

SOUTH AFRICA / JUDGMENT

## Amatola Water Board v Hlutiyo; Amatola Water Board v Oliphant and Another (2708/2017; 2037/2017) [2019] ZAECGHC 77 (9 July 2019) [2019] ZAECGHC 77

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M S Rugunanan

CASE / FILE NUMBER

2708/2017; 2037/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO. 2708/2017

Date heard: 21 June 2019

Date delivered: 09 July

2019

In

the matter between:

AMATOLA  
WATER BOARD  
Applicant  
and  
KATE  
HLUTIYO Respondent  
CASE NO. 2037/2017  
AMATOLA  
WATER BOARD  
Applicant  
LUKHANYO  
SHANE OLIPHANT  
First Respondent  
MOMELEZI  
ZONDANI  
Second  
Respondent

**JUDGMENT**

RUGUNANAN, AJ:

[1] Leave to appeal, either to the Full Court of this Division or to the Supreme Court of Appeal, is sought against judgments by Mageza AJ who dismissed motion proceedings launched by the applicant (whom it is

common cause is an organ of state) in which it sought to review and set aside the decisions by its former Chief Executive Officer (CEO) in appointing the respondents Ms Kate Hlutiyo (Case No. 2708/2017) and Mr Lukhanyo Oliphant (Case No. 2037/2017) to its establishment.

The CEO, Mr Lefadi Makibinyane, was joined as an additional respondent in both matters but withdrew his opposition prior to the matters being argued before Mageza AJ.

[2] The applications for review were founded on grounds set out in section 6(2) of the Promotion of Administrative Justice Act,[1] alternatively on breach of the principle of legality and were necessitated through a process of investigation in which it was established that the appointments by the CEO were unlawful in that section 217(1) and section 33(1) of the Constitution were disregarded where there was a deviation from the

applicant's employment policies and procedures set out in its "Recruitment and Selection Policy" ("RSP").

The applicant's stance accords with an implicit recognition that the law places upon it a duty to rectify the unlawful decisions.[2] This is particularly relevant because the Constitutional Court has now firmly held, in MEC for Health, Eastern Cape v Kirland Investments, that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until it is properly set aside by a court of law. [3]

[3] In both matters the applicant prayed for condonation for the late delivery of its applications for leave to appeal. The applications ought to have been delivered on 16 October 2018 but were delivered a day later on 17 October 2018. Absent opposition thereto and being satisfied that good cause was shown, I granted condonation.

[4] The applications for leave to appeal are dealt with simultaneously in this judgment seeing as the considerations common to both relate to the issue of the applicant's delay (if any) in launching the review proceedings.

[5] Before dealing with the issue it is appropriate to set out the test to be applied when leave to appeal is sought. Section 17(1) of the Superior Courts Act[4] states that :

*"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:*

(a)

(i) the appeal would have a reasonable prospect of

success; or

(ii) ...

(b) ...”

[6] Although the word “would” contemplates an onerous duty on an applicant for leave to appeal to demonstrate “a reasonable prospect of success”, this does not have to be done as a measure of certainty. What is required of the judge whose judgment is sought to be appealed against, is to consider “objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party.” [5]

#### Review under PAJA or Legality

[7] Each of the applications for review were dismissed by Mageza AJ “purely on the basis of the failure to launch the review within the period of 180 days envisaged by section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”)”. The merits of the review in each instance played no role in the final determination of the applications. Respectfully, the approach without regard to the merits, in considering whether or not to condone the delay, was wrong despite contentions to the contrary by Mr Feni who appeared for the respondents. Two significant judgments recently handed down by the Constitutional Court demonstrate this.

[8] The first is the judgment in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* which held that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA.[6] In a legality review there is no fixed period of time within which to bring an application for review; hence the 180-day bar in PAJA is not the standard for determining whether or not an application for review is timeously brought. The standard for assessing delay in a legality review is whether the delay was unreasonable or undue.

[9] The second judgment is *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* which held that in determining whether an unreasonable delay should be condoned an additional factor to be considered is the merits of the case.[7] The approach to delay within the context of a legality challenge involves the exercise of a broader discretion than that applied to the 180-day bar in PAJA.[8] In addition, the judgment goes a bit further in holding that even where there is no basis for a court to overlook an unreasonable

delay in a legality challenge, section 172(1)(a) of the Constitution nonetheless enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.[9]

Reasonable prospects of success

[10] In seeking to explain the delay in the matters involving Ms Hlutiyo and Mr Oliphant the applicant relied on affidavits by the chairperson of its Board of Directors (“the Board”), Ms Ntombokuqala

Mnqeta. Given the fact that the explanation of events culminating in the launching of the review proceedings is similar, it is unnecessary to traverse the content of each affidavit individually. In the case of Ms Hlutiyo the decision by the CEO to appoint her was taken on 24 June 2016. In Oliphant’s case the decision to appoint him was taken by the CEO on 3 May 2016. In both cases the applicant was unaware of irregularities that led to the appointments because the decision of the CEO did not require the approval of the Board. Ms Mnqeta states that the CEO had a strained relationship with the Board, the consequence being that he did not report to the Board on his activities in his designated capacity. September of that year saw employees of the applicant embarking on unprotected strike action during which acts of sabotage were committed resulting in the supply of water to areas serviced by the applicant being interrupted. Various complaints by the employees’ union were also levelled against Ms Mnqeta and the Board, and in turn, the Board levelled complaints against the union and its management. During July and October 2016 Ms Mnqeta received information anonymously from a whistle blower in which serious allegations were levelled against the CEO. This culminated in the appointment of a ministerial task team to investigate the affairs of the applicant. The appointments of Ms Hlutiyo and Mr Oliphant were among several of the issues identified for investigation by the Task Team. In February 2017 the Board received the report of the Task Team and resolved in March that year that the recommendations of the Task Team be implemented. PriceWaterhouseCoopers (“PWC”) were then mandated to undertake several forensic investigations and once their reports became available, counsel was approached in April 2017 for an opinion which culminated in the Board resolving to launch the application for review of the decisions made by the CEO to appoint the respondents Ms Hlutiyo and Mr Oliphant. The review proceedings were launched on 30 May 2017. In the period of events

detailed by Ms Mnqeta, she explains that the applicant and its Board were confronted by wide ranging challenges and crises at the levels of management and from its labour force. Some of the challenges had to be prioritised over and above others which resulted in a situation where some matters could not be given the amount of attention which they might have required in the normal course.

[11] On the merits, it is the applicant’s case that Ms Hlutiyo was previously employed in its establishment as an office assistant and permanently boarded on 30 September 2014 due to medical incapacity that arose from a stroke. The applicant maintains that Ms Hlutiyo did not enjoy continuous employment as she contends in her opposing

affidavit; she was re-employed to her previous position as an office assistant when the decision to appoint her was taken by the CEO on 24 June 2016. To this end the applicant seeks reliance on an internal memorandum dated 2 June 2016 and a letter dated 24 June 2016 with a caption “Offer of Employment: Office Assistant” which letter Ms Hlutiyo signed as an indication of her acceptance of the terms of her re-employment.

[12] Mr Oliphant was appointed by the applicant’s former CEO as industrial relations specialist on 3 May 2016. The applicant’s grievance about the appointment is that Mr Oliphant should not to have been appointed because he did not score the highest points among the total of three candidates who were shortlisted for interview. Whereas he scored 118 points, another

candidate scored 56 and another candidate topped the list with a score of 129. The challenge to the appointment of Mr Oliphant

emanates from an affidavit by Ms Janine Swart a forensic auditor at PWC wherein she characterises him as a “job hopper” whose experience in labour relations matters is not borne from his curriculum vitae and whose tenure in each organisation in which he had previously been employed, was less than a year. Ms Swart compares his curriculum vitae to that of the other candidate who scored higher, and opines that Mr Oliphant is less likely to hold a steady job and that the other candidate was better placed for appointment. A further undercurrent leading to the appointment of Mr Oliphant came about in consequence of intervention from a Mr Totolo, a labour representative of the South African Municipal Workers’ Union (“SAMWU”). Relying on a series of emails attached as annexures to her affidavit, Ms Swart extrapolated that Mr Totolo objected to the appointment of the other candidate who scored higher than Mr Oliphant because he (i.e. the other candidate) was a member of a rival trade union, the Independent Municipal and Allied Trade Union (“IMATU”). The trail of emails discloses that in the event of the other candidate being appointed, SAMWU would embark on action that would display to the applicant their objection and dissatisfaction to such appointment.

[13] In consequence of the events and circumstances surrounding and ultimately culminating in the appointments of Ms Hlutiyo and Mr Oliphant, Mr Rorke SC who appeared for the applicant contended that the appointments may be found to be unlawful because section 217(1) and section 33(1) of the Constitution were disregarded for want of compliance with the applicant’s RSP. Mr Feni on the other hand contended that the respondents were entitled to assume the contrary since they were unaware of the circumstances leading up to their respective appointments and were at all times acting bona fide.[10] For this reason he contended that their security of tenure would be prejudiced. On this aspect Mr Rorke correctly pointed out that the issue regarding the illegality of the appointments must necessarily be addressed before consideration may be given to any form of just an equitable redress for the respondents.

[14] If regard is had to the continuum of events set out in the affidavit by Ms Mnqeta together with the circumstances relevant to the merits of the abovementioned appointments, then it is conceivable that an appeal court would find that reliance by Mageza AJ on PAJA was, with respect, misplaced in that the applicant's delay (to the extent that it exists) in launching the review proceedings is not unreasonable and therefore the legality challenge which correctly finds application may attract a different conclusion.

[15] A costs award involves the exercise of a judicial discretion. In awarding costs against the applicant on a scale as between attorney and own client, Mageza AJ criticised the applicant in launching the review proceedings which he described as being "frivolous and unnecessary"[11] and bordering on financial recklessness.[12] In truth, the rule of law obliged the applicant to approach the court to purge the unlawful conduct complained of. Respectfully, the costs order against the applicant was not the result of a judicious exercise of discretion.

[16] The following order issues:

- (i) In Case No. 2708/2017 the applicant is granted leave to appeal to the Full Court of this Division against the whole of the judgment, including the costs order, of this court delivered on 25 September 2018;
- (ii) In Case No. 2037/2017 the applicant is granted leave to appeal to the Full Court of this Division against the whole of the judgment, including the costs order, of this court delivered on 25 September 2018;
- (iii) In both cases the costs of the application for leave to appeal shall be costs in the appeal.

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M. S. RUGUNANAN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv. S. Rorke SC

Instructed by Netteltons Attorneys

Makhanda / Grahamstown

For the Respondent: Adv. Z. Feni

Instructed by Yokwana Attorneys

[1] Act No. 3 of 2000

[2] See *Merafong City Local Municipality v Anglogold Ashanti Limited* 2017 (2) BCLR 182 (CC) paragraph [61] where Skweyita J states: "This Court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional

principle that proscribes self-help'. What is more, in Khumalo this Court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking redress of the departments' unlawful decisions. Generally, it is the duty of a stage functionary to rectify unlawfulness. The courts have a duty to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. Public functionaries 'must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it '."

[3] 2014

(3) SA 481 (CC) at paragraph [103]. See also paragraph [82] where Cameron J states: "there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered

litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly." See further Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited

[2019] ZACC 15 at paragraphs [60] and [61]

[4] Act No. 10 of 2013

[5] Per Smith J in Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Mayya International [2016] 137 (ZAECGHC) 137 (10 November 2016) at paragraph [4]. See also S v Smith 2012 (1) SACR 567 (SCA) at paragraph [7], (applied with approval in S v Kruger 2014 (1) SACR 647 (SCA) at paragraph [2] "To succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot

be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[6] 2018 (2) SA 23 (CC) at paragraphs [1], [17], [27], [29]-[30], [35],

[37] and [41].

[7]

[2019] ZACC 15 at paragraphs [55]-[58]

[8] At paragraph [50]

[9] At paragraphs [63] and [64]

[10] In this regard he made reference to the application of the “Turquand Rule” See *One Stop Financial Services (Pty) Ltd v Neffensaam Ontwikkelings (Pty) Ltd and Another* 2015 (4) 623 (WCC) for a discussion of the rule.

[11] Oliphant judgment paragraph [26]

[12] Hlutiyo judgment paragraph [12]

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