CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 159/18

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Applicant
and	
DEMOCRATIC ALLIANCE	First Respondent
PRAVIN JAMNADAS GORDHAN	Second Respondent
MCEBISI HURBERT JONAS	Third Respondent
MALUSI NKANYEZI GIGABA	Fourth Respondent
SFISO NORBERT BUTHELEZI	Fifth Respondent

Neutral citation: *President of the Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ, and Theron J

Judgments: Mogoeng CJ (majority): [1] to [40]
Jafta J (dissenting): [41] to [87]

Heard on: 14 February 2019

Decided on: 18 September 2019

Summary: Rule 53 of the Uniform Rules of Court — application to compel — executive decisions to appoint/remove Cabinet Ministers — mootness — interests of justice

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The President of the Republic of South Africa is ordered to pay costs of this application, including the costs of two counsel.

JUDGMENT

MOGOENG CJ (Cameron J, Froneman J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J and Theron J concurring):

Introduction

[1] Can the decision of the President of the Republic of South Africa to appoint and dismiss a Minister and his Deputy be reviewed and set aside? Is the President under a rule 53 of the Uniform Rules of Court[1] obligation to disclose the reasons for relieving

[1] Rule 53(3) provides:

> "The registrar shall make available to the applicant the record despatched to him or her as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause."

Cabinet Ministers and their Deputies of their duties or should the arguably raw political character of that decision perhaps exempt her from doing so?

[2] The first question would have been answered fully, but was not, because the application that would have created the platform for doing so was withdrawn. The second was, in a way, answered affirmatively in an interlocutory application, the outcome for which is sought to be challenged before this Court. But, no regard was had to the distinctly political nature of those appointments or dismissals.

[3] We thus have to grapple with the question of whether it is in the interests of justice to grant leave to appeal against that order directing the President to disclose the reasons, as well as the relevant part of the record that forms the basis, for the decision to relieve a Minister and a Deputy of their constitutional responsibilities notwithstanding the mootness of the matter.

Background

[4] On 30 March 2017, President Jacob Zuma announced changes to his Cabinet. Several Ministers and Deputy Ministers including the then Minister of Finance, Pravin Gordhan, and his Deputy, Mcebisi Jonas, were relieved of their ministerial duties. In came Minister Malusi Gigaba and Deputy Minister Sifiso Buthelezi. On the same day, the Presidency issued a statement which stated the reasons for the reshuffle.

[5] Four days later, the Democratic Alliance launched an urgent review application to set aside the President's decision in the High Court of South Africa, Gauteng Division, Pretoria. The grounds, therefore, were that his decision was unlawful, unconstitutional and invalid. But, irrationality was the overarching basis. And, that application was brought in terms of rule 53.

[6] The record of the proceedings that presumably culminated in the impugned decision and the reasons for the decision were required within certain timeframes, set by the Democratic Alliance's legal team. When several attempts to have the reasons

and record filed in terms of the truncated rule 53 timeframes failed, the Democratic Alliance brought an interlocutory application to have the President compelled to deliver them.

[7] The President opposed the application. While conceding that the President's decision to reshuffle the Cabinet is required to be rational, it was however contended that rule 53 does not apply to that executive decision and as a result the relief sought by the Democratic Alliance was not competent. His contention was that legality is the correct basis on which to review that decision. But, the order was granted on the basis that rule 53, purposively interpreted, applies to executive decisions and since the appointment or removal of Ministers and Deputy Ministers in terms of sections 91(2) and 93(1) of the Constitution constitutes an executive function, it too fell within the scope of that rule. The order reads in relevant part as follows:

> "2. The [President] is to dispatch to the [Democratic Alliance's] attorneys within five court days of the date of this order:
>
> 2.1 the record of all documents and electronic records (including correspondence, contracts, memoranda, advices, recommendations, evaluations and reports) that relate to the making of the decisions which are sought to be reviewed and set aside;
>
> 2.2 the reasons for these decisions which are sought to be reviewed and set aside."[2]

[8] Aggrieved by this decision, the President applied for and was granted leave to appeal to the Supreme Court of Appeal. While the appeal was pending, President Jacob Zuma resigned and was replaced by President Cyril Ramaphosa. And Minister Gigaba and Deputy Minister Buthelezi were removed from the Finance Portfolio. Mr Pravin Gordhan was appointed to the Public Enterprises Portfolio, all of which inferentially seemed to address the source of the Democratic Alliance's dissatisfaction. As a result, the parties withdrew the review application by agreement.

[2] *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP) (High Court judgment) at para 1.

[9] The Supreme Court of Appeal was informed of that development. It then enquired of the parties whether the appeal against the interlocutory order should still be proceeded with seeing that the review application, which is foundational to the very existence of that order, had ceased to exist.

[10] The Democratic Alliance said it was not necessary to proceed with the appeal by reason of its mootness whereas the President, while conceding mootness, held a different view. He contended that in breach of the doctrine of separation of powers, the High Court has extended the scope of rule 53 to executive actions which amounts to a usurpation of the powers of the Rules Board.

[11] In response to the President's contention, the Supreme Court of Appeal held that, "[t]he correct approach is that the task of developing the rules is best left to the Rules Board. This Court has pronounced on this position."[3]

[12] After quoting quite generously from *Absa Bank*,[4] the Court went on to say:

> "There is thus no compelling reason why this Court should exercise its discretion, absent objective facts, to conclusively determine the ambit of rule 53 when the Rules Board is mandated to do so. Interesting as the debate may be, this Court should not be tempted to decide an issue that may be of academic interest and the decision sought will have no practical effect or result.
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> . . .
>
> To sum up, the question of the High Court having established a precedent is not supported by authority. The decision in *Van Zyl*[5] has put paid to that argument. Similarly defining the ambit or scope of the applicability of rule 53 to executive functions and/or decisions, falls, as correctly argued by the [President], within the

[3] *The President of the Republic of South Africa v Democratic Alliance* [2018] ZASCA 79; 2018 JDR 0765 (SCA) (Supreme Court of Appeal judgment) at para 16.

[4] *Absa Bank Limited v Van Rensburg: In Re: Absa Bank Limited v Maree* [2014] ZASCA 34; 2014 (4) SA 626 (SCA) at para 11.

[5] *Van Zyl v Government of the Republic of South Africa* [2007] ZASCA 109; 2008 (3) SA 294 (SCA).

> terrain of the Rules Board. I therefore conclude that for reasons stated, the relief sought by the appellant will not have any practical effect or result. The appeal must therefore be dismissed."[6]

[13] The President was just as unhappy with this outcome. As a result, he has approached this Court with an application for leave to appeal.

Mootness

[14] The appropriate starting point in dealing with mootness is section 16(2)(a)(i) of the Superior Courts Act.[7] It provides:

> "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

[15] The President has "concede[d] that in light of the withdrawal of the main proceedings, the order of Vally J no longer has any practical effect between the parties and has become academic". The Democratic Alliance agrees that the effect of the withdrawal of the review application is that the interlocutory order "cannot be enforced and ceases to have any effect".

[16] These positions not only accord with the mootness provisions of the Superior Courts Act but are also informed by our jurisprudence. For, even this Court has previously said that where issues are of such a nature that the decisions sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

[17] This would ordinarily put an end to this application. But, this Court has the discretionary power to entertain even admittedly moot issues. In *Langeberg* we said that we have—

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[6] Supreme Court of Appeal judgment above n 3 at paras 17 and 19.

[7] 10 of 2013.

> "a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require."[8]

[18] And in *Shuttleworth* we said—

> "to the extent that it may be argued that this dispute is moot . . . this Court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this Court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear the matter."[9]

[19] It is only when the constitutional threshold requirement for entertaining moot applications is met, that the President's application would be allowed. And that is the interests of justice standard.[10] The question then arises whether it is in the interests of justice for this Court, in the exercise of its discretion, to entertain the appeal against the admittedly moot interlocutory order.

Interests of justice

[20] Several bases have surfaced for possibly breaking through the veil of mootness to decide the appeal.

[21] The President still contends that—

(a) extending the scope of rule 53 to executive functions is an impermissible encroachment into the executive domain, more specifically the exclusive terrain of the Rules Board;

(b) it is a ground-breaking development or a novelty; and

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[8] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg*) at para 11.

[9] *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) (*Shuttleworth*) at para 27.

[10] See section 167(6) of the Constitution.

(c) there is a need for certainty in relation to the obligation to disclose reasons for future Cabinet reshuffles and the relevant part of the record that formed the basis upon which such decisions were taken.

[22] In opposition, the Democratic Alliance argues that—

(a) rule 53 applies to all executive actions;

(b) this Court would have to pronounce on the merits to decide the issue before us;

(c) this being an application for leave to appeal against an interlocutory order, it would be most inappropriate to decide the merits; and

(d) entertaining this matter would require this Court to interfere with the discretion exercised by the Supreme Court of Appeal in relation to entertaining most of these questions.

[23] Whether one agrees or disagrees with Vally J's approach to the applicability of rule 53 to executive decisions of the kind involved here, he did not seek to make or amend rule 53. He sought to embark on what he referred to as a purposive interpretation of that rule. And courts are entitled to interpret laws, including rules of court. It follows that the President's concern about separation of powers in that context is misplaced.

[24] The Democratic Alliance's assertion relating to the applicability of rule 53 to all executive functions requires some special attention. An indication was, as the Democratic Alliance contends, indeed given in *OUTA* that in an application believed to be "in the heartland of executive-government function and domain" concerning "policy-laden and polycentric decision-making" a record would have to be produced in terms of rule 53.[11] And only in a footnote did Moseneke DCJ say:

> "Rule 53 of the Uniform Rules of Court provides that in all applications for review an applicant should call upon the decision-maker to show cause why a decision or

[11] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at paras 67-8.

> proceedings should not be reviewed and corrected or set aside, and to despatch the record of the proceedings sought to be reviewed together with its reasons. Once such a record is made available to the applicant he may make copies and within ten days bring an application to amend, add to or vary the terms of his review application and supplement the supporting affidavit."[12]

[25] It must be noted that the applicability of rule 53 is alluded to in a footnote precisely because we were not called upon to decide whether every executive decision, including those that are seemingly mired in hard-core politics, fall within the ambit of rule 53. The issue was not even debated. To conclude, as does the Democratic Alliance, that *OUTA*, particularly the footnote, is dispositive of the question whether rule 53 applies to all executive decisions, would arguably be to read much more into the footnote than is justifiable. And it bears repetition that the Court was not called upon to decide whether rule 53 applies, hence the relegation of the rule 53 issue to a footnote. The same caution probably extends to the reliance sought to be placed on *ARMSA*[13] and *Van Zyl*.[14]

[26] That said, it must be assumed, without deciding whether the principle applies to this matter, that executive decisions are generally reviewable under the principle of legality or rule 53. And the real basis for considering possible interference with the interlocutory order is therefore the need to provide guidance for future appointments or dismissals of Ministers and Deputies, Members of the Executive Council and Members of Mayoral Councils.

[27] To begin with, this is an application for leave to appeal against an interlocutory order and "generally, it is not in the interests of justice for interlocutory relief to be subject to appeal as this would defeat the very purpose of that relief".[15] This requires a

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[12] Id at para 20.

[13] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* [2013] ZACC 13; 2013 JDR 1041 (CC); 2013 (7) BCLR 762 (CC) (*ARMSA*).

[14] *Van Zyl* above n 5.

[15] *Mathale v Linda* [2015] ZACC 38; 2016 (2) SA 461 (CC); 2016 (2) BCLR 226 (CC) at para 25.

clarificatory context. What the President has applied for is leave to appeal against an interlocutory order. That order directed him to furnish reasons for and the record of the proceedings that preceded the decision to dismiss certain Ministers. The question to be answered is whether he may be granted leave in spite of mootness. Mootness does not have the magical effect of somehow rendering irrelevant, factors that would ordinarily have been considered in an application for leave to appeal against an interlocutory order. Mootness does not lessen the burden for the applicant, it compounds it.

[28] The odds are all the more stacked against entertaining the appeal here because, unlike in almost all other matters where leave to appeal against an interlocutory order was sought, the main application that gave birth to this interlocutory order has been withdrawn by agreement between both participating parties. The reasons and the record whose disclosure that order was supposed to facilitate are no longer necessary. And, as correctly conceded by both parties, the order is of no use or effect to any of them. In sum, the interlocutory nature of the order sought to be appealed against and its mootness combine to create a force that is fatal to the prospects of exercising our discretion in the President's favour.

[29] Additionally, to determine whether the kind of executive decisions to which rule 53 applies or might apply include the appointment and removal of Cabinet Members or Deputy Ministers, is an exercise that is inextricably interwoven with the merits. Remember, the decision initially sought to be reviewed and set aside, in terms of rule 53, was the President's dismissal of Minister Pravin Gordhan and Deputy Minister Mcebisi Jonas. The request for reasons and the associated record owes its appropriateness or relevance, in any court including this one, to that original challenge. The guidance the President needs for future appointments or dismissals cannot therefore be provided without proper regard to the merits and the likely political dynamics at play in decisions of that kind. The irrationality on which the main application hinged could only have been properly tested with the aid of a range of factual considerations, which are just as important to resolve the question whether rule 53 applies to Ministerial appointments or dismissals. The reach of the rationality review in relation to executive

decisions located within the heartland of the Executive was not properly ventilated before us.

[30] It is my understanding that, properly contextualised, the President's thirst for clarity and certainty would not be quenched by a judgment that merely resolves the question whether rule 53 is wide enough to apply to executive decisions. It is not a legal technical knockout that he needs – but an assurance that he has the latitude or space to exercise his powers freely. He strikes me as desiring a decision that resolves the question whether he is under any circumstances obliged to disclose the reasons for appointing or dismissing Ministers and Deputy Ministers regardless of a legal instrument that might be sought to be used to cause him to do so – rule 53 or legality.

[31] This may be inferred from some of the statements made on his behalf, in particular this one:

> "As will be evidenced in the answering affidavit of the President, in his response to your application to compel the delivery of the records, the decision to reshuffle the Cabinet as he did was informed by *his political judgement that the reshuffle will best deliver on the mandate the African National Congress received from the majority of the electorate in the last general elections*."

[32] This seems to suggest that this application relates to an executive decision of the kind this Court has not grappled with before. That this Court might have readily accepted, in a footnote, the reviewability of apparently all executive decisions on the basis of rationality may not necessarily serve as authority for the contention that rule 53 applies to all executive actions. The non-binding concession by the President that the decision to reshuffle Cabinet has to be rational and is therefore reviewable under legality is not dispositive of this complex legal issue. This Court must satisfy itself that our adoption of that concession as law, is in sync with the jurisprudential trajectory we ought to follow. A proper ventilation of the issues that would inform the decision to extend the applicability of rule 53 or a shade of rationality even to this particular executive decision appears to be necessary.

[33] It thus seems to be inescapable that the merits would have to be traversed to do justice to issues relating to the guidance for future cases that the President yearns for. The nature and complexity of the kind of decision initially sought to be challenged by way of review must first be closely examined. We would probably have to dig deeper into the political character of sections 91(2) and 93(1) decisions to address the President's concern properly. And potentially serious separation of powers issues might also have to be wrestled with.

[34] What then is in the interests of justice here – to grant or refuse leave? Again, interlocutory orders are ordinarily not appealable even in circumstances where the main application has not been withdrawn. Here, the main application to which the interlocutory order owes its life has been withdrawn. And it is in the main application that the reviewability of the President's decision and the merits of the application would have been decided. The merits do not merely relate to a matter that is "in the heartland of executive-government function and domain" in connection with "policy-laden and polycentric decision-making", they also seem to relate to a constitutionally-ordained political decision. *OUTA* was about an executive decision to introduce e-tolls. On the contrary, this matter relates to the appointment and removal of Cabinet Members. There is a yawning gap between the true nature or character of each of these decisions. We would probably derive a lot of benefit from a thorough-going and discrete engagement with counsel on this specific issue before a conclusion is reached that legality or rule 53 applies to sections 91(2) and 93(1) decisions.

[35] This Court cannot decide the merits that the High Court and the Supreme Court of Appeal did not decide. The President himself says "the order of Vally J no longer has any practical effect between the parties and has become academic". This Court is thus being asked to advise or guide the President. That is the only real purpose to be served by entertaining this appeal. And courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision,

now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here.

Conclusion

[36] When the President's decision to appoint or dismiss is impugned in the future and she is asked for information that is similar to that asked for in this matter, it would then be open to her to confront that challenge squarely. Only then may we, if the matter ultimately gets to us, traverse the merits that would allow us to provide the guidance now asked for. This is not a case where the interests of justice require that we exercise our discretion to decide a moot issue. As indicated, this is so because the order is interlocutory; the interests of justice are ordinarily against entertaining appeals against interlocutory orders; the main application has been withdrawn and the merits of that withdrawn application are essential for the proper determination of the issues in relation to which the President requires guidance.

[37] It can thus be rightly said that this is an application that—

> "raises no discrete legal point which does not involve detailed consideration of facts and no similar cases exist or are anticipated, so that the issue will most likely need to be resolved in the near future."[16]

[38] There is no discrete issue raised here. Detailed factual considerations would have to be traversed to do justice to this matter. And the President stands to suffer no harm should the determination of the issue be left to a future challenge to the appointments or dismissals of Cabinet Members. A refusal to exercise our discretion to address a moot interlocutory question would thus not be a lost opportunity, necessary to address foreseeably imminent challenges. This is not one of those challenges to presidential power that are likely to arise as frequently as is apparently feared. It didn't for the past 25 years of our constitutional democracy and is most unlikely to arise any time soon.

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[16] *Legal Aid South Africa v Magidiwana* [2014] ZASCA 141; 2015 (2) SA 568 (SCA) (*Magidiwana*) at para 31.

[39] But, even if the request for reasons for the appointment or dismissal is reasonably anticipated, that would then present the President with an appropriate opportunity to mount a proper challenge to the applicability of rule 53 to the exercise of the constitutional power to appoint or dismiss Members of Cabinet. The issue is thus best left to be resolved on another day.

[40] In the result, the application for leave to appeal is dismissed with costs.

Order

[41] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The President of the Republic of South Africa is ordered to pay costs of this application, including the costs of two counsel.

JAFTA J (Nicholls AJ concurring)

[42] I have had the benefit of reading the judgment of the Chief Justice (first judgment). I agree that the matter as between the President and the Democratic Alliance is moot. But I think that it is in the interests of justice to interpret rule 53 for guidance of future cases.

[43] Our difference flows from the exercise of a discretion on entertaining a moot appeal. The fact that this Court retains a discretion to decide a moot appeal cannot be gainsaid. It is also not controversial that the exercise of the discretion depends on where the interests of justice lie. In *Mukhamadiva* this Court formulated the test in these terms:

> "The fact that a matter may be moot in relation to the parties before the court is not an absolute bar to the court considering it. The court retains discretion, and in exercising

> that discretion it must act according to what is required by the interests of justice. And what is required for the exercise of this discretion is that any order made by the court has practical effect either on the parties or others. Other relevant factors that could be considered include: the nature and extent of the practical effect the order may have; the importance of the issue; and the fullness of the argument advanced. Another compelling factor could be the public importance of an otherwise moot issue."[17]

[44] It is evident from this statement that in determining whether the interests of justice warrant a determination of a moot matter, the Court takes account of a number of factors. These include whether a judgment would have a practical effect in future litigation either between the same parties or other parties; the importance of the legal issue raised; the impact or effect of the judgment appealed against on future litigation and the wrong statements of law in that judgment.

[45] The background facts are comprehensively set out in the first judgment for which I am grateful. It is not necessary to repeat them here.

[46] The institution of the review application by the Democratic Alliance in terms of rule 53 automatically triggered certain procedural rights in its favour and imposed obligations upon the President, in his capacity as the decision-maker. From the date of service of the papers on him, the President was under a duty to despatch a record of proceedings relating to the impugned decision to the registrar of the High Court in which the review was launched.[18] The President was obliged to do so within 15 days.

[47] It was the President's breach of this duty which prompted the Democratic Alliance to institute the interlocutory application to compel the President to comply with the rule. The judgment against which the current President seeks to appeal was rendered in that interlocutory application. In that judgment the High Court ordered the President to despatch the record and reasons for the impugned decision, not to the

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[17] *Director-General Department of Home Affairs v Mukhamadiva* [2013] ZACC 47; 2013 JDR 2860 (CC); 2014 (3) BCLR 306 (CC) (*Mukhamadiva*) at para 40.

[18] The text of the relevant part of rule 53 is quoted in [80] below.

Registrar as rule 53 demands, but to the attorneys of the Democratic Alliance. He was required to do so within five days from the date of the order.

[48] It will be noted from the text of rule 53 that it does not require that the record be delivered to the applicant for a review. Instead, it obliges the decision-maker to make delivery to the Registrar. The applicant for a review must approach the Registrar if it wishes to have access to the record and the latter may make the record available on terms the Registrar deems appropriate. Under the rule the applicant is entitled to make copies at its own expense and furnish the Registrar with two copies and each of the other parties with one copy. All of which must be certified as true copies.

[49] The High Court order was based on rule 53 as interpreted by it. Although the Court accepted that the language of the rule does not cover the President, it held that there was no reason not to apply rule 53 in applications to review executive decisions. The High Court concluded:

> "Relying on the purposive interpretation there is no logical reason not to utilise it in an application to review and set aside an executive decision. The judicial exercise undertaken by the court in such a review is no different from the one undertaken in review applications of an 'inferior court, [a] tribunal, board or officer performing judicial, quasi-judicial or administrative functions'. The tests to be applied may be different but the process utilised can be the same. Its provisions, in my judgment, should be applied unless it can be shown that its application in a particular case would result in a failure of justice."[19]

[50] Even though the Democratic Alliance had intimated that it will not enforce compliance with the order following its withdrawal of the review application, the President was wary of the legal effect of the High Court's judgment. He argued in the Supreme Court of Appeal and in this Court that the High Court's judgment set a precedent that rule 53 applies to executive decisions by the President. As mentioned the merits of the appeal may be decided only if it is in the interests of justice to do so.

[19] High Court judgment above n 2 at para 29.

Interests of justice

[51] A number of factors show that it is in the interests of justice to determine whether the High Court was right to conclude that rule 53 applies despite questioning that the language of the rule suggests otherwise.

[52] The first factor is that a judgment of this Court on the matter would have a practical effect in the future for the President and any other party that wishes to have the appointment or dismissal of Ministers reviewed. Rule 53 continues to apply and there is no indication that it will be repealed. There can be no doubt that in future Ministers would be appointed and dismissed as mandated by section 91 of the Constitution.[20] Therefore, it is likely that a similar dispute would arise. The interpretation of rule 53 would be helpful in future litigation between the President and parties who seek to take on review his decision to appoint or dismiss a Minister. This type of practical effect has been accepted as a factor that warranted adjudication of a moot matter in a number of cases.[21]

[53] Relying on a statement made in *Magidiwana*,[22] the Supreme Court of Appeal in this matter refused to reach the merits and interpret rule 53. The statement relied on was to the effect that the appeal in *Magidiwana* did not raise a discrete legal point which excluded consideration of the facts and that no similar cases existed or were anticipated. On the basis of that statement the Supreme Court of Appeal held:

> "The review application having being withdrawn, it would be unwise for this Court to opine on the interpretation of a rule, in the absence of objective facts and the context

[20] Section 91(2) of the Constitution provides:

> "The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."

[21] *POPCRU v SACOSWU* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC); *MEC for Education, Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC); *AAA Investments (Pty) Limited v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC); and *Langeberg* above n 8.

[22] *Magidiwana* above n 16.

within which they were raised in the review application. It would neither be practical nor desirable for this Court to postulate under what circumstances and on what grounds, legal and / or factual, would a cabinet reshuffle be taken on review and the disclosure of the record be demanded in terms of rule 53 in future."[23]

[54] A quick observation is that *Magidiwana* was not concerned with the interpretation of legislation that continues to operate and consequently the reference to the absence of a discrete legal point that did not involve considerations of facts had no bearing on this matter. The statement by the Supreme Court of Appeal in this case suggests that objective facts are necessary for the interpretation of the relevant rule. This is incorrect. Facts play no role in an interpretation of a rule or legislation for that matter.[24] If this were to be so, a provision in legislation would carry different meanings, depending on the facts of specific cases.

[55] This Court has affirmed the principle that facts have no bearing on an interpretation process. In *Kubyana* the Court said:

> "The process of interpretation, I emphasise, does not involve a consideration of facts. Matters of evidence do not come into the equation. This is so because statutory construction is an objective process, with no link to any set of facts but in terms of which words used in a statute are given a general meaning that applies to all cases, falling within the ambit of the statute."[25]

[56] The Democratic Alliance too is mistaken in asserting that the Court would have to pronounce on the merits of the review in determining the scope of rule 53. The interlocutory application had no bearing on whether the impugned decisions were reviewable. The scope of rule 53 may be determined with reference to its language to which I shall return later.

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[23] Supreme Court of Appeal judgment above n 3 at para 15.

[24] *CA Focus CC v Village Freezer t/a Ashmel Spar* [2013] ZASCA 136; 2013 (6) SA 549 (SCA) at para 18.

[25] *Kubyana v Standard Bank of South Africa Limited* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 78.

[57] Another factor that supports entertaining this appeal is the incorrect judgment of the High Court. A rule may not be applied beyond its scope as determined by its language on the ground that "there is no reason in logic not to utilise it". The fact that the rule regulates similar situations does not alter this proposition. Nor does purposive interpretation do. The High Court was therefore mistaken to conclude that rule 53 applies to the review of decisions not mentioned in the rule because there is no logical reason not to use it.

[58] The reasoning also reveals a misapplication of purposive interpretation. A purposive interpretation does not entail asking the question whether there is a logical reason for not applying a legislative provision to a similar set of facts. Instead, the purpose of the provision is invoked to establish context and a meaning that is capable of achieving the object of the provision. In other words, a purposive interpretation is a technique of paying attention to what the lawmakers intended to achieve by enacting the provision in question.[26]

[59] Of course, a purposive construction is not a licence to ignore the language used in a provision under interpretation. An interpretation exercise commences with the consideration of the language used, which must be assigned its ordinary meaning unless provided otherwise in the legislation or that the ordinary meaning would result in an absurdity which is incongruent with the purpose of the provision in question.[27] In *Bertie Van Zyl* this Court emphasised that "a contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute".[28] This principle was reaffirmed in *Oudtshoorn Municipal Council* in these words:

> "In *Bertie van Zyl* this Court stated that 'the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law'. It pointed

[26] *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 21 and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at paras 51-4.

[27] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[28] *Bertie Van Zyl* above n 26 at para 22.

> out that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute."[29]

[60] The High Court here failed to keep fidelity to the language employed in rule 53 despite recognition by that Court that facially the language used does not cover executive decisions by the President and that at the time the rule was adopted in the 1960s executive decisions were not subject to review and that the rule has not been amended to cater for the changed circumstances.[30] All of this illustrates that there are good prospects of success which is an additional factor supporting the adjudication of this appeal.

[61] But of more importance is the fact that if the High Court's judgment is left intact, the President would be placed in a very difficult position in future should his decisions to appoint or dismiss a Minister be challenged on review. The untenable situation he would find himself in stems from both the scheme of rule 53 and the decision of the High Court. As stated, under rule 53 once the review papers are served on the President, he is obliged to submit a record to the Registrar. What triggers this obligation is the service of the papers.

[62] It is not open to the President to take the view that rule 53 does not apply and therefore to ignore the rule. It is not for him as a litigant to determine whether the rule applies or not. That is a function performed exclusively by the courts and here the President is asking this Court to do just that.

[63] Moreover, the High Court's judgment is binding on the President. Without having it set aside on appeal he cannot ignore that judgment. As far as the President is

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[29] *Provincial Minister for Local Government, Western Cape v Oudtshoorn Municipal Council* [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 (CC) (*Oudtshoorn Municipal Council*) at para 13.

[30] High Court judgment above n 2 at para 21.

concerned, the High Court has finally settled the issue of the applicability of rule 53 to reviews pertaining to decisions to dismiss or appoint Ministers.[31]

[64] What is more unacceptable is the proposition that the President should wait for a similar review to be brought in future and raise the issue of the applicability of rule 53 there. This would place the President in a position that is at odds with his duty to uphold the Constitution and all laws. Rule 53 forms part of laws he must uphold. To expect him to comply with this rule and yet challenge its applicability would be equally unsustainable. And this challenge would be hampered by the High Court's judgment which defines the scope of the rule.

[65] If the President were to fail to despatch the record after receipt of papers in future proceedings and seek to challenge the applicability of rule 53, he would be acting in conflict with the present judgment of the High Court. But he would not only be in breach of the judgment, he would be violating section 165(5) of the Constitution which declares that an order or decision of a court binds organs of state to which it applies.[32] There can be no doubt that the judgment of the High Court constitutes a decision on the applicability of rule 53 which is not affected by the abandonment of the order by the Democratic Alliance. It is not open to the President to violate the Constitution, even for a limited period. Yet a refusal to entertain the merits will expose him to that risk if he does not follow the decision of the High Court under appeal.

[66] Other factors which favour adjudication of the matter include the incorrect statements of law in the High Court's judgment. And what makes it necessary to do so is the likelihood of a similar dispute arising in future. On a number of occasions this

[31] *Port Elizabeth Municipality v Smit* [2002] ZASCA 10; 2002 (4) SA 241 (SCA) at paras 9-10 and *Natal Rugby Union v Gould* [1998] ZASCA 62*;* 1999 (1) SA 432 (SCA) at 444.

[32] Section 165(5) of the Constitution provides:

> "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

Court has held that moot appeals may be entertained to correct wrong statements of law.[33] In *AAA Investments* the Court declared:

> "[I]f we do not consider this aspect of the case, the judgment of the Supreme Court of Appeal, with all its implications for future regulations, would remain binding. . . . Neither the judgment of the Supreme Court of Appeal nor that of the High Court can be said to be unassailable."[34]

[67] Superior courts which include the High Court, contribute in the development of our jurisprudence by stating and clarifying what the law requires in a given case. In our system once a superior court has declared what a particular law means, all parties affected by it are expected to follow the law as interpreted by the court. Therefore it is important that incorrect statements of law in judgments be corrected especially where those statements are, as here, likely to regulate future conduct.

[68] The importance of the matter to the President cannot be questioned. He needs to know what his procedural obligations are under the Uniform Rules of Court in case his decision to appoint or dismiss a Minister is challenged. The matter is also of great importance to the public, not only for the fact that it involves a challenge to the appointment or dismissal from Cabinet that governs the country but also for the need to clarify procedural rights of a party who wishes to impugn such decision.

[69] Three factors were advanced as warranting the dismissal of the appeal on the ground of mootness. The first was that it is generally not in the interests of justice to grant leave or entertain an appeal against an interlocutory relief. However, this is not on point. Here we are concerned with the exercise of discretion to adjudicate a moot appeal. We are not dealing with the question whether the order granted by the High Court was appealable. But even if the appealability was in issue, the point would still

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[33] *POPCRU* above n 21 at paras 75-81 and *AAA Investments* above at n 21 at para 21.

[34] *AAA Investments* id at para 21.

be without merit because that order had a final effect. It could not be reversed at the hearing of the review.

[70] Whilst it is true that the withdrawal of the review application rendered the matter moot, this cannot be one of the reasons for declining to decide the appeal. This is so because it is mootness itself that triggers the exercise of discretion. Absent mootness, there is no discretion to exercise.

[71] Another factor that was advanced against adjudication of the appeal was that the conclusion by the High Court that rule 53 applies to a review of executive decisions was not novel. This Court's attention was drawn to a number of cases where the rule was applied to executive decisions. But none of them dealt with a decision to appoint or dismiss Ministers. More importantly none of those cases undertook to interpret rule 53 to determine its scope. It seems that the courts in those matters simply assumed that this rule applies. None of them determines the legal basis for applying the rule.

[72] The other factor put forward as not warranting a decision on the merits was that the determination of the applicability of the rule was bound together with the impugned decisions. For a number of reasons, I cannot agree with this proposition. First, the rule regulates procedural issues and not substantive ones. As it appears from its own text, it governs the process to review a number of specified decisions and proceedings. It can hardly be argued that its scope of operation is linked to the question of whether a review of a particular decision is competent.

[73] Second, the scope of the rule may be determined only with reference to its language. That exercise involves the interpretation of the rule. Review competence plays no part in that interpretative process. Simply put, the question whether the review of the impugned decision was competent has no bearing on the meaning of rule 53. Moreover, the search for answers to the competence question does not lie in rule 53 as this rule has nothing to do with the power to appoint or dismiss Ministers.

Consequently, the interpretation of the rule does not require any reference to section 91 of the Constitution.

[74] For all these reasons I conclude that it is in the interests of justice to determine the merits of this appeal in spite of mootness.

Merits

[75] The issue that arises is whether rule 53 applies to a review of the President's decision to appoint or dismiss a Minister. The answer to this question lies in the interpretation of the rule.

[76] *Endumeni Municipality*, aptly reminds us of what the interpretation process entails:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."[35]

[77] This is a restatement of well-settled principles of interpretation which require us to commence with consideration of the language of rule 53 and proceed to take account of the context in which the rule appears; its purpose and the material known to the Chief Justice in 1965 when the Uniform Rules were made.[36]

[35] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni Municipality*) at para 18.

[36] Government Gazette 999 of 12 January, 1965. But in 1987 the Rules Board was established and it was given the responsibility of making rules for courts.

[78] As noted by this Court in a series of cases, section 39(2) of the Constitution requires that the spirit, purport and objects of the Bill of Rights be promoted in interpreting legislation that affects rights guaranteed by the Bill of Rights.[37] But this promotion of the objects of the Bill of Rights depends on whether the provision under interpretation is reasonably capable of a meaning that advances a guaranteed right. In *Hyundai Motor Distributors*[38] this Court cautioned against stretching language in an attempt to promote guaranteed rights. This Court said:

> "There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[39]

[79] It bears repeating that as we commence the interpretation of the rule, we must maintain fidelity to its language. It is the language chosen by the rule-maker which determines the reach of the rule. No amount of purposive interpretation may extend its scope beyond that language. As far back as 1995, this Court cautioned against a slovenly approach to language during interpretation. In a unanimous judgment in *Zuma*[40] the Court stated:

> "We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination".[41]

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[37] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 88; *Democratic Alliance v Speaker, National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at para 132; and *Phumelela Gaming and Leisure Ltd v Gründlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 27.

[38] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N O* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai Motor Distributors).*

[39] Id at para 24.

[40] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

[41] Id at para 18.

[80] This is the context in which the interpretation of rule 53 must be undertaken.

Meaning of rule 53(1)

[81] Rule 53(1) provides:

> "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—
>
> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and
>
> (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."[42]

[82] It is apparent from the language employed in the rule that it regulates the review of decisions and proceedings of "any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions". The rule requires that the applicant for review must deliver a notice of motion to "the magistrate, presiding officer or chairperson of the court, tribunal or board or the officer" calling upon "the magistrate, presiding officer, chairperson or officer to despatch" to the registrar the record of proceedings sought to be reviewed within 15 days from the date on which the notice of motion is received.

[83] A reading of the text reveals that a decision and proceedings to which the rule applies are those of specified bodies like inferior courts; boards and tribunals which

[42] Rule 53(1) of the Uniform Rules of Court.

perform judicial, quasi-judicial or administrative functions. It does not only single out bodies whose proceedings and decisions are covered by it, but it also classifies the functions performed by those bodies. Therefore, for the rule to apply, the decision or proceedings must belong to one of the identified bodies and relate to one of the classified functions.

[84] The President is not one of the identified bodies nor does he perform one of the classified functions when he appoints or dismisses Ministers. This is hardly surprising. At the time the rule was adopted, the exercise of prerogative powers such as appointing Ministers and dismissing them from Cabinet was beyond judicial control. It was not competent for courts to review those decisions.[43] This was known to the Chief Justice when he made the rule. He could not have intended the rule to cover the President's decisions such as the ones we are concerned with here. The rule carefully identifies the nature of decisions and proceedings to which it applies and the decision-makers it calls upon to despatch a record of proceedings to the Registrar. These decision-makers do not include the President.

[85] It cannot be disputed that in its historical context, the rule was not construed to cover decisions taken by the President in the exercise of prerogative powers. Without changes in its language, there can be no basis for giving it a new meaning now. It bears the same meaning regardless of the nature of the decision or proceedings challenged. And grounds advanced to impugn a particular decision have no bearing on the interpretation of the rule.

[86] Therefore, I conclude that properly construed rule 53 does not apply to the review of decisions to appoint or dismiss Ministers from Cabinet. The question whether those decisions are subject to review accordingly does not arise here and should be left for determination in appropriate proceedings.

[43] *Kruger v Minister of Correctional Services* 1995 (2) SA 803 (T) at 810; *Rapholo v State President* 1993 (1) SA 680 (T) at 688; and *Smith v Minister of Justice* 1991 (3) SA 336 (T) at 340.

[87] But what needs to be stressed at the moment is the fact that under the present legal order rule 53 does not have the monopoly of regulating procedure in terms of which the reviews of administrative decisions are prosecuted. This much is evident from the Promotion of Administrative Justice Act[44] (PAJA) which governs reviews of administrative action. Section 7 of PAJA requires that special rules be made to regulate reviews that fall within its ambit.[45] The Rules Board was obliged to make those rules before 28 February 2009. Until the rules in question came into force, applications for the review of administrative decisions must be instituted in the High Court.[46] This means that rule 53 serves as a stopgap. But notably PAJA does not say that in the High Court review proceedings must be instituted in terms of rule 53.

[88] Accordingly, I would grant leave to appeal and uphold the appeal.

[44] 3 of 2000.

[45] Section 7(3) of PAJA provides:

> "The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review."

[46] Section 7(4) of PAJA provides:

> "Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction."

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