

SOUTH AFRICA / JUDGMENT

Madyibi and Another v Minister of Water and Sanitation and Others (939/2020)

[2024] ZAECKMKHC 126 (19 November 2024)

[2024] ZAECKMKHC 126

COURT

Eastern Cape High Court, Makhandla

BEFORE

Zono AJ

CASE / FILE NUMBER

939/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MAKHANDA)

Reportable

Case No.: 939/2020

Matters

heard on: 10 October 2024

Judgment

delivered on: 19 November 2024

In the matter between:

NTOMBIZINE
MADYIBI
First Applicant
MAUDLINE
MABI
Second Applicant
And
MINISTER
OF WATER AND SANITATION
First Respondent
DIRECTOR-GENERAL
IN THE DEPARTMENT
Second Respondent
OF WATER AND
SANITATION
AMATOLA
WATER

Third Respondent
THE
BOARD OF AMATOLA WATER LISTED
Fourth to Fourteenth Respondent
IN ANNEXURE “A”

JUDGMENT

Zono A J

Introduction

- [1] The applicants are former members of Amatola Water Board who were appointed as such by the former Minister of Water and Sanitation, Ms Lindiwe Sisulu on 5 August 2021. Applicants contend that they received letters of termination penned and signed by the Minister of Water and Sanitation, Mr Senzo Mchunu on 18 January 2022, terminating their respective memberships to the Amatola Water Board. Letters of termination are annexed to the applicants' papers.
- [2] The applicants contend that the termination of their respective memberships was unlawful as it breached the principle of legality. It is further submitted that the applicants did not know that their appointments as Board members did not comply with the requirements for such appointments. As private parties they were not privy to the internal protocols, processes, decisions and arrangements of the Ministry that preceded their appointments by the Minister.
- [3] Underpinned by the aforesaid brief factual scenario, the relief sought was to the effect that the Minister's decision to terminate applicants' membership of the Amatola Water Board be declared as unlawful and accordingly set aside. The applicants, as a consequence of that sought to be reinstated as Board members of the Amatola Water Board. The applicants seek damages they might have suffered as a result of termination of their membership aforesaid, and an order of costs.
- [4] The applicants contend that prior their appointments as Board members there was a long recruitment process which started in 2020 which was the following: advertisements, submissions of application documents, establishment of interview panel by the Minister, interviews on Microsoft Teams. The interview for the first applicant was conducted on 21 November 2020 and for the second applicant was conducted on 13 March 2021. As a result of these processes the applicants were appointed and assumed their duties.

[5] On 15 October 2021, prior to the termination of the applicants' membership, the Minister served a notice in terms of which the applicants were called upon to show cause why their membership cannot be terminated. They were invited to furnish their written reasons within seven days of receipt of the letter/notice. It does not appear that the notice was heeded. No response or reasons had been forthcoming. On 18 January 2022 the Minister terminated applicants' membership aforesaid in terms of the letter or notice. In what follows I deal with the contents of the letter.

[6] The material and relevant parts of the Minister's letter dated 18 January 2022 to the first applicant reads as follows:

'4.... However, considering that the seven (7) days provided has lapsed and I remain uninformed of your views. Therefore, I am taking advantage of this opportunity to terminate your membership of the Amatola Water Board for the following reasons:

- (i) That your appointment was flawed in that it did not follow the process prescribed by the Water Services Act 1997 (Act No 108 of 1987), in that you were not nominated and seconded as required in terms of item 3 of Schedule 1 of the Act. There are stringent procedures for nomination up until to the final stage of appointment to a Water Board. For example, in terms of item 3 of Schedule 1 (5) of the Water Services Act, the following is provided:
- (5) Every nomination of a person for appointment of a Water Board must be signed by a proposer and a seconder, none of whom may be a nominee and must contain the nominee's signed acceptance. No person may nominate or second more than one person.

It is clear from the above that appointing a candidate to a Water Board which he/she has never been nominated and seconded for negates the object of item 3 of Schedule 1 of the Water Service Act in particular item 3(5).

(ii) There is an institutionalised cabinet policy which requires that once the Minister approves the recommended candidate for appointment following compliance with Section 35 read with Schedule 1 procedure of the Water Service Act; and

(iii) That you were never interviewed for the position as it is required in terms of the WSA.

(5) Section 35(5) of the WSA empowers me to terminate membership of board members. It is on the basis of the aforesaid reason and the

power bestowed on me that I take this opportunity to terminate your membership of the Board. I have therefore, based on the above,

painstakingly taken a decision to terminate your board membership in terms of Section 35(5) of Water Service Act 108 of 1997.

(6) I take this opportunity to thank you for serving the Amatola Water Board albeit for a short period of time and wish you the best in your future endeavour.'

Second applicants' letter is, to a large extent, to the same effect

[7] The contents of the termination letter quoted above bring into sharp focus the provisions of Water Services Act 108 of 1997 (the Act). It appears that the Minister, when terminating applicants' membership was invoking the provisions of the Act.

[8] The Minister deposed to an answering affidavit. The essence of his submission is that the appointment of the applicant was irregular and/or unlawful for it did not comply with the imperative provisions of the Act. He further submits that he acted in terms of the Act when terminating the applicants' membership, he acted and exercised the power he has in terms of the Act and related enactments. Accordingly, he submits that his action was lawful.

Discussion/analysis and legal framework

[9] There are instances where a member of Water Board can cease to be a member. Those instances are set out in Water Services Act[1]. The relevant subsection is worded as follows:

‘(1) A member of a Water Board ceases to hold office–

(a)

(b)

(c)

(d)

(e) if his or her appointment has been terminated in terms of Section 35(5) of the Act.’

This is a general provision applicable to all members of the Board. Item 4 of Schedule 1 of the Act deals with the termination of term of office of board members as the heading suggests.

[10] The Minister is invariably empowered to remove the Board members in terms of Section 35(5) of the Act, which provides as follows:

‘(5) The Minister may terminate the appointment of any or all the members of a Water Board.’

In what follows I aptly deal with the provisions of Interpretation Act[2].

[11] Section 10 of the Interpretation Act provides:

‘(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where a law confers a power, jurisdiction or right, or imposes a duty or the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder.

(3) Where a law confers a power to make rules, regulations or by-law, the power shall, unless the contrary intention appears, be construed as including a power exercisable to like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-law.’

[12] Even prior to the advent of the Constitutional dispensation, powers conferred on the administrators were inevitably accompanied by an implied duty to exercise power[3]. Placket J in *Vumazonke*[4] appositely observed as follows:

‘35 Public powers and functions . . . are given to administrative official for a purpose: they are intended to be exercised in the furtherance of the of the public interest.’

[13] The aforesaid statement of law is internationally acclaimed. In *Julius v Lord Bishop of Oxford*[5] where it was held that:

‘Where a power is deposited with a public officer for the purpose of being used for the benefits of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court shall require it to be exercised.’

[14] It is without a doubt that the resolution of the dispute between the parties herein inevitably engages the

interpretation of the provisions of Water Services Act 108 of 1997. As Wallis JA in *Natal Joint Municipality Pension Fund v Endimeni Municipality*[6] observed:

‘18 . . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory

instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration

must be given to the language used in the light of the ordinary rule of grammar and syntax, the context in which the provision appears the apparent purpose to which it is directed and the material known to those responsible for its production . . .’

[15] One of the reasons for the termination of applicants’ membership to the Water Board is non-compliance

with item 3(5) of Schedule 1 of the Water Services Act 108 of 1997. That reason is set out in paragraph 4 of the letter or notice of termination dated 18 October 2022. The item requires that “every nomination of a person for appointment to a Water Board must be signed by a proposer and a seconder. None of whom may be the nominee, and must contain the nominee’s signed acceptance. No person may nominate or second more than one person”.

- [16] Applicants' papers are silent about the manner in which they were nominated, or whether there was any nomination process taken place which was seconded. Because there was no mention of the nomination, as a corollary applicants' papers are devoid of the identity of persons nominating them. This failure is fatal to applicants' application. The applicants content themselves in stating that they were appointed as members of Amatola Board pursuant to a long recruitment process. That does not address the requirements of item 3(5) of Schedule 1 of the Water Services Act.
- [1] Item 4 of Schedule 1 of Water Service Act 108 of 1997.
- [2] Interpretation Act 33 of 1957.
- [3] Chatabac v Union Government (Minister of Justice) and Registrar of Ascatics 1911 AD 13 at 13; Luynch v Union Government (Minister of Justice) 1929 AD 281 at 285; also Baxter L Administrative Law (1984) at 414.
- [4] Vumazonke and others v MEC for Social Development and Welfare for Eastern Cape 2005 (6) SA 229 (SE) paragraph 35.
- [5] Julius v Lord Bishop of Oxford [1880] 5 AC 214 at 225.
- [6] Natal Joint Municipality Pension Fund v Endimeni Municipality 2012 (4) SA 593 at 603 paragraph 18.
- [7] GM Cockram: Interpretation of Statutes, Third Edition, page 163.
- [8] LAWSA: Volume 25 Part 1 page 399 paragraph 366.
- [9] Shalala v Klerksdorp Town Council and Another 1969 (1) SA 582 (T) at 587 A-C.
- [10] Maguma v Station Commander, Fleet Street Police Station and Others (EL 683/2023) [2024] ZAECELLC 8 (19 March 2024) paragraph 51.
- [11] Palscon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 A at 634-5.
- [12] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) paragraph 26.
- [13] Which has not been made out in the founding affidavit.
- [14] Annexure H1-6.
- [15] Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635 H – 636 A.
- [16] Nkume v TransUnion Credit Burear (Pty) Ltd and Another 2014 (1) SA 134 (ECM) paragraph 7.

- [17] MEC for Environmental Affairs and Developmental Planning v Clarrison's CC 2013 (6) SA 235 SCA paragraph 18; Magqazana v Buffalo City Metropolitan Municipality and Another (EL 1386/2023) [2024] ZAECELLC 7 (5 March 2024) paragraph 19.
- [18] Mwelase v Minister of Social Development and Others (CA74/16) [2018] ZAECMHC 16 (22 March 2018) paragraph 25; Baxter: Administrative Law page 305.
- [19] Minister of Social Development and Another v Mpayipheli (CA 135/16) [2018] ZAECMHC 31 (26 June 2018) paragraph 18.
- [20] Kimberly Junior School and Another v Head of the Northern Cape Education and Others 2010(1) SA 217 (SCA); 2009 (4) All SA 135 (SCA) paragraph 11.
- [21] Paola v Jeeva N.O. [2003] ZASCA 100; 2004
- (1) SA 396 (SCA) paragraphs 11, 14 and 16.
- [22] Union of Refugee Women v Director: Awate Security Industry Regulatory Authority 2007 (4) SA 395 (CC) paragraph 78.
- [23] South African Defence and Aid Fund v Minister of Justice 1967
- (1) SA 31 (C) at 34-35; President of RSA v South African Football Union 2000 (1) SA 1 (CC) paragraph 168.
- [24] Cool Ideas 1186 CC v Hubbard and Another 2014
- (4) SA 474 paragraphs 58, 77 and 99.
- [25] Lester v Ndlambe Municipality 2015 (6) SA 283 (SCA) paragraphs 26, 27 and 28.
- [26] Section 35(5) of Water Services Act 108 of 1997.
- [27] Schedule 1 (4)(e) of Water Services Act 108 of 1997.
- [28] Administrative Law page 305.
- [29] National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) paragraph 44.
- [30] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [2006] ZACC 9; 2007 (1) SA 343 (CC) paragraph 68.

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