IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 32021/2021

Date of hearing: 2 May 2024

Date delivered: 31 May 2024

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

31/5/24 [redacted]
DATE SIGNATURE

In the matter of:

SOLIDARITY **Applicant**

and

MINISTER OF HUMAN SETTLEMENTS WATER AND SANITATION **Respondent**

JUDGMENT

SWANEPOEL J:

[1] The old adage "charity begins at home" is at the heart of this application. The applicant is a registered trade union that acts in this matter on behalf of its members, many of whom work in the engineering field, and also in the public interest. It seeks an order reviewing the respondent's decision to procure, on behalf of the Department of Human Settlements, Water and Sanitation ("the Department"), the services of some 25 Cuban scientists, engineers and engineering assistants ("the engineers") on the grounds that the decision was unlawful and constitutionally invalid. Moreover, the applicant seeks an order setting aside the respondent's decision, and an interdict restraining the respondent from giving effect to the individual contacts between the Department and the Cuban engineers.

[2] The respondent initially opposed the matter and delivered an answering affidavit. Unfortunately, the respondent took no further part in the matter, failing to deliver heads of argument, and failing to appear at the hearing of the matter. I say that the respondent's absence was unfortunate, as I would have preferred to have heard the respondent's perspective on the matter before making a decision.

[3] South Africa and Cuba have enjoyed a longstanding and close relationship. One of the products of this relationship is the ongoing cooperation between the countries in the field of water and sanitation. During December 2001 the countries entered into the first cooperation agreement in terms of which Cuban engineers were seconded to South Africa. That agreement was followed by a second agreement and then by a third (current) agreement which was concluded on 6 February 2020. It is pursuant to the latter agreement that 25 engineers were deployed to South Africa. The applicant says that there are many South African engineers with the same or even better qualifications who could have been appointed to fill the posts that the Cuban engineers were appointed to. It points out that as a result of the Covid-19 pandemic, and due to the depressed economic circumstances in which we live, many local engineers have been unable to obtain employment. It says that the failure

to consider such persons for these posts was unfair, not cost effective, and irrational. The applicant argues that the decision to spend millions of rand on foreign nationals whilst South Africans were willing and able to provide the services was "astounding and unpatriotic".

[4] The applicant seeks the following relief:

[4.1] That leave be granted to the applicant to prosecute the application in the public interest;

[4.2] That the decision of the respondent to procure, on behalf of the Department of Human Settlements, Water and Sanitation, the services of Cuban scientists, engineers and engineering assistants in the field of water resource management and water supply, be declared unlawful and constitutionally invalid;

[4.3] That the decision be reviewed and set aside;

[4.4] That the Department of Human Settlements, Water and Sanitation be interdicted and restrained from giving effect to the individual employment contracts entered into between the Government of the Republic of South Africa and the Cuban scientists, engineers and engineering assistants;

[4.5] Costs on the attorney/client scale;

[4.6] Further and/or alternative relief.

IN LIMINE

[5] The respondent has taken the point that although the application is aimed at setting aside the respondent's executive decision to appoint the engineers, any such order would of necessity impugn the agreement between South Africa and Cuba, and that the applicant ought to have joined the President of the Republic and the Minister of International Relations and Cooperation, being the persons who are responsible for international relations. Furthermore, the respondent says that the individual engineers have a direct and substantial interest in the outcome

of the application and should have been joined as parties. Therefore, the respondent says, the application should be dismissed for non-joinder.

[6] The applicant says that the President and the Minister of International Relations and Cooperation have no interest that might be adversely affected by the outcome of the application. It argues that the application is not aimed at the decision to conclude the agreement between South Africa and Cuba, but rather at the appointment of the Cuban engineers to render services to the Department. As for the individual engineers whose contracts are under attack, the applicant says that although they may have an interest in the outcome of the application, it is simply a financial interest and not a direct and substantial interest in the legal outcome of the case, and that they do not have to be joined.[1]

[7] In respect of a party being allowed to participate in proceedings that might affect its rights, the Constitutional Court has said[2]:

> "If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation."

[8] In *Matjhabeng Local Municipality v Eskom Holdings Ltd*[3] the Constitutional Court held:

> "The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it."

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[1] See: Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (OPD) at 168 to 170
[2] In SA Riding for the Disabled Association v Regional Land Claims Commissioner 2017 (5) SA 1 (CC)
[3] 2018 (1) SA 1 (CC) at 33 E - F

[9] It is thus not negotiable that a party who has a direct and substantial interest in a matter must be heard before a decision is made that adversely affects its interests. I do not believe that one can glibly say that the individual Cuban engineers do not have a direct and substantial interest in the matter, especially as regards the order sought interdicting the Department from giving effect to their contracts. The engineers are already in South Africa, and have been for some years. Were I to grant the interdict order, their contracts would effectively be terminated and they would be left unemployed. In my view the Cuban engineers have a direct and substantial interest in the interdict relief sought by the applicant.

[11] As for the rest of the relief sought, declaring the decision to appoint the engineers unlawful and setting it aside, it seems to me that the point of contention is not the decision to appoint the engineers, but the fact that these particular appointments allegedly do not comply with either the provisions of section 217 of the Constitution which deals with the procurement of goods and services by organs of state, nor with the requirements for the appointment of state employees in terms of the Public Service Act, 103 of 1994 ("the PSA"). The applicant makes the point specifically that it does not attack the authority of the respondent to enter into the bilateral agreement with Cuba; it takes issue with the manner in which the engineers were appointed.

[12] If that is the case, then the only party with an interest in the matter is the respondent. If the lawfulness of the bilateral agreement is not in issue, then the President and the Minister of International Relations and Cooperation cannot have an interest in the relief sought. Equally, if the relief granted does not affect the interests of the engineers, then they would not be prejudiced by not having been parties to the application.

[13] The respondent argued in its answering affidavit that the contract was concluded in the exercise of executive authority, and that it is impossible to attack the appointment of the engineers without challenging the legality of the agreement. I disagree. It is not in dispute that the

executive is entitled to enter into bilateral (or multilateral) agreements, and the lawfulness of the agreement itself is not under attack, but its implementation within the country must be lawful. In short – conclude the agreement, but implement it in a lawful manner.

MERITS

[14] The applicant alleged in its founding affidavit that the appointment of the engineers constituted the procurement of services which required the respondent to follow a procurement process as required by section 217 (1) of the Constitution, which reads as follows:

> "When an organ of state in the national, provincial or local spheres of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."

[15] The Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA") and the Preferential Procurement Regulations[4] have been enacted to give effect to the principles of fairness, equality, transparency, competitiveness and cost-effectiveness provided for in section 217. The PPPFA requires the state to prepare an invitation to bid, after having undergone a proper assessment of the state's requirements. A party who wishes to provide goods or services to the state must then submit a tender for consideration in response to the invitation.

[16] The respondent did not take issue with the applicant's contention that none of these procurement processes were followed. It said, however, that the appointment of the engineers did not occur in terms of section 217, but rather, that the engineers were employed in terms of the PSA.

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[4] R 32 published in Government Gazette 40553 of 20 January 2017

[17] The applicant, in reply, argued that none of the procedures laid down in the Public Service Regulations 2016[5] by which state employees are appointed were complied with in the appointment of the engineers. Regulation 57 (1) reads as follows:

"(1) An executive authority-

(a) shall not appoint any person-

(i) under the age of 15 years of age; or
(ii) under the minimum school-leaving age in terms of any law;

(b) shall determine the health requirements for incumbency of a post in any case where it is part of the inherent requirements of the post;

(c) shall subject an employee or a candidate for employment to personnel suitability checks as directed by the Minister;

(d) shall ensure that each person upon appointment, is provided with written particulars of employment, including the terms and conditions of his or her service; and

(e) shall not, with due regard to section 10(a) of the Act, appoint a temporary employee permanently or vice versa without complying with regulations 65 and 67."

[18] The relevant subsections in Regulation 65 provide for the advertisement of vacant posts. They say:

"**65 Advertising**

(1) An executive authority shall ensure that vacant posts in the department are advertised, as efficiently and effectively as

[5] Published under Government Notice R 877 in Government Gazette 40167 of 29 July 2016

possible, to reach the entire pool of potential applicants, including designated groups.

(2) An advertisement for a post shall as a minimum specify the job title, salary scale, core functions, place of work, inherent requirements of the job, including any other requirements prescribed in these Regulations.

(4) An executive authority shall advertise a vacant post, as a minimum, in the public service vacancy circular issued by the Department of Public Service and Administration, but may also advertise such post-

(a) within the department;

(b) locally; or

(c) nationwide.

(7) A funded vacant post shall be filled within eight months after becoming vacant.

(8) An advertisement contemplated in subregulation (4) may be utilised to create a pool of potential candidates for a period of not more than three calendar months from the date of advertisement to fill any vacancy in the relevant department if-

(a) the job title, core functions, inherent requirements of the job and the salary level of the other vacancy is the same as the post advertised; and

(b) the selection process contemplated in regulation 67 has been complied with.

(9) With due regard to the criteria in regulation 67(5)(b) to (d), an executive authority may fill a vacant post without complying with subregulations (3) and (4) if-

(a) the department can fill the post from the ranks of employees who have been declared in excess and are on a salary level linked to the grade of that post;

(b) the department can appoint into the post an employee who was appointed under an affirmative action measure as contemplated in section 15 of the Employment Equity Act;

(c) the post is to be filled through a transfer of an employee in terms of section 12(3) or 14 of the Act; or

(d) the post falls within an occupation or category of employees as directed by the Minister."

[19] Regulation 67 makes provision for the appointment of a selection panel which shall consider applicants for appointment. Regulation 67 (1) reads as follows:

67 Selection

(1) An executive authority shall appoint a selection committee to make a recommendation on the appointment to a post. The selection committee shall consist of at least three members who are employees of a grade equal to or higher than the grade of the post to be filled, or suitable persons from outside the public service. However-

(a) the chairperson of the selection committee, who shall be an employee, shall be of a grade higher than the post to be filled; and

(b) in the event that the head of the component within which the vacant post is located, is graded lower than the vacant post, such a head may be a member of the selection committee. "

[20] It seems clear to me that the purpose of these Regulations is to ensure that a transparent and fair process is followed in the appointment of state employees. The applicant says that none of these processes were followed. The rule 53 record filed by the respondent supports the applicant's contention. It does not show that any of the requirements of the Regulations were complied with. It follows that the appointment of the engineers in terms of the PSA was unlawful.

[21] Whether the services of the engineers were sourced in terms of section 217 and the PPPFA, or whether they were appointed in terms of the PSA is of no moment. Neither the requirements of section 217 nor the PSA regulations were complied with. The appointments are unlawful no matter which regulatory regime applies.

[22] The exercise of all public power must comply with the Constitution and the doctrine of legality, which is part of that law.[6] Where public power is exercised unlawfully, a court is obliged to declare such conduct inconsistent with the Constitution. Section 172 (1) of the Constitution says:

> "(1) When deciding a constitutional matter within its power, a court –
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including –
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[6] Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

[23] Having held that the appointment of the engineers was unlawful, I am obliged by section 172 to make a declaratory order to that effect.

[24] The next question is what remedy must be applied? It does not necessarily follow where a declaration of constitutional invalidity is made that the offending conduct must be set aside. In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd*[7] the Court reiterated the principle enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[8] that in appropriate circumstances a Court will refuse to set aside an invalid administrative act. The Court aims at achieving an outcome that is just and equitable, and if the circumstances justify the setting aside of the unlawful conduct, then such an order will follow. Conversely, if the circumstances are such that it is just and equitable not to set aside the conduct, then a Court may decline to do so.

[25] The contracts of the engineers are due to end in August 2024. I have already said that it would be improper to grant interdicts against the Department to restrain it from continuing with the contracts, in the absence of having heard submissions for the engineers.

[26] The agreement between South Africa and Cuba was entered into on 6 February 2020 for an initial period of five years, but it may be extended for another five years by either party on six months' notice. Given the fact that the current agreements terminate in August 2024, there is no point to an order interdicting the existing employment contracts, as the proverbial horse has bolted. In any event, as I have said above, I do not believe that it would be appropriate to grant an interdict in respect of the individual employment agreements without the engineers having been heard.

[27] As for the future, it would seem sufficient to declare illegal the appointment of engineers without adhering to either proper procurement

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[7] 2008 (2) SA 638 (SCA)
[8] 2004 (6) SA 222 (SCA)

processes or to the Regulations governing the appointment of public servants. The respondent may then give effect to the agreement with Cuba, but in a lawful manner.

[28] As far as costs are concerned, the applicant has sought attorney/client costs. It is trite that punitive costs are an extraordinary measure that should only be imposed in cases where there are special circumstances present, such as malice, dishonesty etc. I do not believe that this is such a matter.

[29] I make the following order:

[29.1] The appointment of Cuban scientists, engineers and engineering assistants to the Department of Human Settlements, Water and Sanitation without adherence to either section 217 of the Constitution, the Preferential Procurement Policy Framework Act, 5 of 2000 and the Preferential Procurement Regulations published in Government Gazette 40553 of 20 January 2017, or to the Public Service Act, 103 of 1994 and the Public Service Act: Regulations, 2016 is declared to be unlawful and constitutionally invalid.

[29.2] The respondent shall pay the applicant's costs on the High Court Scale C.

[redacted]

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR THE APPLICANT: **Adv. W.P. Bekker**

ATTORNEY FOR THE APPLICANT:	**Serfontein Viljoen & Swart**
DATE HEARD:	**2 May 2024**
DATE OF JUDGMENT:	**31 May 2024**