THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 664/17

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**APPELLANT**

and

DEMOCRATIC ALLIANCE	**1st RESPONDENT**
PRAVIN JAMNADAS GORDHAN	**2nd RESPONDENT**
MCEBISI HURBERT JONAS	**3RD RESPONDENT**
MALUSI NKANYEZI GIGABA	**4TH RESPONDENT**
SFISO NORBERT BUTHELEZI	**5TH RESPONDENT**

Neutral Citation:	*The President of the RSA v DA & others* (664/17) [2018] ZASCA 79 (31 May 2018)
Coram:	Maya P and Majiedt and Dambuza JJA and Plasket and Mothle AJJA
Heard:	2 May 2018
Delivered:	31 May 2018

Summary: Section 16(2)(a)(i) Superior Courts Act 10 of 2013 – Appeal against an interlocutory order in a review application – review application withdrawn – judgment would have no practical effect or result – Appeal found moot and dismissed.

ORDER

On appeal from: The High Court, Gauteng Division, Pretoria (Vally J) sitting as court of first instance:

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Mothle AJA (Maya P, Majiedt and Dambuza JJA and Plasket AJA concurring)

[1] What started as a case of major public interest ended up being overtaken by new developments before it was heard. This appeal, with leave of the High Court, Gauteng Division, Pretoria (Vally J), arises from an interlocutory application in which the President of the Republic of South Africa (appellant) was ordered to make available to the Democratic Alliance (respondent), a record of decision requested in terms of rule 53 of Uniform Rules of the Court, pending an application for review of the appellant's decision to reshuffle the cabinet, (the review application). The review application was withdrawn. Therefore, the crisp issue raised by this appeal is whether the decision or relief sought would have any practical effect or result or, stated otherwise, whether the appeal has not become moot.[1]

[2] The principle of mootness has evolved over the years and is now provided for in s 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013,[2] which provides:

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[1] In effect the appeal faced two hurdles, first the fact that it was an appeal on a ruling concerning an interlocutory application and secondly the question of mootness. The mootness question took precedence.

[2] This text appeared in section 21A of the repealed Supreme Court Act 59 of 1959.

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[3] The factual matrix is briefly that on 31 March 2017, the then President of the Republic of South Africa, President Jacob Zuma, announced a cabinet reshuffle and in the process removed the then Minister of Finance, Mr Pravin Gordhan, as well as his deputy, Mr Mcebisi Jonas, both cited as second and third respondents respectively. The second and third respondents were replaced by Mr Malusi Gigaba and Mr Sfiso Buthelezi (also cited as the fourth and fifth respondents in the review application) as new Minister and Deputy Minister of Finance, respectively.

[4] On 4 April 2017, the respondent launched the review application, challenging the constitutional validity of the appellant's reshuffle of the cabinet, which resulted in the dismissal of Mr Gordhan and Mr Jonas. The review application was brought in terms of rule 53 of Uniform Rules of Court. The rule permits an applicant to call 'upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.

[5] The respondent alleged that through rule 53, it sought, amongst other relief, disclosure of the record of the appellant's decision to effect the cabinet reshuffle. The respondent particularly called for disclosure of an alleged 'intelligence report', the existence of which, it is alleged, was in the public domain.

[6] It was common cause between the parties that after the exchange of correspondence, the appellant failed to make available the record sought. The respondent then approached the High Court by way of urgency, seeking relief to compel the appellant to make available the record in order to prosecute its

review application. The High Court accepted that there was no precedent which served as authority that rule 53, applies to executive decisions. In its judgment the High Court stated that it had applied the purposive method of interpretation to conclude that rule 53 also covered executive decisions and thus ordered disclosure of the record. The appellant successfully applied to the High Court for leave to appeal the ruling to this Court.

[7] After the lodging of the appeal documents and the allocation of the date of hearing, circumstances changed. First, President Jacob Zuma, whose cabinet reshuffle was being challenged, resigned from office. Secondly, the new President, Mr Cyril Ramaphosa, effected a cabinet reshuffle. Thirdly, on 18 April 2018 this Court was informed that the review application before the High Court had, by agreement between the parties, been withdrawn.

[8] The following day, on 19 April 2018, the parties were directed in writing to file written submissions on 'why the appeal against a judgment on an interlocutory issue should be entertained when the main proceedings, the review application, has been withdrawn'. Both the appellant and the respondent delivered written submissions.

[9] In his written submission and at the hearing of the appeal, the appellant, arguing against mootness, contended that the order of the High Court established a precedent which extends the ambit of rule 53 to cover executive functions. In so doing, it was argued that the High Court usurped the powers of the Rules Board as the only body authorised to effect changes to the rule. In establishing this precedent, the argument continued, the High Court impermissibly encroached into the terrain of the other branches of government in breach of the doctrine of separation of powers. The decision was described by appellant's counsel as 'ground-breaking' and needed to be corrected as it posed an uncertainty for future cabinet reshuffles or the reshuffles of provincial executive councils by the Premiers. There was further argument on the merits of the appeal, which in my view are irrelevant for consideration of the question of mootness.

[10] The respondent argued that the matter was moot mainly for two reasons. First, the review application had been withdrawn and thus the order sought would have no practical effect. Secondly, generally an interlocutory order is not appealable. Therefore the appellant still has to seek the court's indulgence to prosecute the appeal. In response to the submissions of the appellant that the decision of the High Court is ground-breaking and unprecedented, the respondent pointed to a number of decisions where the courts have applied rule 53 in circumstances that appear to be extending its scope and ambit, including where it concerned executive functions. I now turn to deal with these submissions.

[11] The question of mootness of an appeal has featured repeatedly in this and other courts.[3] These cases demonstrate that a court hearing an appeal would not readily accept an invitation to adjudicate on issues which are of 'such a nature that the decision sought will have no practical effect or result'. The Constitutional Court in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21 footnote 18 remarked:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599), where Didcott J said the following at para [17]:

"(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become."

[12] There are instances where there have been exceptions to the provision, initially of s 21A of Act 59 of 1959 and presently s 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013. The courts have exercised a discretion to

[3] See *John Walker Pools v Consolidated Aone Trade and Invest 6 (Pty) Ltd (in Liquidation) & another* (245/2017) [2018] ZASCA 012 (8 March 2018; *SA Metal Group (Pty) Ltd v The International Trade Administration Commission* (267/2016) [2017 ZASCA 14 (17 March 2017); *Legal Aid South Africa v Mzoxolo Magidiwana* (1055/13) [2014] ZASCA 141 (26 September 2014) and cases cited there.

hear a matter even where it was moot. This discretion has been applied in a limited number of cases, where the appeal, though moot, raised a discrete legal point which required no merits or factual matrix to resolve.[4] In this regard, the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), in paragraph 11 held:

'… A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others.'

The question is thus whether such a discretion should be exercised in this case.

[13] The appellant submitted that in future there could develop a class or classes of presidential executive functions where disclosure of records as stated in rule 53 would not apply. In reply, appellant narrowed its argument in support of a request for a ruling by this court to decide on the applicability of rule 53 to executive functions concerning the reshuffling of cabinet. The essence of appellant's argument against mootness as I understood it is twofold. First, that there is a need to set aside the decision of the High Court as it established a wrong precedent on the applicability of rule 53 to disclosure of the records relating to a reshuffling of cabinet, and secondly, the need for a ruling in order to provide guidance for future reshuffling of cabinets.

[14] In support of the submission that the appeal is not moot, the appellant made the argument that the decision of the High Court is unprecedented and therefore even in the absence of the review application, there is a compelling reason for this Court to intervene. The respondent in answer, contended that the decision of the High Court is not unprecedented and there is no compelling reason for this court to pronounce on a matter that is moot. Instances were cited where this Court and the Constitutional Court had interpreted rule 53 to be applicable to decisions arising from the discharge of executive functions and to decisions of other constitutional organs of state. By way of example, reference was made to the matter of *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) SA 294

[4] See *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA).

(SCA), in which this Court held in a judicial review of an executive decision that the parties were required to follow rule 53. Further, in the recent Constitutional Court decision in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8 (24 April 2018), which concerned a review of a decision of the Judicial Service Commission regarding the appointment of judges. The Constitutional Court found that rule 53 applied, and the Judicial Service Commission was ordered to provide a full record of its decision. Therefore in my view, the decision of the High Court does not establish a kind of precedent that may cause this Court to decide on the appeal, even if it is moot.

[15] As stated above, the purpose of the interlocutory application compelling disclosure of the record was clearly intended to enable the respondent to prosecute its review application. The review application having being withdrawn, it would be unwise for this court to opine on the interpretation of a rule, in the absence of objective facts and the context within which they were raised in the review application. It would neither be practical nor desirable for this Court to postulate under what circumstances and on what grounds, legal and/or factual, would a cabinet reshuffle be taken on review and the disclosure of the record be demanded in terms of rule 53 in future. This Court stated in paragraph 31 of the judgment in *Legal-Aid South Africa v Mzoxolo Magidiwana (1055/13) [2014] ZASCA 141: 2015 (2) SA 568 (SCA)*:

‘ … The appeal raises no discrete legal point which does not involve detailed consideration of facts and no similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.’

[16] The appellant raised, as one of its grounds of attack, the submission that the High Court in extending rule 53 through its interpretation, veered impermissibly into the terrain of the Rules Board, in breach of the doctrine of separation of powers. If this argument is correct, then it would equally apply to this Court. The correct approach is that the task of developing the rules is best left for the Rules Board. This Court has pronounced on this position. In *ABSA Bank Limited v Van Rensburg and Another: In Re: ABSA Bank Limited v*

Maree and Another 2014 (4) SA 626 (SCA), The Court said in para 11 of the judgment:

'At stake is the precise requirement of a rule of court procedure. Bearing in mind that section 21A was aimed at reducing the heavy workload of appellate courts, it is very relevant that there is a statutory body specially created to deal with all issues pertaining to matters of this nature, as pointed out by Absa itself. The Rules Board for Courts of Law Act 107 of 1985 (the Rules Board Act) is chiefly aimed as providing "for the making of rules for the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, High Courts and Lower Courts". This object is achieved through the Rules Board for Courts of Law (the Rules Board) which is empowered, inter alia, "from time to time on a regular basis [to] review existing rules of Court and subject to the approval of the Minister, make, amend or repeal rules …. Regulating the practice and procedure in connection with litigation … [and] the form, contents and use of process." The present question falls squarely within this ambit and any uncertainty relating to the relevant rule's application should rightly be resolved by the Rules Board.'

[17] There is thus no compelling reason why this Court should exercise its discretion, absent objective facts, to conclusively determine the ambit of rule 53 when the Rules Board is mandated to do so. Interesting as the debate may be, this Court should not be tempted to decide an issue that may be of academic interest and the decision sought will have no practical effect or result.

[18] The merits of the appeal were argued in full. However, in consideration of the position I take on the mootness of this appeal, I refrain from expressing a view on the merits.

[19] To sum up, the question of the High Court having established a precedent is not supported by authority. The decision in *Van Zyl*[5] has put paid to that argument. Similarly, defining the ambit or scope of the applicability of rule 53 to executive functions and/or decisions, falls, as correctly argued by the appellant, within the terrain of the Rules Board. I therefore conclude that

[5] Ibid.

for reasons stated, the relief sought by the appellant will not have any practical effect or result. The appeal must therefore be dismissed.

[20] In the result I make this order:

The appeal is dismissed with costs including the costs of two counsel.

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S P Mothle
Acting Judge of Appeal

APPEARANCES:

For Appellant: I A M Semenya SC
M Sikhakhane SC
M Sello
Instructed by:
The State Attorney, Pretoria
The State Attorney, Bloemfontein

For 1st Respondent: S Budlender
L Zikalala
Instructed by:
Minde Schapiro Smith Inc, Bellville, C/o Klagsbrun Edelstein, Nieuw Mucklneuk
Symington & De Kok, Bloemfontein

For 4th & 5th Respondents:

The State Attorney, Pretoria
The State Attorney, Bloemfontein