Reportable

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 5660/2020

In the matter between:

ZULULAND DISTRICT MUNICIPALITY	**FIRST APPLICANT**
THE SPEAKER, ZULULAND DISTRICT MUNICIPALITY	**SECOND APPLICANT**
THE MAYOR, ZULULAND DISTRICT MUNICIPALITY	**THIRD APPLICANT**
THE DEPUTY MAYOR, ZULULAND DISTRICT MUNICIPALITY	**FOURTH APPLICANT**

and

THE MEC: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL	**FIRST RESPONDENT**
MDLEDLE INC	**SECOND RESPONDENT**

JUDGMENT

Delivered on. 06/05/2022

Chili J:

[1] The applicants brought an application to declare unlawful, review and set aside:

(a) the report issued in the Forensic Investigations into allegations of Maladministration, Fraud and Corruption at Zululand District Municipality authorized by

the first respondent (hereinafter 'the MEC'), and purportedly conducted in terms of s 106(1)*(b)* of the Local Government Municipal Systems Act 32 of 2000 (hereinafter 'the Municipal Systems Act');

(b) the decision of the MEC to publish and/or adopt the report; and

(c) the decision of the MEC communicated on 18 April 2020, to refuse to comply with the KwaZulu-Natal Commissions Act 3 of 1999 (hereinafter 'KZN Commissions Act') in relation to the investigation referred above. The case for the applicants is that the investigation and subsequent report are ultra-vires, procedurally unfair, contrary to the empowering statute and unsustainable. Moreover, the decision to refuse to comply with the KZN Commissions Act is unlawful.

Background

[2] On 21 August 2019 the first applicant (through the second applicant) was informed by Mr T Tubane (Head of Department in the MEC's office) that the MEC had instituted an investigation purportedly in terms of s 106(1)*(b)* of the Municipal Systems Act, into 16 allegations of maladministration, fraud and corruption allegedly taking place at the first applicant. The second respondent had been designated to conduct the said investigations. Of relevance to note, the letter from Mr Tubane recorded, that 'it [would] be necessary for the investigators (second respondent) to liase both verbally and in writing with Councillors, officials, stake-holders and service providers of the first applicant'[1]. The first applicant received no further correspondence thereafter until 11 May 2020.

[3] On 11 May 2020 the second applicant received an email from Mr S Govender, (the MEC's Senior Manager) the relevant portion of which reads:

'…The investigation authorized by the MEC in terms of section 106 of the Systems Act has been finalized and a report is ready for tabling at Zululand Municipality. For this reason, we hereby request attendance for a short item for the tabling of the forensic report, at your virtual council meeting due to be held on 14 May 2020.'

A virtual meeting was subsequently held on 14 May 2020 by the first applicant's council whereupon the second respondent presented a report comprising 387 pages and an

[1] See letter dated 21/08/2019, Annexure BJ 2 at pages 35-39 of the indexed papers.

additional 61 annexures, and a letter from the MEC dated 1 May 2020 but signed by the MEC on 14 May 2020,[2] the relevant part of which reads:

'You are required to table this report before council and provide me within 21 days of receipt hereof, with a certified copy of the council resolution taken at the ordinary special council meeting convened to deal with this matter, together with your detailed comments and proposed actions (disciplinary action, civil recovery and/or criminal charges registered)'.

[4] On 10 June 2020 the first and second applicants, through their attorneys, Garlicke and Bousfield, addressed a letter to the first respondent pointing to deficiencies in the report and inviting the first respondent to withdraw the letter dated 14 May 2020 until the issues raised had been addressed.[3] In para 10 of the letter the author observed that failure by the investigators to give various affected persons a hearing before compiling a report is unlawful, procedurally irrational and in breach of the right to be heard (*audi alteram partem* rule). In his reply the MEC in a letter dated 15 June 2020 reiterated that the investigation had been completed and added,

'…The mere fact that there may be certain information and/or documentation required by the investigator and/or documentation required by the investigator, subsequent to the submission of the investigation report, *does not detract from its status as final report which is ripe for implementation'*. (My emphasis.)[4]

With regards to respective complainants' rights to be heard, the first respondent sought to suggest that ample opportunity had been afforded to the respective complainants to 'contest or challenge whatever allegations may have been made against them'. Immediately thereafter he remarked:

'However, notwithstanding the above, and as an act of good faith to demonstrate that my only intention is to deal with the matter at hand as fairly as possible, I have directed the investigator to nevertheless afford your client(s) an opportunity to state their side of the story and thereafter report to me once that exercise has been completed.'[5]

[5] Following on numerous correspondences exchanged by the parties, the MEC ultimately forwarded a letter to the first and second applicants' attorneys in which he re-affirmed his decision, that the provisions of the KZN Commissions Act are not

[2] See letter Annexure BJ 5 at pages 428 to 431 of the indexed papers.
[3] See Annexure BJ 6 at pages 432 to 435 of indexed papers.
[4] See para 4 of first respondent's letter at page 441 of indexed papers.
[5] See para 6 of Annexure BJ 7 at page 441 of indexed papers.

peremptorily applicable to s106 (1) (b) investigations. He pressed on with the finalization of the investigation without the input of the affected complainants. In support of the MEC's decision, Mr Tubane reiterated that rules of natural justice do not apply in s 106(1)*(b)* investigations. In amplification he stated, that the recommendations that follow on a s 106 investigation and subsequent report, have no adverse effect on the rights of the persons implicated in the report and added that the said recommendation and report 'have no direct external legal effect'.

The applicants' case

[6] The applicants' application is founded on three grounds, firstly, that the investigation failed to comply with the peremptory provisions of the KZN Commissions Act, read with s 106 of Municipal Systems Act, including the holding of public hearings; secondly, that the investigation was conducted in a procedurally unfair manner and contrary to the requirements of the *audi alteram parterm* rule; and thirdly, that the evidence before the investigators was not rationally connected to the findings in the report.

The applicability of the KZN Commissions Act.

[7] The investigation by the second respondent (as directed by the MEC) was purportedly conducted in accordance with the provisions of s 106 of the Municipal Systems Act the relevant portion of which reads:

'106 Non-performance and maladministration. — (1) If an MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must —

(a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or

(b) if the MEC considers it necessary, designate a person or persons to investigate the matter.

(2) In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act No. 8 of 1947), and the regulations made in terms of that Act apply, with the necessary changes as the context may require, to an investigation in terms of subsection (1) *(b)*.

(3) *(a)* An MEC issuing a notice in terms of subsection (1) *(a)* or designating a person to conduct an investigation in terms of subsection (1) *(b)*, must within 14 days submit a written statement to the National Council of Provinces motivating the action.

(b) A copy of the statement contemplated in paragraph *(a)* must simultaneously be forwarded to the Minister and to the Minister of Finance.'

It is settled, that in KwaZulu-Natal, the provincial legislation applicable to investigations under s 106(1)*(b)* is the KZN Commissions Act. Confirming the finding of Nicholson J, the Supreme Court of Appeal in *Minister of Local Government, KwaZulu-Natal v Umlambo Trading*[6] held, that the 'KZN Commissions Act *certainly constitutes applicable provisional legislation as contemplated by s 106(2) of the Municipal Systems Act*.' (My emphasis). The court proceeded as follows:

'Moreover, having regard to the ordinary grammatical meaning of s 106(2), it is clear that it is only in the absence of applicable provincial legislation that ss 2 to 6 of the (national) Commissions Act, apply, "with the necessary changes as the context may require", to an investigation in terms of s 106(1)*(b)*.'

[8] It was submitted on behalf of the applicants that the provisions of the KZN Commissions Act, inserted by an amendment in 2015, specifically provides, that sections 3, 4, 5, 6, and 7 of the KZN Commissions are applicable to investigations under s 106(1)*(b)* of the Municipal Systems Act. The KZN Commissions Act regulates every aspect of a commission, including the appointment of the commission, terms of reference to be investigated, the collection of evidence, the evidence of witnesses, (including the right to legal representation), the sittings of the commission, (including a requirement that hearings be conducted in public) and publication of any report.[7] In particular, s 3(2) of the KZN Commissions Act which is applicable to investigations under s 106(1)*(b)* of the Municipal Systems Act provides:

'Unless the chairperson for good reasons decides otherwise, all evidence and addresses shall be heard by a commission in public, and the chairperson shall give notice thereof in such manner as he or she may determine.'

It is not in issue that no hearings were held at all, let alone public hearings. It is further not in issue that the report was finalized without any input from the applicants.

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[6] *Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal v Umlambo Trading 29 CC and others* 2008 (1) SA 396 (SCA) para 24.

[7] See sections 2(1) 3, 4 and 8 of the KwaZulu-Natal Commissions Act 3 of 1999, respectively.

[9] Mr Gauntlet for the applicant, submitted, correctly in my view, that compliance with the KZN Commissions Act is not merely a formality. It gives expression to important procedural rights and the requirements of procedural fairness. In *Secretary of the Judicial Commission of Enquiry into Allegation of State Capture v Zuma*[8] the court drew a distinction between two types of commissions, *viz,* a commission established for purposes of gathering information and to inform and a fact finding commission aimed at reaching conclusions on issues. There is no doubt that the commission set up by the MEC in the present application falls squarely under the category of the second type of commission. The investigation conducted by the second respondent resulted in a report which makes serious findings and highly prejudicial recommendations against the applicants. It called on the applicants to answer to serious allegations of mismanagement of funds belonging to the public. In addition, the MEC, following on the recommendations made by the second respondent, invited the second applicant to consider institution of either criminal or civil proceedings against those implicated in the report. That clearly is a matter of public interest entitling the applicants to at the very least, an opportunity to explain themselves. When dealing with the commission in which a matter of public interest is at issue, the Constitutional Court (in the context of a commission conducted under the National Commissions Act 8 of 1947) stated:[9]

'In addition to the function of advising the President, a commission of inquiry may also serve the purpose of holding a public inquiry in respect of a matter of public concern. The purpose of a public hearing under those circumstances is to restore public confidence in the institution in which the matter that caused concern arose. Here the focus is not what the President decides to do with the findings and recommendations of a particular commission. Instead, the objective is to reveal the truth to the public pertaining to the matter that gave rise to public concern. Affirming this purpose in Minister of Police, this Court stated:

> "In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent."'

Failure to comply with the requirements of procedural fairness.

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[8] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2; 2021 (5) SA 1 (CC); 2021 (5) BCLR 542 (CC) paras 5 and 6.

[9] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2; 2021 (5) SA 1 (CC); 2021 (5) BCLR 542 (CC) para 5.

[10] It was argued on behalf of the applicants that in addition to the failure to comply with the KZN Commissions Act, the investigators also failed to comply with the requirements of procedural fairness in that they failed (1) to give the applicants a clear statement of the case they were required to meet and (2) to give the applicants a meaningful opportunity to respond to allegations levelled against them. There is merit in this argument. It was submitted both in the papers and in argument (on behalf of the respondents) that procedural fairness is not a requirement at an investigation and report stage. In para 33 of his affidavit Mr Tubane (on behalf of the MEC) stated:

"…Full rights of *audi alteram partem* and the other principles of natural justice would be accorded to the affected persons in their disciplinary hearings "[subsequent disciplinary hearings]."

The Appellate Division in *South African Roads Board v Johannesburg City Council*[10] described the *audi alteram partem* principle as being:

'… a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary…'

In the words of Lord Denning quoted in *Administrator, Transvaal v Traub*:[11]

'… an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say'.

In *Du Preez v Truth and Reconciliation Commission*[12] it was held, that the

'*audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly . . . The duty to act fairly, however, is concerned only with the manner in which decisions are taken: it does not relate to whether the decision itself is fair or not.'[13]

[11] It is common cause, or at least not in dispute, that when informing the applicants about the pending investigation, Mr Tubane expressly stated in a letter dated 29 August

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[10] *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 at 10G – I. See also, *Attorney-General, Eastern Cape v Blom and others* 1988 (4) SA 645 (A) at 660H – 662I.

[11] See *Administrator, Transvaal, and others v Traub and others* 1989 (4) SA 731 at 754I – J.

[12] *Du Preez and another v Truth and Reconciliation Commission* [1997] ZASCA 2; [1997] JOL 1149 AD.

[13] Cf the remarks of Farlam J in *Van Huyssteen and others NNO v Minister of Environmental Affairs and Tourism and others* 1996 (1) SA 283 (C) at 304A – 305D.

2019, that the investigators would, as part of their investigation, liase both verbally and in writing, with the applicants. That did not happen. The applicants received correspondence from the MEC and his Senior Manager, Mr S Govender, only after the investigation had been completed and the report finalized. In fact, it is not in dispute that the applicants were denied a right to be heard. In his answering affidavit Mr Tubane stated:

'It was argued by applicants that the named persons were not accorded the right of *audi alteram partem*. The MEC responded to this issue by pointing out that the report merely contained recommendations and that full rights of *audi alteram partem* and the other principles of natural justice would be accorded to the affected persons in their disciplinary hearing.'[14]

It is my view that the investigators (second respondent) were under a duty to act fairly towards the applicants by affording them the opportunity to be heard and that failure to do so amounted to procedural unfairness necessitating the grant of the relief sought.

[12] In light of the view I take, I do not consider it necessary to deal with the third ground of review, viz, that the evidence before the investigators was not rationally connected to the findings in the report. I am satisfied that on the first two grounds, namely, failure to comply with the KZN Commissions Act and procedural unfairness, individually or cumulatively considered, the applicants succeeded in establishing that the impugned decisions are unlawful and that they stand to be set aside.

[13] It was common cause at the hearing of the opposed application that the only party opposed to the relief sought is the first respondent. There is therefore no justification in burdening the second respondent with costs.

[14] In the circumstances I make the following order:

Order

[14] See para 33 of Mr Tubane's affidavit (on behalf of the MEC) at page 580 of the indexed papers.

1. The order is granted in terms of para's 1, 2, 3 and 4 of the notice dated 27 August 2020.
2. The first respondent is to pay the costs of the application.

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Chili J

Cases cited

1. *Administrator, Transvaal, and others v Traub and others* 1989 (4) SA 731: applied.

2. *Attorney-General, Eastern Cape v Blom and others* 1988 (4) SA 645 (A): referred to.

3. *Du Preez and another v Truth and Reconciliation Commission* [1997] ZASCA 2; [1997] JOL 1149 AD: applied.

4. *Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal v Umlambo Trading 29 CC and others* 2008 (1) SA 396 (SCA): applied.

5. *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2; 2021 (5) SA 1 (CC); 2021 (5) BCLR 542 (CC): applied.

6. *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1: applied.

7. *Van Huyssteen and others NNO v Minister of Environmental Affairs and Tourism and others* 1996 (1) SA 283 (C): referred to.

Legislation cited

1. The Local Government: Municipal Systems Act No. 32 of 2000: section 106.
2. KwaZulu-Natal Commissions Act No. 3 of 1999 (as amended by KwaZulu-Natal Commissions Amendment Act 4 of 2015): sections 2(1), 3, 4 and 8.
3. Commissions Act No. 8 of 1947: sections 1, 2, 3 and 4.
4. Constitution of the Republic of South Africa, 1996: section 127 (2) (e).

Appearances

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