THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 869/2021

In the matter between:

SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY **First Appellant**

MINISTER OF HEALTH **Second Appellant**

and

AFRICAN CHRISTIAN DEMOCRATIC PARTY **Respondent**

Neutral citation: *South African Health Products Regulatory Authority and Another v African Christian Democratic Party* (869/2021) [2022] ZASCA 158 (21 November 2022)

Coram: Petse AP, Makgoka and Plasket JJA and Windell and Mali AJJA

Heard: 14 November 2022

Delivered: 21 November 2022

Summary: Civil procedure – supervisory order – affected parties not heard before order made – order not applied for by any party – no evidence to justify making of order – order set aside.

ORDER

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

1. The appeal is upheld.
2. Paragraphs 1 and 2 of the high court's order are set aside.

JUDGMENT

Plasket JA (Petse AP, Makgoka JA and Windell and Mali AJJA concurring):

[1] The respondent, the African Christian Democratic Party (the ACDP), applied to the Gauteng Division of the High Court, Pretoria (the high court) for an order directing the first appellant, the South African Health Products Regulatory Authority (the SAHPRA) to remove restrictions on the use of a drug called Ivermectin, an animal remedy, for the treatment of Covid-19 in humans, including doing 'all things necessary to regulate and ensure the manufacture' of Ivermectin. The orders sought by the ACDP were, in terms of paragraph 3 of the notice of motion, to 'operate until such time as clinical evidence demonstrates Ivermectin to not be effective in the treatment of Covid-19'.

[2] In due course, the ACDP, as well as the applicants in three similar matters, on the one hand, and the SAHPRA and the second appellant, the Minister of Health (the Minister), on the other, settled the four matters. They agreed to the terms of an order. The high court made two additional orders, however, that the ACDP and the other applicants had not sought, that the parties had not agreed to and to which the SAHPRA and the Minister had registered their objections. Paragraphs 1 and 2 of the order read as follows:

‘1 SAHPRA is ordered to report back to the Court, by way of affidavit, every three months following the date of the granting of this order, until otherwise ordered on inter alia: --

1.1 adjustments made to the Programme and why such adjustments were necessary, for the prevention and/or treatment of COVID-19;

1.2 newly approved unregistered Ivermectin products;

1.3 newly authorized importers;

1.4 the number of Ivermectin products made available for named patients under the Programme; and

1.5 the particulars of healthcare facilities (including hospitals, pharmacies, compounding pharmacies and licensed dispensing doctors) that have been authorized to hold stock of unregistered and/or compounded Ivermectin products.

2 Any party to this application may approach the Court by way of Notice of Motion and Supplementary Affidavits, after having given reasonable notice in the circumstances to all relevant parties, for relief pertaining to:

2.1 the insufficiency or the impracticality of the Programme, or any amendments affected thereto by SAHPRA;

2.2 any party’s failure to give effect to the content of the Court order; and

2.3 any further aspects relating to the administration and allowance of the use of Ivermectin as a treatment against COVID-19, which is in the public interest and necessary to be considered by the Court.’

[3] After the order was made, the SAHPRA and the Minister made an application for the rescission of the two paragraphs. In the alternative, they sought leave to appeal. Sardiwalla J granted the alternative relief with the result that this appeal is before us with his leave.

[4] Only the ACDP opposed the appeal. Shortly before it was to be heard, the ACDP withdrew its opposition following an undertaking by the SAHPRA and the Minister that they would not seek a costs order against it. With the consent of both appellants, the matter was dealt with in terms of s 19*(a)* of the Superior Courts Act 10 of 2013. This section provides that this court may ‘dispose of an appeal without the hearing of oral argument’.

Background

[5] The four applications brought against the SAHPRA and the Minister were due to be argued together, from 29 to 31 March 2021, before Sardiwalla J. The parties settled the matters before the hearing and draft orders in each matter were prepared.

[6] On 29 March 2021, the parties met with Sardiwalla J. He requested them to consolidate the four settlement agreements into one order. He also said that he thought a supervisory order should be included requiring the SAHPRA to report to him every three months. He stated, according to the deponent to the founding affidavit in the rescission/leave to appeal application, that he 'regarded himself as "seized" of all matters involving Ivermectin'.

[7] On 1 April 2021, the SAHPRA's attorney sent Sardiwalla J a letter attaching a consolidated draft order that the parties agreed to, plus one compiled by the four applicants that contained the supervisory order as well. They had drafted this document to meet the direction issued by Sardiwalla J. In the letter, Sardiwalla J was informed that the SAHPRA and the Minister objected to the supervisory order being made and requested an opportunity to present oral argument. Both the SAHPRA and the Minister filed heads of argument.

[8] Counsel for the ACDP then wrote to Sardiwalla J to inform him that his client wished to file heads of argument concerning the supervisory order, while another of the applicants advised Sardiwalla J that he was taking instructions from his client on the issue. He suggested that the order by agreement be granted and that argument on the supervisory order be heard on a date to be arranged. This was supported by another of the applicants.

[9] Later that day the parties were advised that Sardiwalla J had decided to hear the parties at 10h00 on 6 April 2021. On that morning, the SAHPRA filed supplementary heads of argument. Apart from the SAHPRA and the Minister, none of the other parties filed heads of argument. When the SAHPRA's attorney telephoned Sardiwalla J's registrar to obtain the link for a virtual hearing, he was told that Sardiwalla J would no longer be hearing the parties as he had made a decision, and that his order would be sent to the parties shortly.

[10] A short while later, the SAHPRA's attorney was asked by Sardiwalla J's registrar to send her the agreed draft order as well as the draft order containing the supervisory order in Microsoft Word format. He did so. Two hours later, Sardiwalla J issued an order that included the supervisory order.

[11] As no reasons accompanied the order, the SAHPRA's attorney requested reasons from Sardiwalla J. In his letter, the attorney stated that the SAHPRA intended appealing against the supervisory order and that, to facilitate doing so, it requested that the parties be 'provided with written reasons for paragraphs 1 and 2 of the court order'. He said that this request was made because the supervisory order was 'explicitly not the subject of agreement between the parties'; that the SAHPRA had informed the court in writing of this fact; and that both the SAHPRA and the Minister had filed heads of argument opposing the grant of the order. He concluded by saying that '[d]espite having delivered written submissions and having been asked to appear in court on 6 April 2021, the hearing did not take place'.

[12] On 25 June 2021, Sardiwalla J furnished reasons. They made no mention of the supervisory order or why he had granted it.

The issues

[13] In addressing the legal issues that arise in this appeal, it is necessary to commence with a first, fundamental, principle. It is that judicial power has limits. In *S v Mabena and Another*[1] Nugent JA said:

'The Constitution proclaims the existence of a state that is founded on the rule of law. Under such a regime legitimate state authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the state. Far from conferring authority to disregard the law the Constitution is the imperative for justice to be done in accordance with law. As in the case of other state authority, the exercise of judicial authority otherwise than according to law is simply invalid.'

[1] *S v Mabena and Another* [2006] ZASCA 178; 2007 (1) SACR 482 (SCA) para 2.

[14] And, in *National Director of Public Prosecutions v Zuma*,[2] Harms JA made the point that 'in exercising the judicial function, judges are themselves constrained by the law'. He then explained that '[t]he independence of the Judiciary depends on the Judiciary's respect for the limits of its powers' and that 'its function is to adjudicate the issues between the parties to the litigation and not extraneous issues'.

[15] The first difficulty that arises in respect of the supervisory order is that Sardiwalla J failed to afford the SAHPRA and the Minister a hearing despite knowing that they had not agreed to the supervisory order and opposed it being made. He had agreed to a hearing but inexplicably changed his mind and made the order, including the supervisory order, in the absence of the parties and without hearing argument. In these circumstances, an oral hearing was, without doubt, essential. Courts decide matters, particularly opposed matters, in open court, and the exceptions to this rule are limited. Indeed, the idea that all judicial proceedings must be conducted in open court is over two centuries old in this country, dating back to 1813.[3] Section 32 of the Superior Courts Act 10 of 2013 now provides that except where otherwise provided for in the Act or in another law, 'all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court'.[4] Determining justiciable disputes in open court, where the parties are heard, is the default position in our legal system.

[16] Section 34 of the Constitution gives effect to the founding value of the rule of law. It provides:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

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[2] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 15.

[3] See the historical survey of the rule from Roman-Dutch times to 1959, when the Supreme Court Act 59 of 1959 was passed, in *Financial Mail (Pty) Ltd v Registrar of Insurance and Others* 1966 (2) SA 219 (W) at 220E-221G.

[4] As to the importance of open justice, see *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) paras 29-30.

[17] The rule of law consists of both substantive and procedural elements.[5] One of its most fundamental procedural elements is that when a person may be adversely affected by an exercise of public power, they are entitled to be heard.[6] In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)*[7] Yacoob J held:

'This s 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.'

[18] In *Knoop NO and Another v Gupta and Another*[8] in which, as in this case, an order had been granted that none of the parties had applied for and without hearing the parties on the issue, Wallis JA held that the order was invalid. This was so because when 'an issue is not raised in the pleadings or affidavits in a case, and the order granted is one on which neither party has been heard, there is a breach of a fundamental constitutional right'. In this matter, the order must be set aside for the same reason.

[19] Secondly, the fact that the supervisory order had not been applied for by any of the parties and was not an issue in the pleadings requires that it be set aside. In *Fischer and Another v Ramahlele and Others*[9] this court dealt with a situation in which an application and counter-application had been referred to oral evidence on an issue that, one way or the other, would have been dispositive of both. The judge had,

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[5] *Pharmaceutical Manufacturers Association of SA and Another; In re ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 37.
[6] *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) paras 46 and 131. See too A S Mathews *Freedom, State Security and the Rule of Law* (1988) at 20.
[7] *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) para 11.
[8] *Knoop NO and Another v Gupta and Another* [2020] ZASCA 149; 2021 (3) SA 135 (SCA) para 28.
[9] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA).

however, required the parties to address him on two other issues that he had identified, and which were not canvassed in the papers. He decided the matter on the basis of one of his own points without, it would appear, the necessary evidence.

[20] In upholding the appeal against the order made in those circumstances, Theron and Wallis JJA said the following:[10]

'[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.'

It was, Theron and Wallis JJA concluded, 'impermissible' for the court to decide the matter as it had.[11] So too in this matter.

[10] Paras 13-14.
[11] Para 24.

[21] Thirdly, the supervisory order was granted despite the complete absence of evidence to justify it. In *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)*[12] the court held that the remedial powers of our courts to grant mandatory relief against the government 'includes the power where it is appropriate to exercise some sort of supervisory jurisdiction to ensure that the order is implemented'. How these powers are exercised 'depends on the circumstances of each particular case'[13] but ultimately a supervisory order may be made 'if it is necessary to secure compliance with a court order'.[14] Important as a supervisory order may be in appropriate cases, the granting of this type of relief must be carefully considered – and justified on the facts – particularly because of its separation of powers implications.[15]

[22] In this case, not only was there no evidence as to the necessity of a supervisory order but the fact that the SAHPRA and the Minister had settled the matter and agreed to an order suggests that there was probably no necessity for one. Furthermore, had Sardiwalla J allowed the parties to argue the matter, he would have been informed of the separation of powers problems that the grant of the supervisory order would create, and the possible consequence of it purporting to by-passing the obligation, imposed by s 7(2) of the Promotion of Administrative Justice Act 3 of 2000, to exhaust the internal remedy created by s 24A of the Medicines and Related Substances Act 101 of 1965. Finally, it strikes me as telling that the reasons that Sardiwalla J furnished made no mention of the supervisory order and consequently gave no reason at all for it being granted. And this despite being pertinently asked to furnish reasons on this very issue – the only issue that was not agreed to and was in dispute. For this reason too, the order cannot stand.

Conclusion

[23] The appeal must succeed for the three inter-related reasons of a failure to hear the SAHPRA and the Minister before making the supervisory order; the fact that it was

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[12] *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) para 104.
[13] Para 113.
[14] Para 129.
[15] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* [2004] ZASCA 47; 2004 (6) SA 40 (SCA) para 39.

not an issue on the pleadings and was not applied for by any party; and that it was granted in the absence of any evidence to establish that it was necessary. As the SAHPRA and the Minister undertook not to seek any costs order against the ACDP, no order of costs will be made.

[24] I make the following order:

1 The appeal is upheld.

2 Paragraphs 1 and 2 of the high court's order are set aside.

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C Plasket

Judge of Appeal

APPEARANCES

For the first appellant:	G Marcus SC (with A Hassim SC)
Instructed by:	Hahn & Hahn Attorneys, Pretoria
	Symington & De Kok, Bloemfontein
For the second appellant:	T Skosana SC (with T Lupuwana and M S Manganye)
Instructed by:	State Attorney, Pretoria
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