



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. **YES**
22 MARCH 2022
DATE SIGNATURE

Case No: 12337 / 2022

In the matter between:

AFRIFORUM NPC

Applicant

and

**MINISTER OF INTERNATIONAL
RELATIONS
AND CO-OPERATION**

First Respondent

**DEPUTY-MINISTER OF INTERNATIONAL
RELATIONS AND CO-OPERATION
(MR. ALVIN BOTES)**

Second Respondent

**DIRECTOR-GENERAL OF THE
DEPARTMENT OF INTERNATIONAL
RELATIONS AND
CO-OPERATION**

Third Respondent

**AFRICAN RENAISSANCE AND
INTERNATIONAL CO-OPERATION FUND**

Fourth Respondent

**ADVISORY COMMITTEE OF THE
AFRICAN RENAISSANCE AND**

Fifth Respondent

**INTERNATIONAL
CO-OPERATION FUND**

Sixth Respondent

MINISTER OF FINANCE

Seventh Respondent

NATIONAL TREASURY

Eighth Respondent

**PARLIAMENT OF THE REPUBLIC OF
SOUTH AFRICA**

Ninth Respondent

**PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

NEUKIRCHER J:

- 1] The purpose of the African Renaissance and International Co-Operation Fund Act (AFR Act) 51 of 2000 is “[t]o establish an African Renaissance and International Co-Operation Fund in order to enhance co-operation between the Republic and other countries, in particular African countries, through the promotion of democracy, good governance, the prevention and resolution of conflict, socio-economic development and integration, humanitarian assistance and human resource development...”

- 2] In pursuance of this objective, the African Renaissance Fund (AR Fund) was established and provided the framework and basis for the South African Government to identify and fund projects and programmes aimed at achieving the objectives of the Fund which were to enhance a) co-operation between the Republic and other countries, in particular African countries, b) the promotion of democracy and good governance, c) the prevention and resolution of conflict, d) socio-

economic development and integration; and e) humanitarian assistance and human resource development.¹

- 3] The AR Fund receives its funding in several ways. Section 2 of the ARF Act provides:

“(2) The Fund consists of –

- (a) money appropriated by Parliament for the Fund;*
- (b) unexpended money in the previous Fund;*
- (c) money received by way of repayment of any loan made from the Fund;*
- (d) interest received on any loan made from the Fund, including interest from any investment of money standing to the credit of the Fund; and*
- (e) money accruing to the Fund from any other source.”*

- 4] Section 5 of the ARF Act sets out the requirements for the utilization of the Fund

“5 Utilisation of Fund

(1) The Minister must, in consultation with the Minister of Finance, establish an Advisory Committee consisting of the following members-

- (a) the Director-General or the delegate of the Director-General;*
- (b) three officers of the Department appointed by the Minister; and*
- (c) two officers of the Department of Finance appointed by the Minister of Finance.*

¹

Section 4 ARF Act

(2) The Advisory Committee must make recommendations to the Minister and the Minister of Finance on the disbursement of funds through loans or other financial assistance as contemplated in subsections (3) and (4). (3) The funds must be made available or disbursed upon the recommendation of the Advisory Committee and approval by the Minister in consultation with the Minister of Finance.

(4) Loans or other financial assistance must be granted or rendered in accordance with an agreement entered into between the relevant parties, excluding assistance for the promotion of democracy and good governance or the prevention or resolution of conflict.”

- 5] This matter involves money retained by the Fund under section 2(2)(b) and approved for disbursement by the ARF Advisory Committee and the Minister of Finance for the purpose of providing humanitarian aid to Cuba.

BACKGROUND

- 6] On 21 July 2021, the Minister of International Relations and Cooperation² (Minister Pandor) received a formal request for emergency assistance consisting of food and medical supplies from the Ambassador of Cuba. It appears that, at some stage between the receipt of this letter, and a memorandum directed to the Minister of Finance dated 29 July 2021, the ARF Advisory Committee approved

² The first respondent in this application

the request and suggested to Minister Pandor that an amount of R50 million be approved for “*urgent humanitarian assistance.*”

- 7] On 1 August 2021 Minister Pandor formalised this request in a letter to the Minister of Finance³. She states in this letter the following:

“The Covid-19 pandemic, in addition to the crippling U.S economic blockade, has resulted in Cuba’s worst economic crisis in 30 years. This has led to chronic shortages of electricity and food, which have fuelled unprecedented protest action across Cuba, as public discontent was driven, among other factors, by long food lines, power cuts, and a critical shortage of medicines.

The Cuban Government is struggling to keep shelves stocked with essential food and goods. With a lack of foreign currency income and the continued stranglehold of the U.S. blockade, the movement of goods into the country is very slow, complicated and expensive.

My Department received a letter dated 20 July 2021 (Annexure A), from the Cuban Ambassador, H.E. Rodolfo Benitez Version, requesting South African assistance to address the shortage of food and medical supplies in the country.

The Department has submitted to National Treasury a request to retain the surplus of R71 million for the 2020/2021 financial year. (Annexure B).

The AFR Committee, through round robin, recommended to the Minister of International Relations and Cooperation and the Minister of Finance

³

The seventh respondent herein

an amount of R50 000 000 for urgent humanitarian assistance to the Republic of Cuba.

The recommendation of the Advisory Committee is in line with Section 5 of the African Renaissance and International Cooperation Fund Act, 2000...to disburse funds from the ARF as contemplated in subsections (2), (3) and (4). The Act requires us to concur in approving the recommendation of the Advisory Committee before the funds can be utilized.

In view of the above requirement, I humbly request you to concur with me in approving the recommendation of the Advisory Committee to release R50 000 000 for urgent humanitarian assistance to the Republic of Cuba.”

- 8] On 3 August 2021, 2 days after the request to approve the donation to Cuba was made, the Minister of Finance gave permission for the amount of R71 million to be retained and on 13 August 2021 he gave his approval for the R50 million assistance. In his letter of approval, the Minister of Finance also records the following:

“...I propose that we consider a discussion as Cabinet on how we can extend the financial assistance to Cuba beyond this requested assistance, which can be multi-year, considering the turmoil financial situation of Cuba which might take years to recover from.

All this high-level proposal must obviously take into account South Africa’s very constrained fiscal position and also the testy relations between Cuba and the United States.”

- 9] On 22 February 2022, and in response to a question posed by Mr WF Farber to Minister Pandor in the National Assembly on whether, against the background of record high unemployment figures and persistent levels of poverty in the Republic the R50 million donation to Cuba could not have been put to better use at home, Minister Pandor replied as follows:

“The Cuban government called on South Africa and other partner countries in their hour of need in July 2021. Cuba’s worst economic crisis in 30 years was caused by the devastation of the COVID-19 pandemic and further exacerbated by the economic, commercial and financial embargo against Cuba by the United States. Cuba as a result is experiencing chronic shortages of food, fuel, medicine and electricity. South Africa responded to this call for humanitarian assistance in the context of reciprocity and its historical friendship and solidarity with Cuba which was cemented [through] Cuba’s sacrifices during our struggle for freedom. Cuba also responded without hesitation to South Africa’s call for medical professionals to assist during the first months of the COVID-19 pandemic in South Africa.

The African Renaissance and International Cooperation Fund (ARF), which is located within DIRCO, and which is legally constituted to implement humanitarian assistance of this nature, is coordinating the project with relevant stakeholders, following all necessary legal prescripts.

The required concurrence to release an amount of R50 million from the African Renaissance Fund was provided by the Minister of Finance, after which the Acting Director-General of DIRCO approved the request for humanitarian assistance by Cuba be implemented through the supply chain management processes as regulated by the Public Finance Management Act (Act No.1 of 1999).

These processes were concluded by December 2021.”

- 10] As can be seen from the response of Minister Pandor, the question posed by the DA was not exactly answered, but it is exactly the backdrop of South Africa’s “*very constrained fiscal position*”⁴ that Afriforum states that the permission to retain the R71 million and the grant of the aid to Cuba must be seen. In fact, Afriforum goes even further – the causa behind the application is the unassailable fact that the South African economy is struggling, especially in the aftermath of the COVID-19 pandemic and there are huge shortcomings in giving effect to the Constitutional imperatives of housing, schooling, municipal services and service delivery which affect every single South African on a daily basis throughout this country.
- 11] Furthermore, the South African Government is already in substantial debt. At present, the Government provides social grants to the unemployed to assist them in their daily living and this, given the amount of people it aids, is on a massive scale. Thus, it argues, the

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See the letter of the Minister of Finance as set out in par 8

money donated to Cuba could have been put to better use to benefit ordinary South Africans. It also argues that, as the Government is already in substantial debt, this huge donation to a foreign country is irrational, unreasonable and “*wholly [i]nsensible*”.

THE RELIEF SOUGHT

- 12] Afriforum seeks to interdict to halt the payment of the funds to Cuba pending an application, to be instituted, to review and set aside the decision to donate the amount of R50 million to Cuba alternatively proceedings to declare the donation unlawful and/or unconstitutional.⁵

URGENCY

- 13] Before I deal with the merits of the application, it is appropriate to deal with the issue of urgency. All the respondents⁶ took issue with urgency. The basis upon which they did so is the following:

- 13.1 that Afriforum has known since it was announced on 4 February 2022 that the donation of R50 million would be made – yet it waited until 28 February 2022 to launch these proceedings;

⁵ Afriforum also sought orders that full particulars of any payment (had it already taken place) be provided – this relief is not relevant as it has been stated by the respondents that no payment has taken place

⁶ This excludes the eighth respondent which filed a Notice to Abide. Thus any further reference to “the respondents” in this judgment excludes the eighth respondent

- 13.2 that there is no imminent transfer of funds as the process contemplated in section 5(4) of the ARF Act has not yet been completed;
- 13.3 that any agreement will in any event not be binding until such time as the agreement is tabled in the National Assembly in terms of s231 of the Constitution;
- 13.4 that the decision to approve and make the donation is an executive decision which does not affect the rights of the South African public and therefore there can never be any urgency as a result;
- 13.5 that, as this matter is not about public funds there can never be any harm caused to the fiscus which will have a direct, external legal effect.
- 14] I determined that the matter was urgent and, without abandoning the issue of urgency and simply in order to expedite issues, the matter was argued by the respondents focusing mainly on the merits.
- 15] The reasons for my finding of urgency are (shortly) the following:
- 15.1 whilst Afriforum has indeed known about the donation since 4 February 2022, it spent some time trying to establish the *cause* behind the donation and how, where and when the donation would take place. This it did by various means :

correspondence⁷ directed to DIRCO⁸ and a request for an undertaking to be provided by 25 February 2022 that no donation would be made until all questions were sufficiently addressed. The response from DIRCO is dated 25 February 2022. To have launched any application prior to receipt of this letter would have been imprudent and premature. This application was launched 2 court days later;

15.2 Afriforum also sought documentation to shed light on the source of the donation and the methodology behind it. Perhaps, had that been provided, this application would not have seen the light of day. However, Afriforum was informed that any documentation would have to be sought under the provisions of the Promotion of Access to Information Act, 2000 (PAIA). Perhaps too had the response to Afriforum's letter of demand dated 9 February 2022 been provided sooner, either the PAIA application could have provided sufficient answers to satisfy Afriforum, or this application would have been launched sooner.

16] Whatever the situation, the application was launched as soon as the response from DIRCO was received. Afriforum cannot be faulted for that.⁹

⁷ Dated 9 February 2022

⁸ The Department of International Relations and Cooperation

⁹ *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 (SE) para 34

- 17] The fact is too that this application involves substantial funds – a donation of R50 million is a sizeable amount of money in anyone’s books. Once the funds leave the country, it is difficult to imagine how it would be returned – this is especially so for two reasons a) DIRCO does not refer to the R50million as a “loan” which would be repaid – it refers to it as a “donation, and b) on DIRCO’s own papers, the donation would consist of goods which will be procured and in respect of which the supply chain approval was granted in December 2021. DIRCO’s case is that, as yet, no service provider has been appointed. Thus, it is urgent to hear this matter so that there is certainty on whether the supply chain process may be finalised or not.
- 18] Lastly, even if it is so that the decision is an executive one, that does not exempt the decision from scrutiny by a court of law. Afriforum intends to institute proceedings either for review, or for declaratory relief. Either way, all it needs to do in this application is demonstrate that it has a *prima facie* case even if open to some doubt.
- 19] Thus I was, and am, of the view that the matter is urgent.
- 20] I turn now to deal with the merits. In doing so I am mindful that, in the event that the interdict is granted, none of my findings are binding on the court hearing any further application. Furthermore, given the fact that this matter was heard in the urgent court, and this judgment prepared with that in mind, I do not intend to detail each and every

minutiae of the arguments presented. Instead, the arguments have been distilled and encapsulated into those that have particular relevance to the relief sought in this application. The respondents have presented further arguments which, if the interdict is granted, will have a bearing on the merits of any future application Afriforum may decide to institute.

INTERIM INTERDICT

21] It is trite that an applicant, to be successful in its claim for an interim interdict, must show the following:

21.1 a prima facie right, even if open to some doubt;

21.2 that it has a well-grounded apprehension of harm if the interdict is not granted and it ultimately succeeds in establishing its right;

21.3 that the balance of convenience favours the granting of the interim interdict; and

21.4 that it has no other satisfactory remedy.¹⁰

The prima facie right

22] All Afriforum needs to demonstrate is that it has a prima facie right even if open to some doubt - at issue is whether it does. The respondents all argue that the application is not only bad in law, but it is premature. The argument is premised upon the following:

¹⁰ *Setlogelo v Setlogelo* 1914 AS 221 at 222; *Erikson Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973 (3) SA 685 (A) at 691; *Knox D'Arcy Ltd Jamieson and Others* 1996 (4) SA 348 (A) at 361

- 22.1 the AR Fund receives its funding from an allocation given to it in the National Budget yearly¹¹. In 2020/2021 the amount allocated to the AR Fund by Parliament was the amount of R48,5 million¹². This amount excludes the amount that stood to be retained¹³ of R71 million. These funds, once in the AR Fund cannot be used for any purpose other than that set out in the AFR Act and thus these funds are not available for use in the South African economy whether for housing, infrastructure, education, health or any other project dedicated to the fulfilment of Constitutional imperatives and/or the upliftment of the South African community in general;
- 22.2 the retention of the R71 million was but the first leg in the grant of the donation of R50 million to Cuba. The second leg is that the Advisory Committee must make the recommendation to donate, the third leg is that the first to sixth respondents must consent to the donation, and the fourth leg is that there must be an agreement entered into between South Africa and Cuba¹⁴. This agreement has not yet been put in place and it, in any event, requires Parliamentary oversight as is set out in s231 of the Constitution. Thus, argue the respondents, the application is premature;

¹¹ Section 2(2)(a) of the ARF Act

¹² Per Vote 6.3 of DIRCO's vote. These are the funds appropriated by Parliament for the particular

financial year (ie here it is 2021/2022). This appropriation is reflected in the Appropriation Act 10 of 2021 for the particular purpose of the AR Fund

¹³ After the required application for retention was approved by the Minister of Finance

¹⁴ Section 5(4) of the ARF Act

22.3 as the decision for the retention and the donation was a function of executive power¹⁵, PAJA is not available to Afriforum;

22.4 similarly, a review under legality is not available to Afriforum as the decisions were rationally connected to their purpose;

22.5 that the remedy available to Afriforum was not a review challenge to the decision, but rather to declare the ARF Act unconstitutional, but even then Afriforum would suffer setbacks, as it could not prove any rationale which would entitle it to any success on this basis, and even so this is not available to Afriforum as this is not the basis upon which the present case is premised.

23] If any one of the respondents' arguments are correct, that then would be the end of this application.

24] Afriforum however argues that the entire process, from the application for the retention of the R71 million to the approval granted for the donation of R50 million, is flawed. The argument is that "*donations of state funds affect the public purse and the effect is so direct and substantial on the masses that their duly elected representatives must specifically review and consider it*". In making this submission,

¹⁵ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 143 as to the relevant considerations that determine the nature of the power that has been exercised; *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) : the determination of whether a particular decision is administrative or executive action is decided on a case-by-case basis having regard to certain factors

Afriforum argues that the entire process has been not only tainted by illegality, but also unlawfulness. Whilst the first may be applied to so-called “legality reviews”, the second is available in respect of both PAJA and legality reviews.¹⁶

“[19] ...It is now settled law that these (ie the President’s) decisions must comply with the doctrine of legality. The doctrine is fundamental to our constitutional order. Should an executive decision not comply with this doctrine it would be unlawful. Thus, if it is to be lawful it must not be irrational or arbitrary.”¹⁷

- 25] Afriforum has argued that the retention of the R71 million should never have been granted. Had it been refused, the funds would have been channelled back into National Treasury’s Revenue Fund where it could have been allocated to various state departments for use for *inter alia* service delivery on the National front and/or other urgent and pressing domestic needs.
- 26] It is common cause that the AR Fund is public entity listed in Schedule 3 of the PFMA. As such, it is required to comply with the prerequisites of the PFMA and the Treasury Regulations. In terms of section 53(1) of the PFMA, the accounting authority for a public entity listed in Schedule 3 which is not a government business enterprise, must submit to the executive authority responsible for that public entity, at least 6 months before the start of the financial year of the

¹⁶ *DA v President of the Republic of South Africa* 2017 (4) SA 253 (GP)

¹⁷ See also: *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) para 49; *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para 69; *SA v Ethekwinni Municipality* 2012 (2) SA 151 (SCA) para 21

department designated, or another period as agreed between the executive authority and the public entity, a budget of estimated revenue and expenditure for that financial year, for approval of the executive authority.

27] In terms of section 53(3) of the PFMA

“(3) A public entity which must submit a budget in terms of subsection (1), may not budget for a deficit and may not accumulate surpluses unless the prior written approval of the National Treasury has been obtained.”

28] National Treasury Instruction Number 12 of 2020/2021 (Instruction 12) sets out the procedure to be adopted when applying for this retention. Paragraphs 5.2 and 5.3 of Instruction 12 state the following:

*“5.2 The submission referred to in paragraph 5.1 above must be presented to the relevant Treasury from the period 1 August to 30 September each year as indicated in the enclosed **Annexure B**¹⁸.*

5.3 Requests submitted to the relevant Treasury to retain surpluses must be accompanied by the following:

*(a) the calculation that was used to arrive at the amount of the surplus as contained in the enclosed **Annexure A**;*

¹⁸ According to Annexure B, financial year end is 31 March and surplus not approved by Treasury must be surrendered to the Revenue Fund by 30 November

- (b) *a copy of the audited financial statements including the notes to these audited financial statements;*
- (c) *detail on how previously approved surpluses were utilised by the public entity;*
- (d) *motivation detailing how the surpluses arose and why the surplus should be considered for approval (i.e. provide specific details such as, working capital requirements); and*
- (e) *detailed information on contingent liabilities if any, (with an indication of when these may be realised.)”*

29] It is common cause that the request for retention is dated 31 May 2021, i.e. 2 months prior to the date mentioned in paragraph 5.2 of Instruction 12; that the request for retention preceded the request from Cuba for humanitarian aid; that Minister Pandor sought permission to make the donation on 3 August; that the request for retention was approved on 3 August 2021 and that the approval for the donation was given on 13 August 2021.

30] Afriforum argues that all these dates are relevant and, in particular the fact that the request for retention was made too early. It argues that the dates of 1 August to 30 September are peremptory and that any request made prior to, and even after, those dates is irregular¹⁹.

¹⁹ *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty)Ltd; Minister of Environmental Affairs and Tourism v Smith* 2004 (1) SA 308 (SCA) where the court stated that, as a general principle, an administrative authority has no power to condone failure to comply with a peremptory requirement. It only has such power if has been afforded the discretion to do so.

31] Whilst the request for retention complies in part with Instruction 12, it fails to set out the detail required in paragraph 5.3(b), (c), (d) and (e). Afriforum attempted to obtain the documents that pertained to the decision regarding the retention and the decision to grant the donation request, this was met with a “refusal” – I use that word loosely as the respondents informed Afriforum that access to the records of this decision will be considered according to the procedures set out in the Promotion of Access to Information Act no 2 of 2000, thus effectively stymieing Afriforum for the time-being.

32] Afriforum argues that these documents will inform its review application which, it argues may be premised on either irrationality or unlawfulness. It argues that if first to seventh respondents have not complied with the PFMA and Instruction 12, then the donation violates the PFMA which is designed to control public spending and this is because of the following:

32.1 at the time that the AFR Advisory Committee resolved to approve the donation, the AR Fund legitimately had R48,5 million from the approved budget of 2020/2021²⁰;

32.2 as the R71 million retention had not yet been approved, the above decision was irrational and unlawful as the AR Fund did not have sufficient funds to make the R50 million donation.

- 33] Afriforum also argues that the Minister of Finance, in granting his approval for the retention of the R71 million acted irrationally and unlawfully as he failed to consider the fact that South Africa was, itself, suffering severe economic hardship due to the COVID pandemic; that South Africa had borrowed heavily from international funds and was therefore already in substantial debt (which makes the donation irrational); and that with many South Africans reliant on social grants to survive, the money is desperately needed for them and to fulfil the Constitutional commitments domestically.
- 34] This is all so and is very apparent from the Minister of Finance's own letter dated 13 August 2021 in which he acknowledges "*South Africa's very constrained financial position*".²¹
- 35] Thus it would appear that given this acknowledgement by the Minister of Finance, Afriforum has demonstrated (at least *prima facie*) that the approval to retain the R71 million was irrational and, perhaps even, unlawful. It has also demonstrated that at the time Minister Pandor wrote to the Minister of Finance to approve the R50 million loan, the

²¹ This in the context of the proposal that a Cabinet discussion take place on extending "multi-year" financial assistance to Cuba beyond the present donation of R50 million

AR Fund did not have sufficient means to make (or honour) that donation. Although it may well be argued that the case made out by Afriforum is somewhat tenuous, that is all that is required to succeed on this ground – and it has.

Irreparable Harm

36] At present, the issue is whether the R50 million donation stands to be made soon. On the respondents' version it does not. They argue that for the donation to be made, an agreement needs to be concluded between Cuba and South Africa, in terms of section 5(4) of AFR which has yet to take place. They also argue that for any agreement with Cuba to be valid, it must comply with section 231 of the Constitution. As this process has yet to take place, they argue that there is no irreparable harm that stands to be suffered were the interdict not to be granted²².

37] But, in my view, this is not the only aspect to be considered here: Cuba has not asked for funds – they have asked for aid in the form of food and medical supplies. On the respondents' own version this

²² *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 56:

"[56] Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily, the harm sought to be prevented through interim relief must be connected to the grounds in the main application."

request will be implemented through supply chain management processes which are regulated by the PFMA and these procurement processes were completed in December 2021.²³ The respondents' argued that all that remained of these processes was for the service provider to be appointed. However, therein lies the irreparable harm – once the service provider is appointed and the humanitarian aid purchased, the money has been expended. This could be at any stage as the respondents have failed to divulge any further information on this issue. Thus the harm is immanent and ongoing.

- 38] Given the fact that the respondents have refused to provide any form of an undertaking not to continue with the donation pending the outcome of future proceedings, I am of the view that Afriforum has demonstrated the irreparable harm to be suffered were this interdict not to be granted – the public purse stands to lose R50 million which will affect every single South African on many levels.

Balance of convenience

- 39] In my view this is tied up with the issue of irreparable harm. It stands to reason that none of the respondents can claim that they will suffer any harm were the R50 million donation to be put on hold whilst the matter is to be adjudicated on its complete merits. As Afriforum

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See Minister Pandor's reply to the National Assembly of 22 February 2022

simply seeks an order that the funds should not be disbursed, were its future application to fail the funds will remain available for disbursement.

No available remedy

40] It is important to note that the requirement is not that there is no other remedy available, but rather that there is no other satisfactory remedy available²⁴ – there is none.

COSTS

41] I am of the view that costs should follow the result. Afriforum represents the interests of the broad South African public. As they are successful in this application and there is therefore no reason why they should be out of pocket.

ORDER

42] I am therefore of the view that the relief sought in the Notice of Motion should be granted and an order is granted as follows:

1. Pending the final outcome of an application to be instituted by the applicant to review and set aside the relevant decision to donate an amount of R50 million to the Government of Cuba/ the Cuban people (as announced by the 2nd respondent on 2 February 2022), or the final outcome of proceedings to declare that the donation is unlawful and/or unconstitutional, the first,

²⁴ *Webster v Mitchell* 1984 (1) SA 1186 (W)

second, third and fourth respondents are interdicted from paying over the relevant funds or any part thereof to the Government of the Republic of Cuba/the Cuban people or any agent or intermediary.

2. The applicant is directed to institute such proceedings contemplated in prayer 2 and to serve the application on the respondents within 20 days of date of this order.
3. The first, second, third, fourth, fifth, sixth, seventh and ninth respondents are ordered to pay the costs of this application.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Matter heard on: 17 March 2022

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 MARCH 2022.

For the applicant	: Adv J Hamman
Instructed by	: Hurter Spies Inc
For the first to fifth respondents	: Adv H Rajah
Instructed by	: The State Attorney, Pretoria
For the sixth, seventh and ninth	
Respondents	: Adv Sello SC and with her Adv Lekoktla
Instructed by	: The State Attorney, Pretoria