

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 23/091427

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |

25 September 2025

DATE

SIGNATURE



In the matter between:

DEMOCRATIC ALLIANCE

SAREL JACOBUS FRANCOIS MARAIS

First Applicant

Second Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

RETIRED JUSTICE PMD MOJAPPELO

LEAH GCABASHE SC

ENVER SURTY

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

[1] The issue for determination in this application is whether the first respondent, the President of the Republic of South Africa (“the President”), may appoint a Judge, in this case, the second respondent, retired Justice Mojapelo (“Justice Mojapelo”) to a panel of enquiry.

Background

[2] On 6 December 2022, a sanctioned Russian cargo ship, The Lady R, docked at Simon’s Town Naval Base in Cape Town. The public was not informed of the reason for the ship’s presence at the Naval Base, or whether any cargo was off-loaded or on-loaded. Three days later, the Lady R departed from Simon’s Town.

[3] The silence surrounding the incident led to widespread speculation, and a few months later, the United States ambassador to South Africa, Reuben Brigetry, accused the country of having supplied arms to Russia during the Lady R’s docking.

[4] This prompted the President to appoint a panel of enquiry to investigate and report on the incident. The panel consisted of Justice Mojapelo, Leah Gcabashe SC (the third respondent), and Enver Surty (the fourth respondent). Justice Mojapelo headed the investigation.

[5] The panel’s terms of reference were not published. It had no powers in law to compel anyone to provide information, no obligation to conduct the investigation in public, and its report was, save for a cryptic executive summary, kept secret. Furthermore, the panel was based in the Presidency, and it had no structural or functional independence.

The applicants' challenge

[6] The first applicant, the Democratic Alliance, a political party and the second applicant, Sarel Jacobus Francois Marais, a member of the National Assembly elected as a representative of the Democratic Alliance and the shadow Minister of Defence and Military Veterans, contend that the President could not have appointed a Judge to conduct the investigation in question. The reason being that Judges are independent and not tools of the executive branch. According to the applicants, it is inherently inconsistent with the separation of powers for the President to appoint, and for a Judge to accept an appointment to conduct this type of executive investigation.

[7] In the result, the applicants submit that the President's conduct in appointing Justice Mojapelo and Justice Mojapelo's conduct in accepting the appointment are constitutionally invalid and should be declared as such.

[8] Although the applicants also sought an order, "*to the extent necessary*", for the reviewing and setting aside of the appointment and report, they indicated that they do not challenge the outcome of the investigation and did not persist with that relief.

Respondents' response

[9] The respondents contend that it was within the constitutional powers of the President to appoint Justice Mojapelo to investigate the circumstances surrounding the docking of the Lady R at Simon's Town Naval Base in December 2022.

[10] According to the respondents, the court, however, does not have to pronounce on the issue in dispute because the application is moot.

[11] I propose to deal with the issue of mootness first.

Mootness

[12] The respondents submit that, in the absence of a challenge to the findings of the panel, there is no live issue between the parties. Furthermore, the relief sought by the applicants will lay down a rigid rule that a retired Judge may not be appointed to an investigative panel, a proposition that directly contradicts the jurisprudence of the Constitutional Court, which makes it clear that each case must be determined in its own context.

[13] The respondents are correct that courts will generally decline to entertain litigation in which there is no live or existing dispute. The rationale being that a pronouncement on an abstract proposition of law would amount to no more than an advisory opinion. [See: *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd* 2020 (4) SA 409 (CC) para 47].

[14] Notwithstanding the aforesaid general principle, a court may consider a moot issue, if certain requirements are met. In *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), the court as follows at para [11]:

“ [11] This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. 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. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced . . . ”

[15] The applicants submit that the dispute in this case, to wit; the legality of the exercise of public power, meets the requirements set out above.

[16] In support of this submission, the applicants relied on *Buthelezi v Minister of Home Affairs* 2013 (3) SA 325 (SCA). In *Buthelezi*, the appellants (members of parliament) sought an order declaring the unreasonable delay by the Minister of Home Affairs in processing the Dalai Lama's visa application unlawful. It was common cause between the parties that the Dalai Lama's visit had been cancelled and that the relief would have no practical effect. The appellants, however, intended to invite the Dalai Lama again and submitted that he could not be expected to accept such an invitation without the assurance that the delay would not recur.

[17] On the question of mootness in the relevant circumstances, the court held as follows at paragraph [4]:

“[4] The application was dismissed by the court below on the grounds that there was no live controversy. That was rightly not pressed in argument before us. Whether the authorities had acted lawfully was and remains a live issue. That they would not be called upon to reconsider their conduct if they had acted unlawfully goes only to whether a decision on that question would have practical effect. In view of the appellants' intentions, it cannot be said that it will not.”

[18] Although there is no indication, in this case, that the President will appoint retired Judges to investigative panels in future, the applicants submitted that future Presidents may wish to investigate matters. The court's decision will, therefore, have a practical effect on whether it is permissible to appoint a retired Judge or other member of the judiciary to such panels.

[19] The applicants also referred to the following dicta in *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC):

“[32] It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The

matter cannot therefore be said to be moot. It is also live because if we find that the removal of the applicants was unlawful, it would be necessary to consider their claim for restitutionary relief.”

[20] The facts herein do not concern the same constitutional issues that arose in *Pheko*.

[21] In this matter, the appointment of Justice Mojapelo to head the investigative enquiry into the Lady R saga occurred in unique circumstances. Considerations of national security were, according to the President, the reason for the secrecy in respect of the panel's terms of reference and the method of execution.

[22] The president explained that the seriousness of the matter and its potential constitutional and diplomatic consequence, informed his decision to appoint a retired and well-respected Judge as chairperson of the panel. This appointment, according to the President, would serve the interests of independence and impartiality.

[23] The likelihood of a similar circumstances under which Justice Mojapelo was appointed and the specific considerations surrounding the decision arising again are slim.

[24] A similar situation was considered by the Constitutional Court in *President of the Public of South Africa v Democratic Alliance* 2020 (1) SA 428 (CC). Former President Zuma's decision in March 2017 to use his powers under section 91(2) and 93(1) to reshuffle his cabinet was challenged by the Democratic Alliance (DA). During the proceedings, the DA obtained an interlocutory order requiring the President to furnish the record and reasons for his decision under rule 53(1)(b).

[25] The President applied for and was granted leave to appeal the interlocutory order. However, before the matter could be heard, he resigned and the present President was appointed. The DA then withdrew the main application, but the President persisted with the appeal, arguing that the applicability of rule 53 on executive decisions would have a bearing on future executive decisions to appoint or

dismiss cabinet members. The Supreme Court of Appeal dismissed the appeal on the ground that the withdrawal of the main application resulted in the matter being moot.

[26] The President applied for leave to appeal to the Constitutional Court. Although the main application was withdrawn and the leave to appeal only pertained to the interlocutory order, the Court held as follows:

“[33] It thus seems to be inescapable that the merits would have to be traversed to do justice to issues relating to the guidance for future cases that the President yearns for. The nature and complexity of the kind of decision initially sought to be challenged by way of review must first be closely examined. We would probably have to dig deeper into the political character of ss 91(2) and 93(1) decisions to address the President’s concern properly. And potentially serious separation-of-powers issues might also have to be wrestled with.”

[27] The President conceded that the interlocutory order no longer had any practical effect between the parties and has become academic. In the circumstances the court held, that:

“[35] This court is thus being asked to advise or guide the President. That is the only real purpose to be served by entertaining this appeal. And courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here.”

Conclusion

[28] A decision on the legality and constitutionality of the President’s appointment of Justice Mojaelo, to an investigative committee, will not fulfil any discernable purpose as the *Buthlezi* judgment did. Should a similar decision arise in future and before it has been given effect, careful consideration of the complex issues raised in this application will undoubtedly be undertaken at that time.

[29] The judicial resources in this division are already stretch far beyond their limits. The court simply does not have the luxury of dispensing advice.

[30] In light of the above, I am of the view that the matter is moot and the application stands to be dismissed with costs.

Order

[31] Therefore, I make the following order:

1. The application is dismissed.
2. The first and second applicants are ordered to pay the costs of the application, including the costs occasioned by the employment of two counsel. Counsel's fees are to be paid on scale C.



JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date heard: 29 July 2025

Date delivered: 25 September 2025

APPEARANCES:

For the First and Second Applicants: Adv M Bishop, and

Adv M de Beer

Instructed by:

Minde Schapiro and Smith Inc.

For the First Respondent:

Adv F Nalane SC, and

Adv N Stein

Instructed by:

The State Attorney

