IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISON PRETORIA

CASE NO: 033367/2022

Heard on: 08 & 09/02/2024

Judgment: 29/02/2024

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~

(3) REVISED.

DATE 29/02/2024 SIGNATURE

IN THE MATTER BETWEEN:

SOLIDARITY **Applicant**

And

THE MINISTER OF HEALTH **First Respondent**

THE DIRECTOR – GENERAL: NATIONAL DEPARTMENT OF HEALTH **Second Respondent**

THE MINISTER OF PUBLIC SERVICE AND ADMINISTRATION **Third Respondent**

THE MINISTER OF FINANCE **Fourth Respondent**

NATIONAL TREASURY **Fifth Respondent**

Implementation of a Bill before Parliament - the National Health Insurance Bill- *ultra vires* – s3(7)(a) of the Public Service Act – executive authority in terms of s 85 of the Constitution- constituting capacity in advance of law reform and implementing a bill- s 25 of the Public Service Regulations- in consultation with- misrepresentation- a representation is not false if it may be true.

JUDGMENT

UNTERHALTER J

The applicant, Solidarity, is a trade union. Until its recent enactment, there served before Parliament the National Health Insurance Bill ('the Bill'). Solidarity brings under review five decisions. These decisions, Solidarity complains, were taken to bring into operation the National Health Insurance

Fund (‘the NHI Fund’). The NHI Fund is a central part of the Bill. To take these decisions, Solidarity contends, in advance of the Bill becoming law is unlawful, irrational, and fails to respect the constitutional doctrine of the separation of powers. Solidarity seeks, with one exception, to have the decisions reviewed, set aside and declared unlawful. It cited as the respondents, the Minister of Health (‘the Health Minister’ as first respondent), the Director General of the Department of Health (‘the DG’ as the second respondent), the Minister of Public Service and Administration (‘the PSA Minister’ as the third respondent), Minister of Finance (‘the Finance Minister’ as the fourth respondent), and the National Treasury (‘the Treasury’ as the fifth respondent). The respondents were responsible, in their different capacities, for taking one or more of the five decisions.

[1] The decisions that Solidarity seeks to impugn are these. First, a decision taken by the DG to advertise and fill 44 vacancies for the ‘recruitment of competent technical specialists to assist with the preparation of the NHI Fund’ (‘the recruitment decision’). Second, the decision of the Health Minister and the DG to establish 5 chief directorates in the National Health Insurance Branch (‘the NHI Branch’) of the Department of Health (‘the directorates decision’). Third, the Health Minister and the DG took the decision to establish the NHI Branch. (‘the NHI Branch decision’). Fourth, the respondents established a transitional functional organisation, with the establishment of posts on 2 June 2022 (‘the establishment decision’). Fifth, the Treasury approved ‘the shifting of funds to the compensation of Employees Budget: National Health Insurance’ on 9 June 2022, and the delegation of authority in terms of s 8 of the Appropriations Bill, 2018 (‘the funding decision’). I refer to these decisions, collectively, as ‘the decisions’.

[2] In its amended notice of motion, Solidarity sought to review and set aside, and declare constitutionally invalid, the decisions. However, in the light of the position taken by Treasury and the Finance Minister, counsel for Solidarity, at the oral hearing of this matter, no longer sought any relief against these two respondents, nor did it persist in challenging the funding decision.

Standing

[3] The Health Minister, the PSA Minister, and the DG object to the standing of Solidarity. They contend that Solidarity has no legal interest as a trade union to make the challenge that it does. The internal structure and staffing of the NHI Branch, in anticipation of the enactment of the Bill, does not engage any interest of the members of Solidarity, they contend. Nor, they argue, has Solidarity established a basis to bring these proceedings in the public interest. The founding affidavit is said to lack averments that Solidarity is genuinely and objectively acting in the public interest.

[4] These contentions cannot prevail. Our law takes a generous approach to the showing that is required to establish public interest standing in constitutional cases.[1] Solidarity, in its founding affidavit, explained its legal interest. It stated that, as a trade union, it wishes to ensure that public funds are not spent in a manner that is wasteful and irregular, and that the Department of Health carries out its functions in conformity with the rule of law. These averments were not challenged, beyond a bare denial. The invocation of the public interest by a litigant requires substantiation. Trades unions represent significant numbers of workers. Workers, and their representative organisations, the trade unions, are an important constituency

[1] *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 251 (CC) at paragraph 165

in our national life. They, as with all South Africans, have an interest to ensure that the executive is organised to secure public goods in conformity with the law. Solidarity brings this case to contest the legality of the decisions taken by the respondents in anticipation of legislation that was still to become law. Nothing before me suggests that Solidarity is not acting with a genuine concern to ensure that the executive complies with the rule of law. Solidarity thus has standing to bring this case. The objection to its standing must fail.

Solidarity's case

[5] Solidarity's challenge rests upon two propositions. First, it contends that the decisions constitute the implementation of the Bill. At the time the decisions were taken, the Bill was before Parliament. The executive, constituted by the respondents, Solidarity argues, cannot take decisions to implement the Bill. To do so assumes a power that the executive does not have because the Bill is not law, and hence does not confer any power to act. The respondents may have anticipated that the Bill would become law. But that is neither respectful of the deliberative autonomy of Parliament, nor does it afford the respondents any legal basis to act. Until the Bill, in its final form, is enacted by Parliament, given Presidential assent, and comes into force, the respondents enjoyed no competence to take actions as if the Bill were legislation. I shall refer to this challenge as the *vires* challenge, though the challenge also embraces the contention that the decisions are unconstitutional because they violate the separation of powers, and that they are also irrational.

[6] The second proposition upon which Solidarity relies is that the decisions now challenged were not lawfully taken because they failed to comply with Regulation 25(2)(a)(i) of the Public Service Regulations ('the

Regulations'), promulgated in terms of s 41 of the Public Service Act, 1994 ('PSA'). In terms of s 3(7)(a) of the PSA, an executive authority (which includes the Minister responsible for a department of state) has all the powers and duties necessary 'for the internal organisation of the department concerned'. Regulation 25 of the Regulations concerns the duty of an executive authority to prepare a strategic plan. Regulation 25(2)(a)(i) provides as follows: 'Based on the strategic plan of the department, an executive authority shall – (a) determine the department's organisational structure in terms of its core mandated and support functions – (i) in the case of a national department or national government component, after consultation with the Minister and National Treasury'. ('the Consultation Regulation'). The Health Minister was thus required to consult with the PSA Minister and the Treasury in determining the Department of Health's organisational structure.

[7] Solidarity references the correspondence sent by the Health Minister to the PSA Minister dated 16 May 2022. This letter sought approval for the establishment of 'the nucleus staff establishment for the National Health Insurance (NHI) Branch'. The Health Minister stated in the letter that 'National Treasury has allocated earmarked funds in Vote 18 for the establishment of the NHI Capacity since 2020/21 and has continued to provide a MTEF Allocations for 2022/23 to 2024/25 for the establishment of this capacity' ('the representation'). Solidarity alleges that the representation was false. The Health Minister claimed that Treasury had approved the allocation of funds for the establishment of the NHI Branch, when it had not. This was a material misrepresentation, relied upon by the PSA Minister in giving his concurrence. As a result, his concurrence was vitiated by a material error: it was not a valid concurrence. Hence, there was no lawful consultation in compliance with the Consultation Regulation,

and the reorganisation of the Department of Health, effected by the decisions, was invalid, and falls to be set aside. I shall refer to this challenge as 'the misrepresentation challenge'

The vires challenge

[8] I turn first to the *vires* challenge. Section 3(7)(a) of the PSA is cast in wide terms. It provides that: 'An executive authority has all the powers and duties necessary for - the internal organisation of the department concerned, including its organisational structure and establishment, the transfer of functions within that department, human resource planning, the creation and abolition of posts and provision for the employment of persons additional to the fixed establishment'. This provision should be interpreted in the light of the casting of the executive authority of the Republic that is made by s 85 of the Constitution. The executive authority of the Republic is vested in the President. The President exercises executive authority, together with the other members of the Cabinet, in a number of ways set out in s 85(2). These include: the implementation of national legislation; developing and implementing national policy; preparing and initiating legislation; and co-ordinating the functions of state departments and administrations. The power to determine the internal organisation of a department of state that s 3(7)(a) confers must serve one of the types of executive authority that s85(2) of the Constitution recognises.

[9] One type of executive authority is the implementation of national legislation. Solidarity emphasised that the current legislation that the Health Minister and the Department of Health are required to implement is the National Health Act 61 of 2003 ('the NH Act'). The NH Act is predicated upon the provision of public health by recourse to principles that are quite different to the Bill. Solidarity characterises the NH Act as an enactment

that privileges decentralisation, whereas the Bill, through the NHI Fund, is based upon the universal provision of health care on a centralised basis. Whatever the utility of these broad characterisations, it is common ground that the Bill marks a radical departure from the NH Act.

[10] Solidarity complains that the decisions deplete resources that the Health Minister should be devoting to the implementation of the NH Act. That complaint cannot be sustained, framed in such unqualified terms. While the Health Minister is obliged to ensure that his department is organised to implement the NH Act, it is clear from the provisions of s 85(2) of the Constitution that the Department of Health may be organised ((and hence staffed) to do more than this. The question that arises is whether the decisions fall within the remit of what the Health Minister may do. If they do, the use of resources is lawful, and the fact that these resources are no longer available for the implementation of the NH Act would be a resource allocation decision of the Health Minister that falls squarely within the powers conferred upon him by s 3(7)(a) of the PSA. If the decisions are *ultra vires*, then the decisions were not lawfully taken, and, subject to the question of remedy, the resources devoted to giving effect to the decisions would be available for other lawful purposes. But even if the decisions were to be set aside, it would not bind the Health Minister to devote these resources to the implementation of the NH Act. The Health Minister may decide to apply these resources to some other lawful project, and it is not for this court to direct the Health Minister in such allocative decision-making.

[11] What then is the Health Minister empowered to do by way of organising his department while the Bill is making its way through Parliament? Section 85(2) of the Constitution permits the Health Minister to develop

and implement national policy. Doubtless policy was developed as a precursor to the preparation of the Bill. The Health Minister and the Department of Health also prepared and initiated the Bill for consideration by Parliament. And permissibly so, given s 85(2) (d) of the Constitution. But that is not what Solidarity challenges. The Bill before Parliament marks a radical change to the basis upon which health care is to be rendered in this country. The Bill is predicated upon the provision of universal health care by the state, rendered free at the point of delivery, without, over time, the use of private medical insurance. Solidarity contends that the decisions implement the Bill, which, at the relevant time, was not national legislation. And, hence, such implementation was *ultra vires*, unconstitutional and irrational.

[12] Does the Health Minister enjoy a power to organise the Department of Health to undertake functions that go beyond the preparation and initiation of legislation, but do not amount to the implementation of a bill before Parliament that does not enjoy the force of law? Solidarity contends that a department of state may take some actions to prepare for a bill becoming law, but its actions may not conflict with existing legislation. This does not appear to me to be the salient criterion by reference to which our law demarcates lawful preparatory work that may be undertaken by a department of state in anticipation of a significant statutory change and the implementation of a bill that is before Parliament, which may not become law or may do so with significant amendments that reflects the outcome of Parliament's deliberative decision-making. The Bill marks a radical departure from the NH Act. Whatever lawful preparatory work the Health Minister may undertake, it is likely to be at odds with the NH Act because such preparation is a forward looking exercise predicated upon legislative change.

[13] It appeared to be common ground between the parties that a department of state may take some actions that prepare for the adoption of legislation, most especially legislation of the kind proposed by the Bill that would effect profound changes to the provision of health care services in this country. The parties are not in agreement as to the scope and source of the power to do so. The respondents rely upon s 27 of the Constitution. Section 27(1) confers the right upon everyone to have access to health care services, and then, in terms of s27(2), the state is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 85(2)(e) of the Constitution confers executive authority to perform any other executive function provided for in the Constitution. The 'other measures' that s 27(2) contemplates fall within the executive functions described in s 85(2)(e). These other measures, the respondents maintain, include the decisions that are challenged by Solidarity. They are decisions to ensure that when the Bill becomes law it may be implemented effectively, and thereby move towards the universal provision of health care in conformity with what s 27 of the Constitution requires. In *Treatment Action Campaign (No 2)*[2], it was argued, there is recognition of the power of the state to take reasonable measures to fulfil its obligations in terms of s 27(2) of the Constitution.

[14] *Treatment Action Campaign (No 2)* was a case that addressed the restrictions the state had imposed on the availability of Nevirapine to address mother-to child transmission of HIV. The state was found by the Constitutional Court to have breached its obligations under s 27(2), read with s 27(1)(a) of the Constitution. The restrictions that breached these provisions of the Constitution were to be found in a policy adopted by the

[2] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC)

Government. This policy was subjected to constitutional scrutiny and found wanting. Here, however, we are not concerned with a government policy that must be measured against a constitutional yardstick. Rather, the Health Minister has introduced the Bill into Parliament so as to effect a radical legislative change to the provision of, and access to, health care. That is the measure chosen to give effect to the obligations resting upon the state in terms of s27(2). Once that is so, the issue is not whether the proposed legislation meets the constitutional standard of reasonable measures that s27(2) requires. That, no doubt, is a dispute for another day. The issue is rather what executive powers permit of the decisions that have been taken in anticipation of the Bill becoming law. And that is a matter that was not in issue in *Treatment Action Campaign (No2).*

[15] The correct enquiry is to identify the executive authority and the scope of that authority enjoyed by the Health Minister in deciding how to organise the Department of Health in anticipation of the Bill becoming law. Section 85(2)(e) of the Constitution refers to: 'performing any other executive function provided for in the Constitution or in national legislation.' One such item of legislation is s3(7) of the PSA which, as I have observed, confers upon the Health Minister the powers and duties necessary for the internal organisation of the Department of Health. Something is necessary, if it is required to achieve a particular end. Section 3(7) confers powers upon the relevant Minister that are required to effect the organisational matters described in s3(7)(a). The Health Minister enjoys the power to structure the Department of Health and employ persons, as required, to carry out its functions. Although this is a broad power, like any power, it is not without limits.

[16] Those limits are determined by the demarcation of the lawful functions of the Department of Health. The Health Minister has no power, in terms of s3(7), to organise the Department of Health so as to discharge a function it does not have or could not undertake. A decision to organise the Department of Health in this way would not be necessary, and hence it would be unlawful. And so the organisational freedom that s3(7) confers is disciplined by the lawful functions that the Department may discharge.[3] What are these functions, when a Minister has introduced proposed legislation into Parliament, and awaits the legislation that Parliament enacts (or fails to enact) ?

[17] In the ordinary course of government business, a Minister, as here, will have prepared and initiated legislation, as s85(2)(d) of the Constitution contemplates. Sometimes that proposed legislation will be modest, but, as in the case of the Bill, the proposed legislation entails a radical change, with significant consequences for the way in which a sector of the economy is to function. In these circumstances, there would be a considerable risk to the public good if the responsible Minister failed to take any steps to organise the relevant department of state in preparation for the proposed legislation becoming law. True enough, as Solidarity pressed in argument, the Bill envisages a staged implementation of the legislation. But, as a matter of principle, it is hard to see how it is a sound basis for public administration that preparation for the implementation of radical law reform can only commence upon a bill becoming law. Imagine that our country faced a war, and mobilisation by way of conscription was to be enacted. It would be a matter of grave public concern if the Department of

[3] Of some analogical assistance see *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) at paragraphs 51 -53

Defence could only commence preparations for compulsory conscription once Parliament had passed the required legislation.

[18] Solidarity's central contention is this. Preparation is one thing, but the implementation of a Bill, not yet law, cannot be lawful because a department of state cannot do what Parliament has yet to pass into law. This contention is correct. But it must be properly understood. If a power has not been conferred upon the Health Minister to act, he may not do so. That is the time-honoured postulate of the *ultra vires* doctrine and the principle of legality. And it matters not that the Health Minister anticipates that he will be given the power when the Bill enjoys the force of law. That does not mean, however, that the Minister may not make organisational changes to the Department of Health to prepare and plan for the day that the Bill does become law. To constitute an organisational structure that would be utilised for the implementation of proposed legislation; to create posts for this purpose; and allocate a budget to do so; all of this is prudential planning in anticipation of an important law reform. And, in my view, falls within the functional remit of a department of state.

[19] Put simply, there is a distinction between creating organisational capacity within a department in anticipation of proposed legislation becoming law, and taking administrative actions that assume a power that does not (yet) have a basis in law. I observe the following. First, this distinction rests upon the proposition that it is lawful for a department of state to enjoy a functional competence to plan, prepare and create dedicated capacity in anticipation of a significant change to the law. This is a necessary incident of s 3(7) because the very matters there referenced by way of internal organisation postulate a forward-looking and anticipatory vantage point. Hence, the power and duty to engage human resource planning, to abolish

and add posts and transfer functions. The internal organisation of a department must be dynamic and fit for purpose, one of which is that it may be required to render public service to administer new law that is before Parliament and forms part of the legislative programme of the government of the day.

[20] Second, to create capacity and design a department's organisational structure in a manner suited to an anticipated law change need not be wasteful expenditure. What systems will be needed; what competences and training will be required; how programmes will be designed and by whom– these, and no doubt many other matters, prepare the ground for change, without implementing proposed legislation that is not yet law. Of course, if Parliament does not pass the legislation and abandons it, resources will have been used to no end. But that does not of necessity mean that the expenditure was wasteful, as Solidarity appears to assume. The executive authority may initiate legislation. This is foundational to the way in which an elected government discharges its democratic mandate. Public administration must be ready to implement this legislative programme. To do so it must plan and create capacity. Provided that is done with reasonable prudence, it is not wasteful, but essential to the functioning of a democracy. Solidarity fears that resources used in this way deplete what is available to service the needs of the NH Act. Resource allocation within a department of state will no doubt always be a difficult balance to strike against the constraint of limited resources, but provided the requirements of legality are met, this is an area in which courts exercise considerable restraint.

[21] Third, as a matter of application, the distinction between planning an organisation and creating capacity in readiness for a change to the law and implementing that law may appear to make fine distinctions. But it rests,

ultimately, on what is done. To configure the organisation, to create capacity, and to plan for change is not the same thing as taking administrative actions that assume a power not (yet) conferred. For example, to send out call up papers and muster conscripts in advance of any law that permits of this is unlawful; but to plan for the day when a bill before Parliament becomes law and requires this is both lawful, and often prudent.

[22] Solidarity's legality challenge thus turns on the decisions and how they are to be characterised, given the distinction I have drawn between lawful planning and capacity creation, on the one hand, and the unlawful implementation of a bill before Parliament, on the other. And it is to this matter that I now turn.

[23] I have described above the decisions that Solidarity seeks to review and set aside. I will consider whether the decisions were taken *ultra vires*. In order to do so, it is necessary to have regard to the Bill, and its essential features. For it is the Bill that Solidarity contends is being implemented by way of the decisions, in advance of the Bill becoming law. The Bill has as its purpose to achieve affordable universal access to quality health care services. To do this, the Bill would establish and maintain a NHI Fund, funded by mandatory prepayments. The NHI Fund is central to the design of the Bill. It will be constituted as a National Government Component as contemplated in s 7 of the PSA. The NHI Fund will procure health services, medicines and health related products, and users will receive health care services free at the point of care. The chief source of funding for the NHI Fund is money appropriated annually by Parliament, principally by way of taxation. The NHI Fund is governed by a Board, appointed by the Health Minister.

[24] Solidarity's case is that the decisions implement key provisions of the Bill, most especially the establishment of the NHI Fund. The DG decided to establish the NHI Branch; the Health Minister and the DG decided to create 5 chief directorates in the NHI Branch; the DG decided to advertise and fill 44 vacancies to secure technical specialists to assist with the preparation of the NHI Fund; and to establish a transitional organisational structure. Solidarity places some emphasis upon a document, styled 'the business case for amendment to the organisational structure of the national department of health to establish a comprehensive national health insurance fund administration'. I shall refer to this document, less compendiously, as the 'organisational change document'. The organisational change document was signed on 4 May 2022 by, amongst others, Dr Crisp, then the Deputy Director General: NHI in the Department of Health. It evidences, Solidarity contends, that the proposed organisational changes to the Department of Health mirror the provisions of the Bill, and in particular s11, to manage the NHI Fund, to set up the procurement of health services under the auspices of the NHI Fund and, more generally, to operationalise the NHI Fund.

[25] The organisational change document sets out in its executive summary why it is that an amendment is required to the organisational structure of the Department of Health. It observes that 'National Health Insurance (NHI) will be implemented as one of the most comprehensive and fundamental reforms that the South African health sector has seen. *The capacity to develop and sustain the functions required to run the NHI Fund needs to be built as a matter of urgency.'* (my emphasis) What follows is a lengthy motivation to strengthen the NHI component in the Department of Health.

[26] There can be little doubt that the detailed specification of the work to be undertaken by the NH Branch, the 5 chief directorates that will direct the work of the NH Branch, and the posts to be created and filled in the NH Branch are intended to lay the groundwork for the establishment of the NHI Fund set out in the Bill. Among the functions that require attention is how to manage what is termed 'sector-wide procurement'. The organisational change document also makes it clear that technical posts need to be created and personnel appointed 'to develop the draft policies and procedures for the Schedule 3A entity' (i.e. the NHI Fund) and the NHI Fund will 'be deeply reliant on digital systems (ICT). Work has been done on building the architecture of the system and in rolling out terminals to public Health Care facilities across the country'. There can be little doubt that the decisions were taken to create capacity, develop policies, build systems, and recruit technical expertise that will be used by the NH Fund, on the assumption that the NHI Fund will come into being.

[27] The decisions must be understood by reference to the organisational change document. It is the blueprint, authorised by high-ranking officials within the Department of Health, as to what the decisions were intended to effect. The decisions go beyond mere planning for the NHI Fund. They create capacity to be used by the NHI Fund, they work out how the NHI Fund will be operationalised, and the systems it will require. Where then do the decisions fall: do they implement the Bill or prepare and create capacity for the NHI Fund when and if it is constituted?

[28] There can be no doubt that the respondents who took the decisions assumed the Bill would become law, and the NHI Fund would be constituted as the Bill proposes. The executive authorities responsible for

organising the public service in anticipation of significant law reform should recognise that Parliament decides what to legislate, and its deliberative process may yield outcomes that do not align with the legislation that was initiated by the responsible Minister. Parliament is not, under the Constitution, an extension of executive authority. But nor can the executive authorities simply wait upon final presidential assent to legislation before anything is done in anticipation of legislative change. Hence, the delineation I have sought to make between unlawful implementation of a Bill that fails to respect the separation of powers, and lawful planning and capacitation which permits the public service to ensure that the legislative programme of the government of the day is capable of effective implementation when Parliament legislates.

[29] I am of the view that the decisions fall within the confines of legality. That is so because the decisions propose actions that do not, ultimately, constitute the NHI Fund, or commence its operation. The organisational change document is clear that the NHI Fund can only be constituted once the Bill becomes law. The Bill requires that the Board manages the NHI Fund. The Board does not exist. The radical change the Bill would bring into being can only be effected by NHI Fund. The universal provision of health care services and the large-scale procurement this entails has not taken place. The provision of health care continues within the framework of the NH Act. Medical schemes continue to make provision for private health care. And the central theme of the organisational change document is to create capacity and undertake the work needed so that the NHI Fund can be operationalised. Doubtless the posts created, those recruited, the systems that are developed, and the policies formulated are intended to be used by the NHI Fund, and will be so utilised if the Bill becomes law. But ultimately capacitation in anticipation of a radical change to the law is not

implementation of a Bill that is not yet law. Accordingly, I find that Solidarity's *vires* challenge must fail. And in consequence the decisions do not want for constitutional validity, nor are they irrational.

The misrepresentation challenge

[30] I recall that Solidarity's case is that the PSA Minister was not lawfully consulted in compliance with the Consultation Regulation, and hence the reorganisation of the Department of Health effected by the decisions is invalid. Solidarity avers that the Health Minister represented that Treasury had allocated funds for the proposed reorganisation, when it had not. The concurrence of the PSA Minister, given in June 2022, was thus obtained by reason of a misrepresentation which was material to the concurrence that was sought from the PSA Minister. The Treasury did authorise the shift of funds on 11 July 2022, but this occurred after the concurrence of the PSA Minister had been secured.

[31] Doubtless it may be of some relevance, when the PSA Minister is consulted, for the PSA Minister to know whether public funds will be available to make possible the proposed reorganisation. But the decision as to whether public funding will be made available for the proposed reorganisation is not within the remit of the PSA Minister. If there is no funding, the concurrence of the PSA Minister may be redundant. If there is funding, then the PSA Minister will give consideration to matters relevant to the public service that bear upon the reorganisation sought. The PSA Minister would have proceeded on the premise that funding had been approved when the concurrence was given. It had not yet been approved, but it was authorised by Treasury not long thereafter.

[32] The premise of the PSA Minister's concurrence was not false, but rather, had yet to be determined. There is a difference between a representation of fact that is false, and a representation of fact that may yet be true. If the representation turns out to be true, then it is not an operative misrepresentation that may be said to vitiate the consultation held with the PSA Minister, and for two reasons. First, it is not a misrepresentation. It turned out to be true. Second, it cannot vitiate the concurrence given because the PSA Minister's concurrence was not based on any competence of the Minister to approve funding. The PSA Minister had no such competence. The PSA Minister's concurrence is based upon considerations relevant to the executive authority of the PSA Minister. There is no reason to think that the representation made to the PSA Minister was in any way operative in giving his concurrence. And, if it was, as indicated, it turned out to be true. The representation cannot, in these circumstances, serve to render the concurrence mistaken or otherwise invalid. The misrepresentation challenge must also fail.

Conclusion

[33] For these reasons the application must be dismissed. As to costs, Solidarity brought a case that raised important questions as to the powers of an executive authority, and its limits, in addressing fundamental changes to the law. There is no reason, under the principles in *Biowatch,* to make Solidarity liable for the costs incurred by the respondents. The parties will each bear their own costs.

[34] In the result, the application is dismissed.

DN UNTERHALTER

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA, GAUTENG DIVISION

JOHANNESBURG

Heard on: 08 /02/2024

Judgment: 27/02/2024

Appearances:

For the Applicants:	**MJ ENGELBRECHT SC and**
	K PERUMALSAMY
Instructed by:	**HURTER SPIES INC**
For the First -	**CP WESLEY SC, K KOLLAPEN and**

Third Respondents	**L MOKGOROANE**
Instructed by:	**THE STATE ATTORNEY**
(PRETORIA)	
For the Fourth and	**JJ GAUNTLETT SC and F PELSER**
Fifth Respondents	
Instructed by:	**THE STATE ATTORNEY**