CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 34/13
[2013] ZACC 24

In the matter between:

FREDERICK COENRAD DANIEL Applicant

and

PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA First Respondent

GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA Second Respondent

Judgment delivered on: 27 June 2013

JUDGMENT

THE COURT:

[1] The applicant, Mr Frederick Coenrad Daniel, seeks an order setting aside an earlier order issued by this Court. This application is a sequel to the application lodged in this Court by the applicant under case CCT 106/12 (first application). In that case the applicant sought an order declaring that the President's failure to appoint an independent Commission of Inquiry was inconsistent with the Constitution. In

addition, the applicant sought an order directing the President to establish the Commission within ten days.

[2] In the first application (as is the case here) the President and the Government of the Republic of South Africa were cited as respondents. In November 2012 this Court issued directions calling upon the President to respond to the first application. Indeed, on 12 December 2012, the President filed his response which set out in detail his opposition to the relief sought. In the main, the affidavit filed on behalf of the President contended that the direct access procedure was inappropriate for the case and listed a number of considerations militating against it.

[3] Having considered the papers filed in that application, this Court issued an order on 31 January 2013 in the following terms:

> "The Constitutional Court has considered the application for direct access and concluded that the application should be dismissed, as it is not in the interests of justice to grant the applicant direct access.
> Order:
>
> 1. The application is dismissed.
> 2. There is no order as to costs."

[4] The rescission of this order is sought on the ground that it was erroneously granted. The applicant asserts that this Court fell into error in characterising the first

application as being one for direct access. The Rules of this Court, read with the Uniform Rules of Court, permit a party to seek relief such as the present.[1]

[5] The general principle is that once a court has duly pronounced a final order, it becomes *functus officio* and has no power to alter the order. However, Rule 42 of the Uniform Rules creates exceptions to this principle. The Rule empowers courts to rescind or vary orders in certain defined circumstances. In this case the applicant relies on only one of the grounds listed in Rule 42. He contended that the order "was made in error". This falls under the first ground listed in Rule 42. It authorises rescission of an order erroneously granted in the absence of a party affected by it.

[6] The applicant is required to show that, but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court was not aware of at the time the order was made and which

[1] Rule 29 of the Rules of this Court extends the application of Rule 42 of the Uniform Rules to Constitutional Court. Rule 42 provides:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) an order or judgment granted as the result of a mistake common to the parties.
>
> (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

would have precluded the granting of the order in question, had the Court been aware of it.[2]

[7] Regarding the error, the applicant contended that the first application concerned an issue that falls exclusively within the jurisdiction of this Court. Therefore, he did not seek direct access but approached the Court in the ordinary course of seeking relief obtainable only from this Court. This argument obliges us to examine the nature of the claim made in the first application.

[8] Before dismissing the first application, this Court considered the matter and held that it was not in the interests of justice to grant direct access to the applicant. This finding was based on the fact that the grounds advanced by the applicant did not justify bringing the application in this Court to have the dispute determined by it as a court of first and last instance. Implicit in this was the fact that the applicant was free to approach another competent court for the relief sought.

[9] But now the applicant argues that the above finding was made in error because his claim falls squarely within the exclusive jurisdiction of this Court. The submission advanced now is that the President's failure or refusal to appoint a Commission of

[2] *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) at para 6 and *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D-G.

Inquiry constitutes a failure to fulfil a constitutional obligation contemplated in section 167(4)(e) of the Constitution.[3]

[10] In opposing rescission, the President contends that section 84(2)(f) of the Constitution confers a discretionary power on him to appoint Commissions of Inquiry. The President disputes that the section imposes a constitutional obligation and submits that the applicant's claim does not fall within the exclusive jurisdiction of this Court. The applicant is free to approach other courts for the same relief, argues the President. Consequently, the order issued on 31 January 2013 was not, he contends, erroneously granted.

[11] The question whether conduct of the President constitutes a failure to fulfil a constitutional obligation has been considered by this Court before. In *Doctors for Life International v Speaker of the National Assembly and Others*[4] this Court construed section 167(4)(e) in the context of section 167(5) read with section 172(2)(a) of the Constitution and concluded that the words "fulfil a constitutional obligation" should

[3] Section 167(4) provides:

> "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."

[4] [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

be given a narrow meaning "because a broader meaning would result in a conflict with section 172(1)(a) which empowers the Supreme Court of Appeal and the High Courts to make orders concerning the constitutional validity of the conduct of the President."[5]

[12] Drawing from *Doctors for Life International*, this Court in *Von Abo v President of the Republic of South Africa*,[6] held that "obligation" in section 167(4)(e) means a duty specifically imposed on the President to perform specified conduct. Examined in this context, section 84(2)(f) does not impose a duty on the President but a power which may be exercised at his discretion. Accordingly, the President's failure to appoint a Commission of Inquiry does not amount to a failure to fulfil a constitutional obligation.

[13] This view is reinforced by the decision of this Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.[7] In that case this Court rejected the argument that a High Court did not have jurisdiction to pronounce on the President's decision to appoint a Commission of Inquiry. Consequently, it would be incorrect to read the relevant provisions as allowing a High Court to decide issues relating to the appointment of Commissions of Inquiry while excluding their jurisdiction when it comes to a refusal to appoint a Commission.

[5] Id at para 20.

[6] [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 36.

[7] [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC).

[14] It follows that the failure to appoint the Commission of Inquiry in this case does not constitute an issue that falls within the exclusive jurisdiction of this Court. This finding inevitably leads to the conclusion that the impugned order was not granted erroneously. Accordingly the application for rescission must fail.

[15] In the result the application is dismissed.

Attorneys for the Applicant:	Van Wyk and Ayre Attorneys.
Attorneys for the Respondents:	The State Attorney.