

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 106/08
[2009] ZACC 2

SHANE VAN STRAATEN

Applicant

versus

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Third Respondent

Decided on : 24 February 2009

JUDGMENT

THE COURT:

[1] This is an urgent application for direct access in terms of section 167(4)(d) of the Constitution. That provision provides for the exclusive jurisdiction of this Court to decide the validity of a constitutional amendment.¹ The applicant, Mr van Straaten,

¹ Section 167 provides:

- “(1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.
- (2) A matter before the Constitutional Court must be heard by at least eight judges.
- (3) The Constitutional Court—
 - (a) is the highest court in all constitutional matters;
 - (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

who is representing himself, is seeking an order to declare the National Prosecuting Authority Amendment Bill, 2008 and the South African Police Service Amendment Bill, 2008 to be invalid. Together, these bills disband the Directorate of Special Operations unit, the so-called Scorpions, and, in its place, establish a new specialised unit to fight crime. The applicant has cited as respondents, the President, the Minister for Justice and Constitutional Development and the Speaker of the National Assembly. He alleges that Parliament has recently passed these two bills.

[2] The gravamen of his complaint is that some members of the ruling party (the African National Congress), who voted in favour of these two bills, should not have

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- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
 - (4) Only the Constitutional Court may—
 - (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
 - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
 - (c) decide applications envisaged in section 80 or 122;
 - (d) decide on the constitutionality of any amendment to the Constitution;
 - (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
 - (f) certify a provincial constitution in terms of section 144.
 - (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.
 - (6) 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—
 - (a) to bring a matter directly to the Constitutional Court; or
 - (b) to appeal directly to the Constitutional Court from any other court.
 - (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.”

participated in the consideration of these bills because these members were biased against the Scorpions. He alleges that these members were either under investigation by the Scorpions or were facing criminal charges. He also alleges that their conduct in voting on these bills was unlawful, unconstitutional and constituted corruption. He makes further allegations that are not necessary to repeat.

[3] The applicant appears to confuse these bills with a constitutional amendment. Hence the allegation that this matter is brought to this Court under section 167(4)(d) of the Constitution.

[4] The applicant is asking us to consider the constitutional validity of parliamentary bills. The jurisdiction of this Court to consider the constitutionality of a bill is limited to specific circumstances contemplated in section 167(4)(b). It may do so either at the instance of the President in terms of section 79(4)(b)² or at the instance

² Section 79 provides:

- “(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- (2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.
- (3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if—
 - (a) the President’s reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
 - (b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.
- (4) If, after reconsideration, a Bill fully accommodates the President’s reservations, the President must assent to and sign the Bill; if not, the President must either—
 - (a) assent to and sign the Bill; or
 - (b) refer it to the Constitutional Court for a decision on its constitutionality.

of a Premier in terms of section 121(2)(b).³ Both in the *President of the Republic of South Africa and Others v United Democratic Movement and Others*⁴ and in *Doctors for Life International v Speaker of the National Assembly and Others*,⁵ we held that the Constitution contains clear and express provisions which preclude any court from considering the constitutionality of a bill save in the limited circumstances referred to in sections 79 and 121 of the Constitution. This case does not fall within the limited circumstances mentioned in these two sections.

[5] It is true that the President has recently signed these bills into law. And this Court would ordinarily have jurisdiction to consider the constitutional validity of these bills once they have been enacted into law. However, as we pointed out in *Doctors for Life International*, the “crucial time for determining whether a court has jurisdiction is when the proceedings commenced.”⁶ Therefore the question whether

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- (5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.”

³ Section 121 provides:

- “(1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.
- (2) If, after reconsideration, a Bill fully accommodates the Premier’s reservations, the Premier must assent to and sign the Bill; if not, the Premier must either—
- (a) assent to and sign the Bill; or
- (b) refer it to the Constitutional Court for a decision on its constitutionality.
- (3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and sign it.”

⁴ *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as amici curiae)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 26.

⁵ [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 43.

⁶ *Id* at para 57.

this Court has jurisdiction must be determined at the time when the present proceedings were instituted and not when the Court considers the matter.⁷

[6] This Court therefore has no jurisdiction to consider the present application.

[7] There is one matter which calls for comment. The papers in this application were served on the State Attorney, Johannesburg on 11 December 2008. In terms of Rule 1(8) of the Rules of this Court,⁸ read with Rule 4(9) of the Uniform Rules of Court,⁹ notice of application may be served on the State Attorney. Service of the papers on the State Attorney, Johannesburg by the applicant therefore constituted proper service on the President and the Minister for Justice and Constitutional Development.

[8] The *dies* have expired. No communication has been received from the office of the State Attorney. Nor have the offices of the President and the Minister responded to the application. Whether the latter were made aware of the present application by the State Attorney is not easy to tell. But at least we are entitled to assume that, in the

⁷ Id.

⁸ Rule 1(8) provides:

“Subject to rule 5, the provisions of rule 4 of the Uniform Rules shall apply, with such modifications as may be necessary, to the service of any process of the Court.”

⁹ Rule 4(9) provides:

“In every proceeding in which the State, the administration of a province or a Minister, Deputy Minister or Administrator in his official capacity is the defendant or respondent, the summons or notice instituting such proceeding may be served at the Office of the State Attorney situated in the area of jurisdiction of the court from which such summons or notice has been issued: Provided that such summons or notice issued in the Transvaal Provincial Division shall be served at the Office of the State Attorney, Pretoria, and such summons or notice issued in the Northern Cape Division shall be served at the Bloemfontein Branch Office of the State Attorney.”

fulfilment of its professional obligation and its duty to this Court, the State Attorney must have made the offices of the President and the Minister aware of the present application.

[9] This is not the first occasion that the state has not responded to a matter that is before this Court.¹⁰ This failure on the part of the state is regrettable. The state has an obligation to respond to court processes. It cannot simply disregard court processes. It must lead by example. While, as pointed out above, we cannot identify precisely where the fault lies, we can, with confidence, lay the blame squarely at the office of the State Attorney, Johannesburg. That office was served with the papers. It had an obligation to respond to the application. That this was not done is cause for grave concern in a country governed by the rule of law.

[10] Having regard to the number of occasions on which a situation such as the present has occurred, we have considered whether this is an occasion to make an order that the office of the Minister for Justice and Constitutional Development provide us with a report setting out steps to be taken in order to avoid a recurrence of this situation. After anxious consideration we have decided against that course. However, to ensure that this situation is not repeated, the Registrar is requested to send a copy of this judgment to the offices of the President and the Minister for Justice and

¹⁰ *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* [2006] ZACC 7; 2006 (8) BCLR 901 (CC); *Nyathi v MEC for Department of Health, Gauteng and Others* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).

Constitutional Development. We are confident that these offices will take appropriate steps to prevent a situation like this from occurring again.

[11] There has been no opposition in this matter. The issue of costs does not therefore arise.

[12] In the event, the Court makes the following order:

- a) The application is dismissed.
- b) The Registrar is directed to send copies of this judgment to the offices of the President and the Minister for Justice and Constitutional Development.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J