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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: 25616/06

2007-06-14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 21/9/07 SIGNATURE

In the matter between

M KRUGER Plaintiff

and

PRESIDENT OF REPUBLIC OF SOUTH AFRICA Defendant

JUDGMENT

PRELLER, J: On 19 July 2006 the President and the Minister of Transport published proclamation R27 of 2006 in terms of which Section 4, 6, 10, 11 and 12 of the Road Accident Fund Amendment Act, number 19 of 2005, would come into operation on 31 July 2006.

It is clear and it was in fact common cause that the proclamation had been issued in error. The intention was, in fact, that Sections 1 to 5 of the Amending Act should come into operation, of which the effect

would be that Sections4, 6, 10, 11 and 12 of the Road Accident Fund Act, number 56 of 1996 (the Principal Act) would be amended with effect from the said date.

The result of the incorrect proclamation was that certain amendments to the Principal Act would become operative before the required tariffs and regulations have been put into place. In the absence thereof the amended parts of the Act would simply be incapable of operation.

The first and the second respondents promptly became aware of this error and on 31 July they published Proclamation R32 of 2006, which purported to amend R27 by the substitution of a reference to the correct Sections of the Amending Act (i.e. Sections 1 to 5) for the reference to the incorrect Sections. If that amendment is valid, the problem will be solved.

The applicant, however, submits that the power that the President has to issue a proclamation does not include the power to revoke or amend a previous proclamation. To achieve the desired result, submits the applicant, Parliament will have to pass a law which makes clear which Sections of the Amending Act are in operation and which ones are not.

The applicant further submits that Proclamation R27 is so clearly wrong that it is irrational and therefore invalid. If the applicant is correct in this submission there will be uncertainty as to whether the amendments to Section 4, 6, 10, 11 and 12 of the Principal Act are effective or not.

In practical terms the result of such uncertainty may well be that an injured person who has a valid claim for compensation against the Road Accident Fund, may be advised that Proclamation R32 is invalid, that Proclamation R27 accordingly remains in force and that he does not have a claim against the fund.

Various other permutations of these uncertainties can be postulated which could easily result in injustice being done, particularly to indigent claimants. The applicant accordingly applies for an order declaring Proclamation R27 of 2006 to be nil and void.

The first and second respondents are clearly of the view that the problem has been solved by Proclamation R32 and it can safely be assumed that no act of Parliament will be passed as mentioned above. The applicant accordingly submits that the only solution is to apply to a court for an order in terms of prayers 1 and 3 of the notice of motion.

The applicant is an attorney practising in Parow, Cape. The majority of his work consists of personal injury claims and his firm serves the poor areas of the Cape Flats. In the majority of cases his clients are unable to pay a deposit to cover the costs of assessors and other experts to investigate and prepare those cases for trial. The result is that he has to assist them by making the initial disbursements on their behalf and then recover the same at the end of the case.

Because of the uncertainty that exists around the legal requirements for a valid claim, he cannot incur the initial expenses without a sufficient degree of confidence in the outcome of the claim. It is clear that in these circumstances many of his indigent clients who

may have valid claims, may be left without recourse against the fund.

The applicant submits that because of the nature of his practice he has *locus standi* to bring the application both in his own interest and in the interest of his future unidentifiable clients. In this regard he claims to be acting in the public interest in terms of Section 38(d) of the constitution.

Mr Tokota, for the respondents, argue that if the applicant is correct in his view that Proclamation R27 is void and that it could not be amended by Proclamation 32, the legal position is clear and the applicant can proceed with his practice as in the past. If, in any of his cases, the point is taken that the Act has been amended, that point can be met with the very same arguments that are advanced in this application. There is therefore, according to him, no need for the relief claimed.

Mr Budlender, on the other hand, submits that the respondents have no need for an invalid proclamation to remain on record and that there is no prejudice to the respondents in having it removed. In view of the risk and uncertainty to the applicant, it may as well be removed if the respondents have no real need for it.

In the end the two real disputes between the parties were the appellant's *locus standi* and the respondents' power to amend a proclamation.

Mr Budlender submitted that because the applicant's interests, including his own financial interests, are directly affected, he has *locus standi*. He further has *locus standi* because he is acting in the public

interest. This was not, he expressly submitted, a class action in terms of Section 38(c) of the constitution but firstly an action in his own direct interest in terms of Section 38(a) and secondly in the public interest in terms of Section 38(d).

The proper approach to the question of standing in constitutional matters was considered extensively by the constitutional court in the matter of *Ferreira v Levin NO and Others* 1996 1 SA 984 CC. At paragraph [165] Chaskalson P said:

> "Whilst it is important that the court should not be required to deal with abstract or hypothetical issues and should devote its scarce recourses to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled."

As to Mr Tokota's submission that the applicant should wait until this defence is raised in one of his cases, the court dealt with exactly that situation in paragraph [162] to [164] of the judgment and came to the conclusion that the applicant in that case did not have to wait until he is actually charged with refusing to answer incriminating questions before he can challenge the constitutionality of the offending provision. The fact that the situation might arise in which he will face a prosecution

is sufficient to give him standing.

In paragraph [166] the learned President refers to the Canadian case of *Morgentaler and Others v R* in which it had been held that a male doctor was entitled to challenge abortion legislation and remarked that "it matters not whether he is the victim."

See also paragraph [226] to [231] of the same judgment where O'Regan J deals with the "generous and expanded approach to standing in the constitutional context" which is the proper one in cases of this nature.

In the new constitutional dispensation the approach to access to the court in constitutional challenges should not be regulated by rules that grew under the previous dispensation and which were considered in *inter alia Henri Viljoen v Awerbuch Brothers* 53 2 SA 151 O at 169 H; *SA Optometric Association v Frames Distributors* 1985 3 SA 100 O 104 B-F; *Reckitt and Coleman v Johnson and Son* 1993 2 SA 307 A 321 B-C, to which Mr Tokota referred me.

It is clear that the strict "direct and substantial interest" as required in those cases cannot close the door to a constitutional challenge. See *Ferreira v Levin* (*supra*) at paragraph [230].

Section 38 of the constitution allows certain named parties to challenge the constitutionality of a provision which infringes or threatens a right in the Bill of Rights.

Mr Budlender has expressly disavowed any reliance on an infringement of, or a threat to, an entrenched right. For his case, he said, he relies on something even more fundamental than that being

Section 1(c) of the constitution according to which the rule of law is one of the values on which our democratic state is founded.

The values in Section 1 are the very parents of the rights entrenched in chapter 2 and it seems obvious to me that the right to challenge cannot be limited to cases where entrenched rights are infringed but that right must include infringements of the core values of the constitution.

In my view the circumstances in *Ferreira v Levin* were sufficiently similar to the facts of the present case to constitute authority for the applicant's right to challenge the constitutionality of the proclamation and the consequences thereof.

The second bone of contention was the question whether the President can revoke or amend his incorrect proclamation. Innocent as it may seem, the mere amendment of a proclamation goes to the core of the very important value of the rule of law.

Mr Tokota pointed out that in terms of Section 10(3) of the Interpretation Act 33 of 1957, the power to make rules, regulations or bye-laws normally includes the power to rescind, revoke, amend or vary those rules, regulations and bye-laws.

He also referred me to Section 14 of that Act, in terms of which the power to *inter alia* give notices or to perform an act for the purpose of the law may be exercised at any time after the passing of that law. He submitted that all of these powers must mean that the President also has the power to amend any proclamation which brings an act into operation.

Unfortunately these two sections do not say what Mr Tokota wants them to say. Section 10(3) confers the power to make rules, regulations and bye-laws which may well, and probably does, include the power to amend or even revoke them in appropriate cases. The power to bring acts of parliament into operation is, however, not included in that provision.

In my view there is a difference in principle between making or amending regulations etc. and bringing into operation or suspending an act of parliament. I shall revert to this topic later in this judgment.

The provisions of Section 14 do not require much consideration in the present context. There was no argument about the President's power to bring different parts of the act into operation on different dates and he has in fact attempted to do exactly that.

More importantly though, on reading of the two Sections separately or jointly, can the intention be forced into them that the powers expressly conferred by the two sections should be extended to include the power to "make or break" acts of Parliament.

In his written heads of argument Mr Tokota relied on the principle *expressio unius est exclusio alterius* and submitted that:

> "Express conferment of the power to issue a proclamation bringing into operation the act necessarily empowers the first respondent to amend any incorrect reference in that proclamation."

At first blush the principle seems to me to have the exact opposite effect. The express conferment of the power to issue a

proclamation and the failure to mention a revocation or amendment thereof seems to mean that the latter two powers are excluded.

He also referred met to the following passage in Baxter *Administrative Law* page 404:

> "Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly conferred because they are reasonably required in order to exercise the powers expressly conferred or because they are ancillary or incidental to those expressly conferred."

The empowering section in this case is Section 13 of the Amending Act. It simply provides that the amendments will come into operation on a date or dates published by the President in the *Gazette*. That will obviously be at a stage when everything that is necessary for the proper functioning of the act is in place.

The necessary framework for the act to operate is either in place or it is not. If it is, it is a simple matter to bring the act (or part thereof) into operation. A date is published in the *Gazette* and that is the end of it. There is no need for any further powers to be implied in order to enable the President to exercise the power of performing this simple act. Of course the possibility that a *bona fide* error, such as occurred in the present case, might be made, was not contemplated when Parliament passed Section 13 of the Amending Act.

I have earlier touched upon the question whether Section 13 of the Amending Act read with Sections 10(3) and Section 14 of the

Interpretation Act, gives the President the power to revoke or amend the proclamation which has brought an act of Parliament or part thereof into operation.

This question arose but because it was not necessary to do so, was unfortunately not fully dealt with by the constitutional court in *Pharmaceutical Manufacturers of South Africa* 2000 2 SA 674 CC at [91].

The principle was recognised that Parliament has the power to correct the error (similar to the present one) that had been made by the President. It is also significant that the court considers the possibility that Parliament might have been convened to correct the error and the court mentions the fact that the President himself approached the court urgently. It is not without significance that the possibility is not even raised that the President might have saved all the costs and inconvenience of approaching the court by the simple device of revoking or amending the offending proclamation.

It seems like a minor step of interpretation of the three sections above to accord to the President the power to correct the error but there is a far more fundamental principle involved. The power and duty to make an repeal laws rests with Parliament. Included in that power should strictly speaking also be the power to decide when a new law comes into force. Because new laws often require regulations and the taking of other administrative steps in order to operate effectively, the practice as developed over many years for Parliament to leave it to the executive to decide when everything necessary is in place for a new law

to function. In such case there is a provision in the act which empowers the President to bring the act into operation (and nothing more) by proclamation when the time is ripe. That provision certainly does not empower the President to later revoke the proclamation if he no longer likes the act, thereby effectively repealing it.

Taking this argument to its logical conclusion would mean that the President would have the power to revoke by proclamation any act that he or his predecessors have previously brought into operation by publishing a proclamation to that effect in the *Gazette*. One can hardly imagine the consequences if e.g. the statutes protecting land tenure, the labour legislation or even the Criminal Procedure Act should be revoked in terms of this hypothetical extended power. Such a regime will simply be government by decree which is the antithesis of the Rule of Law which is one of the cornerstones of our Constitution.

My conclusion is therefore that the President's power to bring an act into operation by way of a proclamation does not include the power to either amend or revoke that proclamation. Even if the act expressly gave that power to the President, such a provision would probably be unconstitutional.

In view of the fact that it was common cause that the proclamation has been issued in error it is not necessary for me to consider whether the effect thereof is illegality because of the irrationality of its consequences. In the circumstances it is clear that the following order should be made:

1. It is declared that Proclamation R27 of 2006 is null and void and of no force and effect.
2. The second respondent is ordered to pay the applicant's costs.
3. The order in paragraph 1 above is referred to the constitutional court for confirmation in terms of Section 172(2)(a) of the Constitution.
