THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 5950/2017

THE DEMOCRATIC ALLIANCE **APPLICANT**

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **1st RESPONDENT**

SPEAKER OF THE NATIONAL ASSEMBLY **2nd RESPONDENT**

Coram: ROGERS J & WILLE AJ

Heard: **31 MARCH 2017**

Delivered: **31 MARCH 2017**

EX TEMPORE JUDGMENT

ROGERS J (WILLE AJ concurring)

[1] This is an urgent application by the Democratic Alliance ('DA') for interim relief pending a proposed application for judicial review which the DA undertakes to institute by no later than Monday 3 April 2017. The interim relief which the DA seeks concerns the so-called cabinet reshuffle which was announced in the early hours of this morning, Friday 31 March 2017.

[2] The interim relief which the DA claims is an interdict to prevent the swearing-in ceremony of the newly appointed cabinet ministers and deputy ministers scheduled to take place at six 'o clock this evening, ie in about 50 minutes' time, and to interdict the reshuffle and to order that the cabinet, as it existed immediately prior to the announcement of the reshuffle, remain in place pending the judicial review, alternatively pending a vote of no-confidence in the President to be moved in the National Assembly.

[3] In regard to the vote of no-confidence, there is a prayer directing the President, alternatively the Speaker, to summon the National Assembly to an extraordinary sitting with a view to considering and voting on the DA's motion of no-confidence. Mr Katz SC, who appeared for the DA leading Mr Mayosi, did not press for this latter relief.

[4] The President's power to select ministers to his cabinet is to be found in s 91(3) of the Constitution. His power to appoint deputy ministers is sourced in s 93(1) of the Constitution. The power to de-select (dismiss) ministers and deputy ministers is not expressly conferred by the Constitution but is inherent in the power of selection (cf *Masethla v President Of the Republic of South Africa & Another* 2008 (1) SA 566 (CC) para 68).

[5] In the proposed review, which is to be instituted by Monday, the DA will be contending that the President has exercised his constitutional powers of selection and dismissal in a manner which is unlawful. The present application foreshadows that this contention will be based on allegations that the President's decisions are irrational and were taken in bad faith.

[6] We need not decide today whether the President's decisions under the provisions I have mentioned are susceptible to judicial review. I am not aware of any decision of our higher courts holding that certain classes of acts performed in the exercise of public power are altogether beyond the reach of judicial scrutiny. It may well be that, as an exercise of public power, the President's decision to appoint or dismiss a minister or deputy minister is subject to legality review inter alia on the ground of irrationality, having due regard to the purposes for which the powers in question have been conferred (the oath or solemn affirmation which the President and his ministers must make, as set out in Schedule 2 of the Constitution, shed significant light on these purposes). But the threshold at which a court will intervene must be sensitive to the nature of the power.

[7] It is difficult to imagine a power closer to the heartland of the President's personal preferences than the power to appoint and dismiss ministers and deputy ministers; it is by its nature highly discretionary. It may well be that the exercise of these powers can be impeached on the ground of irrationality but the threshold for judicial interference is likely to be very high. Of course, if bad faith could be properly proved by satisfactory evidence, interference might follow more readily. In general, though, I think it can be said that the primary consequence of decisions to appoint and fire cabinet ministers which the public or sectors of it regard as bad decisions, is political rather than legal.

[8] The interim relief which the DA seeks presupposes that the applicant enjoys reasonable prospects of success in the proposed review. That is the essence of the DA's alleged *prima facie* case or *prima facie* right. I have indicated that the evidence required for interference on the basis of irrationality is likely to be at a high threshold though *mala fides* may stand on a different basis. But whatever the precise test for interference, it would need to be supported by facts properly established.

[9] Because of the (perhaps understandable) haste with which this application has been brought, the founding papers consist essentially of conclusions rather than facts when it comes to matters such as irrationality and bad faith. Ordinary observers of South African public life over the last 15 months may have their own views about the quality of the President's decisions but any conclusion we reach as

a court must be based on facts before us rather than on public perceptions or our own private opinions. Here the factual foundation for the *prima facie* case underlying the interim relief sought is not in our view to be found within the four corners of the affidavits before us.

[10] Apart from having to prove a *prima facie* case, the applicant must also establish that the balance of convenience favours the granting of interim relief and that, in the absence of such interim relief, irreparable harm is likely to be suffered. The relatively short founding affidavit concentrates on the harm flowing from the cabinet reshuffle rather than on facts showing it to be an impeachable decision. The consequences are largely financial in nature, concerned with a rapid weakening in the South African currency and the risk of a sovereign credit downgrade. These phenomena are not to be underestimated: if South Africa is downgraded to sub-investment (junk) status, the cost of our borrowings, which are already very high, will increase and that will undoubtedly compromise the country's ability to tackle a large number of social and economic challenges which have to be met to alleviate poverty and advance the quality of life of all our citizens.

[11] Insofar as the financial consequences are concerned, they are really tied up with the decision concerning the occupants of the positions of finance minister and deputy finance minister rather than the other elements of the cabinet reshuffle. The application does not in fact set out what the reshuffle comprises but I think we may accept that the decisions concerning the finance minister and deputy finance minister represent a significant subtext in this application. Now, insofar as irreparable harm is concerned in respect of those specific two positions, I think Mr Jamie SC, who together with Mr Studti appeared for the President, is correct in submitting that the decision has already been made and that nothing that happens by way of the swearing-in ceremony in less than an hour's time is going to change this.

[12] The reason for this is that a swearing-in is only required if a person is joining the cabinet. I think we may take judicial notice of the fact that the person who has been appointed to occupy the post of finance minister is a serving cabinet minister who has hitherto occupied the position of Minister of Home Affairs. He will continue

to serve in the cabinet and will not have to be sworn in. Accordingly, stopping the swearing-in ceremony is not going to have any effect on that particular appointment.

[13] It is true that the application also seeks generally to preserve the status quo which prevailed prior to the announcement of the cabinet reshuffle. If the review in due course succeeds, one may well revert to that position but at the present time the effect of granting interim relief would be to reinstate into the cabinet a finance minister who has already been dismissed from it and to displace a person who has already been deployed to that position and in respect of whom no further procedural requirements, such as swearing-in, are needed in order for him to fulfil the functions of the finance minister.

[14] Another aspect which has weighed with us in assessing the element of irreparable harm is the extent to which the irreparable harm can truly be said to be a consequence of the assumption of office by the newly appointed ministers, particularly through the process of swearing-in. It is not our place to comment in a political sense on whether the reshuffle decision is good or bad. But if the cabinet reshuffle has already caused harm, and if that harm deepens in the days ahead, it is our view that that principal cause of the harm is the public perception, here and abroad, concerning the quality of the decisions made by our President and what it says about his plans for the future. We do not think the question as to whether particular appointees are sworn in and start performing their functions is the source of the harm; it is the perceived quality of the President's decisions.

[15] The leading Constitutional Court cases make it clear that when courts are asked to intervene, in advance of review proceedings on an interim basis to restrain the exercise of statutory powers, there is an additional qualification over and above the conventional test for the granting of interim relief. That additional test is whether the circumstances are exceptional and the case for intervention strong and clear (*National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) 223 (CC) paras 41-47; *City of Tshwane Metropolitan Municipality v Afriforum & Another* 2016 (6) SA 182 (CC) para 43). This is to prevent the danger of courts being drawn in to political matters, in potential violation of the separation of powers, in circumstances where the case for judicial interference is not clearly made out. We

do not think that the standard of a proper and strong case has been met here. That is because of what we have said concerning the absence of facts currently on the record in support of the *prima facie* case and concerning the facts advanced in support of the contention of irreparable harm and balance of convenience.

[16] The fact that we have come to these conclusions does not imply that the courts should shirk from their duty to uphold the Constitution. But the rule of law is not necessarily advanced by overhasty intervention. The rule of law may have to tolerate a period of turmoil and discomfort so that the Constitution can be vindicated in accordance with principles of justice by which facts are properly established and parties have adequate opportunity to advance their arguments. That has not been possible in this case and we do not feel impelled, by the strength of what has been put before us, to intervene.

[17] Finally, we must emphasise that our decision in this matter is not about the wrongs and rights of the President's decision. Nobody, and certainly not the President, would be entitled to point to our decision as in any way vindicating his decision to make the cabinet reshuffle. We simply say that, at this stage and on the limited facts now before us, it would not be right for us to intervene.

[18] As to the order to be made, we do not see any purpose in keeping this particular application alive. The DA will be entitled to launch its review on Monday or any other day of its choosing and in accordance with whatever timetable it considers appropriate in the circumstances. In regard to costs, we are reluctant now to make an order. The DA was no doubt acting in what it believed to be the best interests of the country. We have not really heard proper argument on costs. We therefore intend to direct that the costs of this application will be reserved for decision in the review to be instituted, on the basis that if that review is not instituted or prosecuted with reasonable expedition, one or both of the respondents may set this application down for a decision on costs, subject to reasonable notice being given to the applicant.

[19] We therefore make the following order:

(i) The application is dismissed.

(ii) The costs of the application are reserved for decision in the review to be instituted by the applicant. If the said review is not instituted within a reasonable period of time or is not thereafter prosecuted with reasonable expedition, one or both of the respondents may set the matter down for a decision on costs, subject to reasonable written notice being given to the applicant.

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ROGERS J

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WILLE AJ

APPEARANCES

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