The failure by the President to comply with the remedial action taken against him by the Public Protector in her report of 19 March 2014 is inconsistent with Section 83(b) of the Constitution read with s. 181(3) and 182 (1) (c) of the Constitution and is invalid."

[19] Before Ideal with the issues before me I deem it appropriate to refer to a paragraph in the Nkandla decision at page 609 being paragraph 71 which reads as follows; "In sum the Public Protectors Powers to take appropriate remedial action is wide but certainly not unfettered. Moreover the remedial action is always open to judicial scrutiny". It is also not inflexible in its application but situational and at paragraph 74 the court emphasising the fact that decisions although

binding are not immune from judicial scrutiny said the following:

"This is so because our Constitutional order hinges also on the rule of law. No decision provided in the Constitution or law may be disregarded without recourse to a court of law. To do so would amount to a licence to self help."

[20] In the review application as well as in his answering Affidavit to the application to compel compliance the President has raised

pertinent and crucial constitutional issues which can be summarised as follows:

20.1 The remedial action directing the President to appoint a commission of enquiry is dictatorial and offends separation of powers doctrine which is part of our rule of law.

20.2 Section 84(2) (f) of the Constitution grants exclusive and executive power to the President and no one else to appoint commissions of inquiry.

20.3 That no arm of government can constitutionally intrude into the sphere of the other unless authorised by the Constitution.

20.4 That the remedial action is inconsistent with the Constitution and accordingly invalid.

[21] In the matter of City of Tshwane Metropolitan Municipality v Afriforum and Another 2016 (6) SA279 Afriforum had obtained an interdict preventing the City of Tshwane from replacing the old street name in Tshwane with new names. That interdict was granted pending the review application brought by Afriforum to review the city's decision.

[22] The City of Tshwane held the view that the interim interdict should not prevent it from carrying out its decision and thus filed an appeal against the granting of the Interim interdict. The full court of this division dismissed the appeal so did the Supreme Court of Appeal. The City then petitioned the Constitutional Court for direct access to appeal the decision of the High Court.

[23] That matter was finally decided on the basis that Afriforum had not satisfied the requirements for an interim interdict to be granted in their favour hence the appeal was upheld and Tshwane was permitted to continue with the name changes notwithstanding the pending review application.

[24] There is a distinction between the issue and facts in the City of Tshwane vs Afriforum matter and what is in issue in the present

matter. It must be recalled that in the City of Tshwane vs Afriforum matter, Afriforum issued its first interdict and when the City suspended the idea of the name changes Afriforum did not launch a review application it was only after 7 months when nothing was happening that when the City recommenced with the name changes that Afriforum then filed a fresh interdict. In dealing with the aspect of Afriforum having failed to prove that it will suffer irreparable harm if the interdict was not granted the Constitutional Court held that irreparable harm implied that the effect of the harm could not be reversed. The Constitutional Court found that the review court could reinstate the old names if Afriforum was successful.

[25] The irreparable harm referred to in the Afriforum matter cannot in my view be compared to the irreparable harm that will follow should I conclude that the remedial action should be implemented notwithstanding the pending review application.

[26] It must be kept in mind at all times that what the President is asking for in the review application is that the remedial action in 8.4 be set aside on the basis that it is unconstitutional, dictatorial and usurps the powers that vest in the President only.

That application strikes at the very heart of the powers of the Public Protector and the extent to which her remedial action is

authorised and circumscribed by the constitution.

[27] It is significant to note that the Public Protector is not opposing the review application but has filed an application opposing the application to stay the implementation application. The Public Protector in her affidavit opposing the stay says no more than that the President as well as other ANC leader have at various platforms indicated that he is not opposed to setting up a commission enquiry but not on the terms as dictated to by the Public Protector.

[28] When the Constitutional Court refused to hear the DA's application during February 20 17 it was aware that a review application had been launched. It is therefore not surprising that the Constitutional Court said that it was not in the interest of justice to hear the matter at that stage. In my view the Constitutional Court implied that the review application must be dealt with and finalised before the President could be compelled to comply with the remedial action set out in paragraph 8.4.

[29] The Public Protector conceded at paragraph 5 of her Answering Affidavit to the stay application and said that this court has a discretion to stay the remedial action pending the determination of review if this court is satisfied that it is in the interest of the court to do so.

[30] In my view it will not be in the interest of justice to direct the President to implement the remedial action prior to the review court having finalised the constitutional dispute raised by the President.

[31] I say that it will not be in the interest of justice because once the President appoints such a commission or even .before he does so he will be entitled to challenge the decision compelling him to do the appointment. This \viii result in parallel procedures based on the

same issues namely the review and the appeal against my decision. In my view it will not only be a waste of resources but may very well amount to abuse of legal process. Secondly I enquired from Applicant's counsel what will happen to the commission if the review court sets aside the impugned remedial action I did not get a clear answer save to say that it will stop to function. I am not told what will happen to the decision the commission may have already taken. The commission may have incurred expenses in setting up offices, issued subpoenas to witnesses and called for written submissions. In my view it will not be in the Interest of justice at this stage to compel the President to implement the remedial action.

- [32] In the recent unreported matter between: South African Reserve Bank v Public Protector and 5 others Case Number 43769117 a judgment by my brother Murphy J dated 15th August 2017 the court had to deal with the challenge by the Reserve Bank against the remedial action taken by the Public Protector. At paragraph 9 of that judgment the court said the following:

"Despite initially opposing the application, the Public Protector filed an answering affidavit in which she conceded the merits and consented to all the relief sought. She has agreed that her remedial action is unlawful in that only Parliament has the power to amend the Constitution and that she has no power to dictate to Parliament. "

- [33] The question to be asked is if that is what she said recently about parliament will her view be different when it is the President who claims the sole constitutional authority to appoint a commission of enquiry. That question will have to be answered on the 23rd October 2017.
- [34] The Applicant has failed to demonstrate what prejudice or harm will befall it if the President does not appoint a commission of enquiry now 10 months after the report by the Public Protector. Nothing has happened in the last 10 months it will therefore not make any difference if the commission is appointed after the review shall have been heard should the President fail in his application to set aside the remedial action.
- [35] In the matter of MEC for Health Eastern Cape and Another vs Kirland Investments (Pty) Ltd 2014 (3) S 481 CC the court held that when an administrator errs those decisions exist and have legal effect until set aside on review.
- [36] The review application raises important legal and constitutional issues and is a matter of great public interest on which this court still has to pronounce itself and accordingly to compel the President at this stage will not only be tantamount to denying him a hearing or his day in court but it may also be understood to mean that the Public Protector powers are unassailable irrespective of the content of her decision. That cannot be correct.
- [37] In my view it is immaterial whether the review application suffices to stay the Applicant's application to compel or whether an order shall be granted as per the conditional counter application. The result will be the same. The Applicant is being technical by insisting that the application to stay should have preceded the application to review. Interlocutory applications can be brought at any time during the proceedings.

- [38] In summarising their opposition to the granting of the conditional counter application the DA conceded that the standard for a stay application is the same as the standard for an interim interdict and rely on the decision of *City of Tshwane vs Afriforum* (Supra) also the decision of *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2010 (5) BCLR 457 (11) and lastly the decision in the matter of *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (11) BCLR 1148 (CC).
- [39] In the *National Treasury & Others v Opposition to Urban Tolling Alliance* (matter) otherwise popularly referred to as the OUTA matter, the then Deputy Chief Justice Moseneke in granting National Treasury leave to appeal the decision of the High Court made the following remarks at paragraph 22:
- "[22] I am of the view that the pending judicial review raised at least two constitutional issues. The review has been brought under Section 6 of the Promotion of Administrative Justice Act Section 3 of 2000 (PAJA) a statute enacted to give effect to the right to just administrative action guaranteed by the Constitution. Secondly the review poses the question whether the relief sought entails an improper trespass on the exclusive domain of the Executive. Similarly in the Appeal before us the prominent issue is whether the grant of the interim interdict has impermissibly trespassed upon the Constitutional tenet of separation of powers. These are constitutional issues of considerable importance. "*
- [40] I have kept in mind that in deciding this application it would be inappropriate for this court to express a view or usurp the functions of the review court. What is of prime importance is the considerable constitutional issues that have been raised one of which is the aspect of separation of power. The constitutional court in the OUTA matter in upholding the appeal expressed itself strongly on this issue.
- [41] Lastly in a unanimous decision of the Constitutional Court in the matter of *International Trade Administration Commission vs SCAW* (Supra) it was held that since the interdict had the effect of curtailing executive power to formulate and implement trade policy and also caused irreparable harm by maintaining antidumping duties which would have otherwise ended, leave to appeal had to be granted. The court strongly discouraged judicial intrusion on executive domain. In the present matter the President makes the point that the Public Protector in taking remedial action 8.4 is intruding on his executive domain.
- [42] In my view it will be in the best interest of justice to grant the President a stay of the implementation of the remedial action pending a decision in the review application. In any event the Democratic Alliance itself makes the point that only a court order will suffice to suspend implementation of the remedial action.
- [43] In the result I make the following order:
1. The Application by the Democratic Alliance (Applicant) in which it seeks implementation of the remedial action 8.4 taken by the Public Protector is hereby stayed pending finalization of the review application under case number 91139/16.

2. The Applicant (Democratic Alliance) and the Second Respondent (Public Protector) are ordered to pay the costs of this application which shall include the costs of two counsels.

DATED at PRETORIA on his the 29TH day of SEPTEMBER 2017.

M A MAKUME

JUDGE OF HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING

12 & 13 SEPTEMBER 2017

DATE OF DELIVERIN

29 SEPTEMBER 2017

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WITH HIM

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