

SOUTH AFRICA / JUDGMENT

Open Secrets and Another v Minister of Finance and Others (55493/2020) [2021] ZAGPPHC 570 (13 September 2021)

[2021] ZAGPPHC 570

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga, Baqwa, Sardiwalla

CASE / FILE NUMBER

55493/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE NO:55493/2020

In

the matter between:

OPEN
SECRETS
FIRST APPLICANT
UNPAID
BENEFITS CAMPAIGN
SECOND APPLICANT
and
THE
MINISTER OF FINANCE
FIRST RESPONDENT
ISMAIL
MOMONIANT N.O
SECOND RESPONDENT
FUNDI
TSHAZIBANA N.O

THIRD RESPONDENT
THEZI
MABUZA N.O
FOURTH RESPONDENT
DEON
ROSSOUW N.O
FIFTH RESPONDENT
SIZWE
NXASANA
SIXTH RESPONDENT
FINANCIAL
SECTOR CONDUCT AUTHORITY
SEVENTH RESPONDENT

JUDGMENT

Coram: Raulinga J, Baqwa J, Sardiwalla J

1. This application concerns a challenge by the applicants against the regulations promulgated in terms of section 61(1) of the Financial Sector Conduct Authority Act 9 of 2017 (“the FSCA Act”) on 29 March 2018 in Government Gazette No:4155D GN R405 (“the regulations”). These Regulations were twice amended, and on both counts subjected to a public comment process, on 29 March 2019 and 5 August 2020.
2. The applicants’ case is that the Regulations fall to be declared as unlawful and set aside on the basis that they are:
 - 2.1 unlawful to the extent that they fail to provide for openness and transparency in the appointment process; by the Minister of Finance (“the Minister”) of the commissioner and the Deputy commissioner of the FSCA;
 - 2.2 unlawful to the extent that they fail to provide public access to the interviews conducted by the shortlisting panel;
 - 2.3 ultra vires alternatively irrational, in that the Minister unilaterally adopted the appointment process applicable to the head of one organ of State i.e. the Commissioner for the South African Revenue Service (“SARS Commissioner”), to another, i.e. the FSCA; and
 - 2.4 ultra vires to the extent that they permitted the Minister to not only delegate his obligation of appointment, but also to the extent that they give the shortlisting panel unfettered powers to determine its own process, without any guidance.
3. Prior to launching this application (i.e. Part B), the applicants had sought urgent application under Part A, interdicting the shortlisting Panel from shortlisting and interviewing the candidates in the appointing of a Commissioner and Deputy Commissioner(s) of the FSCA, and making any recommendations to the Minister. Furthermore, compelling the respondents to publish within 3 days of the grant of the order; the schedule of interviews of

candidates so shortlisted and interviewed carried out to date; and the criteria in respect of which such candidates were so shortlisted and interviewed.

4. The original relief under Part B was as follows:

“1. Declaring as unlawful and setting aside the Regulations (defined above) to the extent that they fail to provide for media and or public access to the interviews of the shortlisted candidates for the Commissioner and or Deputy Commissioner(s) of the seventh respondent.

2. In the event that prayer 1 is granted:

2.1 Compelling the respondents to publish within 3 days of the grant of this order: -

2.1.1 the schedule of interviews of candidates so shortlisted and interviewed for the position of Commissioner and or Deputy Commissioner(s) of the seventh respondent; and

2.1.2 the criteria in respect of which such candidates were shortlisted and interviewed.

2.2 Declaring as unlawful and setting aside any recommendation by the shortlisting panel to the first respondent for the commissioner and or Deputy Commissioner(s) of the seventh respondent, if any

2.3 Declaring as unlawful and setting aside any appointment made by the first respondent for the Commissioner and or Deputy Commissioner (s) of the seventh respondent if any, pursuant to the shortlisting Panel’s recommendations.”

5. As can be gleaned from the applicants’ Supplementary Founding Affidavit, their application has changed from a review to an application for a declarator. It seems to me that the applicants’ case is a demand for the Regulations to allow public and media access to the interviews of shortlisted candidates. It therefore follows that all process leading up to (and including) the shortlisting process are accepted as lawful.

6. That being the case, it therefore means that the recruitment, selection and appointment process, all of which are now unchallenged, in terms of the amendment to the notice of motion, are irrelevant to the present application.

7. When the proceedings in this matter concluded, counsel for the parties were invited to file supplementary heads in order to address the additional authorities that were relied upon at the hearing of the application. – that includes authorities with reference to the issues addressed in oral argument.

8. I am minded to mention that, in their supplementary heads, the applicants refer to a plethora of authorities, which though are important, the majority of them are not relevant to their issues for determination by this Court. It is for that reason that the determination of this application will be confined to a few relevant aspects.

9. The applicants submit that, the Regulations have not been validly executed, having not been re-considered by Parliament. Further, that the Minister has unlawfully delegated his power to carry out the appointment process contrary to the express obligations placed on him by Section 61(1) and (2) of the FSCA Act to appoint the Commissioner and the Deputy Commissioner(s) of the FSCA. This, because the Minister has delegated the decision making power to the Shortlisting Panel, which amounts to a reverse onus at rationality in circumstances where the Minister may disagree with the Shortlisting Panel itself. The applicants also submit that the shortlisting Panel's conduct is ultra vires by further delegating their own powers to the recruitment agencies. Last and not Least, that the respondent's inviting public comments on the shortlisted candidates is contradictory to their stance of carrying out the appointment process behind closed doors.
10. On a separate issue, the applicants argue that the relief sought is not moot in that section 34 of the Constitution entitles them to approach the Court for redress provided that the dispute can be resolved through the application of the law. It is as a result that, once the applicants received and considered the Rule 53 record, as well as the developments in the appointment process, they amended the relief sought as they are entitled to do. Consequently, by amending the notice of motion, they have not abandoned the relief initially sought by then, in that the Court is enjoined by section 172(a)(1) of the Constitution to declare, in a constitutional matter, any conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. The applicants further argue that, the mootness of the relief sought is alternated by the fact that the applicants are not prosecuting a review relief. Therefore, the Court should rely on section 172 (1) (b) of the Constitution, in that the notice of motion makes it abundantly clear that the applicants seek declaratory relief, together with a setting aside of the regulations, in a way that fits squarely with the permissible terms of section 172 of the Constitution.
11. Regarding the wrong cause of the action, the applicants contend that constitutional values give rise to justiciable rights. They submit that section 1 is not the Preamble which is not justiciable whereas clauses in a Constitution or conduct clearly are. In support of their argument, the applicants refer to a number of authorities which in my view deserve no citation in this judgment because they lack relevancy.
12. One is mindful of the fact that according to the applicants, prior to the amendment, the relief sought was for both declaratory relief and judicial review. In the founding affidavit the following is stated:
 - 12.1 "Part B of the notice of motion is a "normal" review which will proceed in accordance with the relevant timelines. It shall be persisted with irrespective of whether the semi- urgent relief sought in Part A is granted", and

12.2 “The relief sought in Part B of the notice of motion is to declare as unlawful and set aside the Minister’s decision to conduct the appointment process of the Commissioner and Deputy Commissioner(s) under a veil of secrecy, without any public participation or oversight in any shape or form”.

13. After the amendment, the relief is clearly only for declaratory relief. In the supplementary founding affidavit, the following is stated:

13.1 “I am advised that in terms of Rule 53 of the Uniform Rules of Court, an applicant in judicial review proceedings is entitled to unilaterally amend their notice of motion after receipt of the Rule 53 record”.

13.2 “Filed simultaneously with this affidavit, and pursuant to Rule 53, the applicants have filed an amendment to the notice of motion which summarily, deletes paragraph 2 of the notice of motion”.

13.3 “The effect of this is to place only the declaratory relief to declare the Regulations (defined in the founding affidavit) as unlawful before this Court, such relief operating prospectively”;

13.4 “The applicants, consequent upon the amendment to the notice of motion, abandon any “consequential” relief aimed at setting aside any appointments that may have taken effect by the time this matter is heard and or adjudicated”.

14. It seems to me that the applicants probate and reprobate, in that in their pleadings they admit that the review relief has been discarded, but in argument they deny that the relief has been abandoned and therefore it is not moot. In my view, it simply means that there was no need for the amendment of the notice of motion, in that they concede that they permissibly “changed” their case, to the extent occurred. However, they say that they cannot abandon something they did not plead. This cannot be correct because this is what the applicants pleaded in the supplementary founding affidavit page 003-7.

15. One is inclined to agree with the respondents in their submissions that the cause of action is wrong. In this matter PAJA applies and, as such the applicants ought to have launched an application for condonation for non-compliance with the 180-day requirement. It is also trite that reliance on constitutional values as rights is impermissible.

16. It is common cause that the present application started as a review application under Rule 53. The amendment to the notice of motion was done pursuant to Rule 53(4) i.e. there was no abandonment of applicants’ case. The applicants only abandoned a PAJA review in their reply and heads of argument. I agree with the respondents that this manner of pleadings is inappropriate. The applicants must stand or fall by their founding papers, there being no exceptional circumstances permitting them to make out a case in reply or their heads of argument- *Bowman N.O v De Souza Roldao*[1]. The founding papers present a case for review. As such, the abandonment of prayer 2 does not constitute an abandonment of a review. The prayer for declaratory relief was sought in the context of review proceedings - see *Fair-Trade Independent Tobacco Association V President of the Republic of South Africa and Another*[2].

17. In *Stellenbosch Municipality and Another V Fusion Properties 233 cc and Others*[3], the court found that a declarator that regulations are unlawful entails a review for their lawfulness. The Court held that “couching

their principal prayers for relief in the form of a declarator appears to be a patent to attempt to escape the provisions of PAJA

with regard to the time limits relating to review applications”. Indeed, this is not permissible.

18. The applicants made an attempt to convince this Court why they don’t rely on PAJA. However, our Courts have made it clear that PAJA applies to the making of the regulations- *Esau and Others V Minister of Co-Operative Governance and Traditional Affairs and Others*[4].

19. Moreover, the principle of subsidiarity prevents from relying directly on the Constitution to challenge the Regulations where PAJA applies. The cause of action should be based under PAJA. O’Reagan J made it clear in *Mazibuko and Others V City of Johannesburg and Others*[5] that: “Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution”.

20. The applicants seem to misconstrue this principle in their interpretation thereof. They have failed to base their challenge to the Regulations on PAJA or challenge PAJA’s constitutional validity as decided in *Mazibuko*, supra.

21. The applicants failed to bring an application challenging the lawfulness of the Regulations within 180 days as required by section 7(1) of PAJA. The regulations they challenged were promulgated on 29 March

2018. The 180-day time period started running from the date of promulgation when members of the public, such as the applicants could reasonably have become aware of the Regulations. As can be gleaned from the founding affidavit, the applicants became aware of the Regulations timeously- *Founding Affidavit* p 001-36 at para 79. Surprisingly, the applicants didn’t substantially deal with this issue in their submissions. The application can be dismissed on this ground alone, since there is no formal application for condonation - *Buffalo City Metropolitan Municipality V Asla Construction (Pty) Limited*[6].

22. As stated in this judgment above, the conduct of the Shortlisting Panel pursuant to the Regulations is not before the Court for determination, following the abandonment of prayer 2 of the original notice of motion.

23. Paradoxically, the applicants are of a firm view that constitutional values in sections 1 (c) and 195 create actionable rights and can be relied upon to found a right to public participation or media access in the appointment process for purposes of the application. This view by the applicants is misplaced. Instead, the values play an important role in interpreting provisions of the Constitution including those in the Bill of Rights- *Britannia Beach Estate (Pty) Ltd and Others V Saldanha Bay Municipality*[7].

24. In *New Nation Movement NPC and others v President of South Africa and others*[8], the Constitutional Court interpreted and applied various provisions of the Constitution. The Court held that the values under section 1 of the Constitution may not be relied upon to frame or found a cause of action, since they do not create actionable rights.

25. The applicants contend that the Minister unlawfully delegated his powers to the shortlisting Panel. In this regard, the respondents correctly submit that the Minister retains and exercises his powers to appoint in terms of section 61(1) and (2) of the Act. The Minister has also determined the appointment process required by section 61 (4) of the Act, as set out under the whole of Part 2 of the Regulations. - *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*[9]. The Shortlisting Panel merely make recommendations to the Minister as a step in the appointment process. The Shortlisting Panel scrutinizes applications received, assesses them in terms of the criteria published, to shortlist candidates for interviews, interview them and make recommendations to the Minister. It is impractical for the Minister to scrutinize all the applications and shortlist candidates. In fact, it will be a very onerous task for the Minister to undertake. In any event, the conduct of the Shortlisting Panel is not being challenged.

26. The applicants allege that the Minister has delegated power to the Shortlisting Panel without any constraints or guidelines to amount to vagueness. This submission is contrary to the constraints contained in Regulation 9 in that:

26.1 The procedures of the Shortlisting Panel must be fair, impartial and transparent (Regulation 9(4)(b))

26.2 The Shortlisting Panel must perform its functions in accordance with the requirements of Regulation 9(6) (a).

26.3 The Shortlisting Panel must keep minutes of each meeting (Regulation 9 (51))

26.4 The Shortlisting Panel can only use headhunting if there are not sufficient candidates to be shortlisted for interviews (Regulation 9 (6) (c), as introduced by the amendment of 5 August 2020.

26.5 The Minister ultimately decides whether to accept the recommendations of the Shortlisting Panel or to refer the recommendations back to the Shortlisting Panel (Regulation 10).

27. In support of their argument on vagueness, the applicants rely on the Constitutional Court decision in *Affordable Medicines Trust and Others v Minister of Health and Another*[10]. It is evidently clear that the dicta in this case support the argument by the respondents that the Minister's delegation is not vague.

28. Paragraphs 108 and 109 of the judgment are apposite to the submission by the respondents, contrary to what the applicants submit:

"[108] Sub-regulation 18 (5) was challenged on the basis that it is vague and does not conform to the principle of legality. The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution. Which is the supreme law. The doctrine of vagueness

is founded on the rule of law, which as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and acceptable manner. What is required is reasonable certainty and perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unruly to impede or prevent the furtherance of such objectives. As the Canadian Supreme Court observed after reviewing the case law of the European Court of Human Rights on the issue:

“Indeed...laws that are framed in general terms may be better suited to the achievement of their objectives, in as much as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern state intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactment remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

[109] where, as here, it is contended that the regulation under consideration is vague for uncertainty, the Court must first construe

the regulation applying the normal rules of construction including those required by constitutional adjudication. The ultimate

question is whether so construed, the regulation, indicates with reasonable certainty to those who are bound by it what is required of them”.

29.Axiomatically, the applicants seem to miss the point concerning their understanding of the principle of vagueness as interpreted by the Constitutional Court in Affordable Medicines. They have failed to make out a ground of review based on the doctrine of vagueness.

30.I agree with the respondents that section 172 of the Constitution only permits a declaration of invalidity and the setting aside of Regulations to the extent of their inconsistency with the Constitution. Instead, the order that the applicants seek is for a declaration of invalidity and the setting aside of the Regulations, i.e. from Regulation 1 to 2.- this is impermissible.

31.It is my considered view that the applicants’ case has no merit and falls to be dismissed.

32. In their pleadings and original heads of argument, the respondents were of the view that the applicants should not be mulcted with costs. However, in their supplementary affidavit, they submit that since the applicants pursued an academic and frivolous application, the Biowatch principle should not apply to their case. I disagree with this contention, in that the applicants are pursuing public interest litigation in the advancement of constitutional justice, which is an important public law principle.

33. In the premises, I would make the following order:

3.1.1 The application is dismissed.

3.1.2 There is no order of costs.

T. J RAULINGA

JUDGE OF THE HIGH COURT

I agree

S.A.M BAQWA

JUDGE OF THE HIGH COURT

C.M SARDIWALLA

Appearances

1ST and 2nd Applicant's Counsel : Adv. K Premhid

Adv. A Louw

Applicant's Attorneys

: Centre for Applied Legal Studies

1st respondent's Counsel

: Adv. N Maenetjie SC

Adv. R Tshetlo

Respondent's Attorney

: State Attorney

Date of hearing

: 13 May 2021

Date of judgment

: 13 September 2021

[1] 1988(4) SA 326(T) at 327.

[2] (21688/2020)

[2020] ZAGPPHC 246 (26 June 2020) at paras 89-91.

[3] [2009] JOL 24603 (WCC) at para 27.

[4] (611/2020)

[2020] ZASCA 9 (28 January 2021) at para 83.

[5] 2010

(4) SA1 (CC) para 73.

[6] 2019

(4) SA 331 (CC) at paras 50-51

[7] 2013

(11) BCLR 1217 (CC) at paras 16-17.

[8] 2020

(8) BCLR 950 (CC)

[9]

[2006] ZACC 9; 2007

(1) SA 343 CC at paras 47-48, 126-127.

[10] 2008

(3) SA 247 (CC).

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