REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

Case Numbers: 1992/2004
2406/2004

In the matters between:

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA — **Applicant**

and

EISENBERG AND ASSOCIATES — **Respondent**
THE MINISTER OF HOME AFFAIRS — **Intervening Party**

and

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA — **Applicant**

and

EISENBERG AND ASSOCIATES — **Respondent**
THE MINISTER OF HOME AFFAIRS — **Intervening Party**

REASONS FOR JUDGMENT DELIVERED ON 16 APRIL 2004

<u>HJ ERASMUS, J</u>

Introduction

This is an extraordinary case in which relief of an extraordinary nature is sought: the President of the Republic of South Africa ("the President") applies for the rescission of an order this Court made on 8th March 2004 by agreement between the Minister of Home Affairs ("the Minister") and Eisenberg and Associates ("Eisenberg") under case number 1589/2004 in an urgent application in which the Minister was the respondent. The President also seeks an order setting aside and declaring invalid certain regulations published by the Minister on 8th March 2004 which were due to come into effect on 7th April 2004.

At the outset it should be stressed that the case is not concerned with the merits of the content of the regulations.

The matter was argued before me on Monday 5th and Tuesday 6th April 2004. At the hearing, Mr M Donen SC and Ms K Pillay appeared for the President, Mr D Unterhalter SC and Ms AM Annandale for the Minister, and Mr A Katz for Eisenberg.

By reason of the fact that the regulations were due to come into force and effect on 7th April 2004, the proceedings were conducted under severe constraints of time. The Court was obliged to come to a decision on the orders sought by the President not later than midnight on 6th April 2004. I am indebted to the legal representatives of the parties for the manner in which they dealt at short notice with a wide range of issues, including issues of constitutional importance.

In the late afternoon of 6th April 2004 I made the following orders:

1. In case number 1992/2004:

   a) the application for leave to intervene by the Minister of Home Affairs is granted;

   b) the rule made on 10 March 2004 is discharged; and

   c) no order as to costs is made.

2. In case number 2406/2004:

   a) the applicant's failure to comply with the Rules of Court in regard to service and time periods is condoned;

   b) the application for leave to intervene by the Minister of Home Affairs is granted;

   c) the order made by consent on 8 March 2004 in case number 1589/2004 is rescinded

   d) the regulations made by the Minister of Home Affairs pursuant to the provisions of section 7(1) of the Immigration Act, 2002 (Act 13 of 2002) and published on 8 March 2004 in *Government Gazette* No. 26126 (*GN* 352 of 2004) are set aside, and

   e) no order as to costs is made.

I indicated at the time that I shall in due course give reasons for the orders made. These are my reasons.

<u>The background</u>

<u>The Immigration Act and Regulations</u>

Section 7(1) of the Immigration Act 13 of 2002 ("the Act") provides that –

> The Minister shall have the power to make regulations called for, or conducive to, the implementation of this Act, and in making regulations in terms of this Act, the Minister shall –

The section then proceeds to prescribe a detailed procedure the Minister has to follow when making regulations. In *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) at 285D—E (par [11]), Chaskalson CJ points out that the section must be read with the definitions in section 1, and proceeds (at 285G (par [12]):

> Read in the light of these definitions the regulations referred to in s 7 are regulations made after consultation with the Board. The power vested in the Minister by this section is a power to make such regulations. In doing so the Minister is obliged to follow the consultative process set out in s 7 and to publish the definitions [*sic*: regulations?] in the manner required by the definition of 'publish'".

Following upon the coming into force of the Act on 14th March 2003, the Minister set in motion the consultative process provided for in section 7 of the Act. The process was completed by January 2004 and a final set of regulations was formulated. The Minister indicated at the time that the regulations were finalised and were ready for publication.

At a media briefing on 11th February 2004, the Minister stated that the Cabinet had decided to review the regulations. The Minister says in an affidavit filed in these proceedings that the President requested him during January 2004 to bring the regulations before the Cabinet.

The Cabinet, once the regulations were brought before it, appointed an *ad hoc* committee of Ministers, headed by the Minister himself, to deal with the review of the draft regulations. It was common cause at the hearing before me that some of the members of the Cabinet had queries and reservations about aspects of the regulations which impact upon their Departments. The Department of Foreign Affairs, for example, raised objections to the regulation of visa exemption in the

draft regulations on the ground that visa exemption is a matter of foreign policy which cannot unilaterally be dealt with in regulations made by the Minister. Nonetheless, the Minister says that he responded to all the Ministers concerned and that "the bulk of the final Regulations were accepted by cabinet".

There were also differences of opinion about the constitutionality of certain of the regulations. The Minister of Justice instructed the Chief State Law Adviser to assemble a team to scrutinise the draft regulations. The team was to report to the Minister as head of the *ad hoc* committee dealing with the proposed regulations so as to enable the Minister to convene the committee to study the report. The team appointed by the Chief State Law Adviser in due course submitted a report in which they expressed the opinion, *inter alia*, that the “drafting style and format used is laborious, inelegant and not reader friendly at all”, and that a number of regulations are (or may be found by a competent Court to be) *ultra vires* the Act. The Law Advisers of the Department of Home Affairs ("the Department") on 28 February 2004 responded in a lengthy memorandum in which they endeavoured to refute the findings and conclusions of the team appointed by the Chief State Law Adviser. In this regard, the Minister says in one of his affidavits filed in these proceedings --

> I have urged my Department to continue discussions with the State Law Advisors to canvass the full measure of the outstanding legal issues so as to reach mutual and constructive understanding.

This was the position when Eisenberg on 2nd March 2004 launched its urgent application which in due course precipitated these proceedings.

The Eisenberg application

In the application brought by Eisenberg (under case number 1589/2004) the Minister is cited as respondent. In the Notice of Motion an order was sought in the following terms:

1. Declaring that only regulations made by the Respondent in terms of section 7 of the Immigration Act 13 of 2002 are valid and lawful.

2. Interdicting Respondent from making regulations in terms of section 7 of the Immigration Act 13 of 2002 other than those he was about to make on or about January 16, 2004.

On 4th March 2004 the Minister gave notice of his intention to abide the decision of the Court in the matter.

In an answering affidavit, the Minister states that he does not dispute the correctness of any of the allegations contained in the founding affidavit deposed to by Mr Gary Eisenberg. He further states that for the assistance of the Court, he attaches the immigration regulations to which the applicant refers in the founding affidavit. As far as the relief which is sought is concerned, the Minister states that he abides the decision of the Court, and in so far as the Court may require any representations or submissions from his Ministry, he will cause his legal representatives to be present at the hearing of the matter.

Mr Gary Eisenberg, in an affidavit deposed to on behalf of Eisenberg in these proceedings, explains that that the urgent application for a declaratory order was brought because Eisenberg had reason to believe that the *ad hoc* committee of Ministers were to make changes to the draft regulations that the Cabinet had already in principle decided must be made. Eisenberg was of the opinion that the Cabinet committee had no power to make immigration regulations, and that the procedure adopted by the Cabinet was in violation of and a subversion of the consultative process provided for in section 7 of the Act. The purpose of the declaratory order and interdict was to ensure that only regulations made in accordance with the prescribed consultative process would be promulgated.

When the matter was called before me in motion court on 8th March 2004, Mr A Katz and Ms AM Annandale appeared, respectively representing the Eisenberg and the Minister. At that stage, the Court file contained only the brief answering affidavit of the Minister with a set of regulations annexed thereto. A copy of the founding affidavit was handed up from the Bar. Counsel then informed me that the parties had reached agreement on an order which differs from the relief sought in the Notice of Motion. I was requested to make an order by consent between the parties in the following terms:

1. The Respondent shall forthwith publish the Immigration Regulations annexed to his affidavit marked "MG 1".

2. The Respondent is directed to gather all proposals he has thus far received since the completion of the process set out in section 7(1) of the Immigration Act, Act 13 of 2002 from his cabinet colleagues and within 30 days of this Order shall publish a general description of such proposals as possible amendments to the Immigration Regulations made pursuant to paragraph 1 of this Order so as to comply with section 7(1)(a) of the Immigration Act giving the public ample time to provide its comments on such proposed amendments.

The Ministry of Home Affairs caused the regulations to be published on the same day (8th March 2004) in *Government Gazette* 26126 (*GN* 352 of 2004). The regulations as published in the *Government Gazette* run to 251 pages.

Regulation 51 provides that the regulations shall come into force and effect thirty days from the date of their publication in the *Government Gazette*; that is, on 7th April 2004.

The suspending application

On 10th March 2004 I was approached at about 21h00 as a matter of urgency by the legal representatives of the President. The founding affidavit in the urgent application was deposed to by the Honourable Penuell Mpapa Maduna, the Minister of Justice of the Republic of South Africa. In his affidavit, the Minister of Justice pointed out that the status of the immigration regulations at Cabinet level is still unresolved, and that the "necessary input from various ministries which would be involved in the implementation of the proposed regulations are still outstanding". He adds that various objections to the constitutionality of the proposed regulations still needed to be resolved. The Minister is also of the view that it was constitutionally incompetent for this Court to have made the order it made on 8th March 2004, and that accordingly it was not competent for the Minister or his legal representatives to consent to such an order.

In view of the fact that the issues raised were *prima facie* of great public importance and seemed to involve unresolved differences at cabinet level about various aspects of the immigration regulations, I made an order (under case number 1992/2004) in the following terms:

> 1. The respondent (Eisenberg and Associates) is called upon to show cause on 1 April 2004 why the order granted under case number 1589/04 (in the matter between Eisenberg and Associates and the Minister of Home Affairs) should not be suspended pending an application by the above applicant to set aside the said order.
>
> 2. The order under case number 1589/04 is suspended pending the abovementioned return day.

The return day was by consent extended to 5 April 2004.

The rescission application

On 24 March 2004, the President brought an application (under case number 2406/2004), citing Eisenberg and Associates as respondents, for an order --

1. condoning the applicant's failure to comply with the rules of this Honourable Court in regard to service and time periods by virtue of the urgency of the matter;

2. rescinding the order made by consent on 8 March 2004 under case number 1589/04, a copy of which is annexed hereto marked A;

3. declaring the regulations made by the Minister of Home Affairs on 8 March 2004, pursuant to the provisions of section 7(1) of the Immigration Act, 2002 (Act No 13 of 2002) and published in the Government Gazette No 26126, to be invalid and of no force and effect;

4. setting aside the aforementioned regulations.

Eisenberg does not oppose the relief sought by the President nor does it oppose the Minister’s application for leave to intervene. In his answering affidavit, Mr Gary Eisenberg makes it clear that the affidavit is solely made in order to assist the Court in the resolution of the matter, and that counsel will appear at the hearing for the sole purpose of assisting the Court on legal issues arising. I can only add that the affidavit of Mr Eisenberg proved most helpful, and that the contribution of Mr Katz at the hearing was equally helpful.

The Minister applied for leave to intervene in both the suspending application and the rescission application. His initial attitude was:

> I wish at the outset to make it plain that as a Minister of the applicant’s cabinet, I am neither authorized nor do I wish to oppose the application.

The applicant’s heads of argument were made available to me and to counsel for the Minister on the evening of Sunday, 4th April 2004. On the morning of 5th April, Mr Unterhalter requested time to determine the attitude of the Minister in

regard to certain submissions in the heads which were not anticipated or foreshadowed in the applicant's founding affidavit. In these submissions, the Minister's integrity was called into question. Having obtained instructions from his client, Mr Unterhalter informed the Court that the Minister would now apply to intervene to oppose both applications. A further affidavit, deposed to by the Minister, and dealing with the submissions raised in the heads of argument and the application for leave to intervene as an opposing party, was handed in on the morning of 6th April 2004.

What I had before me at the hearing on 5th and 6th April 2004 were therefore:

1. the return day of the order granted as a matter of urgency on 10th March 2004;

2. the applications of the Minister for leave to intervene in both applications brought by the President; and

3. the President's application for the rescission of the order made on 8th March 2004, and for declaring the regulations invalid and for setting them aside.

It was agreed not to deal separately at the hearing with the applications for leave to intervene, and that I would deal with all the issues raised on the papers and in argument in my rulings at the end of the proceedings.

The issues

The issues argued before me were the following:

1. The Minister's applications for leave to intervene.

2. The jurisdiction of the Court to entertain the application of the President.

3. The requirements of co-operative government set out in the Constitution.

4. Individual or collective responsibility of Ministers in the Cabinet.

5. The order of Court obtained by consent on 8th March 2004.

The applications for leave to intervene

Whatever was said on paper prior to the hearing about the applications for leave to intervene, at the hearing the Minister was treated by all involved, including counsel for the President, as a respondent who opposed the relief the President was seeking. This was undoubtedly in part due to the fact that, in view of the constraints of time, it was not possible first to resolve the issue of intervention and then to proceed with the hearing of the other issues. In argument, counsel referred to all the affidavits filed by the Minister, including that filed on the morning of 6th April 2004, as if they were documents filed by a party to the proceedings. In the circumstances, the Minister's applications for leave to intervene were granted.

I may add that in my view there is substance in the submissions of Mr Unterhalter that the Minister should have been joined as a necessary party. The President seeks in these proceedings to set aside the regulations made by the Minister in

terms of a statutory instrument empowering him to make regulations. The President seeks a constitutional review of the exercise of the Minister's powers, and as the functionary whose exercise of power is called into question, the Minister should in my view have been joined.

Individual or collective responsibility of Ministers in the Cabinet.

The President's application turns on the question whether or not the approval of Cabinet was necessary before the Minister made the immigration regulations on 8th March 2004. If the approval of Cabinet was necessary, the regulations were made unlawfully and the President is entitled to the relief he seeks. If Cabinet approval was not necessary, the regulations were lawfully made in terms of section 7 of the Act and the President is not entitled to the relief he seeks.

Section 85 of the Constitution deals with the executive authority of the Republic and provides as follows:

1) The executive authority of the Republic is vested in the President.

2) The President exercises the executive authority, together with the other members of the Cabinet, by –

   a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
   b) developing and implementing national policy;
   c) co-ordinating the functions of state departments and administrations;
   d) preparing and initiating legislation; and
   e) performing any other executive function provided for in the Constitution or in national legislation.

The President appoints the members of the Cabinet, assigns their powers and may dismiss them (section 91(1) and (2) of the Constitution). In terms of section 92(2) of the Constitution, the members of the Cabinet are accountable

collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

The position is, in my view, correctly summarised by Currie and De Waal in *The New Constitutional and Administrative Law*, Volume I (2001) in the following terms (at 256):

> In principle, the President and the other members of the Cabinet are individually responsible to Parliament for powers exercised individually, and collectively responsible for powers exercised collectively. As was stated, this means that the cabinet is collectively responsible for major policy decisions. The President is individually responsible for the exercise of head of state powers and powers conferred to the President in terms of ordinary legislation. Ministers are individually responsible for the exercise of powers conferred on them by ordinary legislation, which is not of a nature where the approval of Cabinet is necessary.

Mr Unterhalter submitted that where Parliament confers upon a Minister, in plain and unmistakable terms, the power to make regulations, the Minister is vested with subordinate law-making powers which derive from an enactment of Parliament. The origination of the Minister's power in the statute is not altered by the fact that the Minister is a member of the Cabinet appointed by the President. The repository of the power remains the Minister, and the origin of the power remains the enactment of Parliament. The provisions of section 85 of the Constitution neither divest a Minister of the power given to him by Parliament to make regulations, nor do they render the exercise of the Minister's power subject to Cabinet supervision.

The validity of these submissions as statements of general principle cannot be faulted. There are, however, two qualifications of the general principle.

First, in the exercise of power conferred on him by Parliament, a Minister must comply with the Constitution, which is the supreme law, and the doctrine of legality which is part of that law (*Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at par [18]).

The second qualification is that the exercise of the power must accord with the grant of the power; or, put differently, there must be compliance with the jurisdictional facts upon which the valid exercise of the power pursuant to the enabling enactment are dependent. It is accordingly necessary to examine the precise ambit of the power to make regulations which Parliament conferred on the Minister.

Section 7(1) of the Act provides --

> The Minister shall have the power to make regulations called for, or conducive to, the implementation of this Act ….

In exercising the power vested in him to make regulations, the Minister is obliged, as has been pointed out above, to follow the consultative process set out in section 7 of the Act. In exercising the power vested in him, the Minister must also have regard to the aims of the Act and the objectives of immigration control as set out in therein. Regulations which are "called for, or conducive to, the implementation" of the Act, are regulations which give effect to the aims of the Act and the objectives of immigration control set out in the Act. In other words, the regulations that are made must be rationally related to the purpose for which the power to make the regulations was given (*Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others, supra,* at [par 85]).

In the Preamble it is stated that the Act –

> aims at setting in place a new system of immigration control which ensures that –
>
> ……..
>
> (c) interdepartmental coordination constantly enriches the functions of immigration control and a constant flow of public inputs is present in further stages of policy formulation, including regulation making.

Section 2 of the Act, which deals with the objectives and functions of immigration

control, provides as follows in subsection (1) (d) and (i):

> 1) In the administration of this Act, the Department shall pursue the following objectives:
>
> ………….
>
> (d) creating a climate of cooperation with other organs of State to encourage them to take responsibility in implementing this Act within the ambit of their respective powers and functions;
>
> ………….
>
> (i) promoting integration of functions, harmonisation and cooperative relations among all organs of State with responsibilities in respect of controlling the borders and activities at ports of entry.

Subsection (2) of section 2 of the Act provides that, in order to achieve the objectives set out in subsection (1) of section 2, the Minister's Department shall, *inter alia*, liaise with certain other Departments (the South African Police Service and the South African Revenue Service) and shall –

> f) in cooperation with the Department of Foreign Affairs –
>
> i) promote programmes in foreign countries with the aim of deterring people from becoming illegal foreigners;
>
> ii) table the need for cooperation in preventing migration towards the Republic on the agenda of relations with foreign states, negotiating appropriate measures and agreements with such foreign states.

The themes of coordination and cooperation pervade the aims and objects of the Act. The Act aims at setting in place a system of immigration control on the basis of "interdepartmental coordination". Among the objectives the Department must pursue in the administration of the Act, are the creation of "a climate of cooperation with other organs of State", and the "promotion of integration of functions, harmonisation and cooperative relations among all organs of State". Finally, in order to achieve the stated objectives, the Department must liaise with other Departments, and must cooperate with the Department of Foreign Affairs in negotiating appropriate measures and agreements with foreign states to deal

with problems of migration towards the Republic.

If one of the jurisdictional facts for the valid exercise of the power to make regulations pursuant to the provisions of section 7 is that the regulations should be called for or conducive to the implementation of the Act, the regulations must give effect to the stated aim and objects of setting in place a system of immigration control on the basis of interdepartmental coordination, the pursuit of creating a climate of cooperation with other organs of State, and the promotion of integration of functions, harmonisation and cooperative relations among all organs of State.

Coordination and cooperation between organs of state is a constitutional imperative. Chapter 3 of the Constitution reinforces this cooperation, and section 41(1)(h)(iv) explicitly enjoins organs of state to coordinate "their actions and legislation with one another".

In terms of section 85(2)*(c)* of the Constitution, interdepartmental coordination is one of the executive functions to be exercised by the President together with the other members of the Cabinet. Matters of interdepartmental coordination therefore are matters of collective responsibility.

In terms of section 85(2)*(b)* of the Constitution, the development and implementation of national policy is a matter of collective executive responsibility. Section 7 of the Act does not empower the Minister to make regulations that, in effect, develop and implement national policy. In so far as the Minister may elect to make national immigration policy in exercising his powers under section 7 of the Act, he is bound to do so under the hegemony of section 85(2)*(b)* of the Constitution. The unilateral implementation of policy to regulate portfolios other than his own by the Minister in regulations framed in terms of his powers under section 7 would also be in conflict with the central aims of coordination and cooperation which underlie the Act.

The dispute in the Cabinet about the regulations which deal with visa exemption, the contention of the Department of Foreign Affairs being that visa exemption is a

matter of foreign policy, cannot therefore be resolved unilaterally in regulations made by the Minister. It is a matter of collective executive responsibility under section 85(2)*(b)* of the Constitution, and the impasse must be resolved in cooperation with the Department of Foreign Affairs.

The power to make regulations is conferred on the Minister within the context of the Act which requires coordination of function and policy of different organs of state. The exercise of that power by the Minister is, therefore, not a matter of individual but of collective responsibility. In the exercise of that collective responsibility, the provisions of section 7 of the Act need to be complied with.

The jurisdiction of the Court to entertain the President's application

Mr Unterhalter submitted that this Court lacks jurisdiction to determine the dispute before it. He said that the dispute before the Court is one between organs of State and that the Court lacks jurisdiction to determine disputes between organs of State by reason of the exclusive jurisdiction enjoyed by the Constitutional Court in terms of section 167(4) of the Constitution.

Section 239 of the Constitution defines an organ of State as follows:

> a) any department of State or administration in the national, provincial or local sphere of government; or
>
> b) any other functionary or institution --
>
> > i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> >
> > ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

In *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at 10B (par [12] Goldstone J referred to the President as "an executive

organ of State". In *National Gambling Board v Premier, Kwazulu-Natal, and Others* 2002 (2) SA 715 (CC) at 724E (par [19]) it was held that a Minister, being a functionary that exercises a power or performs a function in terms of the Constitution, is an organ of State.

The questions which arise in this matter are whether a dispute between the President and a Minister who is a member of his Cabinet is a dispute between organs of State; or whether it is an internal dispute within an organ of State, namely, the Cabinet; and whether the Cabinet is an organ of State?

In *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at 937G--H (par [25]) it is stated:

> The national sphere of government comprises at least Parliament, the President and the Cabinet … These State organs comprise the national sphere of government and are within it. They are not s 239 organs of State because they are neither departments nor administrations within the national sphere of government.

In *National Gambling Board v Premier, Kwazulu-Natal, and Others, supra,* at 724G--725A (par [21]) the above statement is clarified as follows:

> Whether Parliament, the President and the Cabinet are organs of State within the definition in s 239 was not an issue in the *Langeberg* case. As it stands, the quoted words may be understood too widely. In context they mean that Parliament, the President and the Cabinet are not organs of State within the meaning of para *(a)* of the definition.

Parliament, the President and the Cabinet are not organs of State within the meaning of para *(a)* of section 239 of the Constitution because they are not departments or administrations within the national sphere of government (*Independent Electoral Commissions v Langeberg Municipality, supra,* at 937G--H ([par 25])). In terms of para *(b)* of section 239 the definition of "organ of State" includes any other functionary or institution exercising a power or performing a

function in terms of the Constitution.

In terms of the Constitution, the executive authority of the Republic vests in the President (section 85(1)). The Constitution requires the President to exercise the executive authority together with the Cabinet (section 85(2)). The Cabinet consists of the President, the Deputy President and the Ministers. The members of the Cabinet are accountable individually and collectively to Parliament (section 92(2)). Under these provisions, the Cabinet is an institution that exercises powers and performs functions in terms of the Constitution. The Cabinet is therefore an organ of State in terms of para *(b)* of section 239 of the Constitution.

The conclusion that both a Minister and the Cabinet may qualify as an organ of State in so far as they exercise a power or perform a function in terms of the Constitution or in terms of legislation, finds support in Currie and De Waal *The New Constitutional and Administrative Law*, Volume I (2001) at 246.

In my view, the dispute in this matter does not involve a dispute between organs of State as contemplated by section 167(4) of the Constitution. The dispute concerns actions taken by a member of the Cabinet which the President, as head of the national executive, alleges are actions that fall within the collective responsibility of the Cabinet.

The requirements of co-operative government

It was further submitted on behalf of the Minister that the President has not complied with the principles of cooperative government entrenched in Chapter 3 (sections 40 and 41) of the Constitution. Section 40(2) requires that all spheres of government must observe and adhere to the principles of cooperative government and conduct their affairs within the parameters of Chapter 3. In terms of section 41(3) it is peremptory that organs of State involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by

means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before they approach a Court to resolve the dispute. Section 41(4) provides that if a Court is not satisfied that the requirements of internal settlement have been met, it may refer a dispute back to the organs of State involved.

Mr Unterhalter submits that there has been no compliance by the President with the obligations of cooperative government to avoid the proceedings now before the Court, and in the absence of such compliance, this matter may not be ventilated before this Court.

It has been held above that the subject matter of the dispute that underlies these proceedings falls within the collective responsibility of the Ministers. The dispute is not an inter-governmental one between organs of State which would fall within the parameters of Chapter 3 of the Constitution -- it is a "domestic" dispute which involves interaction within the executive, the Cabinet. The Minister took the resolution of the dispute out of Cabinet by using the opportunity afforded by the Eisenberg application to "resolve" it by invoking the aid of the Court. In the circumstances, I am of the opinion that there was no obligation on the President to comply with the provisions regarding cooperative government in Chapter 3 of the Constitution.

The order of Court obtained by consent on 8th March 2004

Mr Donen submitted that the order obtained by consent on 8th March 2004 constituted an abuse of the process of court, is *ultra vires* the Act and is unconstitutional.

It is necessary at this juncture to deal in more detail with the events which preceded and followed upon the order granted on 8th March 2004. In doing so, I

shall not unnecessarily repeat what is said above under the heads *The Immigration Act and Regulations* and *The Eisenberg application*.

At the beginning of March 2004 the differences of opinion in the Cabinet regarding the draft immigration regulations were unresolved. On 3rd March 2004 the Minister in a letter to the Minister of Justice said that he looks forward to the matter of the regulations "being taken forward in policy discussions once there is greater clarity on the relevant legal issues".

On 2nd March 2004 the Eisenberg application was launched. It will be recalled that in its Notice of Motion, Eisenberg sought (i) a declaratory order to the effect that only regulations made in terms of section 7 of the Act are valid and lawful, and (ii) a prohibitory interdict restraining the Minister from making regulations in terms of section 7 of the Act other than those he was about to make on or about 16th January, 2004.

On 3rd March 2004 the Minister informed the President of the Eisenberg application and said that he would in due course inform the Cabinet. The Minister also caused a copy of the papers to be delivered to the Chief State Law Adviser.

On 4th March 2004 the Minister gave notice of his intention to abide the decision of the Court. In an answering affidavit, the Minister states that he does not dispute the correctness of any of the allegations contained in the founding affidavit and reiterates that he abides the decision of the Court.

On 5th March 2004 a copy of the draft regulations was delivered to the

Government Printers. The Minister in his affidavit of 6th April 2004 says that this was done --

> ….. for no other purpose than being there should the need have arisen for them to publish as a consequence of the negotiations which were undergoing between my lawyers and that of Eisenberg & Associates or as a result of the court hearing to be held on March 8.

Upon the initiative of the legal representatives of the Minister, a form of order was agreed upon which differed materially from the relief sought in the Notice of Motion. Mr Gary Eisenberg says that the Minister's legal representatives approached Eisenberg's legal representatives on Sunday, 7th March 2004 and proposed that a different order to that sought in the Notice of Motion should be granted. Agreement was reached on the morning of 8th March 2004 on the form of order to be sought.

The Minister did not inform the President, the Cabinet or the Chief State Law Adviser of his intention to consent to an order which differed materially from the relief sought by Eisenberg and which would involve the immediate publication of the draft immigration regulations.

It will be convenient at this stage to repeat the terms of the order to which the Minister consented on 8th March 2004:

> 1. The Respondent shall forthwith publish the Immigration Regulations annexed to his affidavit marked "MG 1".

2. The Respondent is directed to gather all proposals he has thus far received since the completion of the process set out in section 7(1) of the Immigration Act, Act 13 of 2002 from his cabinet colleagues and within 30 days of this Order shall publish a general description of such proposals as possible amendments to the Immigration Regulations made pursuant to paragraph 1 of this Order so as to comply with section 7(1)(a) of the Immigration Act giving the public ample time to provide its comments on such proposed amendments.

In the Eisenberg application an order for the immediate publication of regulations was not sought. The Minister explains his consent to an order which obliged him "forthwith" to publish the draft regulations, in the following terms –

> The application launched by Mr Eisenberg forced me to focus on the meaning and implication of section 7 of the Act and my own misgivings on the validity of a Cabinet process aimed at altering the regulations after the completion of the section 7 process. Therefore, by the time I consented to the March 8 Order of this Honourable Court and implemented it by ordering the publication of the Immigration Regulations I was convinced that my action was required and compelled by what the law required.

The Minister further says that the prohibitory interdict originally sought by Eisenberg would have placed him in a stale-mate position and potentially stagnated the regulation-making process. The Minister adds that the order originally sought –

> would have further precluded me from completing the deliberations before Cabinet in regard to such regulations, thereby precluding the process of obtaining cabinet's contributions to any regulations. It will be observed that the second part of the Consent order taken on 8th March, 2004 has provided for the continuation of the process serving before Cabinet and furthermore, by virtue of the fact that such process would continue further in terms of an order of Court and thereby be protected from further challenges that may have been made to such regulations.

On the face of it, a contradiction seems to lurk in the Minister's explanation. On the one hand, he says that he agreed to the immediate publication of the draft regulations because he had "misgivings on the validity of a cabinet process aimed at altering the regulations after the completion of the section 7 process". On the other hand, he says that the order sought by Eisenberg would have precluded him from completing the deliberations before Cabinet in regard to the regulations, "thereby precluding the process of obtaining cabinet's contributions to any regulations".

Be that as it may, it is clear that the Minister accepts that the Cabinet is entitled to contribute to the development of the regulations, provided that any amendments resulting from the deliberations in Cabinet be subjected to the consultative process prescribed in section 7 of the Act. There is nothing in the

papers, apart from a suggestion by the Minister, that establishes an intention on the part of the Cabinet to make amendments to the draft regulations without complying with the consultative process prescribed in section 7 of the Act.

As has been pointed out above, the regulations were published on the same day that the order by consent was granted (8th March 2004) in *Government Gazette* 26126 (*GN* 352 of 2004).

On the same day (8th March 2004) the Minister informed the President of the Court order. He did not make reference to the fact that the order had been made by consent (on terms initiated by his legal advisers) and that the terms of the order differed materially from the order originally sought by Eisenberg. He further informed the President that "I have complied with such an order."

In regard to the second part of the Court order, the Minister informed the President:

> I shall comply with the second paragraph of the Court Order as soon as possible and will collate the comments thus far received during the Cabinet process and publish them for public comments in terms of section 7(1)(a) of the Act.
>
> ……….
>
> I will act expeditiously to ensure that the process may continue as directed by the Court and that policy formulation through regulations carries forward without undue delay in an open and transparent manner.

In his first affidavit, filed in his application for leave to intervene in the suspending application, the Minister says:

> I also believe it to be important that this Honourable Court be advised of the fact that I immediately complied with the Order granted by this Honourable Court on 8 March 2004 [and] published the Regulations that very day.

In an affidavit filed in the rescission application, the Minister qualifies his position by saying --

> When I published, although I was doing so pursuant to the provisions of a Court Order, I was nonetheless acting in terms of section 7 of the Act and believed that what I was doing was valid, constitutional and lawful exercise of that power which would bring about valid regulations.

Mr Donen submitted that it is apparent from the foregoing facts that the actions of the Minister were carefully orchestrated to circumvent the Cabinet process that was under way, and that the Court and the President had been deliberately misled. The Court, so it is alleged, was misled by the fact that the presiding Judge was not informed of the full context within which the order by consent was sought. The President was deliberately misled by the fact that he was not informed of the Minister's decision not merely to abide the decision of the Court, but to consent to an order that the regulations be published forthwith. The Minister's immediate compliance with the order was made possible by the fact that the text of the regulations had been handed to the Government Printer on 5 March 2004. Mr Donen says that neither the Court, nor the Act, nor the Constitution can countenance this deception and that the order should be set aside for this reason alone. (I should add that Mr Donen made it clear that it was not submitted that counsel participated in the deliberate deception).

The facts do not warrant the inference that the Minister's conduct was part of a *mala fide* scheme of deliberate deception. In my view, given the Minister's reservations about the Cabinet process, the Minister used the opportunity afforded by the Eisenberg application to publish the regulations, and there are no grounds for finding that, when he consented to the order on 8th March 2004 and implemented it by publication of the regulations, he was not *bona fide* convinced that his action was required and compelled by what the law required.

Mr Donen further submitted that in consenting to the order, the Minister abdicated his powers to the Court and then acted under the Court's direction. I agree with Mr Unterhalter that a *mandamus* such as that contained in the first part of the order is a recognised remedy in public law and one which the Court is empowered to grant. One of the established purposes which a *mandamus* serves

is to compel a body to perform a statutory duty. The Minister makes it clear that when he published the regulations pursuant to the provisions of the order, he was nonetheless acting in terms of his powers under section 7 of the Act and believed that what he was doing was a valid, constitutional and lawful exercise of that power.

In all the circumstances, the order falls to be set aside not because it was obtained by deception, nor on the ground that by consenting to it, the Minister abdicated his powers to the Court. The order is incompetent and must be set aside because the making of regulations under section 7(1) of the Act is a matter of collective responsibility of the executive and Cabinet approval is necessary for the making of regulations.

Rescission of the order and setting aside of the regulations

The President applied for rescission of the order granted on 8th March 2004 under the provisions of Uniform Rule of Court 42(1)*(a)* which provides as follows:

> 1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

The order was sought and granted in the absence of the President who, as head of the executive, was clearly affected thereby.

The order was erroneously sought and erroneously granted because the making of regulations under section 7 of the Act is a matter of collective responsibility of the executive and Cabinet approval is necessary for the making of regulations.

Though the error is not apparent on the record of the proceedings, the Court is not confined to the record of the proceedings in deciding whether a judgment was erroneously granted (*Standard and Another v ABSA Bank* 1997 (4) SA 873

(E) at 882C--G, not following *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E); see also *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (TkHC) at 201A--H; *Smit v Van Heerden* [2002] 4 All SA 461 (C) at 467f—g). The words of Nepgen J in *Standard and Another v ABSA Bank, supra,* at 882E—F are apposite to the present matter:

> It seems to me that the very reference to 'the absence of any party affected' is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the Court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the Court in order to have such order or judgment rescinded or varied on the basis of facts, of which the Court would initially have been unaware, which would justify this being done. Furthermore the Rule is not restricted to cases of an order or judgment erroneously granted, but also an order or judgment erroneously sought. It is difficult to conceive of circumstances where a Court would be able to conclude that an order or judgment was erroneously sought if no additional facts, indicating that this was so, were placed before the Court.

The Minister says that he published the regulations pursuant to the order of Court, and adds that in doing so exercised his powers under section 7(1) of the Act. If the order of Court is set aside, the regulations made pursuant thereto must also be set aside. In so far as the Minister in making the regulations exercised his powers under section 7(1) of the Act, the regulations must be set aside because, the making of regulations in terms of the Act being a matter of collective responsibility of the executive, Cabinet approval was necessary for the making of the regulations.

<u>Costs</u>

At the outset, the President sought no order as to costs against the Minister. When the Minister at the hearing of the matter gave notice of his intention to apply for leave to intervene as an opposing party, the President changed his stance. I was asked to make an order that the Minister pay the costs *de bonis propriis.*

I declined to make such an order because the Minister sought leave to intervene in his capacity as Minister of Home Affairs and as a servant of the State in the public interest. By his intervention, the Minister ensured that all relevant facts, seen from the different perspectives of the parties, were placed before the Court. The submissions of his counsel at the hearing contributed significantly to the clarification of the issues before the Court.

The President did not seek an order of costs as against Eisenberg.

These are the reasons for the orders I made on 6th April 2004.

<u>HJ ERASMUS J</u>