CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 201/14

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
MINISTER IN THE PRESIDENCY	Second Applicant
DIRECTOR-GENERAL IN THE PRESIDENCY	Third Applicant
MINISTER OF HEALTH	Fourth Applicant
DIRECTOR-GENERAL OF THE DEPARTMENT OF HEALTH	Fifth Applicant

and

SOUTH AFRICAN DENTAL ASSOCIATION	First Respondent
HOSPITAL ASSOCIATION OF SOUTH AFRICA	Second Respondent

Neutral citation:	*President of the Republic of South Africa and Others v South African Dental Association and Another* [2015] ZACC 2
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J
Decided on:	27 January 2015
Summary:	Section 167(6) of the Constitution — direct access — application to declare invalid and set aside President's Proclamation — review of exercise of public power

National Health Act 61 of 2003 — sections 36 to 40 — decision to bring provisions into operation premature — rationality review

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ORDER

On application for direct access:

1. Direct access is granted.
2. Proclamation 21 of 2014 is declared invalid and set aside.
3. There is no order as to costs.

JUDGMENT

THE COURT:

Introduction

[1] This is an application for direct access in terms of section 167(6)(a) of the Constitution.[1] The matter concerns the premature promulgation of a

[1] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
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> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

Rule 18 of the Rules of the Constitutional Court provides:

> "(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
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> (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
>
> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;

proclamation bringing certain sections of the National Health Act[2] into operation.

[2] The President, the Minister in the Presidency, the Director-General in the Presidency, the Minister of Health and the Director-General of the Department of Health (the applicants) maintain that the President's decision to bring the provisions into operation was made in error and was therefore irrational in law. They seek an order declaring the Proclamation[3] invalid and setting it aside. The South African Dental Association (SADA) and the Hospital Association of South Africa (HASA) are cited as respondents in this matter. They support the relief sought by the President. Indeed, it was SADA who brought the alarming situation that necessitates this application to the attention of the Presidency.

(b) the nature of the relief sought and the grounds upon which such relief is based;

(c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,

(d) how such evidence should be adduced and conflicts of fact resolved.

(3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.

(4) After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—

(a) a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or

(b) a direction indicating that no written submissions or affidavits need be filed.

(5) Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."

[2] 61 of 2003.

[3] Proclamation by the President of the Republic of South Africa 21 of 2014: Commencement of Certain Sections of the National Health Act 61 of 2003, GN 21 *GG* 37501, 31 March 2014 (Proclamation).

Factual and legal background

[3] On 21 March 2014 the President signed the Proclamation pursuant to section 94 of the National Health Act.[4] As its only purpose, the Proclamation brought sections 36, 37, 38, 39 and 40 of the National Health Act into operation on 1 April 2014. Taken together, these sections criminalise providing health services without holding a certificate of need. The National Health Act authorises the Minister of Health (the Minister) to prescribe regulations regarding applications for, and the granting of, certificates of need.[5] These regulations are not yet in place.

[4] The consequence is that health service providers in South Africa are currently engaging in criminal conduct, as no individual or entity that provides health services is in a position to obtain the required certificate of need as long as the regulations have not taken effect.

[4] Section 94 provides that the National Health Act "takes effect on a date fixed by the President by proclamation in the Gazette". See also section 81 of the Constitution.

[5] Section 1 defines "health services" as—

> "(a) health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution;
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> (b) basic nutrition and basic health care services contemplated in section 28(1)(c) of the Constitution;
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> (c) medical treatment contemplated in section 35(2)(e) of the Constitution; and
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> (d) municipal health services."

Section 36(1) proscribes the provision of health services absent the certificate of need. Subsection 2 thereof directs applications for this certificate to the Director-General "in the prescribed manner" subject to a "prescribed fee". Section 37 provides that a certificate of need will be valid for a "prescribed period". And most importantly, section 39(1) authorises the Minister to prescribe, through regulations, the requirements for the issuing of a certificate of need to individuals and various categories of entities. Section 39(2) empowers the Minister, also through regulations, to prescribe fees and other processes in relation to the application for certificates of need. Lastly, section 40 makes non-compliance with section 36(1) a criminal offence accompanied by criminal sanctions. It follows that section 40 of the Act is currently enforceable against all health service providers.

[5] The President approached this Court directly to rectify this.[6] He submits that the regulations, which do not yet exist, form an essential part of the legislative scheme.

[6] He submits that the untimely effect of the Proclamation was unintentional since it was promulgated in error. According to the President, he acted in good faith when he determined a date for the statutory provisions to take effect, but was led astray by his advisors' mistaken counsel. Had he been aware of the correct position, namely that the necessary regulations were still pending, he would have selected a later date. Thus the Proclamation should be reversed to allow the consultative process to run its course. Since the provision of health services is now proscribed, the issuing of the Proclamation was objectively irrational as a matter of law.

[7] The President also maintains that the Proclamation is at odds with sections 1, 7, 8, 11, 27, 28 and 195 of the Constitution.[7] Accordingly, he asks this Court to declare the Proclamation invalid in terms of section 172(1)(a) of the Constitution.[8]

[8] SADA and HASA agree that this Court is the proper forum to grant the relief and that the Proclamation should be declared invalid and set aside.

Direct access

[6] The third applicant, the Director-General in the Presidency, deposed to the founding affidavit to the application for direct access on behalf of the President and the other applicants. As the President is the first applicant, this judgment will refer to the President when it is detailing the submissions of the applicants.

[7] Section 1(c) of the Constitution provides for the supremacy of the Constitution and the rule of law. Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8 provides that the Bill of Rights is applicable to all branches of government. Section 11 guarantees everyone the right to life. Sections 27 and 28 enshrine the right to access to health care for adults and the right to basic health care for children. Section 195 sets out the basic values and principles governing public administration including transparency and accountability.

[8] Section 172(1)(a) provides: "When deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

[9] This Court is generally reluctant to sit as a court of first and final instance.[9] Direct access is granted only if it is in the interests of justice to do so.[10] In determining whether direct access is in the interests of justice, a range of factors is relevant, including—

> "the importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute of fact may arise in the case, the possibility of obtaining relief in another court, and time and costs that may be saved by coming directly to this Court."[11]

[10] The matter raises an issue of constitutional importance – the provision of health services. The provisions brought into force by the Proclamation contemplate a legislative scheme detailed in regulations that are non-existent and consequently criminalise the provision of health services. There are no disputes of fact or contested legal averments that necessitate the matter first being heard by the High Court and the Supreme Court of Appeal. This Court is the only court that can finally and effectively dispose of it.[12] The legislative process required for Parliament to address the consequences of this Proclamation would be lengthy and burdensome and may fail to expeditiously address the precarious position that the health services industry finds itself in.[13] There is no reason to believe that this

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[9] *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 14.

[10] *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 12.

[11] Id.

[12] Section 172(2)(a) of the Constitution provides that the—

> "Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or *any conduct of the President*, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court." (Emphasis added.)

[13] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) this Court noted at para 91:

> "The President is answerable to Parliament and Parliament has the power to correct the decision. But Parliament was not in session at the time because of the pending general election, and considerable cost and inconvenience would have been occasioned by calling

Court's intervention would upset the legislative process or programme or infringe the separation of powers. The impugned provisions are intended to come into force only once the regulations are in place. It is in the interests of justice that application for direct access be granted.

Merits

[11] At stake is the exercise of public power in accordance with the Constitution and the rule of law.[14] The President's issuing of the Proclamation bringing into operation sections 36 to 40 of the National Health Act, before the issuing of regulations that are essential to the operation of these sections, has led to an untenable and unintended situation. Health service providers are practising without a certificate of need. And that certificate cannot be issued without the promulgation of the necessary regulations. This renders the provision of health services unlawful. Though, it seems, no criminal prosecutions have been brought, the position is clearly undesirable. South African health service providers may be inhibited or discouraged from providing an essential service at the risk of criminal sanction for doing so.

[12] The Proclamation was issued in error and the President submits that this exercise of his public power was *bona fide* but irrational. He is unable to withdraw the Proclamation because the date for its commencement has long since passed.[15] There is no mechanism contained in the National Health Act

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Parliament together on the eve of the election for the sole purpose of reversing the President's decision. The fact that another course might possibly have been open to the applicants in the present case does not mean that the President's decision was not justiciable. There might be cases in which a court would decline to intervene in matters that are properly matters to be dealt with by the Legislature, but this is not such a case."

A similar impediment to Parliamentary involvement was not present in this case. However, the Court did not find that only Parliament may be called upon to address issues such as these. In this case, the Court is satisfied that the facts justify judicial review.

[14] Id at para 20.

[15] *Kruger v President of Republic of South Africa and Others* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) at para 61. In addition, this Court held at para 63 that—

itself to remedy the consequences of the Proclamation. Even though the Proclamation was issued in error, it remains in force and has legal effect. It is an inevitable consequence of the rule of law that the Proclamation may not be ignored until it is set aside.[16] This Court is therefore called upon to consider and set aside the Proclamation.[17]

[13] In *Pharmaceutical Manufacturers* this Court held that the President's decision to bring an Act into force is reviewable and the standard is that of rationality.[18] This Court stated:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short

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"the President could lawfully have withdrawn the First Proclamation once he had realised his mistake as long as he did so in unambiguous terms, and before 31 July 2006. It would impose an undue burden on the President to have required him to apply to court to have the incorrect proclamation set aside even when the proclamation had not yet come into force."

[16] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 103. See also *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

[17] See also *Kirland* id at para 90, where this Court held that the appropriate remedy was judicial review.

[18] This Court held at para 79:

"This is one of those difficult cases. The power is derived from legislation and is close to the administrative process. In my view, however, the decision to bring the law into operation did not constitute administrative action. When he purported to exercise the power the President was neither making the law, nor administering it. Parliament had made the law, and the Executive would administer it once it had been brought into force. The power vested in the President thus lies between the law-making process and the administrative process. The exercise of that power requires a political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation which comes into force only when the power is exercised. In substance the exercise of the power is closer to the legislative process than the administrative process. If regard is had to the nature and subject-matter of the power, and the considerations referred to above, it would be wrong to characterise the President's decision to bring the law into operation as administrative action within the meaning of item 23(2)(b) of the Sixth Schedule of the Constitution. It was, however, the exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution insofar as they may be applicable to the exercise of such power." (Footnote omitted.)

of the standards demanded by our Constitution for such action."[19] (Footnote omitted.)

[14] This Court must therefore determine whether the President's decision is rationally related to the purpose for which the power was given. This is an objective enquiry, unaffected by any good intentions the President may have had.[20]

[15] The purpose of the President's power to bring portions of the National Health Act into operation is to achieve an orderly and expeditious implementation of a national regulatory scheme for health services.[21] Clearly the decision to issue the Proclamation before there was any mechanism in place to address applications for certificates of need, thereby rendering the provision of health services a criminal offence, was not rationally connected to this purpose (or any other governmental objective).

[16] This mirrors the finding of this Court in *Pharmaceutical Manufacturers*. There, the President had prematurely brought into operation an Act regulating the manufacture and sale of medicines before the appropriate regulatory infrastructure was in place.[22]

[17] Accordingly, the President's decision was irrational and therefore invalid. The Proclamation must be set aside.

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[19] *Pharmaceutical Manufacturers* above n 13 at para 85.

[20] Id at para 86.

[21] In terms of section 79(1) of the Constitution:

> "The President must either assent to and sign a Bill passed in terms of [Chapter 4 of the Constitution] or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration."

In terms of section 81:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

[22] *Pharmaceutical Manufacturers* above n 13 at para 87.

Order

[18] The following order is made:

1. Direct access is granted.

2. Proclamation 21 of 2014 is declared invalid and set aside.

3. There is no order as to costs.

For the Applicants:	State Attorney, Cape Town.
For the Respondents:	Werksmans Attorneys.