

SOUTH AFRICA / JUDGMENT

Zuma and Another v South African Broaddcasting Corporation and Others (2024/077748) [2025] ZAGPJHC 79 (31 January 2025) [2025] ZAGPJHC 79

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

2024/077748

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FLYNOTES:

CONSTITUTION

– Freedom of expression – Terms
used by SABC –
Applicants
objecting to use of term Government of National Unity
(GNU) – Reliance on section 16 is
counter-intuitive
– Court not to enter political debate on
names that players in politics adopt – Constitutional
rights
not implicated – Remedies available for
broadcasting issues and complaints – Claim for
review
under PAJA or legality must fail – Constitution,
ss 16 and 172.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2024-077748

(1)

REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED: NO
31/01/2025

In the matter between: JACOB GEDLEYIHLEKISA
ZUMA
First Applicant
UMKHONTO WESIZWE
PARTY
Second Applicant
And
SOUTH AFRICAN
BROADCASTING
First Respondent
CORPORATION
THE CHAIRPERSON OF THE
BOARD
Second Respondent
OF
THE SABC

THE GROUP CEO: SABC
Third Respondent

JUDGMENT
FISHER J

Introduction

- [1] This case involves the use by the first respondent of the term or name Government of National Unity or the acronym GNU to describe the coalition of political parties that formed a new government in the wake of the hung parliament which resulted from the May 2024 general elections. These parties are: the African National Congress (ANC), Democratic Alliance (DA), Patriotic Alliance, Inkatha Freedom Party, Good Party, Pan Africanist Congress of Azania, Freedom Front Plus, United Democratic Movement, Al Jama-ah and Rise Mzansi.
- [2] The applicants, Mr Jacob Zuma and the Umkhonto Wesizwe (MK) Party seek a declaration of constitutional invalidity in relation to the conduct which entails the use of the term and name in broadcasts by the first respondent, the South African Broadcasting Corporation Ltd (SABC). The second and third respondents are respectively the SABC’s Chairperson and CEO.
- [3] In the alternative to the declaratory relief the applicants seek the review and setting aside of the refusal by the third respondent to cause the SABC to desist from the use of the term pursuant to a demand by the applicants.

The parties’ contentions

- [4] The applicants argue that the use of the term is politically contentious – some, including the applicants - alleging that it does not conform to the definition of a Government of National Unity because a major party, viz the MK party is excluded from the coalition; others take up the opposite position, being that it is properly called a Government of National Unity in that it seeks to create a unified South Africa and is a majority government made up of parties that have unified along certain lines and with common aims.
- [5] The applicants contend that the use of the term implicates constitutional imperatives and thus section 172 of the Constitution is implicated.
- [6] The starting point of the applicants’ argument is that GNU is a political term of art – i.e. that it has a defined meaning within the political domain.
- [7] It draws for this submission on a definition in the Oxford Dictionary of African politics which defines a GNU as “A government that brings together a number of rival leaders and political parties in order to promote national unity and political stability and states that “[g]overnments of national unity are often formed after a political crisis, after a period of conflict, or during a transition from one regime type to another”.
- [8] The applicants contend that because this definition is not strictly met, this political term may not be used to describe the coalition government because it is inaccurate and misleading and tendentious to one side of the debate.
- [9] This argument presupposes that this term is definitive of a coalition that includes all major parties.
- [10] The SABC acknowledges that the use of the name is controversial from the point of view of political ideology. It argues, however, that this is the name which the Government goes by, and that it uses it in the same manner as it uses other names which are given to parties by themselves. It argues that the use of this name does not entail it taking sides in the debate.
- [11] It is not in dispute that the SABC provides coverage aimed specifically at identifying the existence of the political debate as to whether the coalition is properly described as a GNU or not and at educating the public as to the tenets of this debate. There is no complaint that it suppresses information relating to the existence of the controversy.

Declaration of invalidity

- [12] The main foundation on which the case of the applicants’ rests is the declaratory relief sought. Section 172(1)(a) of the Constitution states that this Court must declare “any law or conduct that is inconsistent with the Constitution” to be invalid to the extent of its inconsistency.
- [13] Section 172 is a special constitutional provision, and its application is specifically related to the breach of constitutional rights.

- [14] The enquiry is an objective one. Conduct is either inconsistent with the constitution or it is not. The subjective positions in which the parties find themselves has no bearing on the determination. A court will not restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of conduct that is contended to be inconsistent with the Constitution.[1]
- [15] The starting point of the inquiry is whether the declaration involves constitutional rights. The applicants contend that it does. The rights contended for are rights under section 16 which encompasses the right to speak freely and receive information or ideas.
- [16] The framing of the constitutional issue along the lines that it invokes section 16 rights and thus other rights which are related to or implicated therein is counter- intuitive. It seeks to constrain usage in the impugned terrain rather than allow for the free exchange of information. This argument inevitably invokes the language of restraint and lack of freedom of expression. Such restraint is anathema to section 16 rights and any other constitutional rights which their protection might involve.
- [17] The argument goes that, because the MK Party has deliberately been excluded from the coalition, it offends section 16 rights for the populace to hear in broadcasts of the SABC that the coalition espouses unity.
- [18] To my mind, this is not a matter implicating section 16 in any manner or form. At best for the applicants the complaint devolves into one which is to the effect that the use of the term is inaccurate.
- [19] Were I to assess the term, I would incline to the view that the use of the term imports no more than that parties in a multi-party democracy which have differing political leanings have banded together by agreement, not on the basis that they abandon their fundamental values, but on the basis that they form a government along some common grounds and for a common purpose.
- [20] It is, after all, universal practice for political parties, by means of the names they give themselves, to seek to encapsulate compelling ideals in a manner that is accessible. But is this legally objectionable? Even if the term were definitive on the basis that it conveys the inclusion of all major parties, can the use of the term on be found to be objectionable and thus unlawful? I think not.
- [21] It could equally be argued that the second applicant's use of its own name – is evocative of the struggle of the ANC and thus that it attempts to appropriate those laurels; that the Democratic Alliance is not truly democratic; that the African National Congress is neither National nor African in the true sense, that the Communist Party does not adhere to the ideals of Marxist theory. I could go on, but the point is made.

- [22] It is not the remit of the court to enter into political debate as to the names that players in the political field adopt to brand themselves. What is Democratic? What is National? What represents unity? The applicants would have this court decide the political ideals bound up in the use of the name on the basis of their meaning not in a linguistic sense but in the realm of political theory. This is untenable.
- [23] To my mind the challenge is mischievous. It seeks to have the courts enter these idealistic debates which is neither its place nor, more formally put – its sphere of jurisdiction.
- [24] The Constitution does not accord to persons the right to hear only information which is considered objectively accurate.
- [25] Thus, Constitutional rights are not implicated and the claim under section 172 must fail.

The review

- [26] The South African Broadcasting Corporation Ltd (SABC) is a State-owned entity created in terms of the Broadcasting Act.[2] Its conduct, policies and the content it offers are heavily regulated by statute.
- [27] Section 6(4) of the Broadcasting Act provides that the SABC must provide a wide range of programming that "reflects South African attitudes, opinions, ideas, values and artistic creativity" and "offers a plurality of views and a variety of news, information and analysis from a South African point of view."
- [28] Section 6(8) obliges the SABC to adopt a Code of Practice that ensures that both the services it provides, and its own personnel comply with a range of standards including "a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest".
- [29] The Free to Air Code of Conduct to which the SABC is bound provides that, where controversial issues of public importance are discussed, the SABC should make a reasonable effort to present opposing points of view and that issues should be presented in a balanced way, allowing the audience to make up its own mind.
- [30] Section 192 of the Constitution provides that national legislation must establish an independent authority, "to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society".
- [31] The purpose of the ICASA Act[3] is to, "regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by s 192 of the Constitution."[4]
- [32] The ICASA Act establishes the Independent Communications Authority (the Authority) which is the authority contemplated by section 192 of the Constitution.

- [33] The Authority is a juristic person that is independent, and subject only to the Constitution and the law. It is admonished to be impartial and to perform its functions without fear, favour or prejudice.[5] It functions without any political or commercial interference.[6]
- [34] In terms of section 3(5) of the ICASA Act, a person affected by any action, finding or decision of the Authority may apply to a court with competent jurisdiction for review of that action, finding or decision.
- [35] The Complaints and Compliance Committee (Complaints Committee) of the Authority investigates, hears if appropriate, and makes a finding on complaints lodged with the Authority regarding, inter alia, allegations of non-compliance with the ICASA Act or the underlying statutes, which are defined as the Broadcasting Act[7], Postal Services Act[8] and Electronic Communications Act.[9]
- [36] The Complaints Committee is an administrative tribunal performing an administrative function when investigating and adjudicating complaints. This adjudication of a complaint constitutes administrative action as contemplated in Promotion of Administrative Justice Act (PAJA).[10]
- [37] The SABC also contains its own internal up-wards referral process in relation to complaints involving breaches of its editorial policy.
- [38] Thus, to the extent that any person is of the view that the use of the term constitutes misinformation or the taking of a particular side in the debate by the SABC he has his remedies which ultimately include judicial review.
- [39] The review is directed at the refusal of the CEO to have the SABC stop using the term.
- [40] The respondents contend that the refusal does not constitute administrative action or the exercise of public power. They raise, in any event, issues of subsidiarity and failure to exhaust remedies under the ICASA Act.
- [41] There is a statutorily required administrative process that has to be undertaken by persons in the position of the applicants in the event of them being aggrieved by a broadcast. This does not involve demand being made to the CEO of the SABC. The corollary of this is that the CEO of the SABC is not empowered to take the steps demanded by the applicants. This was conveyed in the letter containing the refusal in issue.
- [42] The refusal to comply with the demand does not constitute administrative action and neither is it an exercise of public power.
- [43] Thus, the claim for review under PAJA or legality must fail.

Conclusion

[44] This is not a constitutional matter, and it is not one where the court has jurisdiction.
Furthermore, the CEO simply does not have the power which the applicants seek to invoke.

Costs

[45] The challenge is so obviously without foundation that it is difficult to accept that it has been brought to further any real interest either of the applicants or more generally.

[46] I thus will not apply the Biowatch[11] principle.

Order

[47] The application is dismissed with costs which are to be taxed according to scale C, to include the costs of two counsel where employed and the liability for which is to be joint and several.

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 31 January 2025.

Heard:

27 January 2025

Delivered: 31 January 2025

APPEARANCES:

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Applicant's Attorneys: KMNS Attorneys

Respondent's Counsel: Adv. T Motau SC Adv. M Salukazana Adv. P Njokweni

Respondent Attorneys: ENS Africa

[1] Ferreira v Levin 1996

(2) SA 621 (CC) 57.

[2] Broadcasting Act 4 of 1999.

[3] The Independent Communications Authority of South Africa Act 13 of 2000.

[4] Section 2 of the ICASA Act

[5] Section 3(3) of the ICASA Act.

- [6] Id section 3(4).
 - [7] Broadcasting Act 4 of 1999.
 - [8] Postal Services Act 124 of 1998
 - [9] Electronic Communications Act 36 of 2005.
 - [10] Promotion of Administrative Justice Act 3 of 2000.
 - [11] Biowatch Trust v Registrar Genetic Resources (2009
 - (6) SA 232 (CC).
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