IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 7798/09

In the matter between:

GLENISTER, HUGH	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF SAFETY AND SECURITY	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Fifth Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

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REASONS DELIVERED ON FRIDAY, 26 FEBRUARY 2010

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[1] In this application the applicant sought an order:

(a) declaring invalid and of no force and effect the National Prosecuting Authority Amendment Act No. 56 of 2008, and the South African Police Service Amendment Act No. 57 of 2008;

(b) Interdicting and restraining respondents from implementing and enforcing the provisions of the two Acts pending confirmation of the order of invalidity by the Constitutional Court;

(c) Directing sixth respondent to pay applicant's costs, such costs to include the costs attendant upon the engagement of two counsel and the qualifying expenses of the expert witness Groeneveldt.

[2] After hearing argument by counsel for applicant and the first, second and third respondents ("respondents"), the following order was made:

"The application is dismissed and no order as to costs is made. Reasons for the order will be furnished in due course."

What follows, are the reasons for the order.

[3] The grounds upon which applicant sought relief are set out in paragraph 98 (i)-(vii) of his original heads of argument. The first ground is a rationality review, i.e. the absence of a rational basis for the enactment of the two Acts referred to above. Grounds (ii) – (vii) are all premised on the alleged failure by Parliament and the President to fulfil constitutional obligations. These are alleged to be the following:

(a) A violation of the constitutional obligation of the accountability (ground (ii)).

(b) The failure to comply with the constitutional obligation to cultivate principles of good human resource management practices and good labour relations (ground (iii)).

(c) The violation of the constitutional obligation to comply with international obligations (ground (iv)).

(d) The failure to comply with the constitutional obligation to allow proper public participation (ground (v)).

(e) The failure to comply with the obligation not to undermine the values enshrined in the Bill of Rights (ground (vi)).

(f) The failure to comply with the constitutional obligation to allow the National Prosecuting Authority to properly exercise its functions (ground (vii)).

[4] The applicant did not allege that the Acts as such are unconstitutional. No specific section or provision of the Acts was attacked on the basis of its unconstitutionality. As indicated above, the constitutional validity of the Acts was only challenged on two bases, namely that the Acts are not rationally related to a legitimate government purpose (ground (i)) and that the Acts are unconstitutional as Parliament or the President had failed to fulfil one or more or all of the aforementioned constitutional obligations (grounds (ii)- (vii)).

[5] Dealing firstly with grounds (ii) – (vii), the starting point is section 167(4)(e) of the Constitution, which provides that only the Constitutional Court may decide that Parliament or the President failed to fulfil a constitutional obligation. Reference can be made to **King v Attorneys' Fidelity Fund Board of Control** 2006 (1) SA 474 (SCA) and **Doctors for Life International v Speaker of the National Assembly & Others** 2006 (6) SA 416 (CC). In both these cases it was stressed that the purpose of granting the Constitutional Court exclusive jurisdiction in terms of section 167 (4) of the Constitution, is to preserve the comity between the

judicial branch of government and the other branches of government, by ensuring that only the highest court in constitutional matters intrudes into the domain of the other branches of government. It thus follows that while vesting in the judiciary the power to declare statutes and the conduct of the highest organs of state inconsistent with the Constitution (section 172 of the Constitution), the jurisdiction to determine disputes that involve important questions that relate to the sensitive areas of separation of powers, must be decided by the Constitutional Court in terms of section 167 (4). One of the sensitive areas is the determination of the question whether the President and/or Parliament failed to fulfil constitutional obligations which have specifically and exclusively been imposed on them (section 167 (4) (e)). See also: **Women's Legal Centre Trust v President of the Republic of South Africa and Others**, Constitutional Court Case No. CC13/09, decided on 22 July 2009.

[6] In the instant matter there is no dispute between the parties as to the nature of the obligations upon which applicant relies in grounds (ii) to (vii). Mr. P Hoffman SC, with him Mr. P Hazell SC, acting on behalf of applicant, in response to a question by the court, agreed that grounds (ii) to (vii) constitute a reliance upon the failure of the President and Parliament to fulfil their specific constitutional obligations. In view of the provisions of section 167(4)(e), this court has no jurisdiction to determine

the dispute over whether the President and Parliament failed to fulfil the said constitutional obligations, or not.

[7] The nature of this application underscores the relevance of having such matters determined by the highest court. The dispute as to whether Parliament and/or the President failed to comply with the relevant constitutional obligations, involves important questions that relate to the sensitive areas of separation of powers, the adjudication of which have been reserved for the Constitutional Court. The dispute as to whether the relevant constitutional obligations have been breached, requires the determination of what appears to be an important issue, namely whether disestablishing the Directorate of Special Operations ("DSO") was motivated solely by a desire on the part of the ruling party to protect its members from investigation by the DSO. This is clearly the sort of matter which the Constitutional Court, if it deems it appropriate, has to decide, as envisaged by section 167 (4) (e). It follows that grounds (ii) to (vii) should fail due to a lack of jurisdiction on the part of this court to hear the relevant disputes emanating therefrom.

[8] It was argued on behalf of applicant that this court does have jurisdiction, as the final relief claimed relates only to the invalidity of the two Acts. It was submitted that the jurisdictional limitation (section 167

(4) (e)) would only have been relevant had the Acts not been passed into law and had the relief claimed been in the form of a *mandamus*, interdict or some other relief not consonant with a declaration of invalidity. This submission provides no answer to the jurisdictional limitation imposed by section 167 (4) (e) of the Constitution. The fact of the matter is that the declaration of invalidity which applicant sought, can, in terms of grounds (ii) to (vii), only be granted upon a finding by this court that Parliament or the President failed to fulfil their said constitutional obligations. The latter finding is precluded by the provisions of section 167 (4) (e). Therefore, no finding could be made to the effect that the President or Parliament failed to fulfil the said constitutional obligations and, consequently, no declaration of invalidity based upon the non-fulfilment of these constitutional obligations, could follow.

[9] The suggestion in respondents' heads of argument, that the wording of section 167 (4) (e) precludes this court from making a positive finding, but not from deciding that Parliament or the President has <u>not</u> failed to fulfil a constitutional obligation, was not persisted with in argument by counsel for respondents, Mr. W Duminy SC, with him Ms. Poswa-Lerotholi. He conceded that such an interpretation would make no practical sense, as it would require the court to hear the matter, but if at the end of the hearing it was found that the President or Parliament failed

to fulfil the constitutional obligations, no order could be made. In any event, in the **Doctors for Life**-case at paragraph 30, it was stressed that:

"The question whether the NCOP (National Council of Provinces) has failed to facilitate public involvement in its legislative processes concerns a dispute over whether parliament has fulfilled a constitutional obligation as contemplated in section 167 (4) (e). Only this court has the jurisdiction to decide such a dispute." (our emphasis).

[10] It followed, that the only basis upon which this court could exercise jurisdiction to hear the application, was ground (i). The room for interference by a court in a rationality review is very limited. A court would normally only be entitled to interfere on this basis if it is found that the exercise of public power has been arbitrary, i.e. that there was no rational basis for the decision which had been made. In **Bel Porto School Governing Body v Premier Western Cape** 2002 (3) SA 265 (CC), the following was said in this regard:

"The fact that there may be more than one rational way of dealing with the particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."

[11] In **Pharmaceutical Manufacturers of SA: In re: Ex Parte President of the RSA** 2000 (2) SA 674 (CC), the following was said in paragraph 90 in regard to the rationality-requirement:

"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately."

[12] In **Khosa, Mahlaule and Others v Minister of Social Development and Others** 2004 (6) SA 505 (CC), at paragraph 67, the Constitutional Court emphasised that the test for rationality is a relatively low one and that the standard of reasonableness "is a higher standard than rationality".

In **Nieuwoudt v Chairman, Amnesty Subcommittee, TRC** 2002 (3) SA 143 (C), Davis J, writing for the Full Bench, articulated the application of the rationality test for review, as follows at 164 G-H:

"...So long as there is a rationale for the decision which is based on the evidence placed before the committee, a Court should be loathe to substitute its own opinion for that of the committee. In essence the test is a common-sense one."

[13] Having regard to all the evidence before the court, we were in agreement with the submission on behalf of respondents, namely, that the establishment of the Directorate of Priority Crime Investigation within the framework of the SAPS Amendment Act, is manifestly designed to enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes and other crimes. This is a legitimate governmental purpose and the means by which it is sought to be achieved appear to be rational. It follows that, objectively viewed, the decision is rational and can certainly not be described as arbitrary. This Court accordingly concluded that there is no merit in ground (i) upon which applicant relies.

[14] In the result the application fell to be dismissed.

[15] In regard to the issue of costs, Mr. Duminy submitted that the application borders on the vexatious and in view thereof applicant should be mulcted in costs. We were not convinced that in bringing this application, the applicant conducted himself in a manner which should compel us to express our disapproval by means of an adverse costs order. On the contrary, this court was of the view that no costs should be ordered against the unsuccessful applicant, as the application raises a matter of some importance.

[16] In the result the application was dismissed with no order as to costs.

Desai, J

Fourie, J

Zondi, J