



**IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 22352/20

In the matter between:

SAKELIGA NPC

Applicant

and

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA AND EIGHT OTHERS**

Respondent

ORDER

1. It is declared that the Directions issued by the Minister of Small Business Development (the seventh respondent) on 12 May 2020 under Government Notice R522 in Government Gazette 34406 are illegal and invalid.

2. The seventh respondent is ordered to pay the applicant's costs relating to the relief sought in respect of the Directives issued by the seventh respondent on 12 May 2020, such costs to include the costs of senior counsel.

REASONS

LOUW J:

1. The applicant sought a declaratory order that the sixth respondent (the Commission for Intellectual Property and Companies) has no authority to issue "*Essential Service Permits/Certificates*" to enable any company or close corporation to conduct essential or permitted services in terms of the Regulations issued under the Disaster Management Act 57 of 2002 (the so-called Level 4 Regulations), and further ancillary declaratory orders.
2. The applicant contended that the instruction by the Minister of Trade, Industry and Competition (the third respondent) to the CIPC to issue such certificates is not authorised by the Level 4 Regulations and that the CIPC, being a creature of statute, does not have the power in terms of the Companies Act to issue such certificates.

3. It was submitted on behalf of the respondents that the third respondent merely requested the CIPC to issue certificates to companies and close corporations who registered as essential service providers on the CIPC's *Bizportal* website and that the CIPC certificates expressly state that the possession thereof was still subject to a business complying with the definition of an essential service business in the Regulations. It was further submitted that the certificates only provided *prima facie* evidence that a particular business was a provider of essential services and that it was "*a nice to have*".
4. The application was heard by me via *Zoom* on 28 May 2020. On 29 May 2020, the Minister of Cooperative Governance and Traditional Affairs (the second respondent) issue new regulations which will apply during Level 3 of the lockdown and which amend and add to the Level 4 Regulations. In terms of regulation 46(1), all businesses and other institutions may operate except those set out in Table 2. There is no reference to essential services in the Level 3 Regulations.
5. Table 2 also provides that all persons that are able to work from home must do so, but that all persons will be permitted to perform any type of work outside the home, and to travel to and from work and for work purposes under Alert Level 3, subject to strict compliance with health protocols and social distancing measures and certain further conditions. In terms of regulation 16 of the Level 4

Regulations, a person could only leave their home for work purposes if it was to perform an essential or permitted service as allowed in Alert Level 4 and had to be in possession of a permit which corresponds with Form 2 of Annexure A. In terms of regulation 28(4) of the Level 4 Regulations, such permits had to be issued by the head of an institution, whether public or private, or a person designated by him.

6. Having considered the Level 3 Regulations, I inquired from counsel whether the CIPC certificate issue had not, as a result, become academic. Counsel for the respondents submitted submissions in which it was contended that the issue had not become academic because of the provisions of regulations 3(1) and 3(2). Those regulations provide that the second respondent may determine by notice in the Gazette which of Levels 1, 2, 3, 4 and 5 apply at a national, provincial, metropolitan or district level or in a hotspot. It was submitted that part or all of the Republic may be returned to alert level 4 or 5, in which event the current *status quo* would be restored. The applicant agreed with this submission in supplementary heads of argument. It also made certain further submissions which, in my view, did not take the matter any further.
7. I respectfully disagree with counsel's submissions. As matters stand, all businesses and institutions may operate, save those mentioned in Table 2. Businesses which provide essential services are no longer

singled out as the only businesses which are permitted to operate and for whom the CIPC certificates were issued. The requirement, if it was a requirement, for a business which performs an essential service to be in possession of such a certificate has clearly fallen away.

8. The possibility that the whole of the country, or specific parts thereof, may be returned to Level 4 or Level 5, is at this stage mere speculation. It may happen or it may not. There is currently no provision or need for the issuing of CIPC certificates, even if the issue thereof was previously lawful. No enforcement officer is therefore entitled to demand the production of a CIPC certificate by any business, whatever the nature of the business, and will act unlawfully if he does so or if he or she arrests or fines or takes any action against any person for failing to produce such a certificate.
9. In view of the foregoing, it would be inappropriate to make any finding in respect of the declaratory relief directed at the CIPC issue. I accordingly also do not make any cost order in respect of the CIPC issue.
10. The seventh respondent (the Minister of Small Business Development) issued directions on 12 May 2020 in which she directed that a number of categories of businesses must be in possession of "*a business license or permit to trade issued in*

accordance with the Businesses Act (Act 71 of 1991) or a business licence or trading permit by the relevant municipality". The categories are:

- 10.1 Small scale bakeries and confectionaries.
- 10.2 Small scale hardware stores.
- 10.3 Informal and small scale restaurants and shisanyamas.
- 10.4 Trades, referred to as artisanry, for rendering necessary repair work, including plumbers, electricians, locksmiths, glaziers, roof repair work, tow trucks, vehicle recovery and motor mechanics.
- 10.5 Small scale motor body repair shops.
- 10.6 Fitment centres.
- 10.7 Sole traders in the clothing, textile and confectionary business.
- 10.8 Co-operatives.

11. Of the listed categories, two, namely hardware stores and artisans, do not require and cannot be issued with licenses or permits in terms of the Businesses Act. The Businesses Act only applies to the sale and supply of perishable foodstuffs, certain health and entertainment facilities and the hawking of meals or perishable foodstuffs. Hardware stores and the listed artisans will therefore not be able to obtain a license in terms of the Businesses Act and will, as a result, be prevented from trading. Furthermore, trades such as

vehicle service centres, fitment centres and body repair workshops who do not require a license or trade permit from a local authority, are now required to obtain such a licence or permit which the local authority is not authorised to issue.

12. It follows that the seventh respondent exceeded her powers and that the Directions which she issued on 12 May 2020 are accordingly unlawful and invalid.