

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/11  
[2011] ZACC 10

In the matter between:

HBR (HOLA BON RENAISSANCE) FOUNDATION

Applicant

and

PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA

First Respondent

MINISTER FOR PROVINCIAL AND LOCAL  
GOVERNMENT

Second Respondent

MINISTER FOR JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT

Third Respondent

PREMIER OF GAUTENG

Fourth Respondent

MEC FOR LOCAL GOVERNMENT, GAUTENG

Fifth Respondent

SPEAKER, GAUTENG PROVINCIAL LEGISLATURE

Sixth Respondent

MUNICIPAL DEMARCATION BOARD

Seventh Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Eighth Respondent

CHAIRPERSON OF THE NATIONAL  
COUNCIL OF PROVINCES

Ninth Respondent

GREATER CITY OF JOHANNESBURG  
MUNICIPALITY

Tenth Respondent

ELECTORAL COMMISSION

Eleventh Respondent

Decided on : 31 March 2011

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JUDGMENT

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THE COURT:

*Introduction*

[1] This is an application for direct access. The applicant sought leave to have the matter heard on an urgent basis. It further sought to interdict the President from announcing the date for local government elections, an order directing the respondents to establish a tribunal to investigate the removal of members of the Municipal Demarcation Board (Board) from office and that the Board should consider its application to have a local municipality established for Soweto.<sup>1</sup>

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<sup>1</sup> In papers drawn by a layperson, the applicant sought an order in the following terms:

- “(a) Granting the urgency of the application in terms of the rules of the Constitutional Court Part VI, rules 12.
- (b) Granting the applicants leave to approach this court by way of direct access in terms of section 167(6)(a) of the constitution.
- (c) Interdict the Honourable President Jacob Gedleyihlekisa Zuma State of the national address from announcing the date of the local government elections. In terms of the rules of the constitutional court, Part III, rule 5(1). The authority responsible for the executive or administrative Act has violated the constitution of RSA (Act No 108 of 1996), the Municipal demarcation Act (Act No 27 of 1998) and the Municipal Structures Act (Act 108 of 1998) hereby referred to is the municipal demarcation board in join proceeding with the head of State.
- (d) Setting up an independent tribunal for thoroughly investigate and make a finding on the matter that includes the removal of municipal demarcation board members. In term of the demarcation process that is governed by three different pieces of legislation which all relate to each other. These are: the constitution of RSA (Act No 108 of 1996), the Municipal demarcation Act (Act No 27 of 1998) and the Municipal Structures Act (Act 108 of 1998).
- (e) The municipal demarcation board reinstate its suspended activity that of which is its core mandate of determining municipal boundaries in accordance with the municipal demarcation Act (Act No 27 of 1998) with immediate effect that fast track the process of Soweto to be a Municipal.
- (f) Further and/or alternative relief as the above Honourable Court may grant.”

[2] The papers were lodged with the Registrar of this Court in the afternoon of 9 February 2011. The matter was set down for hearing on 10 February 2011 at 08h15. After hearing the parties, this Court issued an order<sup>2</sup> dismissing the relief relating to urgency and the interdict restraining the President from announcing the date for the local government elections in the State of the Nation Address, which was to be delivered in the evening of 10 February 2011.

[3] The determination of the balance of the relief was deferred to a later date. The order mentioned that directions for the further conduct of the case would be issued in due course. On 28 February 2011 the Chief Justice issued directions that informed the parties that it would not be necessary for them to file written submissions or further affidavits in the matter.

[4] The Court has decided to dispose of this matter on the papers filed by the applicant.<sup>3</sup> This judgment, therefore, addresses the balance of the relief, the determination of which was deferred on 10 February 2011.

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<sup>2</sup> The Court made the following order:

- “1. The relief sought in prayer (a) of the notice of motion to hear this application as a matter of urgency is refused.
2. The application for an order interdicting the President of the Republic of South Africa from announcing the date of the local government elections in his State of the Nation address today as set out in prayer (c) of the applicant’s notice of motion is dismissed.
3. The relief sought by the applicant in prayers (b), (d) and (e) of the notice of motion is postponed.
4. The costs of today’s hearing are reserved.
5. Further directions on the further conduct of this case will be issued.”

<sup>3</sup> Rule 18(5) of the Rules of the Constitutional Court empowers the Court to summarily dispose of an application for direct access. It provides:

- “(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

*Background*

[5] The applicant is a non-profit voluntary association whose objective is to promote and encourage transformation of communities in the areas where it operates. On 15 October 2010 it applied to the Board, seeking the establishment of a local municipality for Soweto. Presently, Soweto forms part of the municipal area of the City of Johannesburg (City). The applicant further sought that the boundaries of the City be redetermined.

[6] In reply to the application, the Board pointed out that changes to municipal boundaries were suspended in September 2008 and that decisions on requests for redetermination of boundaries will be taken after the local government elections in 2011. However, the Board indicated that it was willing to consider the request by the applicant for redetermination of the City's boundaries if it was submitted by the correct body. It drew the attention of the applicant to section 22<sup>4</sup> of the Local Government: Municipal Demarcation Act<sup>5</sup> (Act).

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(3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."

<sup>4</sup> Section 22(1)(a) of the Local Government: Municipal Demarcation Act provides:

- "(1) The Board performs the function mentioned in section 21(1)–
- (a) (i) on its own initiative;
  - (ii) on request by the Minister or a MEC for local government; or
  - (iii) on request by a municipality with the concurrence of any other municipality affected by the proposed determination or redetermination".

<sup>5</sup> Act 27 of 1998.

[7] Section 22 of the Act stipulates that the Board may redetermine municipal boundaries on its own initiative or on request by the Minister responsible for local government or a provincial MEC for local government or a municipality with the concurrence of any other municipality affected by the proposed redetermination. In the light of this requirement, the Board advised the applicant to submit its request through either the City or the MEC for Local Government in the Province of Gauteng.

[8] It is apparent from the papers that the applicant was unhappy with the Board's response which, in its view, had violated the Constitution and the relevant legislation. The applicant alleges that it approached the City and the MEC, both of whom informed it that matters relating to changes of municipal boundaries were dealt with at national level. It was aggrieved that the Board declined to deal with the request on the Board's own initiative. The applicant demanded the resignation of the entire Board within 24 hours. The demand was communicated through a letter dated 9 November 2010.

[9] When members of the Board did not resign, the applicant addressed a letter to the President, demanding the removal of the Board from office. It gave the President 14 days within which to carry out its demand or face litigation in this Court. The applicant's letter of demand is dated 24 November 2010. On 3 December 2010 the applicant dispatched a reminder to the President, appealing for a response within 48 hours. It alleges that its letters did not elicit a response from the President.

[10] As mentioned earlier, the present application was launched on 9 February 2011, the day preceding the date on which the State of the Nation Address was to be delivered. The applicant cited the President of the Republic of South Africa; the Minister for Provincial and Local Government; the Minister for Justice and Constitutional Development; the Premier of Gauteng; the MEC for Local Government, Gauteng; the Speaker, Gauteng Provincial Legislature; the Municipal Demarcation Board; the Speaker of the National Assembly; the Chairperson of the National Council of Provinces; Greater City of Johannesburg Municipality and the Electoral Commission, as the first to eleventh respondents.

[11] With regard to the balance of the relief sought, the applicant asked for an order directing the respondents to set up an independent tribunal to investigate the removal of the Board from office. It also sought an order that a reconstituted Board be directed to consider its application to establish a local municipality for Soweto and redetermine the City's boundaries.

*Direct access*

[12] As this is an application for direct access contemplated in section 167(6)(a) of the Constitution,<sup>6</sup> it can be entertained only with leave of this Court and may be granted upon the applicant showing that it is in the interests of justice for the Court to

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<sup>6</sup> Section 167(6)(a) of the Constitution provides:

“(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with the leave of the Constitutional Court—  
(a) to bring a matter directly to the Constitutional Court.”

hear the matter. Applications like this are regulated by Rule 18 of this Court's Rules.<sup>7</sup> It requires the supporting affidavits filed by the applicant to set out, among other factors, the grounds on which it is contended that it is in the interests of justice for leave to be granted.

[13] It is now settled that direct access to this Court is permitted only in exceptional circumstances provided the interests of justice justify it.<sup>8</sup> The determination of where the interests of justice lie involves a consideration of a number of factors, including prospects of success on the merits of the case.<sup>9</sup>

[14] The affidavit filed by the applicant in support of the notice of motion does not comply with Rule 18 in that it does not set out any ground on which it is contended the interests of justice warrant a hearing of the matter. Nor does it give reasons why the High Court was not approached for the relief sought. In many cases this Court has stated that it is undesirable for it to sit as a court of first and last instance.<sup>10</sup>

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<sup>7</sup> Rule 18(1) and (2)(a) 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.
- (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.”

<sup>8</sup> *Bruce and Another v Fleecytx Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4 and *Satchwell v President of the Republic of South Africa and Another* [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6.

<sup>9</sup> See *Bruce* above n 8 at para 7; *Transvaal Agricultural Union v Minister of Land Affairs and Another* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 46.

<sup>10</sup> Most of those cases are collected in *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 footnote 18. In that case Ngcobo J said at paragraph 13:

[15] In addition, the applicant has failed to establish prospects of success for the grant of the relief sought. As mentioned above, this is one of the considerations that is taken into account in determining whether it is in the interests of justice to give leave. For it would be a futile exercise to grant leave for direct access where the application in respect of which leave is granted is doomed to fail.

[16] The establishment of a local municipality in Soweto lies at the heart of the applicant's request to the Board. It must precede any redetermination of the City's boundaries because without it there would be no reason warranting the change. But the Board, to which the request was directed, lacks authority to establish a municipality. The Constitution confers on provincial governments the power to establish municipalities.<sup>11</sup> The applicant's failure to submit the request to the Gauteng Provincial Government therefore stands in the way of granting the relief sought.

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“An important factor, which this Court has emphasised time and again, is the undesirability of this Court sitting both as the court of first and final instance in a matter in which other courts have jurisdiction. In terms of section 169 of the Constitution, the High Courts have constitutional jurisdiction, including the jurisdiction to make an order concerning the validity of a provision in an Act of Parliament or a provincial Act. The Constitution contemplates that such orders will be referred to this Court for confirmation. Effect must be given to this by ensuring that courts are not bypassed in matters that fall within their jurisdiction unless there are compelling reasons to do so.” (Footnotes omitted.)

<sup>11</sup> Section 155(6) of the Constitution provides:

- “(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—
  - (a) provide for the monitoring and support of local government in the province; and
  - (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.”



[17] Moreover, the Board's response to the applicant's request does not amount to misconduct, incapacity or incompetence, which are the necessary triggers for the appointment of an investigating tribunal.<sup>12</sup> In terms of section 13 of the Act, members of the Board can only be removed from office on the grounds of misconduct, incapacity or incompetence. The decision to remove must be based on a positive finding to that effect made by a tribunal appointed by the President.

[18] In this case it will be recalled that what the Board did was to point out to the applicant that section 22 of the Act identifies bodies which may submit requests to it for determination of municipal boundaries. The response triggers none of the bases for investigating and removing members of the Board from office. In all the circumstances the applicant has failed to make out a case for the relief sought. It follows that direct access should be refused.

[19] However, the fact that the application ought to be dismissed does not mean that the applicant, as the losing party, must pay the costs. The general rule for awarding costs in constitutional litigation between the State and a private party is that if the private party is unsuccessful it is not ordered to pay costs.<sup>13</sup> But if the private party is

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<sup>12</sup> Section 13(4) of the Local Government: Municipal Demarcation Act 27 of 1998 provides:

- “(4) (a) The President may remove a member of the Board from office, but only on the ground of misconduct, incapacity or incompetence.
- (b) A decision to remove such a member of the Board on the ground of misconduct or incompetence must be based on a finding to that effect by an investigating tribunal appointed by the President.
- (c) The President may suspend a member of the Board who is under investigation under paragraph (b).”

<sup>13</sup> *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21 and 43.

successful, a costs order is awarded against the State. We, therefore, consider that there should be no order as to costs.

*Order*

[20] The following order is made:

The application is dismissed.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J,  
Mogoeng J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J and Yacoob J

For the Applicant:

B Preddy Mothopeng, Chairperson,  
HBR (Hola Bon Renaissance)  
Foundation.

For the First to Sixth, Eighth  
and Ninth Respondents:

KG Lekabe instructed by the State  
Attorney, Johannesburg.

For the Seventh Respondent:

Advocate S Budlender instructed by  
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