

SOUTH AFRICA / JUDGMENT

Godongwana and Others v Pillay, J. and Others (1989/2008) [2009] ZAECGHC 29 (18 May 2009)

[2009] ZAECGHC 29

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Chetty

CASE / FILE NUMBER

1989/2008

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PARTIES:	Case
Number:	1989/2008 High
Court:	Grahamstown DATE
HEARD:	05/14/09 DATE
DELIVERED:	05/18/09
JUDGE(S):	LEGAL REPRESENTATIVES –
Appearances:	for
the Applicant(s):	Adv J.A Newdigate /Adv T. Masuku for
the Respondent(s):	iro of postponement application: Adv P. Benningfield Instructing

attorneys:

Applicant(s): Nolte
Smith Attorneys

Respondent(s): Nettletons
Attorneys
CASE
INFORMATION –
Nature

of proceedings: Application

Topic: Review
Application
Key
Words:Practice – Review –
Commission of Enquiry established by the Premier of the Eastern Cape
pursuant to the provisions
of s 127 (2) (e) of Constitution for fixed
period – Its duration further extended by Proclamation for
further fixed period
– No further proclamation issued –
Commission's Report a nullity liable to be set aside in terms
of s 6 (2) (a)
(i) of PAJA – Report containing prejudicial
material concerning applicants – Whether applicants
should have been
given notice and opportunity to respond before
Report furnished to Premier – Whether failure to do so
procedurally unfair
– Whether Report liable to be set aside in
terms of s 6 (2) (c) of PAJA – Report disseminated for ulterior
motive –
Whether such liable to be set aside in terms of s 6
(2) (e) (ii) of PAJA
IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE – GRAHAMSTOWN)
Case No: 1989/2008
In

the matter between: ENOCH
GODONGWANA
First
Applicant
ARNOLD
MAKHENKESI STOFILE
Second
Applicant
STONE
SIZANI
Third
Applicant
MCEBISI
JONAS
Fourth
Applicant
And
THE
HONOURABLE MR JUSTICE
RAJARITHINAM
PILLAY
First
Respondent
JOHN
GRAHAM GROGAN
Second
Respondent
NOLUYOLO
NONKWELO
Third
Respondent
THE
PREMIER OF THE PROVINCE
OF
THE EASTERN CAPE
Fourth
Respondent

CORAM: CHETTY, J
Date

Heard: 14
May 2009
Date

Delivered: 18 May 2009

Summary:

Practice – Review –
Commission of Enquiry established by the Premier of the Eastern Cape pursuant to the provisions of s 127 (2) (e) of Constitution for fixed period – Its duration further extended by Proclamation for further fixed period
– No further proclamation issued – Commission’s Report a nullity liable to be set aside in terms of s 6 (2) (a) (i) of PAJA – Report containing prejudicial material concerning applicants – Whether applicants should have been given notice and opportunity to respond before Report furnished to Premier –
Whether failure to do so procedurally unfair – Whether Report liable to be set aside in terms of s 6 (2) (c) of PAJA
– Report disseminated for ulterior motive – Whether such liable to be set aside in terms of s 6 (2) (e) (ii) of PAJA

JUDGMENT

CHETTY, J

[1] On 8 April 2005 the then Premier of the Province of the Eastern Cape, Ms Nosimo Balindlela (Ms Balindlela) caused to be published a Provincial Notice, No. 12 of 2005, in terms of which she, acting pursuant to the provisions of s 127

(2) (e) of the Constitution of the Republic of South Africa Act[1], appointed a Commission to enquire into the finances of the Eastern Cape provincial administration. On the same date, regulations

governing the proceedings of the Commission were promulgated by proclamation 2 of 2005. The first respondent, a judge of this court

was appointed chairperson, the third respondent and one Mzimtsha Vizia Nkonki (Nkonki), the other members of the Commission. The Commission colloquially became known as the Pillay Commission. In terms of the notice as aforesaid the Commission was initially appointed for a six month period commencing on the date of publication of the notice i.e. 8 April 2005. On 7 October 2005 however, Provincial Notice No. 39, dated 7 October 2005, published in the Provincial Gazette Extraordinary, extended the duration of the Commission until 31 March

2006. On 17 November 2005 the second respondent was appointed as a member of the Commission to succeed Nkonki. Thereafter Ms Balindlela by Provincial Notice No. 17 dated 21 March 2006 further extended the duration of the Commission until 30 September 2006.

[2] On 1 June 2007, a Report dated 1 June 2007 and titled Report of The Commission of Inquiry into the Finances of the Eastern Cape established in terms of Provincial Gazette Extraordinary (E.C) Notice No 2 of 2005, 8 April 2005 as amended (the Report) was provided to Ms Balindlela by the Commission. Shortly after publication of portions of the Report in the print and electronic media on or about 10 July 2008 the applicants unsuccessfully sought a copy of the Report from the first respondent. Eventually a copy of the Report was obtained from the speaker of the Provincial Legislature.

[3] In October 2008 the applicants filed a notice of motion in terms of which they sought relief framed in the said notice as follows:

“(a) That the report of the Commission of Inquiry into the finances of the Eastern Cape established in terms of Provincial Gazette Extraordinary(E.C.) Notice No. 2 of 2005 of 8 April 2005 (“the Report” and “the Commission” respectively) be reviewed and set aside;

(b) Declaring that the report is a nullity and of no force and effect;

(c) In the alternative to prayers (a) and (b) above, that the portions of the report described in the schedule annexed hereto marked “A” be reviewed and set aside;

(d) That such alternative relief be granted to the applicants as may be appropriate;

(e) That the Respondents, jointly and severally, pay the Applicants’ costs of the application, including the costs attendant upon the engagement of two counsel.

[4] By virtue of the first respondent’s office, the applicants sought and obtained the consent required in terms of s 25 of the Supreme Court Act[2] from the Judge President of this court. The first, second and third respondents have not opposed the application, the state attorney,

acting on their behalf, having filed a notice to abide the decision of the court. Although the fourth respondent filed a notice to oppose the application, no answering affidavits have been filed, the state attorney merely filing a record purportedly in compliance with Rule 53 of the Uniform Rules of Court.

[5] When the matter was called on the morning of the hearing however, Mr. Benningfield, on behalf of the fourth respondent, handed up from the bar a notice of motion and accompanying affidavit in support of an application for a postponement of the matter. Mr. Newdigate, who together with Mr. Masuku appeared for the applicants, intimated that he held instructions to oppose the application for a postponement and the matter accordingly stood down to afford me the opportunity to read the papers. At the resumption of the hearing and at the conclusion of counsel’s address, I refused the application with costs indicating that reasons for the order would be furnished in due course. I then heard the main application. My reasons for refusing the application for a postponement now follow.

The application to postpone the hearing

- [6] It has long been established that a litigant who seeks a postponement must satisfy the court that it should grant him such indulgence. Notwithstanding, a court should be slow to refuse a postponement because of the consequences which may ensue. However, a party who seeks such relief, must fully explain the reason for his non-preparedness. In *Persadh and Another v General Motors South Africa (Pty) Ltd*[3], Plasket J, with reference to a number of decided cases relating to postponements said the following[4]-

“The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent’s procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant’s inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.”

- [7] The application is predicated on three grounds, viz. alleged fundamental defects in the applicants’ founding papers, secondly, the omission to file annexure “A” to the founding affidavit and thirdly, the fourth respondent requires time to file an amended record of the proceedings before the Commission to ensure proper compliance with the provisions of Rule 53.

Non-compliance with Rule 53 (1) (b)

- [8] As regards the latter ground, it must be observed that subrule (1)
- (b) is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings, An applicant is however entitled to waive the requirements of the subrule. The applicants have not taken issue with the insufficiency of the record filed and recourse to an alleged lack of proper compliance with the subrule as justifying a postponement is clearly misplaced. There was nothing to prevent the fourth respondent from filing what it considered a proper record. The fact that it failed to do so can certainly not constitute a basis for allowing a postponement.

Fatal defects in applicants’ founding papers

- [9] The fourth respondent contends that notwithstanding repeated requests that certain alleged defects in the applicant’s papers be cured, the applicants desisted from so doing, and that such omission prejudiced them in the preparation of their opposition to the application. These fatal defects are said to reside in the applicants’ omission to have filed annexure “A” to the papers and the duplication of certain papers to the annexures to the founding papers. Both these grounds are devoid of all substance.

- [10] It is beyond comprehension how a duplication of seven pages can conceivably cause the fourth respondent's attorney any confusion whatsoever. Similarly, the omission to have included annexure "A", referred to in paragraph
- (c) of the notice of motion could have caused the fourth respondent no prejudice whatsoever. Annexure "A" is clearly stated to be a reference to annexures "FA7", "FA8" and "FA9" to the founding affidavit.
- [11] The fourth respondent was aware, as far back as 21 February 2009 that the applicants considered that there was no need to supplement their papers. The answering papers were requested but to no avail. The notice of setdown was served on the fourth respondent's attorneys on 15 April 2009. As adumbrated hereinbefore the application for a postponement is ill conceived and devoid of all merit. There is no suggestion at all that the postponement is sought in order to afford the fourth respondent the opportunity to place its defence before the court. These then constitute the reasons for the dismissal of the application for postponement. I proceed thus with the main judgment.
- [12] Although the application is unopposed, it is nevertheless incumbent upon me to determine whether the applicants are entitled to the relief they seek. As will be gleaned from the notice of motion the application is premised on three grounds. The applicants' contend firstly, that the Report was signed and provided to Ms Balindlela, the then incumbent of the fourth respondent's office, at a time when the Pillay Commission was no longer in existence and when there was no basis in law in terms of which the Commission was authorised, entitled or obliged to deliver the report. Ergo, the Report is a nullity. Secondly, the applicants allege that in as much as the Report constitutes administrative action as contemplated in the Promotion of Administrative Justice Act[5] (PAJA), the failure by the Commission not only to give them notice of the serious allegations levelled against them in the Report but moreover to cause such allegations to be provided to the Premier and subsequently published constituted a flagrant breach of their constitutionally entrenched rights to procedural fairness and thirdly, that at the time Ms Balindlela caused publication of the Report she did so for an ulterior purpose, viz. to embarrass the applicants and advance herself politically.
- [13] In the course of this judgment I have chronologised the events which led the applicants to the doors of this court. All of that detail is sourced from the founding affidavit of the first applicant.

Was the Commission authorised to provide the Report after 31 December 2006

- [14] Although, as adverted to hereinbefore, the lifespan of the Commission was extended by proclamation on two occasions, the second of which to 30 September 2006, Ms Balindlela purportedly further extended its duration until 31 December 2006. It is clear from the affidavit deposed to by the first applicant that there is no proclamation extending the life of the Commission beyond 30 September 2006. It, according to the first applicant, apparently happened as follows - In reply to a question raised in the Provincial Legislature Ms Balindlela furnished the explanation that:-

“(T)he work of the Commission has been concluded with the Chairman, Judge Pillay, due to present the complete report to the Premier. This report is currently being finalised by the Judge and is likely to be available early in the new financial year. The period of the Commission was thus initially extended by Provincial Notice No. 17 of 2006 for six months until 30 September 2006, thereafter to facilitate the finalisation of its work an administrative extension was granted for a further 3 months, until 31 December 2006.”

[15] Mr Newdigate submitted that even assuming the valid extension of the lifespan of the Commission to 31 December 2006, it was no longer in existence on 1 June 2007 when the Report was signed and provided to Ms Balindlela

- in other words, it was powerless to do anything and in particular lacked power to issue the Report. In *Stafford v Special Investigating Unit*[6] Leach J, remarked that a commission of inquiry, in that case, the Heath Commission, likewise, as in *casu*, established in terms of the Provincial Commissions Act[7] (Eastern Cape) does not enjoy juristic personality under the common law. He held that as a creature of statute it only has such juristic personality as is conferred upon it by the statute to which it owed its existence.

[16] The Commission was, as adverted to earlier, established by Ms Balindlela in terms of the power conferred upon her by s 127 (2) (e) of the Constitution. Her power to circumscribe its terms of reference and promulgate the regulations were derived from the powers vested in her by the Provincial Commissions Act (Eastern Cape)[8]. The Commission's powers are likewise derived from the Provincial Act and the regulations made governing the conduct of its

business. The terms of reference are widely stated but in essence required the Commission to inquire into the finances of the Eastern

Cape Provincial Administration and to report to her on such matters as stipulated in its terms of reference. In terms of paragraph 3 of the terms of reference, the Commission was to endure for a fixed period of six months. It is implicit therefrom that both the inquiry and the report would have to be completed within the stipulated period or such extended period any further proclamation decreed.

[17] By issuing Provincial Notice No. 17 on 31 March 2006, Ms Balindlela, once more acting pursuant to the provisions of s 127 (2) (e) of the Constitution, amended its precursor by extending the term of the Commission to 30 September 2006, after which date, as a matter of law, it would cease to exist. If the further extension to 31 December 2006 was legally valid, and about that I have grave reservations, then the Commission ceased to exist beyond that date absent a proclamation to that effect. None has been shown to exist. In my view therefore the Commission lacked jurisdiction thereafter to do anything pursuant to its terms of reference. Its is axiomatic that, even assuming a valid extension to 31 December 2006, the Commission could not conduct any inquiries beyond that date for the simple reason that it had ceased to exist. As a necessary corollary, it likewise had no power to produce a report. The Report is therefore in my view clearly a nullity and liable to be set aside in terms of s 6

(2) (a) (i) of PAJA.

Was the applicants' rights to procedural fairness breached

[18] I am in agreement with the submission advanced by Mr Newdigate that the Commission's Report constitutes administrative action as envisaged in PAJA. Consequently, where the Report materially and adversely affected the applicants' rights or legitimate expectations the requirement of procedural fairness had to be adhered to (s 3 (1)). Unfortunately, the requirement of procedural fairness, rooted in the common law, and now statutorily enjoined by PAJA was simply ignored. The founding affidavit refers to various portions of the Report which the deponent avers contains scurrilous allegations against them. It is unnecessary for purposes of this judgment to incorporate the offensive material therein contained. It suffices to say that the Report is replete not only with allegations of financial impropriety, malfeasance and fraudulent conduct on the part of the applicants and in certain instances their family members, but with positive findings of fact thereanent. The applicants' collective indignation at these untested and unsubstantiated allegations and findings must be accorded due weight and, where found to have been violated, the courts' protection extended to them.

[19] It is thus apposite at this juncture to refer to the judgment of the English Court of Appeal[9], cited with approval by Corbett JA[10], where Lord Denning MR, in a matter concerning procedures in an investigative inquiry, stated the following:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public

interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that counsel for the inspectors went too far on the other . . . he did suggest that in point of law, the inspectors were not bound by the rules of natural justice. . . . He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply. I cannot accept counsel for the inspectors' submission. It is true, of course that the inspectors are not a court of law. Their proceedings are not judicial proceedings. . . . They are not even quasi-judicial for they decide nothing; they determine nothing. They only investigate and report. They sit in private. . . .

But this should not lead us to minimise the significance of their tasks. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions. . . . Seeing that their work and their report may lead to such consequences, I am clearly of opinion that the inspectors must act fairly."

[20] It is furthermore instructive to note from paragraph 1.1 of Chapter 2 of the Report that virtually all the allegations concerning alleged misconduct on the part of the applicants had its genesis in a report compiled during a previous investigation into "alleged irregularities in

the procurement of goods and services”, styled Project Spin. Extracts of that report were handed to the Commission on 8 September 2006 which in turn appears to have analysed the information therein contained and drawn conclusions therefrom which were subsequently incorporated in the Report. It is apparent from the founding affidavit that at no stage were the applicants appraised of these prejudicial allegations and invited to respond thereto. I am satisfied that on this ground too the applicants are entitled to the relief sought.

Administrative action taken for ulterior purpose or motive

[21] The gravamen of the complaint is that when Ms Balindlela surreptitiously caused publication of the Report she did so with an ulterior motive to embarrass the applicants politically. The founding affidavit highlights the enmity which existed between her and the applicants. These averments are uncontroverted and viewed holistically would tend to support the applicants’ contention that the Report falls to be reviewed and set aside under s 6 (2) (e) (ii) of PAJA. However, in view of the conclusion reached on the first two grounds it is unnecessary to make any definite finding in this regard.

[22] There remains the question of costs. In both the notice of motion and the written heads prepared on behalf of the applicants a costs order against all four respondents jointly and severally, the one paying, the others to be absolved, was sought. During argument Mr. Newdigate, whilst persisting with the costs order sought against the fourth respondent submitted that the first to the third respondents should not completely be absolved from being ordered to pay the applicants’ costs jointly and severally with the fourth respondent but that their liability for costs be limited to the date when the notice to abide the court’s decision was filed on their behalf. I am not persuaded that such a costs order would be appropriate. The Commission was established by the fourth respondent and it is the latter who properly should be mulcted with the costs.

[23] In the result the following orders will issue;

1. The Report of the Commission of Inquiry into the Finances of the Eastern Cape established in terms of Provincial Gazette Extraordinary (E.C) Notice No 2 of 2005 dated 8 April 2005 is hereby set aside.
2. The Report is declared a nullity and of no force and effect.
3. The fourth respondent is ordered to pay the applicants costs, such costs to include the costs of two counsel.

D. CHETTY

JUDGE OF THE HIGH COURT

On behalf of the Applicants: Adv J.A Newdigate SC / Adv T. Masuku

Instructed by:

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On behalf of the Fourth Respondent: Adv P. Benningfield

(Only in respect of the postponement application)

Instructed by: Nettletons Attorneys

118 A High Street

[1] Act 108 of 1996

[2] Act 59 of 1959

[3] 2006

(1) SA 455 (E)

[4] At para [13]

[5] Act 3 of 2000

[6] 1999

(2) SA 130 (ECD)

[7] Act 3 of 1994

[8] Act 3 of 1994

[9] Re Pergamon Press Ltd [1970] 3 ALL ER 535 (CA) at 539a-f

[10] In Du Preez and Another v Truth and Reconciliation Commission [1997] ZASCA 2; 1997 (3) SA 204 (AD)

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