

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER : 3236/2015

DATE : 27 FEBRUARY 2015

5 In the matter between:

ANDRIES TLOUAMMA 1st Applicant

AGANG SA 2nd Applicant

MOSIUOA GERARD PATRICK LEKOTA 3rd Applicant

CONGRESS OF THE PEOPLE 4th Applicant

10 **BANTUBONKE HARRINGTON HOLOMISA** 5th Applicant

UNITED DEMOCRATIC MOVEMENT 6th Applicant

And

BALEKA MMAKOTA MBETE, SPEAKER OF
THE NATIONAL ASSEMBLY OF THE

15 **PARLIAMANT OF THE REPUBLIC OF**

SOUTH AFRICA 1st Respondent

JACOB GEDLEYIHLEKISA ZUMA

PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA 2nd Respondent

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JUDGMENT

BINNS-WARD, J

The matter with which the Court is concerned at this stage of
 25 proceedings involves paragraphs 1 to 3 of the notice of motion.

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Procedural and substantive questions arise for determination.

The procedural questions are whether the application for interim relief should be entertained as a matter of urgency
5 and, assuming that it is so entertained, whether the relief sought in terms of paragraph 3 for the programming of the hearing of the application in respect of the issues on which the applicants seek final relief should be granted.

10 The substantive question goes to the interim interdict sought in terms of paragraph 2 of the notice of motion.

The first respondent contended that the applicants had brought the application in a situation of self-created urgency. The
15 basis for this argument was that the applicants had been in a position to institute these proceedings as from the end of November 2014 and that the institution of proceedings in this Court only in the latter part of February 2015 was unreasonable and inexcusable. It had denied the first
20 respondent the opportunity to deal with the allegations in the founding papers adequately. In this regard it should be noted that the first respondent, understandably, confined herself in her answering affidavit to dealing with the matters centrally relevant to the relief sought in terms of paragraphs 1 to 3 of
25 the notice of motion and indicated her intention to deliver
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further answering papers in respect of the final relief sought by the applicants.

It should be noted that the applicants had sought to obtain relief directly from the Constitutional Court. Direct access to the Constitutional Court was refused by that Court in late February 2015 and the current application to this Court was brought virtually immediately thereafter. As mentioned, the first respondent contends that the application directly to the Constitutional Court was misguided and consequently the applicants should pay the price for not approaching this Court earlier in a manner that would have allowed the issues to be more properly and thoroughly ventilated. The first respondent was essentially contending therefore that the manner in which the application for interim relief has been brought was an abuse of process.

I am unable to agree that the application to the Constitutional Court was fundamentally misdirected and so unreasonable that its bringing should count against the applicants on the basis of the respondents' self- created urgency argument. The principal relief sought by the applicants raises constitutional questions of pressing significance and in certain respects entails matter in respect of which it is arguable that only the Constitutional Court might have jurisdiction.

The questions integral to the final relief sought by the applicant are also matters which might reasonably have been found to have been of such pressing constitutional urgency
5 that the Constitutional Court might have decided, exceptionally, to entertain them as a court of first and final instance. I accordingly reject the first respondent's argument that the urgency in the current application is self-created.

10 The debate which the applicants wish to have stayed pending the determination of the principal relief is scheduled to take place on 3 March 2015 - next Tuesday. It is therefore plain that the applicants could not obtain relief at a hearing in the ordinary course. Relief in terms of paragraph 1 of the notice
15 of motion will therefore be granted in respect of the relief sought in terms of paragraph 2.

Turning to the interim interdict, the principles to be applied in respect of applications for interim relief are well established.
20 They are (a) the existence of a *prima facie* right, even if it is open to some doubt; (b) a reasonable apprehension by the applicant of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the granting of the interdict; and (d) the applicant must
25 have no other effective remedy.

Moreover, the remedy is discretionary. Thus even, if an applicant satisfies all the requirements, it remains within the discretion of the court, obviously to be exercised judicially, to grant or decline an interim interdict. The court assesses the evidence holistically to determine whether the requirements have been satisfied and, if they have, how to exercise its discretion.

It is common ground in the current matter that the relief sought in terms of paragraph 2 of the notice of motion will, if granted, result in an impingement on the first respondent's powers and functions as Speaker of the National Assembly and thus entail the judicial arm of government treading on the territory of the legislative branch of government. It is within the authority and, indeed the duty, of the courts to do so in appropriate cases. How the principles governing interim interdict applications are to apply in these circumstances was treated of by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012(6) SA 223. The Court in that matter held that although the requirements pertaining to the determination of interim interdict applications were initially fashioned for, and ideally suited to, interdicts between private parties, they were nevertheless endorsed, at least by the majority of the Court,

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as sufficient to determine applications to restrain the exercise of statutory power *pendente lite*, provided that any court disposed to do so is required to take appropriate cognisance of the trenching effect the grant of such restraining order can have on the exclusive domain of another branch of government, and therefore proceeds sensitively to the constitutional role of the doctrine of a separation of powers in respect of any decision to make the order.

10 In *City of Cape Town v South African National Roads Agency Ltd and Others* 2013 ZAWHC 74, at paragraph 75, I described the effect of the judgment of the Constitutional Court in the OUTA case just referred to as follows:

15 “I have concluded that the intention in the reasoning of the majority judgment in *OUTA* was to reiterate, as a matter of established constitutional principle, that courts seized of applications for interim interdictory relief *pendente lite* in matters where the functions and powers of the executive or the legislature are susceptible to being restrained must be consciously sensitive to the impact on the constitutionally ordained separation of powers of any order they might be inclined to consider making restraining the use of executive or legislative power. Where, on such an assessment, the impact of the

restraining order (what the Constitutional Court labelled for convenience as ‘balance of power harm’) looks to be significant, a court will incline against making the order unless a strong case for the relief has been made out, and only in the clearest of cases. A strong case would be one in which the right at issue, although established only *prima facie* and open to a measure of doubt, nevertheless appears to enjoy good prospects of being established in the main proceedings, and also one in which the need for the intervention of an interim interdict is clearly shown if irreparable harm to the applicant is to be averted – in other words, a case in which the balance of convenience clearly militates in favour of the granting of the remedy. Such a construction would give effect, in my view, to the evident intention in the Constitutional Court judgment (i) to confirm the application of the well-established requirements of the interim interdict remedy in such cases; and (ii) to explain how they should be applied in a manner consistent with respect by the courts for the constitutional scheme of a separation of powers where the remedy would restrain the exercise of executive or legislative power. The greater the impact of the impinging effect of the postulated restraining order on the domain of the executive or the legislative branches the more circumspect, and demanding of the applicant’s

case, the court will be before deciding that it is appropriate to grant it. The principle that a court does not lightly grant an interim interdict pending the review of executive action even if all the requirements for an interdict have been established is nothing new. The Constitutional Court judgment in *OUTA* has fleshed out the articulation of the principle.”

The principal relief sought by the applicants raises novel and complex constitutional issues. The outcome of the application for the principal relief is by the nature of the matter therefore essentially unpredictable. Some of the relief sought might reasonably be described as ambitious. Certainly, this Court is not in a position, without the benefit of detailed and considered argument from all sides and the opportunity for mature reflection, to essay an opinion on the probable outcome of the application for principal relief. This must, in my view, bear on the issue of the strength of the *prima facie* case on which the applicants rely for interim relief. The effect of the relief sought by the applicants in terms of paragraph 2 of the notice of motion is that the debate on the motion of no confidence in the President will not proceed next Tuesday, and that it will proceed only after the determination of the principal relief.

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The first respondent contends that it is within the applicant's power to achieve that of its own doing without the Court's intervention by simply withdrawing the motion and re-enlisting it after the determination of the final relief. The argument is
5 that the applicants will not be irremediably harmed if the interdict is not granted. The first respondent also contends that in the circumstances the "balance of power harm" weighs against the applicants, having regard to the trenching effect of an interim interdict on the separation of powers. In my
10 judgment these contentions carry convincing force.

The applicant's answer is that they will be prejudiced because, if they succeed in obtaining the principal relief, they may face obstruction in getting the motion re-enlisted. In this regard,
15 the applicants' counsel laid emphasis on certain provisions of Rule 102A of the National Assembly, in particular sub-rule (3).

I am not persuaded by these arguments. On the contrary, I consider that the first respondent would be hard-pressed in the
20 face of her averments in paragraph 15 of her answering affidavit to frustrate the re-enlistment of the motion on the agenda as soon as practically possible and without unreasonable delay after the determination of the application for final relief, if re-enlistment were applied for. If the motion
25 has already passed muster in terms of Rule 102A(3), it is not

easy to conceive why it should not do so again when, and if, the matter is re-enrolled. The issue might in any event be addressed by the relief sought in terms of paragraph 4.4 of the applicant's notice of motion to this Court, if it were to be
5 granted - as the applicant's clearly believe it should.

In the circumstances I am not persuaded that the applicants have established all the requirements for interim relief. But, even where I wrong in this regard, I would not be inclined, in
10 view of the separation of powers issues involved, to exercise my discretion in their favour.

The enrolment of the application for principal relief on the semi-urgent roll of this Court is justified. There was no
15 argument to the contrary.

Mr Heunis submitted that if the applicants were unsuccessful in obtaining an interim interdict there should be no orders to costs. He made this contention on the basis of the so-called
20 Biowatch principle. Time has not allowed me the opportunity to give that submission proper consideration. In the circumstances I am going to reserve the costs of this stage of the proceedings to be determined together with the principal application.

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The following orders are made:

1. In terms of paragraph 1 of the notice of motion it is
declared that the application for interim relief was
5 properly brought and entertained as a matter of
urgency in terms of uniform Rule 6(12).
2. The application for an interim interdict in terms of
paragraph 2 of the notice of motion is dismissed.
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3. The application for relief in terms of paragraph 4 of
the notice of motion shall be heard on the semi-urgent
roll of this Court on a date and timetable to be
approved by the Judge President.
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4. The question of costs shall stand over for determination
in the hearing for the principal relief.

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BINNS-WARD, J