

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/02

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, KWAZULU-NATAL

Appellant

versus

PREMIER OF KWAZULU-NATAL

Respondent

In re:

MINISTER OF HEALTH AND OTHERS

Appellants

versus

TREATMENT ACTION CAMPAIGN AND OTHERS

Respondents

Heard on : 6 May 2002

Decided on : 6 May 2002

Reasons delivered on : 5 July 2002

JUDGMENT

THE COURT:

[1] This judgment deals with an application for leave to appeal and coupled with that an application to adduce further evidence in the proposed appeal. Both arose on the periphery of a

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major dispute (the TAC case) in which judgment is being delivered contemporaneously.¹ The nature and history of the dispute in the TAC case appear fully from that judgment. These applications were heard after conclusion of the arguments in the TAC appeal.

[2] The present applicant is the Member of the Executive Council for Health (the MEC) in the province of KwaZulu-Natal (KZN). He was cited as the fifth respondent in the TAC case in the High Court.

[3] The MEC made common cause with the other respondents who opposed the application in the High Court. He was represented by the same attorney (the State Attorney) and the same team of advocates. He also made common cause with the other respondents who, as applicants, applied to the High Court for a certificate in terms of Rule 18 of this Court's rules.

¹ Headed *Minister of Health and Others v Treatment Action Campaign and Others*, CCT 08/02.

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[4] The respondent in the present application is the Premier of KZN. His involvement came about in the following manner. Two days before the application to the High Court was due to be heard, a firm of attorneys acting on the instructions of the Premier filed a notice to the effect that the fifth respondent was appointing them as attorneys of record instead of the State Attorney. The attorneys also filed an affidavit by the Premier to the effect that he wished to intervene in the proceedings on behalf of the government of KZN. He did not support the application for leave to appeal in the TAC case but supported the application by the TAC for leave to execute the High Court's order.² The MEC responded by filing an affidavit contending that he was the fifth respondent, that he did not support the Premier but supported the application for leave to appeal and opposed the application for execution.

[5] When the application for a certificate was called in the High Court, two different senior advocates appeared, each claiming to represent the government of KZN. The High Court ruled that "the intervention of the Premier of KwaZulu-Natal is allowed" and when asked to elaborate on the meaning of its ruling, held in a separate judgment that:

"The meaning of the judgment . . . is that the province of KwaZulu-Natal is now represented by the person in whom the Executive Authority in that province vests and that is by the Premier of the province himself. In other words the representation of the province by the member of the Executive Council for Health has lapsed, the principal has taken over."

²

Id para 9.

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[6] It is against this order of the High Court that the MEC now seeks leave to appeal directly to this Court, the High Court having granted a positive certificate in terms of Rule 18 of this Court's rules. The principle criterion for this Court to grant leave to appeal directly to it, is whether it would be in the interests of justice to do so.³ We therefore proceed to consider whether an appeal directly to this Court is in the interests of justice.

[7] The dispute in this application is not whether the MEC was the correct party to cite in the TAC application. The real dispute is between the Premier and the MEC as to what stance should be adopted by the government of KZN in the TAC matter. Clearly this is a purely political dispute which could and should have been resolved at a political level. If the Premier was of the view that the MEC was not implementing the province's policy⁴ regarding the issues in the TAC case, he should have dealt with that at a political level.⁵

[8] The effect of the High Court's ruling was to substitute the Premier for the MEC as a respondent in the TAC case. It is by no means clear that the Court had the power to do so, nor

³ Section 167(6)(b) of the Constitution.

⁴ See s 125(2)(d) of the Constitution.

⁵ See for instance s 132(2) of the Constitution which provides:
"The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them."

THE COURT

that the dispute was justiciable, more particularly as there had been no substantive application for such relief. It is however unnecessary to express a view on these questions because, for reasons that follow, it is not in the interests of justice to grant the MEC leave to appeal directly to this Court.

[9] On the assumption that the matter is indeed justiciable, it is important to note that the Premier and the MEC are both organs of state in the provincial sphere of government.⁶ They would therefore be bound by the obligation to co-operative government provided for in Chapter 3 of the Constitution. Section 41(1)(h) (part of Chapter 3) provides:

“All spheres of government and all organs of state within each sphere must –

. . . .

- (h) co-operate with one another in mutual trust and good faith by –
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.”

In the *National Gambling Board* case⁷ this Court held that it will rarely grant direct access to organs of state who have not duly performed their obligations to co-operative government. By the same token, the failure to perform those obligations is relevant when

⁶ *National Gambling Board v Premier KwaZulu-Natal and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) para 20-2.

⁷ *Id* para 34.

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deciding whether it is in the interests of justice to grant an organ of state leave to appeal directly to this Court. Therefore, even if the matter is justiciable, the parties have clearly not complied with their obligations under section 41(1)(h) of the Constitution.

[10] Moreover, the relief sought in the MEC's proposed appeal has no practical effect. The MEC was represented in the High Court by the same attorney and counsel as the other respondents and made common cause with them. Those attorneys and counsel appeared in the TAC appeal for the appellants (the respondents in the High Court). The case was fully argued on their behalf. The same attorney and counsel appeared for the MEC in this application for leave to appeal. Should leave be granted and the present appeal succeed, the MEC will have nothing to add in the TAC appeal.

[11] As for the Premier, he did not note an appeal against the High Court's order. He supported the relief that was granted and the application for leave to execute and abided this Court's decision on appeal. The judgment and orders in the main appeal thus bind the Premier, the MEC and the government of KZN. Should leave to appeal be granted and the Premier be successful in his proposed appeal, he would still not be a party to the appeal in the TAC case. It also follows that no useful purpose would be served by allowing the Premier to lodge any additional evidence.

[12] To sum up, this application concerns a political dispute which could and should have been resolved at a political level; even if the dispute is justiciable, the parties did not comply with their obligations to co-operative government; and the appeal will have no practical value. In the circumstances it is not in the interests of justice to grant the MEC leave to appeal.

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[13] Both parties sought to proceed with an issue which should not have been brought to this Court and both failed to comply with their obligations to co-operate in government. In the circumstances no order as to costs should be made.

Order

[14] The application by the MEC for leave to appeal and the application by the Premier to adduce further evidence are both dismissed.

Chaskalson CJ

Langa DCJ

Ackermann J

Du Plessis AJ

Goldstone J

Kriegler J

Madala J

Ngcobo J

O'Regan J

Sachs J

Skweyiya AJ

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For the Appellants: MTK Moerane SC, P Coppin and B Vally instructed by the State
Attorney, Pretoria

For the Respondent: DN Unterhalter instructed by the Larson Bruorton & Falconer
Inc, Durban