

SOUTH AFRICA / JUDGMENT

Cibane and Another v Premier of the Province of KwaZulu-Natal and Others (7655/2020P) [2023] ZAKZPHC 69 (19 June 2023)

[2023] ZAKZPHC 69

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

P C Bezuidenhout

CASE / FILE NUMBER

7655/2020P

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

CASE NUMBER: 7655/2020P

In the matter between: ZIPHATHE MBONENI
CIBANE
FIRST APPLICANT
NONHLANHLA PAMELA
HLONGWA
SECOND APPLICANT
and
PREMIER OF THE
PROVINCE OF KWAZULU-NATAL
FIRST RESPONDENT
DIRECTOR GENERAL OF
THE OFFICE OF THE
PREMIER OF THE
PROVINCE OF KWAZULU-NATAL
SECOND RESPONDENT
MEC FOR FINANCE
KWAZULU-NATAL
THIRD RESPONDENT
INTEGRITY FORENSIC
SOLUTIONS
FOURTH RESPONDENT
THE DEPUTY DIRECTOR
GENERAL OF THE

KWAZULU-NATAL TREASURY
(HEAD OF
INVESTIGATION)
FIFTH RESPONDENT
ADVOCATE
JOE NXUSANI SC N.O.
SIXTH RESPONDENT
JUDGMENT ON
APPLICATION FOR LEAVE TO APPEAL
P

C BEZUIDENHOUT J:

[1]
Applicants are seeking leave to appeal against the dismissal of their application wherein they sought that their suspension be reviewed and set aside, that the adverse findings, remarks and conclusions contained in the forensic report prepared by Fourth Respondent be reviewed and set aside, that Second Respondent's decision to accept the findings in the report and to implement the recommendation be reviewed and set aside and that First and Second Respondents pay the costs of the application. Together with this they seek leave to appeal against the granting of the order in terms of the notice of motion of Fourth Respondent in terms of Rule 6(15) that certain portions in the replying affidavit be struck out. The application is opposed by First and Second Respondent and Fourth Respondent.

[2]
In Applicants heads of argument it was submitted that I misdirected myself by not following the decision in *Msiza v Motau* N.O. [2020] ZAGPPHC 366 that Fourth Respondent ought to have listened to Applicants before making any adverse findings. However at the commencement of argument Mr. Pammenter SC brought to the attention of the Court, to which the Court is indebted to him, that that matter went on appeal TO the Full Court in the Gauteng Division Pretoria in the matter of the Presidential Authority of the South African Reserve Bank v *Msiza and Motau* case number A294/2021 delivered on 2 May 2023 and in a majority decision it was found that both the principles of a legality review and a review in terms of PAJA did not apply. The majority held that the *audi alterem partem* did not have to be applied. He however submitted that it must be considered what powers the investigator had. He submitted

the decision in Zululand District Municipality and Others v MEC:

that treasury regulations applied and disciplinary proceedings were to be held. It was confirmed in the report that it had to institute these proceedings. He submitted that once the report came out it was distinguishable from the Viking Pony decision and that I was bound by

Cooperative Governance and Traditional Affairs KwaZulu-Natal and Another [2022] ZAKZPHC 19 (6 May 2022) a judgment of Chili J in this division.

[3]

He submitted that the report of Fourth Respondent failed to comply with natural justice and that Second Respondent adopted the report to take action on. He submitted that there was no reason for a cautionary suspension.

[4]

The Labour Court was not the correct court and that the relief which was being sought in these proceedings were different to that pending in the Labour Court. Further that the suspension period could not be extended by Second Respondent but only by the Chair. The state of emergency did not affect these powers nor the extension of the time limits. The matter before the Bargaining Council was not *lis pendens* and that leave to appeal should be granted to the Supreme Court of Appeal.

[5]

Ms Gabriel SC on behalf of Fourth Respondent stated that Applicants were public sector employees, not municipal employees as in the matter of the Zululand District Municipality nor were they members of the South African Defence Force and were not employed on a contract. It was submitted that a review under PAJA was not possible nor was it a review under the principle of legality. The disciplinary process and the criminal proceedings have commenced and the decision to take disciplinary steps and criminal charges, was made by Fourth Respondent and the report of Fourth Respondent had no external legal effect.

[6]

Second and First Respondents submitted that it was *lis pendens* as the matter was proceeding in the Labour Court and the relief which was claimed there was the upliftment of the suspension the same as in this matter. That matter has not been taken further in the Labour Court and Bargaining Council although evidence

had been led
there and should first be finalised. Further, that criminal
proceedings are pending. Applicants have been
granted bail and
therefore the application for leave to appeal should be dismissed.
In response Mr. Pammenter SC submitted
that lis pendens did
not apply and that there was no fair administrative action.

[7]

The test in deciding whether to grant leave to appeal or not is set
out in section
17(1) of the Superior Courts Act and can be summarised
that there are reasonable prospects of success or some compelling
reason

for it to be heard or conflicting judgments. The test is
whether there would be reasonable prospects on appeal. See
Caracto (Pty) Ltd v Independent Advisory (Pty) 2020 (5) SA 35 (SCA)
and Smith v S 2012 (1) SACR 567 (SCA).

[8]

The prospect must not be remote but a reasonable chance of
succeeding. Can a
court of appeal reasonably arrive at a
different conclusion? Camacatsa and Others v African National
Congress and Another
(2021) ZSCA 31.

[9]

As appears from the Full Court judgment in Presidential Authority of
the South African

Reserve Bank v M P Msiza and Adv Matau SC it is
neither a review under PAJA nor is it a legality review. The
report by Fourth

Respondent was to establish if there was wrongdoing
by Applicants. It only compiled the report, which was handed to
Second

Respondent, who then took further action. As held in
paragraph 75 of the said judgment not affording Applicants an
opportunity

to respond was not irrational and thus passes the test
under the legality issue. However in this instance the issue is
further

that there is already litigation pending in the Bargaining
Counsel and the Labour Court relating to the suspension of First and
Second Respondents which they have abandoned and which must first be
finalised. The matter is further distinguishable in
that both

Applicants have been charged criminally and therefore are out on bail
at present and therefore this will also affect
the issue of their

suspension. Having now been criminally charged which is a
decision, not taken by any of Respondents herein,
the issue of their

suspension has to an extent in actual fact become academic.

[10]

The report was compiled by Fourth Respondent after obtaining information from various people to establish whether there had been any wrongdoing on the part of Frist and Second Respondents. Besides the fact that as set out a failure not to afford them an opportunity to respond does not make it a review under the principle of legality in this case Applicants were not interviewed because of their aggressive attitude towards Fourth Respondent and its investigators and also their failure to cooperate with them. Accordingly they were not merely ignored but due to their conduct they were not interviewed. Further they have the opportunity in the labour matters in the Bargaining Council and the Labour Court to set out their responses and will even now in the criminal case have such an opportunity.

[11]

The facts therefore are firstly distinguishable from that of the Zululand District Municipality case in that there the persons were informed that they would get an opportunity to put their side of the facts but then it was never done. Further in the Msiza matter the majority decision of the Full Court in my view is applicable and not that of the Zululand District Municipality case.

[12]

The further issue was the application that was brought by Fourth Respondent that certain portions of the replying affidavit be struck out. As set out in the judgment there was no response thereto by Applicants but merely submissions made at the time of the hearing. I cannot find that there are any prospects of another court coming to a different conclusion due to the manner it was dealt with by Applicants as set out in my judgment.

[13]

Having considered the submissions made and also the cases referred to I am of the view that there is no reasonable prospect of another court coming to a different conclusion in this matter. Accordingly the following

order is made: The application for leave to appeal is refused with costs, such costs to include the costs of senior counsel where applicable.
P C BEZUIDENHOUT J.

JUDGMENT

RESERVED: 2 JUNE 2023

JUDGMENT

HANDED DOWN: 19 JUNE 2023 COUNSEL FOR 1ST & 2ND APPLICANTS: C J PAMMENTER SC Instructed by: AP SHANGASE AND ASSOCIATES TEL: 083 779 1143 EMAIL: philanie1234@gmail.com c/o THEMBA MKHIZE ATTORNEYS TEL: 033-39403858 COUNSEL FOR 1ST & 2ND RESPONDENTS: N GOVENDER Instructed by: STATE ATTORNEY REF: 43/004548/20/C/P15 COUNSEL FOR 4TH RESPONDENT: A A GABRIEL SC Instructed by: NORTON ROSE FULBRIGHT SOUTH AFRICA INC TEL: 031 5825616 EMAIL: Purnel.gangiah@nortonrosefulbright.com REF: IFS43/SSK

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