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

REPORTABLE
Case number: 1279/2022

In the matter between:

RICARDO MAARMAN Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First respondent

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Second respondent

JUDGMENT DELIVERED ON 4 APRIL 2022

VAN ZYL AJ:

Introduction

1. This application came before the Court as an urgent matter set down for 31 January 2022. On that day, a draft order was presented to me (by agreement between the parties, so I was told) regulating the delivery of answering and replying affidavits and heads of argument, and postponing the application to a date in February 2022. On 1 February 2022 I was informed that the applicant's legal representatives had acted without his instructions in agreeing to the postponement of the matter, and that he wished for the order to be rescinded. The respondents did not oppose the application for rescission.

2. The parties agreed to having the issue of rescission and, upon rescission if

granted, certain preliminary aspects relating to the application heard on 4 February 2022. The respondent did not raise any objection to the matter being determined attended on argument presented on that day. I rescinded the procedural order of 31 January 2022 on the basis of the Court's common law power of rescission, and counsel addressed me on the aspects referred to below (the applicant had, in the meantime, procured new counsel who argued these points).

3. The present application arises out of litigation instituted in the Constitutional Court some months ago. In the application before me, the applicant seeks an order that a rule *nisi* be issued calling on the respondents to show cause why the following order should not be granted:

> 3.1 "*That this Application is heard as a matter of urgency and that the Applicant's failure to comply with the time limits imposed by the Rules of Court be condoned in terms of Rule 6(12)*.
>
> 3.2 *"The Court suspend the punitive and coercive enforcement of the DMA regulations and allow only for voluntary compliance of the public to all these measures, until such time as the Constitutional Court case no CCT 229/2021 has been finalised*".

4. The DMA regulations mentioned in the notice of motion referred to the regulations promulgated under the Disaster Management Act, 2002, published in the *Government Gazette* of 22 April 2021 under No. 376.

5. I proceed to deal with the background and the preliminary issues raised.

<u>The application in the Constitutional Court</u>

6. On 27 September 2021 an application was instituted in the Constitutional Court under case number CCT 229/21 for "*exclusive jurisdiction and/or direct access*" to that Court.

7. The parties to that application were, as applicant, Mr Maarman, and as *"co-*

applicants", "*more than eight thousand eight hundred South Africans*". The first, second and third respondents were, respectively, the President of the Republic of South Africa, the Speaker of Parliament, and the Governor of the South African Reserve Bank.

8. The relief sought in that application was wide-ranging, and I do not intend repeating the content of the notice of motion here. Where necessary for the determination of the application currently before me, I shall refer to aspects of the relief sought in the Constitutional Court.

9. In short, the applicants wanted the Constitutional Court to hold that the President's conduct in declaring a National State of Disaster as a result of the SARS-COV2 virus (the so-called Corona virus) was invalid, and that such conduct and the conduct of the second and third respondents in various respects relating to the National State of Disaster amounted to the violation of a range of constitutional provisions. The applicants sought the setting aside of the National State of Disaster together with ancillary relief.

10. The respondents opposed the application. Voluminous affidavits were delivered. On 26 January 2022 Constitutional Court dismissed the application.

11. The applicant did not disclose this information to me prior to the hearing in any practice note or correspondence addressed to my registrar. I read it in the respondents' answering affidavits delivered the afternoon before the hearing. The order reads as follows:

> *The Constitutional Court has considered the application for direct access and has concluded that it does not disclose a cause of action insofar as the relief sought against the first and second respondents is concerned. That is so because the allegations of the first respondent's failure to comply with a constitutional obligation proceeds from the premise that the power to declare a state of national disaster in terms of the Disaster Management Act 57 of 2000 (the Act) vests in the first respondent. That power does not vest in the first respondent. It vests in the Minister envisaged in section 1 read with*

section 3 of the Act. Thus, the applicants cannot validly seek relief against the first respondent proceedings from the premise that the power vests in him when it does not. As the relief against the second respondent concerns the alleged declaration of a state of disaster by the first respondent, a power the first respondent does not have, this relief too must fail. The Court has also concluded that the applicants have not made out a case for direct access in respect of the relief sought against the third respondent. It has decided not to award costs."[1]

12. It bears mentioning that previously, on 26 February 2021 under case number CCT 63/21, the applicants had instituted an application in the Constitutional Court seeking relief compelling the President to provide proof of the existence of the Corona virus. That application was dismissed.

13. The applicants thereafter instituted urgent proceedings in this Court under case number 5852/2021 on 27 May 2021, again asking for an order compelling proof of the existence of the virus. According to the applicants, that application was dismissed on the basis that it lacked urgency.

The pending application under case number 21064/2021

14. On 9 December 2021, just over two months after the institution of the Constitutional Court application, the applicants instituted an application in this Court under case number 21064/2021 in which a rule *nisi* was sought calling upon the respondents to show cause why an order in the following terms should not be granted:

14.1 "*That this Application is heard as a matter of urgency and that the Applicant's failure to comply with the time limits imposed by the Rules of Court be condoned in terms of Rule 6(12)*.

14.2 *"The Court suspend the DMA regulations, until such time as the*

[1] Emphasis supplied.

Constitutional Court case no CCT 229/2021 has been finalised".

15. The parties to that application were, as first and second applicants respectively, Mr Maarman and "*Applicants of the Constitutional Court Case No. 299/21*". Having regard to the application in the Constitutional Court, this means that the second applicant was (or were) "*more than eight thousand eight hundred South Africans*".

16. The first and second respondents were, respectively, the President of the Republic of South Africa and the Minister of Co-operative Governance and Traditional Affairs.

17. In the practice note filed by the applicants prior to the hearing, the applicants indicated that the matter entailed the seeking of an urgent interdict "*on the ground that the DMA regulations be suspended pending the Constitutional Court Case no. CCT229/2021 which will only be heard in approximately 8 months' time*".

18. The application was set down for hearing on the urgent roll on 20 December 2021. On that day it was postponed to 7 January 2022, with directions as to the delivery of papers.

19. On 7 January 2022 (the Honourable Justice Binns-Ward presiding) the application was struck from the roll, with costs to stand over for a later date. From a transcript of the proceedings on that day it appears that, apart from some misgivings as to the urgency of the matter, the court file was not in order and the order setting it down for that day had been requested and granted in the absence of agreement from the respondents.
'

<u>The current application</u>

20. Instead of continuing with the pending application under case number 21064/2021, the applicants proceeded to institute the present application.

21. The applicants say that the national state of disaster is having the ongoing

consequence of limiting rights as enshrined in the Bill of Rights, causing economic harm to the people of South Africa. They make wide-ranging allegations (unsupported by expert evidence) as regards the safety and legitimacy of vaccines, and contend that they have no other recourse that to approach this Court for an urgent interim interdict against the punitive and coercive enforcement of the lockdown measures, pending the outcome of the Constitutional Court case. They say that the respondents "*will not be deprived or interfered with any of their measures, instead, reliance will be placed on voluntary compliance by the Applicant and the people of South Africa as exhibited thus far…*"

22. I have mentioned already that the Constitutional Court has given an order, and that there is no proof before this Court that a rescission application has been accepted by the Registrar of the Constitutional Court.

First preliminary point: the current application is not urgent

23. The Constitutional Court application was instituted on 27 September 2021. No interdictory relief was sought at that time. Instead, the pending application under case number 21064/2021 was instituted in December 2021, and the current application was instituted four months after the launch of the Constitutional Court application, on 21 January 2022. The respondents were given until 29 January 2022 to deliver answering papers, and the application was set down for hearing on 31 January 2022. In my view, the applicant does not satisfactorily explain either in his founding papers or his heads of argument why, in these circumstances, the application is urgent.

24. In light of the fact that the relief sought in this application is at its core the same as the relief sought in the Constitutional Court (albeit that the relief sought in the latter Court is expanded in various respects), one would have thought that an application for interim relief pending the outcome of the Constitutional Court application would have been brought at the same time.

25. Be that as it may, the application to the Constitutional Court was not instituted as one of urgency, and the applicants in the pending application expected the

Constitutional Court only to determine the application in "*8 months' time*". The applicant accordingly did not regard the primary relief sought in that application as urgent. Again, there is no explanation why the interim interdictory relief, sought some four months later, is urgent pending the outcome of the Constitutional Court case.

26. Crucially, the national state of disaster was declared on 15 March 2020. Various iterations of the DMA regulations have been in operation from time to time. This has been the prevailing state of affairs for some two years. The applicant now seeks far-reaching relief, even if it is on an interim basis. It is, in my view, not open to the applicant to allege urgency at this stage.

27. The applicant submits that the application is urgent by relying on the alleged ongoing effects of the enforcement of the DMA regulations and the effect of the implementation of vaccines over the many months since the declaration of the national state of disaster has been declared.

28. He alleges that the lockdown measures are causing harm, limiting his rights. Whilst the lockdown measures have necessarily resulted in a limitation of rights, these limitations were sanctioned by section 36 of the Constitution of the Republic of South Africa, 1996. The applicant fails to explain why he did not institute proceedings shortly after the declaration of the state of disaster.

29. The applicant alleges that the vaccination measures implemented by the respondents "*could see the entire nation irreparably harmed*" and "*the entire nation is brought closer to the point of no return or further beyond the point*". No expert evidence is put up in support of this allegation, and there is in any event no explanation why this renders the application urgent at this late stage.

30. The applicant alleges further that the respondents instituted punitive measures for a breach of the DMS regulations and that "*there can never be redress in due course*", thereby potentially rendering the judgment of the Constitutional Court moot. This is not correct, because, had the Constitutional Court application not been dismissed, the applicant would have been vindicated in his claims and there would be no question of mootness. This allegation, in any event, also does not support the

alleged urgency of the matter.

31. The applicant alleges further that the there is no prejudice to the respondents and the interests of justice if the matter is heard on an urgent basis, because "*all the facts before the Court are common cause … and no new or complex matters are place before Court*". This allegation is patently incorrect. The evidence before this Court is far from common cause. The parties have widely divergent stances on a number of material issues. The fact that the applicant has put up essentially the same information in this matter as he had done in the Constitutional Court case and in the pending application under case number 21064/2021, does not mean that this matter can for that reason be dealt with as urgent presumably because the respondents should also be able to "cut and paste" their previous answering affidavits to suit the present application.

32. In fact, given that the current application is in effect a duplication of the pending application, there is no reason why, despite being brought later than the pending application, on shorter notice to the respondent than the pending application, on a factual basis that mirrors the pending application, and in circumstances where urgency is asserted on the same basis as in the pending application, the current application should be entertained at all on the basis of urgency.

33. I agree in any event with the respondents' counsel that there would be indeed prejudice to the respondent and the people of South Africa if the order sought is granted. It will mean that, in the midst of an unprecedented pandemic, the State is deprived of a key means of intervention and response to the pandemic through the DMA regulations and, in particular, the enforcement measures contained therein.

34. The fact that interim (as opposed to permanent) relief is sought takes the question of urgency no further.

35. For this reason alone, I would have struck the matter from the roll.

Second preliminary point: the application is moot

36. The Constitutional Court determined the application under CCT229/21 on 26 January 2022. The order is quoted above.

37. The applicant says that the Constitutional Court only dealt with their application for direct access, and therefore the application in relation to exclusive jurisdiction was still pending. I do not read the Constitutional Court's order so as to reserve any aspect of the application for later determination. The application was refused in its entirety because no cause of action had been disclosed against the respondents. That goes to the root of the entire application, and not simply to the prayer for direct access.

38. The applicants indicated that they had brought an application for rescission of the Constitutional Court's order and therefore the interim relief should be granted pending the determination of the rescission application. Although I have been furnished with a copy of a rescission application dated 2 February 2022, there is no confirmation or indication of whether it has been accepted by the Registrar of that Court.

39. In any event, and assuming that the rescission application has in fact been instituted, when the application in this Court was launched, there was no rescission application pending before the Constitutional Court. A pending application for rescission was thus not the basis upon which the application was instituted, and it cannot support the relief sought.

40. I have mentioned that I read about the Constitutional Court's order in the respondents' papers. Even if the applicant had brought a rescission application before the Constitutional Court, he also did not disclose the crucial fact to this Court (because he did not mention the dismissal of his Constitutional Court application). I agree with the respondents' counsel's submission that, had it not been for the respondents, it is unlikely that this Court would have been apprised of this material information.

41. In all of these circumstances, I am not inclined to allow the applicant to rely on

the application for rescission as a basis upon which to seek the interim relief.

42. It follows that the current application no longer has any purpose (the respondents labelled it "*still-born*"), and falls to be dismissed on this basis.

Third preliminary point: this Court's jurisdiction

43. Does this Court have the necessary jurisdiction to grant the relief sought?

44. In the application to the Constitutional Court the applicants sought a declaration "*that this application falls within the exclusive jurisdiction of this Court in that it alleges the failure of the respondent to discharge their constitutional obligations as per section 167(4)(e) of the Constitution*".

45. In the alternative they sought an order granting them direct access "*as per section 167(6)(a) of the Constitution, due to the importance of the matter, the interest of justice, it is a Constitutional matter, it involves the interpretation of the Constitution, the exceptional circumstances, due to the nature of the recourse sought and the Western Cape High Court found it to be of public interest*".

46. That application thus primarily proceeded on the basis that the Constitutional Court had exclusive jurisdiction to determine the issues raised therein, including, as is set out in the founding affidavit, relief declaring the DMA regulations unlawful and invalid (on the authority of *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly (EFF 1) and Economic Freedom Fighters v Speaker of the National Assembly*[2]).

47. I agree with the respondents that the applicant may not simultaneously assert that this Court has jurisdiction to determine the interim relief sought in respect of final relief that is pending before the Constitutional Court, given the very specific basis upon which the Constitutional Court application was brought. The difference in formulation in the current application, namely the setting aside of the enforcement

[2] 2018 (2) SA 571 (CC).

measures contained in the DMA regulations as opposed to the regulations as a whole, does not change the situation. The enforcement measures are an integral part of the DMA regulations.

48. It follows that, in light of the applicant having invoked the exclusive jurisdiction of the Constitutional Court in respect of the final relief sought, and as a matter of logic, he may not simultaneously invoke the jurisdiction of this Court in respect of interim relief that is fundamentally premised upon the relief sought in the Constitutional Court.

49. For this reason, too, the application falls to be dismissed.

50. This does not mean that there may not be instances where, if the jurisdiction of the Constitutional Court is invoked in relation to final relief, interim relief may be granted by a High Court. It depends of the particular facts of the matter. The current application is not one of those cases.

Fourth preliminary point: the current application does not fall within the category of exceptional cases for the grant of interim relief

51. The applicant says that this case does not involve the separation of powers principle because "*the measures the Respondents claim to rely on will not be affected by the interdict, only the punitive and coercive aspects of clauses which imposes (sic) fines, imprisonment and leads to loss of employment and tuition, will be interdicted, which will then prompt the democratically elected government to rely on voluntary compliance by the public in consonance with the spirit of the Constitution*".

52. He says further that:

52.1 The relief sought is against the punitive aspects of the DMA regulations and not against the regulations themselves.

52.2 The meting out of punishment is essentially and fundamentally a

judicial function, for which the executive, which the respondents represent, is "*ill-equipped and not constitutionally mandated to exercise power over*".

52.3 These punitive measures include the imposition of fines and even imprisonment, which are well within the judicial sphere.

52.4 The executive must make policy: "*theirs is to decide what measures should be adopted*". Their decision to adopt any measure or approach will not be proscribed or prescribed by the relief sought. They will continue to adopt any measure to manage the national state of disaster, but adherence will be voluntary through public participation consonant with a democratic society.

52.5 The continued imposition of punishments by the executive without any checks and balances from the judiciary constitutes an abuse of power and a grave injustice, because punitive measures without "*due judicial capacity is inherently unjust and tyrannical*".

53. These arguments ignore the fact that there is a high threshold for the grant of relief such as that sought in the current application, namely an interdict against a state entity and the restraining of the use of public power.

54. In *Economic Freedom Fighters v Gordhan and others*[3] the Constitutional Court held as follows:

[37] … when granting an interim interdict against a state entity — and, in effect, restraining the use of public power — courts should adroitly '<u>consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought</u>'…

[40] … The interim interdict test … enjoins a court before granting an

[3] 2020 (6) SA 325 (CC). Emphasis supplied.

interdict against an organ of state to ensure that the order 'promotes the objects, spirit and purport of the Constitution'. This invariably attracts various constitutional issues into adjudication, including possible issues regarding separation of powers, the constitutional duties of the parties that may be frustrated by the order and any constitutional rights implicated in the matter.

[42] In addition, before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. The rationale is that an interdict which prevents a functionary from exercising public power conferred on it impacts on the separation of powers and should therefore only be granted in exceptional circumstances.

[48] … where legislative or executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle. Essentially, a court must carefully scrutinise whether granting an interdict will disrupt executive or legislative functions, thus implicating the separation and distribution of power as envisaged by law. In that instance, an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out.

55. In *National Treasury and others v Opposition to Urban Tolling Alliance and others*[4] the Constitutional Court held[5] that "… *courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means*

[4] 2012 (6) SA 233 (CC).
[5] At para [44]. Emphasis supplied.

that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.

56. Citing its earlier jurisprudence on the separation of powers, the Constitutional Court further held[6] that "*(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*

57. This does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it.[7]

58. The current application clearly does not meet the threshold set by the Constitutional Court. It makes out no case for the interdict sought, as it does not make out a case as to the underlying validity of the regulatory or statutory framework upon the which the DMA regulations are based.

59. Most importantly, though, is the fact that the Constitutional Court has already determined that no cause of action has been made out in the application before it. There is thus, for reasons already set out earlier, no pending challenge to the validity of the DMA legislation or the regulations adopted under it.

60. There is accordingly no basis upon which this Court can grant the relief

[6] At para [63].
[7] At para [64].

sought without impermissibly intruding upon the domain of the respondents. This is another reason for the dismissal foo the application.

The effect of the pending application under case number 21064/2021

61. Some argument was presented as regards the effect of the pending application on this Court's jurisdiction, and whether the defence of *lis alibi pendens* could be raised in the context of the current application. In light of the fate of the application as is apparent from what has been set out above, there is no need to determine this issue.

Costs

62. The applicant argues that the Court should follow the so-called *Biowatch* principle[8] in relation to costs, which states that in constitutional matters against the state or organs of state the litigant, subject to exception, should not be made to pay the costs of the state. This is to avoid adverse costs orders against litigants seeking to assert constitutional rights.

63. The applicant states that "*we have not and we contend that under no circumstances have we abused the processes of the court, as we were granted the Rescission under this case number and their costs should be awarded to the applicant*".

64. The respondents, on the other hand, contend that the *Biowatch* principle does not find application in the present situation. In *Biowatch*, the following was stated as regards the approach to costs in constitutional cases:[9]

> *[24] … the general approach of this court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant*

[8] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC).
[9] See also *Lawyers for Human Right v Minister of Home Affairs and others* 2017 (5) SA 480 (CC) at paras [17]-[21].

should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. …

[25] Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule …. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. …

65. The respondents describe the current application as an abuse of process. I am inclined to agree that it was inappropriate and ill-considered.

65.1 The application was instituted whilst there was another application pending, seeking effectively the same relief on the same grounds (the respective founding affidavits are virtually identical).

65.2 It was manifestly not urgent, and yet brought on exceedingly tight timelines.

65.3 It ignores important issues as regards this Court's jurisdiction and the separation of powers and does not make out any case for the grant of relief in the face of these issues.

65.4 It makes allegations of a wide-ranging and general nature, unelaborated and unsupported by appropriate expert evidence.

65.5 Crucially, it was proceeded with in the face of the refusal of the Constitutional Court application, which the applicant failed to disclose to this Court prior to the hearing of the application.

66. For all of these reasons, I am of the view that this is a case where the

Biowatch principle should not apply, and the applicant should pay the respondents' costs on the scale as between party and party.

Order

67. The application is dismissed, with costs, including the costs consequent upon the employment of two counsel.

68. The applicant shall bear the costs of the rescission application instituted on 3 February 2022.

P. S. VAN ZYL
Acting judge of the High Court

HEARING DATE: 31 January 2022 & 4 February 2022

Appearances:

For the applicant: Counsel unknown, instructed by T. Victor and Associates Inc.

For the respondents: K. Pillay SC (with N. Mayosi), instructed by the State Attorney