

SOUTH AFRICA / JUDGMENT

Zuma and Another v South African Broadcasting Corporation and Others (077748/2024) [2024] ZAGPJHC 903 (30 August 2024) [2024] ZAGPJHC 903

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

077748/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 077748/2024

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: YES

3.

REVISED: NO

30

August 2024

In

the matter between: JACOB
GEDLEYIHLEKISA ZUMA
First
Applicant
UMKHONTO
WESIZWE PARTY
Second
Applicant
and
SOUTH
AFRICAN BROADCASTING CORPORATION
First
Respondent
THE
CHAIRPERSON OF THE BOARD OF THE SABC
Second
Respondent
THE
GROUP CEO: SABC
Third
Respondent

JUDGMENT

YACOOB J:

Introduction

- [1] The first applicant (“Mr Zuma”) is the former president of the Republic, and the president of the second applicant (“the MK Party”), which is a registered political party which has attained representation in the national and some provincial legislatures. The respondent is the national public broadcaster, and the second and third respondents are its board chairperson and group chief executive officer respectively. I shall refer to all the respondents collectively as “the SABC” unless it becomes necessary to distinguish among them.
- [2] Mr Zuma approaches this court in his personal capacity as a citizen and as president of the MK Party. The applicants seek an order, on an urgent basis, that the SABC’s conduct in refusing not to use the term “Government of National Unity”, or “GNU”, when describing the coalition government of the seventh administration of the constitutional democracy established in 1994, is unconstitutional and invalid in terms of section 172 and/ or 38 of the Constitution.[1]

- [3] The applicants seek also that the court grant just and equitable relief resulting from the declaratory order, and in the alternative seek the review and setting aside of the decision of the SABC made on 28 June 2024 refusing to refrain from using the term “on the grounds of PAJA[2] and/or illegality”.
- [4] The term “GNU” began to gain public traction during June 2024. On 25 June 2024, the attorneys for the MK Party addressed a letter to the SABC on the MK Party’s behalf complaining of the SABC referring to national and provincial coalition governments as “Government of National Unity” and “Government of Provincial Unity”, and even local government coalitions as “Government of Local Unity”. The letter complained that this was a breach of the SABC’s obligation to be independent; the SABC’s Editorial Policies; the Broadcasting Charter, the Broadcasting Act and the Constitution. The breach was because as a matter of fact, according to the MK Party (and in this case, both applicants), there was no GNU but only a coalition. The letter demanded an undertaking to stop using the term on all SABC platform, failing which court would be approached to protect the rights allegedly being violated.
- [5] On 26 June, the SABC, in the person of Ms Chabeli, who is also the third respondent, responded that the allegation that the use of the terms constituted breaches of the SABC’s mandate and obligations was untenable, and invoked the SABC’s right to media freedom. It invited the MK Party to follow the editorial complaints mechanism.
- [6] The application was instituted and served on 12 July 2024, and set down in the urgent week of 13 August 2024. However, both the notice of motion and the founding affidavit made reference to approaches being made to the Deputy Judge President for a special allocation. These approaches were not made.
- [7] The notice of motion called for the filing of a record of proceedings relevant to the alternative relief sought, in terms of Rule 53(1)(b) of the Uniform Rules of Court, alternatively section 173 of the Constitution,[3] within 5 days, together with any reasons in terms of PAJA. It provided for the filing of supplementary papers within five days of the record being filed, and called for the filing of a notice of intention to oppose by 16 July and an answering affidavit within five days of the supplementary.
- [8] Apart from a notice of intention to oppose being filed on 16 July as required by the notice of motion, none of the other time limits prescribed in the notice of motion were adhered to by the SABC. Nor did the SABC explain or seek condonation for their lateness. The record, such as it was, was filed only in the late afternoon of 08 August, a mere court day but one before the set down date, and the answering affidavit appeared late on the evening of 12 August. The matter was stood down to Thursday 15 August to permit the filing of a replying affidavit and heads of argument.
- [9] It must be noted that, had the application been an ordinary motion in terms of Rule 6, the SABC’s answering affidavit would have been due 15 days after the notice of intention to oppose had been filed, that is, on 06 August. In ordinary Rule 53 review proceedings, the

record would have been due 15 days after the application had been received, that is, by 02 August. I set out these comparisons because they demonstrate the leisurely approach the SABC has taken in responding to the application, which is relevant in particular to the costs order.

- [10] Counsel for the applicants complained that the answering affidavit ought in any event not to have been filed yet, since the applicants should have had an opportunity to file a supplementary affidavit after the record was filed. This point was not seriously pursued, and taking into account that the record was short and only consisted of the SABC's Editorial Policy, the applicants' letter to the SABC and the SABC's response, all of which were annexed to the founding affidavit, and that the review relief was only sought in the alternative and the despatch of the record only sought in connection with the alternative relief, I do not consider that any prejudice arises from the SABC's failure to await a supplementary affidavit.
- [11] The applicants did, however, contend that the answering affidavit should not be taken into account and judgment granted in the application by default or on an unopposed basis. This has to be balanced with the applicants' own contention in the founding affidavit that this application "raises very novel and multiple issues of considerable constitutional importance" and allegations of the "nature and magnitude of the alleged constitutional violations". It can only be in the interests of justice to deal with issues such as those described by the applicants on an unopposed basis in extremely exceptional circumstances. I am

not persuaded that these are those circumstances.

- [12] The applicants' case, in a nutshell, is that the SABC, as the public broadcaster, with a constitutional mandate, and an undisputed obligation to broadcast news that is accurate, independent and impartial, cannot refer to the coalition government by the term that has been chosen by the former ruling party, the Government of National Unity, or GNU, because that is inaccurate, and by doing so the SABC is spreading propaganda and attempting to "hoodwink" the public into not seeing the true nature of the coalition government. The contention is that political parties are entitled to use whatever terms they wish, and use propaganda to achieve their purposes, and private media does not necessarily have any obligation to be independent. But the SABC as the public broadcaster, with the largest reach of any media entity in the country, governed by legislation and ultimately the Constitution,

and funded by public licence fees, has the highest standards and obligations to the public.

- [13] According to the applicants, the application is inherently and self-evidently urgent because an organ of state is violating constitutional rights, on an immeasurably large scale, on a continuing and daily basis. However, giving due regard to the weighty issues, the applicants state in the founding affidavit that the office of the Deputy Judge President would be approached to request a special allocation, to a Full Court, as soon as one could be constituted.

[14] As I have mentioned earlier, no approach was made to the office of the Deputy Judge President for a special allocation. According to the replying affidavit, the reason this was not done was that the SABC did not file its papers and therefore it was assumed the matter could go ahead on an unopposed basis. In my view this belies the reliance on the importance and weight of the

issues.

[15] The SABC contends that the matter is not urgent, and that no case has been made out on the merits, the applicants simply invoking sections of the Constitution, without demonstrating factually how those sections have been violated, or how they entitle the applicants to relief. It contends that, in any event, there is legislation that governs the SABC which the SABC has complied with, and that it is not open to the applicants to rely directly on the Constitution in criticising the SABC's actions. It also invokes its right to freedom of expression in terms of section 16 of the Constitution. It makes the assertion that "neither the applicants nor the Court may dictate to the SABC how issues and news ... should be reported and described in the reporting".

[16] Regarding the alternative review relief, the SABC contends that the "decision" is not reviewable under PAJA, and if it is, internal remedies have not been followed. It contends also that there is no basis for legality review. It is not clear the basis on which this contention is made, since there can be no contention that the SABC must always act within the confines of the law and the Constitution, and in accordance with its obligations as a public broadcaster, which, it emerged during the hearing, are broadly common cause.

[17] In its heads of argument, and in oral argument, the SABC raised the point that the applicants had not filed a notice in terms of Rule 16A. This was not raised in its answering affidavit.

Urgency

[18] The applicants rely for urgency on the fact that they have alleged violations of fundamental rights by an organ of state, and that they allege violations which affect millions of people on an ongoing basis, with daily or hourly repetition. They rely on the case of *Apleni v President of the Republic of South Africa and Another*,^[4] in support of the proposition that a simple allegation of abuse of public power is sufficient to ensure an application being entertained on the urgent roll.

[19] It is necessary to examine both what was held in *Apleni*, and what the alleged facts are in this case to come to an appropriate

conclusion.

[20] Firstly, Fabricius J held in *Apleni* that

“Where allegations are made relating to abuse of power by a Minister or other public officials which may impact upon the rule of law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally be urgently considered.”[5]

- [21] The allegation that is made must not be simply of a violation of a right, but of an abuse of power. The possible consequence of that abuse of power must be both an impact on the rule of law and a detrimental impact on the public purse. Once those elements are established, the relevant relief sought ought normally be urgently considered.
- [22] I accept for purposes of the analysis that if there is an allegation of a deliberate violation of a fundamental right by an organ of state, that is likely to constitute an abuse of power. I accept also that for this purpose the difference between a Minister or other public official and an organ of state is small.
- [23] It is difficult to comprehend an abuse of power which does not have an impact on the rule of law. Either my brother Fabricius was tautologous in his exposition, or the impact on the rule of law that was required for the urgent consideration of relief is a more tangible impact and not the nebulous impact that is caused by any abuse of power or unlawful action. The facts in Apleni, in which the relief sought impacted on the critical functioning of a Government Department, lead me to the conclusion that it is the latter. There has to be a plausible and clearly discernible possible consequence of an impact on the rule of law caused by the alleged abuse. In addition there must be the detrimental impact on the public purse.
- [24] Finally, even if all of these elements are in some way present, my view is that the last part of the ratio is important as it imports and preserves the discretion of the judge who has to make the determination of whether the matter is urgent in the context of what is before her. That is, that the relief should normally be urgently considered. This, to my mind, must mean that the court must take into account everything else that is relevant, to determine whether it is in the interests of justice that that particular matter should be entertained on the urgent roll.
- [25] Finally a comment on the question of an allegation of an abuse of power. It cannot be that a simple and implausible allegation of an abuse of power guarantees one a place on the urgent roll. This would allow anyone to make the allegation and claim, as of right, that their matter is urgent, relying on the principle in *Twentieth Century Fox*.^[6] The allegation has to be well-founded and plausible, and there must still be sufficient engagement with the other elements an applicant

seeking urgent enrolment is required to demonstrate.

- [26] In this case, there is no allegation on an impact on the public purse, although, if the applicants are vindicated and the SABC is found to be in fact spouting propaganda, there is possibly a misuse of public money obtained through licence fees.

- [27] In addition, in order to support their contention that the harm is ongoing on a daily and hourly basis, Mr Zuma in his founding affidavit lists the SABCs television and radio channels and includes all programming without distinguishing amongst the different types of programming, whether news or opinion or talk or community programming. It became clear during argument that the complaint really is about the use of the term by the SABC as a neutral term, which is a far more nuanced complaint than first appears in the founding affidavit, the occurrence of which is likely to be much less than it occurs in the totality of the SABC's programming.
- [28] Taking into account the applicants' own assertion of how important the issue is, I am not satisfied that the matter can and should be dealt with in the urgent court. It should be dealt with as a special motion, as a special allocation, where a judge has been allocated the matter and has had the time to consider the papers and submissions without the pressures of urgent court. The applicants themselves have foreshadowed this approach in their application.
- [29] In addition, even though the SABC did not raise the issue of the 16A notice in the answering affidavit, it is my view that the question whether and to what extent the court can tell the SABC what to do is not something that can or should be dealt with in a vacuum and with only the submissions of the interested parties before it. The Rule 16A notice calls for third party interventions, in particular amici curiae, and it seems to me a court can only benefit from having submissions from interested intervening parties if they are relevant.
- [30] For these reasons, I do not consider that it is in the interests of justice to deal with this matter on an urgent basis.

Costs

- [31] Ordinarily, having found that the matter is not urgent, the SABC would be entitled to a costs order. However, the lackadaisical manner in which the SABC has dealt with this litigation has been disrespectful to the court and has caused inconvenience to both the court and the applicants.
- [32] It is therefore appropriate, in my view, that each party pay their own costs.

Order

- [33] For the reasons set out above, I make the following order:
- a. The application is struck for want of urgency.
 - b. The applicants are directed to file a notice in terms of Rule 16A.
 - c. The applicants are directed to approach the office of the Deputy Judge President to seek a special allocation.

S YACOOB

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicants: D C Mpofu SC, L Moela and L Ndabula

Instructed by: KMNS Attorneys

For the Respondent: T Motau SC, M Salukazana and P Njokweni

Instructed by: ENS Africa

Date of Hearing: 15 August 2024

Date of Judgment: 30 August 2024

[1] Constitution of the Republic of South Africa, 1996.

[2] The Promotion of Administrative Justice Act, 3 of 2000.

[3] It is not clear the basis on which the applicants seek to invoke s173 of the Constitution, since that is the section that confirms the court's inherent power to protect and regulate its own process, and is the prerogative of the court, not the litigant.

[4] [2018] 1 All SA 728 (GP)

[5] At para 10.

[6] Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982

(3) SA 582 (W) at 582 (G)

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Prepared on 11 October 2026 · Esheria