REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 36314/13

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

21 NOVEMBER 2014 **FHD VAN OOSTEN**

In the matter between

DUBULA JONATHAN QWELANE **APPLICANT**

And

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **FIRST RESPONDENT**

SOUTH AFRICAN HUMAN RIGHTS COMMISSION **SECOND RESPONDENT**

FREEDOM OF EXPRESSION INSTITUTE **FIRST *AMICUS CURIAE***

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA **SECOND *AMICUS CURIAE***

High Court - Practice and Procedure – power of High Court to order consolidation of high court proceedings based on constitutional challenge and equality court proceedings for hearing before high court judge in dual capacity - Equality Court sitting as high court does not have power to transfer a matter to High Court in capacity as High Court - Uniform Rule of Court 11 regulating consolidation on High court - in absence of procedural enactment or rule s 173 of Constitution applicable - considerations arising – convenience - rule of practice by Constitutional Court concerning adjudication of constitutional issues – held: all issues to be resolved before determination of constitutional challenge - consolidation of proceedings ordered - costs of application costs in consolidated proceedings.

J U D G M E N T

VAN OOSTEN J:

[1] This application concerns the novel question whether it is competent for a judge of the High Court to hear equality court proceedings and high court proceedings based on a constitutional challenge in one consolidated case, in the dual capacity of high court judge and duly designated equality court judge.

[2] The litigation between the parties commenced in December 2009 when the second respondent (the SAHRC) instituted proceedings in terms of s 20(1)(f) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) against the applicant and Media 24 Holdings (Pty) Ltd (Media 24) in the Equality Court, sitting in the Magistrate's Court, Johannesburg. The complaint lodged by the SAHRC is that the contents of a newspaper article, written by the applicant and published by Media 24 on 20 July 2008, amounted to hate speech against and harassment of homosexuals, as contemplated in ss 10 and 11 of the Equality Act read with s (9)(4) and s 16(2) of the Constitution. The applicant filed an opposing affidavit in which, apart from six *in limine* defences, and as one of four defences on the relief sought against him, a constitutional challenge to ss 10(1) and 11 of the Equality Act is raised. The SAHRC delivered a replying affidavit and the applicant thereafter, on 1 June 2012, filed an application for the stay of the equality court proceedings pending determination of the constitutional challenge by the High Court. The equality court proceedings were on 11 September 2012, by consent of all parties, transferred to the High Court and the application for the stay of the equality court proceedings was withdrawn.

[3] On 27 September 2013 and pursuant to directions issued by Mayat J at a directions hearing of the Equality Court in terms of regulation 10(5) framed under the Equality Act, the applicant delivered founding papers in the constitutional challenge proceedings against the present respondents (the third and fourth respondents were admitted as *amici curiae* in the equality court proceedings) (the constitutional challenge). The relief sought is firstly, for an order declaring s 10(1) read with ss 12 and 1, and s 11, read with s 1 of the Equality Act unconstitutional, in particular being inconsistent with the right of freedom of expression enshrined in s 16 of the Constitution and, secondly, for the stay of the equality court proceedings pending finalisation of the constitutional challenge by the High Court. A full set of affidavits

was filed and a date for the hearing of the constitutional challenge was allocated by the Deputy Judge President. At a pre-trial conference held on 5 September 2014, the SAHRC noted its intention to launch a counter-application for consolidation of the equality court proceedings and the constitutional challenge, which it did on 16 September 2014. This is the application presently before me. The application is supported by the first respondent but opposed by the applicant. In its heads of argument the first *amicus* has adopted a similar view to that of the applicant but no further arguments were advanced at the hearing. The second *amicus* abides the decision of the court.

[4] A further pre-trial conference was held before me and it was agreed by all parties that the consolidation application would be finalised first and that the proceedings to follow consequent upon the order in the consolidation application, would be heard on a date to be allocated by the Judge President.

[5] The Equality Court, established in terms of s 16 of the Equality Act, has been described as 'a special animal' that could in modern language also be described as 'a special purpose vehicle' (*per* Navsa JA in *Manong and Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape and others (No 2)* 2009 (6) SA 589 (SCA) para 57). It is now well settled that the Equality Court is a creature of statute deriving its powers from its empowering statute, the Equality Act and that it exists separately and distinct from the High Court (See *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape and another (no 1)* 2009 (6) SA 574 (SCA)). In the present scenario the Equality Court has exclusive jurisdiction in respect of the relief sought in the proceedings before it whereas the constitutional challenge can be adjudicated only by the High Court (cf *Minister of Environmental Affairs and Tourism v George and others* 2007 (3) SA 62 (SCA) ([2006] SCA 57 (RSA) para 12-13). In the normal course the proceedings would have continued as parallel proceedings before two distinct courts.

[6] The first issue requiring determination is whether this court is empowered to order the consolidation of the proceedings as sought in this application. The High Court sitting as an Equality Court, it was held in *George* (para 14), does not have the power to transfer a matter to itself in its capacity as High Court. As for the High Court, Uniform Rule of Court 11 provides for consolidation of actions before that

court. In the absence of enabling statutory provisions or rules providing for a consolidation of the proceedings we are now concerned with, it is necessary to consider the provisions of s 173 of the Constitution, which confers on high courts the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice. The nature and content of the power accorded to the courts under s 173 have been considered and pronounced on in a number of Constitutional Court judgments. It suffices for present purposes to refer to *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) (2007 (2) BCLR 167 (CC)) para [90], in which Moseneke DCJ held that s 173 vests in the judiciary the authority to uphold, to protect and to fulfill the judicial function of administering justice in a regular, orderly and effective manner within its jurisdiction. It is a power that should be exercised sparingly and in exceptional cases only having taken into account the interests of justice in a manner consistent with the Constitution (see *S v Thunzi and another* 2011 (3) BCLR 281 (CC) ([2010] ZACC 12)).

[7] The purpose of consolidation of actions before the High Court is to provide for a single hearing of substantially similar issues in order to avoid a multiplicity of trials. In regard to the present position the procedural impasse I have referred to, discloses a lacuna giving rise to an extraordinary situation which in my view, warrants this court to invoke the power provided for in terms of s 173. In the exercise of the power to regulate the process for the purpose of consolidating the proceedings, I am alive to the requirements that it must accord with the Constitution and, as far as possible, with the procedure in the consolidation of actions, ordinarily followed by high courts as provided for in Uniform Rule of Court 11 (*S v Pennington and others* 1997 (4) SA 1076 (CC) (1997 (1) BCLR 1413; [1997] ZACC 10) para 22–23; *Parbhoo and others v Getz NO and another* 1997 (4) SA 1095 (CC) (1997 BCLR 1337 (CC); *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) (2006 (2) BCLR 274 (CC); [2005] ZACC 15) para 48).

[8] Counsel for the applicant contended that consolidation of the proceedings would result in establishing a ‘super court’, which would transcend the jurisdiction of both the Equality Court and the High Court. I am unable to agree. In *George* Cameron JA, writing for the court, paved the way for consolidation of such proceedings, in remarking:

'…[T]he question of double jurisdiction this case raises is not unique, and is likely to arise in every case brought under the Equality Act: and there is no reason why those who have interrelated remedies under the equality statute and other legislation should not be entitled to pursue their remedies in parallel proceedings before the high court in its capacity as an equality court, and the high court in its ordinary capacity.'

and, therefore, so the learned Judge of Appeal concluded:

'Given that the problem of concurrency will inevitably recur, the most productive and expeditious way of achieving efficiency would seem to lie in the matter being referred to the same high court judge who, in his capacity as an equality court judge, is presiding in that court.'

(See also *Dean of the Law Faculty University of the North West and others v Masisi* 2014 (6) SA 61 (SCA) para 11).

The notion of a 'super court' adjudicating the consolidated proceedings, in my view, is illusory. The characteristics of the proceedings, although consolidated, remain unaltered. The pre-trial procedures in respect of both would by the time the hearing takes place, have been finalised. Consolidation affects the hearing only which will now take place before a single judge, in the dual capacity I have referred to. There is no magic to the consolidated hearing: although heard together the presiding judge will adjudicate the issues in each case within the parameters of the powers as specified in the applicable legislation, rules and procedures. All the evidence the parties wish to present on all the issues will be led and arguments advanced with the only difference that it will be confined to one hearing. The unique characteristics of the proceedings therefore remain intact without compromising the rules, procedures and powers of each of the courts.

[9] The paramount test in regard to consolidation of actions in terms of Uniform Rule of Court 11 is convenience (cf *Mpotsha v Road Accident Fund and another* 2000 (4) SA 696 (C) 700I-701B). In the exercise of the court's wide discretion within the context of convenience, considerations such as similarity of the factual and legal issues, expedience, fairness to the parties, absence of prejudice and saving in costs are taken into account (Erasmus *Superior Court Practice* B1-98A; Harms *Civil Procedure in the Supreme Court* B-109). In addressing the requirement of convenience, all conceivable outcomes of the proceedings not only in the court of

first instance, but also thereafter in the Constitutional Court or even in the Supreme Court of Appeal, were analysed and tossed around in argument in support of the opposing views. The exercise, in my view, is speculative, of no value and is best discarded.

[10] In the circumstances of this case the requirement of convenience falls to be considered in the light of the general rule of practice laid down by the Constitutional Court that, where possible, cases should be decided without reaching a constitutional issue (*S v Mhlungu and others* 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793 (CC)). Counsel for the applicant contended that the constitutional challenge should be heard first, for the reason that, if successful, it may render the remaining issues moot. The contention flouts the rule of practice I have referred to and must for this reason alone fail. But, there is a further ground militating against affording such procedural antecedence to the constitutional challenge: it has by now become clear that evidence will be led in the constitutional challenge proceedings. In this regard another admonition by the Constitutional Court comes to the fore: constitutional challenges in the abstract are to be avoided (*Savoi and others v National Director of Public Prosecutions and another* 2014 (5) SA 317 (CC) ([2014] ZACC 5) para 9-13). In view of the far-reaching implications attaching to constitutional decisions, the precise facts to which the constitutional challenge is to be applied must be established (*Prince v President of the Law Society of the Cape of Good Hope and others* 2001 (2) SA 388 (CC) (2001 (2) BCLR 133 (CC); [2000] ZACC 28) para 22; *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) (2002 (7) BCLR 663 (CC); [2002] ZACC 6) para 65). Finally, the applicant, as I have already alluded to, has raised a number of defences to the complaint against him. The ambit of the SAHRC's complaint moreover, extends beyond the prohibitions referred to in the impugned provisions of the Equality Act. The determination of the constitutional challenge accordingly, can and should be kept in abeyance until resolution of all other issues (*Walters* para 67*).* For all these reasons the application is well founded and accordingly must succeed.

[11] In the result the following order is made:

1. The equality court proceedings and the constitutional challenge proceedings are consolidated for hearing before a single judge sitting as Equality Court and as High Court.
2. The costs of the application for consolidation shall be costs in the consolidated proceedings.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***13 NOVEMBER 2014***
DATE OF JUDGMENT	***21 NOVEMBER 2014***