CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 156/15

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG Applicant

and

VUYISILE EUNICE LUSHABA Respondent

Neutral citation: *MEC for Health, Gauteng v Lushaba* [2015] ZACC 16

Coram: Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J

Judgments: Jafta J (unanimous)

Decided on: 23 June 2015

Summary: Constitution — Section 165 — Judicial authority vested in courts — One cannot be a judge in their own matter — Court not competent to authorise party to litigation before it to exercise judicial authority

Constitution — Section 34 — right to fair hearing — no one should be condemned without a hearing

ORDER

On appeal from the order of the Gauteng Local Division of the High Court:

1. Leave to appeal is granted.
2. The order issued by the Gauteng Local Division of the High Court on 26 November 2014 is set aside.
3. The appeal against the order of 16 October 2014 on the merits of the case is dismissed.
4. Paragraph 136 of the order of 16 October 2014 is set aside

JUDGMENT

JAFTA J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

[1] This application for leave to appeal is directed at two consecutive orders issued by the Gauteng Local Division of the High Court. The applicant seeks leave to appeal against the main order in terms of which, as a nominal defendant, he was held liable for 100% of the plaintiff's damages, arising out of the wrongful birth of the plaintiff's son at a state hospital. With regard to the ancillary order on costs, the applicant is asking for permission to challenge it on the ground that it was improperly issued.

[2] The application is opposed by the respondent who complains about the delay in lodging the application in this Court, following the dismissal of the petition by the Supreme Court of Appeal. After the dismissal of the petition on 28 April 2015, the applicant applied for reconsideration of the order in terms of section 17(2) of the

Superior Courts Act.[1] This application was dismissed on 3 August 2015. The current application was lodged in this Court on 25 August 2015. The matter was decided without oral hearing, after submissions by the parties.

[3] The applicant is the Member of Executive Council for Health, Gauteng (MEC). The respondent is Ms Vuyisile Eunice Lushaba, in whose favour the impugned orders were granted. Ms Lushaba instituted a damages claim in the High Court, arising from medical negligence at the hands of officials in the employ of the MEC. The MEC defended the action.

[4] Having heard evidence from both parties the trial Court held that the MEC was liable for Ms Lushaba's damages. That Court disapproved of the manner in which the MEC's defence was presented, and queried the decision taken to defend the action and how that decision was taken. The Court found that the defence advanced to the effect that the MEC's employees were not negligent was devoid of any merit and that the decision to defend was taken without perusal of crucial documents which established negligence.

[5] Consequently, on 16 October 2016 the trial Court ordered the MEC to pay costs of the action on attorney and client scale. But unusually, and having ordered the MEC to pay all the costs on a punitive scale, the trial Court issued a further order in these terms:

> "A rule *nisi* issues, calling upon the defendant to show cause on Tuesday 28 October 2014 at 10h00 why he should not be held liable personally *de bonis propriis* on the attorney and client scale, jointly and severally with the defendant on attorney and client scale, for the costs
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> Alternatively to the preceding paragraph and should the defendant be of the view that he should not be held personally liable, he should identify such persons in the department of Health of Gauteng, as well as such persons in the office of the state

[1] 10 of 2013.

> attorney, who should be personally held liable for the costs as well as the reasons why they should be so held liable.
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> The defendant's affidavits, dealing with preceding two paragraphs, should be filed and served by no later than Thursday 23 October 2014 at 12h00."

[6] On the face of it, the additional order called upon the MEC to show cause on 28 October 2014 why he should not be liable for the costs *de bonis propriis* (from his own pocket) in his personal capacity. Further strangely, the order directed him in the alternative and if he held the view that he should not be held liable personally for the costs, that he should identify persons in his department as well as in the office of the State Attorney, who should be held personally liable for the costs. The MEC was ordered to file affidavits on these matters on 23 October 2014 at 12h00.

[7] In compliance with the order the MEC filed an affidavit deposed to by him in which he confirmed that Mr Jabulani Macheke and Dr Kgoposi Cele were authorised to take decisions on whether to defend actions brought against the department. He went further to state that the two officials followed the correct procedure in this matter and that the decision they took was reasonable in the circumstances.

[8] It turned out that the decision to defend the action was based on the expert opinion of a specialist, Dr Mashamba, who disputed that there was negligence on the part of the officials who attended to Ms Lushaba. But the trial Court rejected Dr Mashamba's opinion on the ground that it was expressed without having had sight of crucial evidence including the opinions of Ms Lushaba's experts.

[9] Attached to the MEC's affidavit were affidavits by Dr Cele, Mr Macheke and Mr Ezekiel Matlou, the State Attorney who represented the MEC in the action. These affidavits explained the role played by each official in relation to the case. In particular they showed that these officials were involved in taking the decision that the action could be defended as it appeared to them that the issue of negligence was

contested. In addition Mr Matlou addressed the failure on the part of the MEC to comply with procedural requirements.

[10] As a result the High Court prepared a comprehensive judgment on who should bear the costs of the action *de bonis propriis*. The Court then issued this order:

> "1. Ezekiel Matlou; Jabulani Macheke and Kgoposi Cele are ordered to pay *de bonis propriis* 50% of the cost (identified as such in paragraphs 134 of my first order of 16 October 2014) jointly and severally with the defendant on the attorney and client scale.
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> 2. In the event of the plaintiff recovering all of her costs from the defendant, the defendant is ordered to recover 50% of the costs paid by her to the plaintiff *de bonis propriis* from Messrs Matlou; Macheke and Cele jointly and severally.
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> 3. The conduct of Mr Matlou is referred to the Law Society of the Northern Provinces for investigation and such further action as it may deem fit.
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> 4. The Registrar is directed to send a copy of this judgment, as well as the judgment in this matter of 16 October 2014 to the Law Society of Northern Provinces with the request that the Law Society investigate the conduct of Mr Ezekiel Matlou as appears from this judgment with a view to taking such action the Law Society may consider appropriate."[2]

[11] It is understandable that trial courts are concerned about the flood of medical negligence litigation aimed at provincial health departments. It is on public record that staggering increases in claims have occurred in recent years, at enormous cost to the public capacity to render health services. It is equally understandable that at times trial courts feel frustration that litigation costs mount up, as delays become more and more protracted, while injured claimants suffer. Worst of all, litigious lawyers seem to prosper and bureaucrats seem to get off scot-free, blithely taking no responsibility. But the Court here sought to apply inapposite implements to a profound structural problem. The quest to bring accountability to those who are responsible for the tragic

[2] 26 November 2014 High Court order at paras 1- 4

proliferation of damages claims, and the seeming morass of never-ending litigation amidst which deserving claimants are sometimes made to suffer, must take a different form.

[12] The High Court was driven to issue the second order after it had found that the MEC could not be held personally liable for costs. But in doing so, the Court departed from the terms of its previous order. It will be recalled that on 16 October 2014, the Court had ordered thus:

> "[S]hould the [MEC] be of the view that he should not be held personally liable, he should identify such person in the Department of Health of Gauteng, as well as persons in the office of the state attorney, who should be personally held liable for the costs as well as the reasons why they should be so held liable."

[13] For many reasons, this was indeed a strange and incompetent order. First, this is not how parties who were not involved in particular litigation should be joined. Second and more seriously, the order reveals that the Court impermissibly authorised one of the parties before it to exercise a judicial power. In its terms the order referred to in the preceding paragraph left it to the MEC to decide whether he was personally liable. But, if he took the view that he should not be personally liable, he should identify persons who should be held personally liable and significantly furnish reasons why those persons should be held liable.

[14] It was not competent for the High Court to allow the MEC to be the judge of whether he should be held personally liable and if he should not be held personally liable, to identify who should be. This does not accord with section 165 of the Constitution which declares that judicial authority of the Republic is vested in the courts. Moreover, the order breached a principle entrenched in our law that no one should be a judge in their own case.

[15] In *De Lange* this Court reaffirmed this and other principles which are fundamental to judicial adjudication in a constitutional order. There it was stated:

> "When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own matter and that the other side should be heard, aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone is entitled to an impartial judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation. When the clear basis for committing a person to prison is coercive rather than punitive, warning lights begin to flash."[3]

[16] But, contrary to the direction of the Court, the MEC, having shown why he should not be held liable, did not identify persons who should be held liable. And consequently he did not furnish reasons for anybody to be held liable. Despite this missing link, the High Court concluded:

> "Messrs Matlou and Macheke and Dr Cele have addressed in their affidavits issues around their conduct and decision making in this case and I am satisfied that they have properly been heard. The rule *nisi* foreshadows the consideration of a special cost order against responsible officials.[4]"

[17] The Court proceeded to order Mr Matlou, Mr Macheke and Dr Cele to pay out of their own pockets 50% of the costs which the same Court had on 16 October 2014

[3] *De Lange v Smuts NO* [1998] ZACC 6; 1998 (7) BCLR 779 (CC) 1998 (3) SA 785 (CC); para 131.

[4] 26 November 2014 High Court Judgment at para 101.

ordered the MEC to pay. This was irregular for a number of reasons. These officials were not at any stage joined as parties to the matter. Second, the rule *nisi* issued on 16 October 2014 did not call any of them to show cause why they should not be held liable. They deposed to affidavits in support of the MEC's contention that he could not be held personally liable. Therefore, there was no legal basis for the Court to exercise its judicial authority over these officials.

[18] Another principle breached is that without notice and opportunity to make representations, the High Court punished the three officials. It is a fundamental principle of our law that no one should be condemned without a hearing. This is part of the rule of law which is foundational to our constitutional order.

[19] It is not correct that the three officials "have been properly heard" only because their affidavits addressed the question why they took the decision to defend the action. Those affidavits were not meant to show cause why these officials should not be held personally liable for costs. On the contrary, they were filed in support of the MEC's case. It was the MEC who was properly heard and not them. An order that was issued in these circumstances violates the officials' right to a fair hearing guaranteed by section 34 of the Constitution.[5]

[20] In *De Beer NO* Yacoob J defined this right in these words:

> "This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so,

[5] Section 34 of the Constitution provides :

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

> in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this."[6]

[21] Recently this Court, in *Stopforth Swanepoel & Brewis Incorporated*, set aside an order issued by the Supreme Court of Appeal without hearing the party against whom the order was made. There, Nkabinde J said:

> "It is indisputable that the attorneys were not a party to the proceedings before the Supreme Court of Appeal. This much was acknowledged by that Court itself. The Court nonetheless proceeded to make an adverse order of liability against the attorneys despite its findings that they acted on instructions of Royal.
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> The Supreme Court of Appeal also ordered the attorneys to pay back not only the funds but also an amount of interest greater than the interest the funds were earning in the interest-bearing trust account. This was so despite the fact that their actions were prescribed in terms of section 78(2A) of the Act. The reason advanced for the decision of the Supreme Court of Appeal is thus not good. In my view, the twin notions of procedural and substantive fairness were violated. The manner in which the decision was arrived at and the reasons advanced adversely affected the attorneys' interests.
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> There was no issue on appeal between the attorneys and the respondents regarding the attorneys' liability. The attorneys were not participants on appeal. They should, at the very least, have been invited to make submissions. That did not happen. Consequently, they were not heard. For these reasons, the attorneys are entitled to seek relief in this Court."[7] (Footnotes omitted.)

[22] It follows that the order of 26 November 2014 must be set aside in its entirety.

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[6] *De Beer No v North Central Local Council and South Central Local Council* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 110 (CC) para 11.

[7] *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments* 129 (Pty) Ltd [2014] ZACC 26; 2016 (1) SA 103 (CC); 2014 (12) BCLR 1464 (CC) at paras 24 -6

[23] With regard to the order of 16 October 2014 which dealt with the merits, the MEC's complaint is directed at the assessment of the evidence. Apart from the fact that this attack does not raise a constitutional issue or an arguable point of law of general public importance, the conclusion reached by the High Court on the merits is unassailable. Therefore leave to appeal must be refused, except to the extent of the alternative order on whether the MEC should be held personally liable for costs and if not that he should identify persons who should be held liable and give reasons for the decision. This part of the order of 16 October 2014 falls to be set aside as well.

Order

[24] In the result the following order is made:

1. Leave to appeal is granted.
2. The order issued by the Gauteng Local Division of the High Court, on 26 November 2014 is set aside.
3. The appeal against the order of 16 October 2014 on the merits of the case is dismissed.
4. Paragraph 136 of the order of 16 October 2014 is set aside.