

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 4020/10

In the matter between:

**THE NATIONAL SOCIETY OF BLACK ENGINEERS
OF SOUTH AFRICA**

First Applicant

SIYABONGA KHESWA

Second Applicant

and

THE MINISTER OF PUBLIC WORKS

First Respondent

**THE ENGINEERING COUNCIL OF SOUTH
AFRICA**

Second Respondent

THE COUNCIL FOR THE BUILT ENVIRONMENT

Third Respondent

D. ARGYRAKIS & 49 OTHERS

Fourth – Fifty Third
Respondents

**HEADS OF ARGUMENT ON BEHALF OF THE FIRST
RESPONDENT**

1.

The Applicants are seeking an order declaring the appointment by the First Respondent of the members of the Second Respondent (i.e. Fourth – Fifty Third Respondents) for a period of four years commencing 28 August 2009 to be invalid.

2

2.

Without presently waiving his right to argue any of the aspects dealt with in the opposing affidavit, the First Respondent will, for the time being, limit its argument to what follows.

THE APPLICATION IS ILL-CONCEIVED

3.

Central in developing the argument that follows is the fact that the engineering professions through the Second Respondent play a pivotal role in maintaining and developing the infrastructure of the Republic of South Africa.

4.

The foregoing stands to reason but will be improvised upon with reference to the Engineering Professions Act, No 46 of 2000 ("the Act"), the Construction Industry Development Board Act, No 38 of 2000 ("the CIDB Act") and the Council for the Built Environment Act, No 43 of 2000 ("the CBE Act"). Reference to the papers filed in the application, particularly by the Second Respondent, will also be made.

3

5.

The decision sought to be set aside was taken on 21 July 2009 and the Fourth – Fifty Third Respondents had been in office since 28 August 2009. It presently is approximately 1½ years later. The enormity of the consequences of the relief sought by the Applicants is fully dealt with by the Second Respondent.

6.

As far as the consequences of the full Council vacating office are concerned, the Applicants deal with that in a baseless and superficial indication that the previous Engineering Council will in terms of section 5 of the Act continue in office until the succeeding Council is duly constituted. It is presumed for purposes of this argument that the Applicants are of the view that by reason of the fact that (according to the Applicants) the present Council has never been duly constituted, the previous Council is still in office. In fact, that is not the situation. In law, the succeeding Council has, until such time as the Honourable Court may grant the relief sought, been duly constituted. Furthermore, the previous Council cannot be said to be a council-in-waiting, i.e. waiting to resume office.

4

7.

Practicality is of critical importance in this regard. The Applicants do not give any indication that the members of the previous Council are willing and/or able to be reinstated 1½ years after leaving office.

8.

The application is also ill-conceived by reason of the fact that the Applicant, through its President, Mr. Madonsela, does not in any way attack the action of the First Respondent on the basis that the First Respondent acted in order to achieve an ulterior purpose or acted in bad faith or irrationally or abused his discretion or failed to apply his mind or was biased in favour of alternatively against certain individuals. The Applicants also do not criticize the qualifications or suitability of the individual members that had been appointed to serve on the Council.

9.

The attack by the Applicants is limited to what Applicants perceive to be procedural shortcomings.

10.

The Second Respondent deals with such procedural shortcomings in detail and the First Respondent will not rehash such facts or argument. First Respondent will argue that strict compliance was not necessary.

Observatory Girls Primary School and Another v Head of Department of Education, Gauteng 2003 (4) SA 246 (W).

11.

Having said that, the First Respondent points out that the First Applicant and Mr. Madonsela are satisfied to accept the validity of the appointment by the First Respondent and are content to allow the appointed members to continue to serve on the Council, provided 25 members of the First Applicant are added to the members of the Second Respondent.

Opposing affidavit, para. 17.6 at p 212;

Opposing affidavit, annexure “ANM1(b)” at pp 241-4.

12.

At the heart of the Applicants' objection to the present Council is the aspect of representativity.

Objections to the Recommendations for ECSA Council Composition :

Term of Office 2009 – 2014, Record, p 30-38;

Submission to the Portfolio Committee : National Assembly and Mr.

Gwede Mantashe : Secretary General of the ANC, annexure “ANM1(a)”

to the opposing affidavit on pp 235 – 240;

Annexure “ANM1(b)” to the opposing affidavit already referred to.

13.

It will be argued with reference to the above documents that the aim with the application is not to remove the Fourth – Fifty Third Respondents from the Council, but to add to the Engineering Council members of the First Applicant so as to achieve better representativity for Blacks and to end White minority domination.

14.

The Applicants intend to achieve the above without any regard for the Act. The Act does not provide for the above.

15.

The Applicants also intend to achieve the above knowing full well that there exists “huge professional development backlogs”, that such backlogs must be

reversed in circumstances where there “is still insufficient growth in the number of graduating Black engineers” and that “those who graduate as engineers are lured into other sectors and thus leave the engineering profession, resulting in the numbers of the existing technical skills being further reduced.”

The foregoing appears from the constitution of the First Applicant.

Opposing affidavit, para. 12.2 on pp 206-7;

Founding affidavit, annexure “VM1” on p 15.

16.

In the circumstances the analysis of the composition of the Engineering Council in the opposing affidavit by the First Respondent is not irrelevant as the Applicants would have it in their replying affidavit.

Opposing affidavit, para. 11.1 on pp 205-6;

Replying affidavit, para. 8 on p 511.

17.

That the application is ill-conceived and brought for an ulterior motive is also clear from the “Objection from Council Member Mr. S.E. Madonsela” which is pp 30 – 38 of the record.

18.

I point out that even though Mr. Madonsela at the time must have known of the alleged procedural shortcomings, the present attack is absent from such document.

19.

Section 41 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) is also of consequence. Such section envisages cooperative government between all spheres of government and all organs of State, of which the Third Respondent is one.

20.

At the time of the launching of the application, Mr. Madonsela was the chairman of the Council for the Built Environment. His council was charged with promoting and protecting the interests of the public in the built environment, facilitating participation by the built environment professions (of which the engineering profession is one) and promoting sound governance of the built environment professions. The CBE was also charged with cooperating with other organs of State and spheres of government in mutual trust and good faith by *inter alia* avoiding legal proceedings against one another. Mr. Madonsela did not thus comply with section 41(1)(h)(vi).

In consequence, the Honourable Court may refer the matter back in terms of section 41(4) of the Constitution.

THE APPROACH OF THE HONOURABLE COURT

21.

It will be submitted on behalf of the First Respondent that the Honourable Court is endowed with a discretion in an application such as the present. Such discretion is an indispensable moderating tool for avoiding or minimizing injustice in circumstances such as the present.

22.

It will be argued that the Applicants intend to use the discretion of the Honourable Court (the “moderating tool”) for their extremist opportunism.

23.

It is pointed out that the Applicants do not raise and explain to the Honourable Court the prejudice flowing to the Applicants from the appointment by the First Respondent of the present Engineering Council.

**SECTION 7 OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT,
2000 (“PAJA”)**

24.

Section 7(1) provides:

“Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date - (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

25.

It is clear that as early as 26 May 2009 (and, on the probabilities even earlier) Mr. Madonsela on behalf of the First Applicant took a serious and focused interest in the election and constitution of the new Engineering Council for the Republic of South Africa.

Record, annexure “J” on pp 30-8.

26.

The First Applicant patently did not bring the present proceedings without unreasonable delay. It considered such part of section 7(1) as *pro non scripto* whereas it is imperative. The present Applicants also brought the present proceedings later than 180 days after the Applicants became aware of the appointment by the First Respondent and the reason for it, alternatively might reasonably have been expected to have become aware of the action and the reasons.

Opposing affidavit, para. 31 on pp 219 – 220.

27.

There is no application for condonation in terms of section 9(1)(b) of PAJA and, if there were, it cannot be said that the “interests of justice so require”, the threshold stipulated in section 9(2) of PAJA for such an application.

28.

The Applicants did not ask for interim urgent relief which may have been less disruptive than the relief presently sought.

After the Applicants became aware of the alleged administrative action on 29 July 2009 it had a full month (until 28 August 2009) to ask for relief on the basis that the Council about to be instituted should not be instituted but that the existing Council should continue in office in terms of section 5 of the Act.

It is submitted that in the circumstances the Applicants are precluded by section 7(1) of the Act to apply for and obtain the relief sought.

DID THE FIRST RESPONDENT TAKE ADMINISTRATIVE ACTION?

29.

“Administrative action” is defined in section 1 of the Promotion of Administrative Justice Act, No 3 of 2000 (“PAJA”) as:

“Administrative action’ means any decision taken, or any failure to take a decision, by-

- (a) an organ of State when
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of State, in exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect ...”.

30.

The First Respondent contends that the Second Respondent is an organ of State. If necessary, argument in that regard will be addressed to the Honourable Court.

31.

The First Respondent points out that notwithstanding the fact that the actions of the Second Respondent leading to the appointment (that is under attack) conceivably qualifying as administrative action, there is no attack from the Applicants in that regard and no relief sought in that regard.

32.

The action of the First Respondent in appointing the members of the Council pursuant to the submission to the First Respondent by the Second Respondent of their names, does not qualify as administrative action.

Bhugwan v JSE Ltd 2010 (3) SA 335 (GSJ);

Sokhela v MEC for Agriculture KZN 2010 (5) SA 574 (KZP).

33.

Furthermore, there is no allegation by the Applicants that the action of the First Respondent adversely affects the rights of any person or has a direct, external legal effect.

DISCRETION

34.

We have already above touched upon the discretion of the Honourable Court as a moderating tool.

In regard thereto see:

***Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA);
Pepkor Retirement Fund and Another v Financial Services Board and
Another 2003 (6) SA 38 (SCA).***

35.

It is submitted that should the Honourable Court find that the actions of the First Respondent were indeed administrative action, the Honourable Court should exercise its discretion against granting the relief asked by the Applicants on the basis of effluxion of time and considerations of practicality.

Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA).

CONCLUSION

36.

The First Respondent asks that the application be dismissed with costs.

The First Respondent submits that it was reasonable and appropriate in the present circumstances to appoint two counsel and will ask that the costs consequent upon the employment of two counsel be admitted.

SIGNED at PRETORIA on this 22nd day of NOVEMBER 2010.

Q. PELSER SC

A.T. NCONGWANE

COUNSEL FOR FIRST RESPONDENT