



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 62/22

In the matter between:

MINISTER OF FINANCE

Applicant

and

**SAKELIGA NPC
(PREVIOUSLY KNOWN AS AFRIBUSINESS NPC)**

First Respondent

RULE OF LAW PROJECT

Second Respondent

ECONOMIC FREEDOM FIGHTERS

Third Respondent

Neutral citation: *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others* [2022] ZACC 17

Coram: Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ, Tshiqi J.

Judgment: Madlanga J (unanimous)

Decided on: 30 May 2022

ORDER

On application for direct access to the Constitutional Court of South Africa on an urgent basis:

The application is dismissed with costs, including costs of two counsel.

JUDGMENT

MADLANGA J (Jafta J, Khampepe J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

[1] This matter was decided without an oral hearing. The crisp question for determination is whether an order given by this Court in *Afribusiness*¹ is susceptible to variation; does the order in any way lack clarity? By a majority decision, this Court – in *Afribusiness* – dismissed an appeal by the present applicant, the Minister of Finance (Minister), against a judgment of the Supreme Court of Appeal. In its judgment, the Supreme Court of Appeal had declared invalid the Preferential Procurement Regulations.² These are Regulations that were made by the Minister in terms of the Preferential Procurement Policy Framework Act.³ The Supreme Court of Appeal suspended the declaration of invalidity for 12 months to enable corrective action.

[2] The Minister now brings an urgent application for direct access seeking a variation of the order that dismissed his appeal. He claims that this Court’s order is ambiguous or lacks clarity and is thus susceptible to variation. According to the Minister, the only thing that gives rise to the perceived problem with the order is a footnote in the minority judgment.⁴ Here is how the problem is said to arise. With reference to the Supreme Court of Appeal’s 12-month suspension of the declaration of

¹ *Minister of Finance v Afribusiness* [2022] ZACC 4; [2022] JOL 52147 (CC) (*Afribusiness*).

² Preferential Procurement Regulations, GN R32 GG 40553, 20 January 2017.

³ 5 of 2000.

⁴ *Afribusiness* above n 1 at fn 28.

invalidity, the footnote says “[t]he period of suspension expired on 2 November 2021”. This date is the end of 12 months from the date of the Supreme Court of Appeal’s order. The Minister observes that the statement in the footnote was “very respectfully in conflict with section 18(1) of the Superior Courts Act”.⁵ The Minister correctly highlights the fact that this Court’s majority judgment does not respond to the content of the footnote. He says “the incorrect statement [in the footnote] is the only articulation of this . . . Court’s position on the suspension period granted by the [Supreme Court of Appeal]”. The Minister concludes that the majority’s omission to address the content of the footnote has resulted in lack of clarity. If I understand the Minister correctly, he suggests that this is exacerbated by the fact that this Court’s order simply says the appeal is dismissed⁶ and “does not purport to set aside, replace, substitute or in any way vary the order of the [Supreme Court of Appeal]”.

[3] The confusion gives rise to three possible interpretations of this Court’s order, so claims the Minister. First, the Minister submits that in terms of section 18(1) of the Superior Courts Act the operation of the order of the Supreme Court of Appeal was suspended from the date the Minister lodged an application for leave to appeal to this Court on 23 November 2020. And the operation of that order started running again when this Court dismissed the appeal on 16 February 2022. Second, the order may be interpreted to mean that the Regulations were invalidated with immediate effect and prospectively from the date of dismissal of the appeal and without any suspension. Third, and in accordance with the doctrine of objective constitutional invalidity, the order may be interpreted to mean that the invalidation is with effect from the date the Regulations were promulgated.

[4] The Minister avers that each of these interpretations has support from different interest groups. He submits that, as a result of these three possible interpretations, this Court’s order is a candidate for variation in terms of rule 42(1)(b) of the

⁵ 10 of 2013.

⁶ This Court’s order simply said: “The appeal is dismissed with costs, including the costs of two counsel.”

Uniform Rules of Court, which is made applicable to this Court by rule 29 of this Court's Rules. Rule 42(1)(b) provides that "[t]he court may . . . *mero motu* [of its own accord] or upon application of any party affected, rescind or vary . . . an order or judgment in which there is an ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or omission".

[5] The Minister submits that the patent error, patent omission, and ambiguity that render this Court's order liable to variation in terms of rule 42(1)(b) consist in the content of the footnote referred to earlier.

[6] The Minister submits that variation is the "cleanest and least burdensome" way to correct the lack of clarity in the order. Variation would require only minor clerical edits to the order of the majority judgment and a correction of the footnote in the minority judgment.

[7] The first respondent, Sakeliga NPC (Sakeliga), which was cited by its previous name, Afribusiness NPC, in the application for leave to appeal to this Court, opposes the present application. The Rule of Law Project and the Economic Freedom Fighters, the second and third respondents, respectively, have opted not to enter the fray. Sakeliga contends that the application is an exercise in futility, an abuse of the process of this Court and a waste of judicial resources. It argues that there is no need for the relief sought by the Minister as the period of suspension is regulated by the Superior Courts Act. That is so because, when the order is looked at in the light of the Superior Courts Act, there is no ambiguity, error or omission. The argument continues that this is a matter of arithmetical calculation. According to Sakeliga, this entails a simple calculation in accordance with the provisions of section 18(1) of the Superior Courts Act. What the Minister is seeking to achieve is an amendment of the order of the Supreme Court of Appeal, which stands as a result of this Court's dismissal of the appeal. The Minister cannot get that outcome using rule 42, submits Sakeliga.

[8] Sakeliga also argues that footnote 28 of the minority judgment is of no consequence and cannot affect the majority judgment.

[9] What must I make of these submissions?

[10] The application does warrant direct access. *Zuma* tells us that it would be inappropriate for any other court to entertain an application in terms of rule 42 pertaining to an order made by this Court.⁷

[11] Coming to the merits, the springboard of this application is the perceived confusion caused by the content of footnote 28 of the minority judgment. The majority judgment opens by clearly stating what it agrees with in the minority judgment.⁸ That does not include the content of footnote 28. In any event, a minority judgment is just that. Unless parts of it have been adopted either expressly or impliedly, I do not understand how it can affect the meaning of an order granted by the majority. The footnote has certainly not been adopted expressly. Nor do I see a basis for an argument that it has been adopted impliedly. It is worth noting that the Minister says the majority judgment is “silent” on the content of the footnote. There is no basis whatsoever for suggesting that the majority judgment adopted the content of footnote 28 of the minority judgment. Therefore, the footnote could not have given rise to any confusion in this Court’s order.

[12] Crucially, the Minister is aware of the import of section 18(1) of the Superior Courts Act. He says in terms of this section the operation of the order of the Supreme Court of Appeal was suspended from the date the Minister lodged an application for leave to appeal to this Court on 23 November 2020. The law is, and has always been, clear on the issue. In *Ntlemeza* the Supreme Court of Appeal traces the

⁷ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Council for the Advancement of the South African Constitution and Democracy in Action as Amicus Curiae)* [2021] ZACC 28; 2021 JDR 2069 (CC); 2021 (11) BCLR 1263 (CC) at para 49.

⁸ *Afribusines* above n 1 at para 96.

law from the common law position before any statutory intervention.⁹ It quotes *South Cape Corporation*, which held:

“Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland . . . it is today the accepted common law rule of practice . . . that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.”¹⁰

[13] Plainly, execution of a judgment means giving effect to the judgment. And reference to “execution of the judgment in any other manner *appropriate to the nature of the judgment* appealed from”¹¹ gives a wide meaning to the word “execution”. We should not be led to think it relates only to execution under a writ of execution. Put simply, it means giving effect to the order, whatever its nature. So, the suspension of the execution of a judgment means “the judgment cannot be carried out and no effect can be given thereto”.¹² And that applies to whatever it is that is required to be done or has to take place in terms of the judgment.

[14] In what effectively amounted to “a restatement of the common law”, rule 49(11) of the Uniform Rules of Court provided:

“Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and

⁹ *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) at para 19.

¹⁰ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545B.

¹¹ Emphasis added.

¹² *South Cape Corporation* above n 10 at 544H.

execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.”

This rule has since been repealed.¹³

[15] The position is now governed by section 18(1) of the Superior Courts Act. This section provides:

“Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.”¹⁴

This too is in line with the common law position which has already been explained. And “operation” which the section couples with “execution” (“operation and execution”) does not alter the legal position stated above.

[16] Based on this clear statutory position, the operation and execution of the order of the Supreme Court of Appeal was halted. In practical terms, what happened immediately after that order was granted was that the countdown on the 12-month period of suspension began. But the countdown was halted on the 21st day by the lodgment of the application for leave to appeal in this Court.¹⁵ Because section 18(1) suspends the operation and execution of a judgment “pending the decision of the

¹³ Rule 49(11) was repealed by means of GN R317 GG 38694, 17 April 2015.

¹⁴ Section 18(2) and (3) provides:

“(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”

¹⁵ The Supreme Court of Appeal made the order of invalidation on 2 November 2020, and the application for leave to appeal to this Court was lodged on 23 November 2020.

application [for leave to appeal] or appeal”, the countdown resumed after this Court dismissed the appeal on 16 February 2022. Unsurprisingly, the Minister does realise that this is how the order ought to be interpreted. He says he is seeking confirmation that—

“the [Supreme Court of Appeal’s] order as a whole was suspended when the Minister applied for leave to appeal to this Court; that the order of suspension by the [Supreme Court of Appeal], once suspended by the application for leave to appeal, did not take effect until this Court dismissed the Minister’s appeal; and that the declaration of invalidity as ordered by the [Supreme Court of Appeal] remains suspended and the period of suspension commenced running again after this Court dismissed the Minister’s appeal on 16 February 2022.”

For the reasons I have given, there is no need for this clear legal position to be confirmed.

[17] As at 16 February 2022, of the 12-month period of suspension, less than a month had elapsed.

[18] With the legal position as plain as it is, I do not understand how the confusion we hear about from the Minister could have arisen. It could have arisen only if the Minister and the interest groups to which he refers interpreted the order without due regard to the law; that is, the provisions of section 18(1). Of course, there is no justification for interpreting the order in a vacuum.

[19] In sum, there is no substance in the Minister’s submissions.

[20] The Director-General of the National Treasury, who is the deponent to the Minister’s founding affidavit, informs this Court that subsequent to the dismissal of the appeal and as a result of the perceived problem with the order, he sent out a communication, the effect of which was to halt government procurement pending the

outcome of the present application. Obviously, this decision was the result of a misunderstanding of the law. It has nothing to do with the order of this Court.

[21] The Minister sought several alternative remedies in the event of the variation order prayed for not being granted.¹⁶ The springboard for all the relief sought – main and alternative – is the idea that there is something wrong with this Court’s order. Well, there is not. That must mean the alternative relief must also fail.

¹⁶ The notice of motion reads:

“Take notice that the applicant (the Minister) hereby applies in terms of rules 12(1), 18 and 29 of the Rules of the Constitutional Court, read with rule 42 of the Uniform Rules of Court and (to the extent necessary) section 167(6)(a) of the Constitution, for an order:

1. Enrolling this application as an urgent application and, insofar as may be necessary, dispensing with the procedures prescribed by the Rules of the Constitutional Court, and directing that the application be heard as one of urgency under rule 12(1) thereof;
2. Granting the Minister direct access to the Constitutional Court in terms of section 167(6)(a) of the Constitution.
3. Varying the order of the Constitutional Court in the matter CCT 279/20 (main case) to make clear:
 - 3.1. that the operation of the period of suspension in paragraph 2(a) of the order of the Supreme Court of Appeal was suspended pending the Constitutional Court’s decision of the appeal in the main case, and recommenced from 16 February 2022, being the date of the Constitutional Court’s order; and
 - 3.2. that tender processes conducted by organs of state under the Preferential Procurement Regulations, 2017, are not affected until the expiration of the suspension period,

and by—

 - 3.2.1 inserting appropriate sub-paragraphs to the order of the majority judgment of Madlanga J; and
 - 3.2.2 to the extent necessary, excising the second sentence of footnote 28 from the minority judgment of Mhlantla J.
4. In the *alternative* to, or together with, the relief sought in paragraph 3 and 4 above, granting declaratory relief to the effect that the import of the judgment and order of the Constitutional Court in the main case is what is set out in 3.1 and 3.2 above.
5. In the *further alternative* to the relief sought in paragraphs 3 and 4 above, granting declaratory relief to the effect that the import of the judgment and order of the Constitutional Court in the main case is what is set out in 3.1 and 3.2 above.
6. In the *further alternative* to paragraphs 3, 4 and 5 above, by declaring that the declaration of invalidity shall operate prospectively only from the date of this Court’s judgment.
7. Ordering any of the respondents who oppose the application to pay the Minister’s costs, including the costs of two counsel, on a joint and several basis with any other respondent who opposed the application.
8. Granting further and/or alternative relief.”

Order

[22] Consequently, the following order is made:

The application is dismissed with costs, including costs of two counsel.

For the Applicant:

N Maenetje SC and M Stubbs instructed
by the State Attorney, Pretoria

For the First Respondent:

T Strydom SC and J P Slabbert
instructed by Kriek Wassenaar and
Venter Incorporated