CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 102/22 *Mncwabe v President of South Africa and Others;* CCT 120/22 *Mathenjwa v President of South Africa and Others*

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 24 August 2023, at 14h00, the Constitutional Court handed down judgment in two applications for direct leave to appeal against a judgment of the High Court of South Africa, Gauteng Division, Johannesburg. The applications were heard together, in accordance with directions issued by the Chief Justice on 18 August 2022.

The applications were brought separately by two litigants: Mr Ron Simphiwe Mncwabe, an admitted advocate, employed as an Additional Magistrate at Tsakane Magistrates' Court, Ekurhuleni (Mncwabe application), and Mr Khulekani Raymond Mathenjwa, an admitted advocate and the Senior Deputy Director of Public Prosecutions in the NPA, Gauteng Local Division (Mathenjwa application). The common respondents were: the President of the Republic of South Africa, the former Minister of Justice and Correctional Services and the National Director of Public Prosecutions (NDPP). In the Mncwabe application, the fourth respondent is Mr Livingstone Mzukisi Sakata, current DPP of the Northern Cape. In the Mathenjwa application, the fourth respondent is Mr Shaun Abrahams, a former NDPP. The fifth respondent is the NPA. The sixth respondent is Ms Nkebe Rebecca Kanyane, the current DPP of Mpumalanga.

Both applications concerned President Ramaphosa's decision to reverse the appointment of five DPPs. These appointments were recorded in a series of Presidential Minutes, duly signed by former President Zuma in the final months of his tenure. The central question in both matters was this: was President Ramaphosa entitled to "reverse" former President Zuma's decision, even after this decision was communicated to the appointees? Put differently, was President Ramaphosa *functus officio*? The High Court answered the question in the negative, finding that the appointments were not finalised, and therefore, President Ramaphosa was at liberty to reverse them. The first judgment, for significantly different reasons, took the same view.

The first judgment, which held the majority, was prepared by Majiedt J (Mathopo J, Kollapen J, Potterill AJ, Rogers J and Theron J concurring). It held that the Court has jurisdiction to entertain the matter and that it is in the interests of justice to hear the application. The first judgment views the issues as follows. The first issue concerned the finality of the appointment of a DPP. Related to this issue, was the correctness of the High Court's finding that "public notification" is a prerequisite for all DPP appointments. The second issue concerns President Ramaphosa's decision to revoke the appointments reflected in the Minutes signed

by former President Zuma. Here, the Court needed to determine whether these appointments were final in law, and consequently, whether President Ramaphosa was barred from reversing them. The third issue was whether President Ramaphosa's decision constituted administrative action, reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The final issue concerned costs.

On the first issue, the first judgment emphasised the importance of the *functus officio* doctrine in upholding the integrity and reliability of official decisions. This doctrine provides that once a decision is made, it cannot be reversed or otherwise altered by the decision-maker. The first judgment found that the principle was misapplied by the High Court, which erroneously concluded that the appointment of a DPP must be announced in the "public domain" before it has legal effect. Instead, private notification is sufficient, as the importance of a position does not "in and of itself […] establish a public notification requirement." On this score, the first judgment found that private notification (to the appointee) would render the appointment final and bind the decision-maker to their decision.

With this general principle established, the first judgment turned to the second issue before it: were the applicants (privately) notified about their appointments? Here, it recognised that it was common cause that Mr Abrahams had informed the applicants of their appointments without any specific instruction to do so. Accordingly, the finality of the appointments would depend on whether Mr Abrahams had the requisite authority to notify the candidates. The first judgment drew a distinction between "original power and conferred authority to notify". Original power would refer to powers Mr Abrahams possessed naturally, as a result of his office as NDPP. These would include the implied powers required for the ordinary execution of his duties. Conferred authority, the first judgment explains, refers to powers Mr Abrahams could not exercise himself, but would need to have been granted to him by former President Zuma. The first judgment found that Mr Abrahams had no original power to inform the applicants. Instead, it found that Mr Abrahams, at best, held the mistaken view that, as NDPP, he was authorised to finalise the appointment. The first judgment also highlighted a number of key omissions in Mr Abrahams' affidavit, in particular, his failure to assert any instruction to transmit news of the appointments to the appointees. In addition, the first judgment emphasised the "irreconcilable differences and inconsistencies" between Mr Abrahams' affidavit and the affidavits deposed by the Director-General on behalf of the President.

Faced with these inconsistencies, the first judgment relied on the maxim *omnia praesumuntur rite esse acta* (it is generally presumed that acts or events which occur regularly or routinely have followed a regular or routine course). It found that the maxim cannot apply to the impugned appointments, as there was insufficient evidence for the Court to rely on. In light of the dearth of evidence, the first judgment applied the *Plascon-Evans* approach to find that absent a basis to reject the President's version of events "as palpably false, far-fetched, or clearly untenable", the applicants failed to discharge their burden of proof, and therefore, justify an order in their favour. It noted that the second judgment comes to a different view on this issue, but found that the second judgment "uncritically" endorsed Mr Abrahams' account of events, and as a result, errs in its evaluation of the burden of proof.

On the third issue, the applicability of PAJA, the first judgment found the applicants' arguments untenable in law. It reasoned that a President's decision to appoint a DPP is a clear case of executive action "that speaks directly to the […] wider administration of the criminal justice system in the country." Accordingly, President Ramaphosa's decision was not subject to review under PAJA. However, the first judgment noted that the President's conduct must still meet the standards of legality and rationality. It found that President Ramaphosa still had to act rationally when he appointed Ms Kanyane and Mr Sakata as DPPs, but was under no obligation to prioritise or seek the views of President Zuma's preferred appointees when making this decision. The first judgment found that on the evidence, President Ramaphosa's decisions did pass the tests of legality and rationality.

Lastly, on the question of costs, the first judgment set aside the High Court's cost order, since the litigants were pursuing their constitutional rights, and were entitled to *Biowatch* protection.

In the second judgment, the Chief Justice referred to the affidavit of Dr Lubisi who was the Director-General in the Presidency at the time when Mr Mathenjwa and Mr Mncwabe were appointed by former President Zuma. The Chief Justice pointed out that Dr Lubisi set out in his affidavit the procedure for the implementation of a President's decision that has been entered in a Presidential Minute. The Chief Justice drew attention to the fact that Dr Lubisi said that in terms of that implementation procedure, "once the President has signed the Presidential Minute, the Presidential Minute is routed back to [the Legal and Executive Services] which will send it back to the line function Department for the implementation of the President's decision by public announcement and/or appointment letter." The Chief Justice said that this is what happened with the Presidential Minutes which contained former President Zuma's decisions appointing Mr Mncwabe and Mr Mathenjwa. The Chief Justice pointed out that the line function Department in this context would be the NPA. Mr Mathenjwa's and Mr Mncwabe's evidence was to the same effect. The first judgment did not dispute this.

In the light of Dr Lubisi's evidence, the Chief Justice concluded that the implementation procedure for Presidential decisions contained in Presidential Minutes required or authorised the NPA to implement former President Zuma's decisions to appoint Mr Mathenjwa and Mr Mncwabe and this entailed that the NPA should inform them of their appointment. He held that, as the Head of the NPA, Mr Abrahams was, therefore, authorised and obliged by the implementation procedure to inform Mr Mncwabe and Mr Mathenjwa of their appointments and that made their appointments final.

Zondo CJ points out in his judgment that the first judgment did not deal with the meaning of the implementation procedure of Presidential decisions contained in Presidential Minutes, nor did it suggest a different meaning for implementation procedure. Zondo CJ concluded that the first respondent, accordingly, had no power to withdraw or revoke the appointments and his decisions to withdraw or revoke the appointments was unlawful and invalid. The Chief Justice would have upheld the appeal and set aside the first respondent's decisions to revoke the appointments. He held that the first respondent had no power to appoint Mr Sakata and Ms Kanyane in Mr Mncwabe's and Mr Mathenjwa's posts because these were not vacant. In the result, the Chief Justice would have ordered that Mr Mathenjwa and Mr Mncwabe be allowed to take up their respective positions in the Mpumalanga Province and the Northern Cape Province. He would have ordered the first respondent to pay the applicants' costs.