

Objective jurisdictional fact or decision subject to review?

Asking different questions in the *Simelane* matter

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Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC) concerned two different kinds of inquiries at issue in the judicial assessment of the exercise of public power. The first inquiry was one into the existence of a fact. The second was one relating to a decision made by an official as to the existence of a fact. The question of fact at issue was whether Menzi Simelane was a fit and proper person to be appointed as the National Director of Public Prosecutions. A prominent issue in the judgment of the Constitutional Court, as was the case with the judgment in the Supreme Court of Appeal, was whether this question of fact was one that was to be objectively assessed, or was rather one to be assessed from the perspective of the judgment of an official, in this case the President.

In calling this a question of fact I make certain assumptions that are necessary for the point of this note. There is room for philosophical debate about the extent to which propositions that are imbued with a great degree of normative evaluation can coherently be regarded as questions of fact. For example, whether certain conduct was cruel, kind, reasonable, fair or the like may, for some people, at heart be a matter of evaluation incapable of being classed as a question of fact along with such questions as whether someone was possessed of a foot, was present at the scene of the crime, or had uttered certain words. For present purposes, this does not matter, although I return to this at the end of this note. The legal discourse we understand draws a distinction, not so much between facts of an evaluative kind and facts of a more empirically demonstrable kind, as between propositions the truth of which is a matter for the courts to declare, on the one hand, and propositions the truth of which is a matter for someone else to declare, subject to the review powers of the court, on the other. When it comes to the exercise of public power, the distinction is often framed as one between jurisdictional facts (or 'objective jurisdictional facts'), on the one hand, and assessments, opinions, decisions, findings, determinations and the like as to the existence of facts, generally by some official charged with making the assessment, on the other hand. It does not matter whether this rubric is employed, or some other rubric. What matters is the distinction between truths declared by the court and truths determined by officials as reviewed by the courts.

In assessing the legality of the exercise of public power, it is often critical for the court to draw this distinction. In the instant

case, the distinction arose in the question whether the statutory requirement that the NDPP be a 'fit and proper person' was a jurisdictional fact with respect to the legality of his appointment, or was rather a matter for the assessment of the President.

Both the Supreme Court of Appeal and the Constitutional Court held that the requirement was indeed a jurisdictional fact.

In other words, both the Supreme Court of Appeal and the Constitutional Court held that it was a prerequisite for the legality of the appointment of the NDPP that he be, as a matter of 'objective fact', a fit and proper person. Yet neither court based its decision on a finding that the appointee was not, as a matter of objective fact, a fit and proper person. Indeed, both courts refrained from making any such finding.

The judgment of the Constitutional Court was that the decision of the President to appoint Mr Simelane was not rational, given the evidence that was available to the President and the considerations that ought to have been taken into account by him to have rendered the decision rational. A powerful case existed for this finding, and its cogency is not the

subject of this note. What calls for explanation in the judgment is the question precisely why the rationality of the President's decision was analysed, and why this was decisive of the case. This is the more so in light of the fact that the subject-matter of the President's decision, found to have been 'irrational', was nothing other than the assessment whether Mr Simelane was a fit and proper person.

Here lies the crux of my difficulty: the decision (the reasoning process, the assessment, the analysis, the determination, call it what one will) of the President that appeared to have been reviewed and found wanting related to the question whether and to what extent Mr Simelane was a fit and proper person. The material and considerations that ought to have weighed on his decision-making related to the integrity, honesty and conscientiousness of Mr Simelane. But this was precisely the question the court had found to have been a jurisdictional fact. If it was a jurisdictional fact, its existence was to be determined by the court, objectively. More to the point, if it was a jurisdictional fact, the President's assessment as to its existence or not was irrelevant to the legality of the appointment premised upon it. The only time it makes sense for a court to resort to reviewing the rationality, or reasonableness, or other features of the reasoning process of a decision by a public official with respect to an exercise of public

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power, is when it is dealing with the kind of proposition the truth of which is a matter for the official to determine. When a court is dealing with an objective jurisdictional fact, it asks itself (with reference to admissible evidence and employing the applicable standard of proof) whether that fact existed, in the court's own assessment. It is, in such a case, not concerned with what other people thought about the existence of the fact, except to the extent that such thoughts form part of the admissible evidence into the court's own assessment of the existence of the fact (which they often must). When, however, the court is concerned with propositions the truth of which is for public officials to determine, it reviews the assessment of the official in question, and tests this assessment by whatever standards and kinds of review are regarded as appropriate in determining the legality of the exercise of power based on the assessment.

The Constitutional Court, having first clearly determined that the matter of Mr Simelane's being fit and proper was an objective jurisdictional fact, seamlessly moved on to inquire into the rationality of the President's decision. It did so without explaining with respect to what precise quality or requirement such rationality was being assessed and why this was relevant or decisive if the question at hand was the existence of an objective jurisdictional fact. The exercise appeared to make sense proportionally to the extent that what was being assessed related to something other than the question whether Mr Simelane was a fit and proper person. For that particular question was an objective jurisdictional fact. But, undeniably, if any quality in respect of Mr Simelane other than his being fit or proper was thought central to the assessment, this certainly did not appear from the analysis. And, if what was at issue as the subject-matter of the President's cogitations was indeed something materially other than whether Mr Simelane was a fit and proper person, it was mysterious why the question to what extent this issue was an objective jurisdictional fact featured so prominently, if at all, in the judgment.

The puzzle was underscored by the concluding observation of the court in paragraph 90:

'This is not to say that Mr Simelane cannot validly be appointed National Director. He may have an explanation and may well be able to persuade the President that he is a fit and proper person and should be appointed.'

This observation was immediately followed by the following statement:

'Given this finding, it is unnecessary for this court to determine whether Mr Simelane is in fact a fit and proper person to be appointed as the National Director...'

'This finding' referred back to the finding in paragraph 89 that the President's assessment of Mr Simelane as fit and proper was irrational, given the evidence that was available to him, and that accordingly the exercise of public power based on such assessment (the appointment) fell to be set aside.

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The simple, but critical, question, remains: since whether the DPP is fit and proper is an objective jurisdictional fact, what relevance to the legality of an appointment premised on this fact resides in a candidate's persuading the President of its existence? More crucially for the law relating to the legality of the exercise

of public power – what did it matter what the President thought and why he thought so, when it came to the presence or absence of an objective jurisdictional fact? All that matters in such a case is what the court thinks. And this the court declined to say.

The difficulty arose because of the recognition of an evaluation such as 'fit and proper' as falling into the category of objective jurisdictional fact in the first place. Had the court dealt with, say, a statutory requirement that the candidate be over the age of 30, the anomalous nature of its analysis would have been clear for all to see. Once it was recognised that such a statutory prerequisite was an 'objective jurisdictional fact' upon which the legality of the appointment depended, all that would have been relevant on this score would have been evidence as to whether the candidate was over 30 or not.

No analysis or review, on rationality grounds or any other traditional grounds of review, into the President's view of this issue would have been regarded as taking the matter any further. As to the issue of being 'fit and proper' (as opposed to a candidate's age), no doubt assessments on this issue by various persons would be important evidence for the court to weigh. But the President's assessment, or rather, the fact that an assessment was that of the President, would bear a completely arbitrary relation to its evidential value in such a case. It would certainly not be directly relevant to the legality of the power to be exercised once the fact was, in fact, true. Nor would it be relevant once the fact was found to be, in fact, false.

The court's recognition that the statutory requirement of being fit and proper was indeed an objective jurisdictional fact was surprising. This was so both with respect to the inherent nature of the proposition thus categorised (highly charged with evaluative judgment), and with respect to the apparent desire of the Constitution to render this matter something in respect of which the President's assessment was to assume some important significance. But once thus categorised (which in principle and logic was perfectly possible), the analysis of this concept ought to have followed through on its categorisation. What one found, instead of an investigation of the evidence about that found to be a question of fact, was a review of the assessment of the official charged with basing his decision on the existence of the disputed fact. Such a review, and its decisive status in the judgment, were consistent only with recognition that the question whether the DPP was fit and proper was one not for the court itself, but for the President, subject to the review of the court, to determine. In other words, it was a subjective jurisdictional fact.

And so a very significant finding, with respect to the location of the boundary lines of the separation of powers in the Constitution, was at once unnecessary and immaterial to the cogency of the analysis and outcome of this decision. **A**