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DISPUTE RESOLUTION ALERT

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PUBLIC LAW:
PUBLIC SECTOR BEWARE: EXECUTIVE ACTION REQUIRES REASONS AND A RECORD

Rule 53 of the Uniform Rules of Court is a tool available to applicants wishing to review decisions before the courts. It requires a decision-maker against whom an application for review is launched to produce the record of and (in some cases) reasons for the impugned decision within 15 days of the application.

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The President's legal team argued that the decision to reshuffle Cabinet was made under the power endowed by s91(2) of the Constitution, which permits the President to appoint and dismiss Ministers.

Its importance in these proceedings has been emphasised by our courts on numerous occasions. In 2012 the Supreme Court of Appeal held that "[w]ithout the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed". The Constitutional Court reiterated this importance in 2014 when it said: "Undeniably, a rule 53 record is an invaluable tool in the review process."

On 4 April 2017, an urgent application to review the President's decision to appoint a new Minister and Deputy-Minister of Finance was launched in the Pretoria High Court. On 4 May 2017, the High Court (per Vally J) heard and granted an application to compel the President to produce the reasons for and record of that decision in accordance with rule 53.

In opposing the application to compel, the President's legal team argued that the decision to reshuffle Cabinet was made under the power endowed by s91(2) of the Constitution, which permits the President to appoint and dismiss Ministers. As such, it amounted to an executive decision which was not provided for in rule 53.

In making this argument, the President took a technical approach to the wording of rule 53, which provides that the record of "the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial and administrative functions" must be produced by the decision-maker. In providing for the circumstances in which the record must be produced, rule 53 is clear that the President performing an executive function is not one of them.

In its reasons subsequently handed down on 9 May 2017, the High Court explained this omission by examining the genesis of the rule, which came about in a time when it was not permissible to review executive action. Since the advent of the Constitution, however, this is no longer the case. It is now settled that decisions of an executive nature must conform to the doctrine of legality (see the Constitutional Court's judgment in *Albutt*). That is, an executive decision must be rational. Rule 53 has not been amended to reflect this change.

The High Court questioned the basis on which an applicant could approach a court, and on which a court could measure the rationality of the impugned decision, if they do not have access to the record. It took a purposive approach to the interpretation of rule 53 to find that "there is no logical reason not to utilise

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While the SCA and Constitutional Court have emphasised the importance of a record in review proceedings, it was not necessary for the High Court to go beyond the explicit wording of rule 53.

[rule 53]" where executive action is being reviewed, unless this would result in a "failure of justice". The High Court further held that the exercise undertaken by a court in a review of an executive decision is no different to a review of a judicial or administrative decision.

As a result of this finding, the High Court did not consider it necessary to have recourse to its inherent power to regulate its process under s173 of the Constitution. However, it is not immediately apparent that this would not have been a more legally-sound approach to the issue.

While the SCA and Constitutional Court have (rightly) emphasised the importance of a record in review proceedings, it was not necessary for the High Court to go beyond the explicit wording of rule 53. Perhaps it would have been better to leave it within each High Court's inherent power to determine whether a record is necessary in reviewing executive action, and to regulate the production thereof. In regulating their process, High Courts are obliged by the Constitution to take the interests of justice into account (including a litigant's right to a fair public hearing). This obligation would have ensured that no applicant in a review of executive action would go without a record where that would not be in the interests of justice.

The legal basis on which the High Court ordered the President to provide reasons for the impugned decision also appears to be incorrect. The wording of rule 53 is such that a decision-maker is only compelled to provide reasons where the law requires it, or where the decision-maker desires to provide them. Vally J, however, merely ordered the reasons to be provided on the basis of rule 53 without providing any indication of the law which compels the President to provide them. Although this likely falls within the High Court's inherent power, this finding was not made in terms of that power.

Nonetheless, in terms of this finding, decision-makers exercising an executive power and who find their decisions subject to review are now compelled to produce the records of their decisions. It is therefore crucial for public sector entities to ensure that, even where their decisions do not amount to administrative action, they keep a proper record of the decision and their reasons therefor in order to produce it under rule 53 should that decision ever be challenged.

Lionel Egypt and Sarah McGibbon

CLICK HERE to find out more about our Administrative and Public Law team.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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