

SOUTH AFRICA / JUDGMENT

Vilakazi and Others v MEC responsible for Economic Development, Gauteng and Another [2023] ZAGPPHC 369; 2023-032601 (18 May 2023)

[2023] ZAGPPHC 369**COURT**

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

2023-032601

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**IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA**

CASE NO:

2023-032601

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED: NO

DATE: 18 May 2023

Signature:

In

the matter between:

SIBONGILE

VILAKAZI

1st

Applicant

THANDIWE

GODONGWANA

2nd

Applicant

LENTSWE

MOKGATLE

3rd

Applicant

DAVID

MAIMELA

4th

Applicant

THEMBA
FAKUDE
5th
Applicant
And
MEC
RESPONSIBLE FOR ECONOMIC DEVELOPMENT,
GAUTENG
1st
Respondent
GAUTENG
GROWTH AND DEVELOPMENT AGENCY
2nd
Respondent

JUDGMENT

NYATHI J

A.

INTRODUCTION

- [1] The applicants are directors, recently terminated, of the Gauteng Growth and Development Agency (“GGDA”), a corporate entity duly established under the amended Blue IQ Investment Holdings Act 5 of 2013 (Gauteng Province) and the Company laws of the Republic of South Africa. The GGDA is an agency under the Gauteng Department of Economic Development.
- [2] The applicants were at all material times members of a board of directors of the second respondent. The board of directors is made up of nine (9) non-executive directors. The first applicant served as the Chairperson of the said Board. Of the nine board members, only four (4) board members joined the first applicant in this application, whilst the other four (4) resigned because of the first respondent’s decision to dissolve the Board.
- [3] The first respondent is the Member of the Executive Council (“MEC”) responsible for the portfolio of Economic Development in the Gauteng Province.
- [4] The applicants are before this court on an urgent basis. They seek an order that is split into part A and part B.
- [5] I am seized with deciding part A wherein the applicants seek an order in the following terms:

5.1 That this application be treated as an urgent application and in so far as may be necessary the forms prescribed by the Rules of this Court be dispensed with;

5.2 That the first respondent's decision to dissolve the Board of the GGDA (the second respondent) and to terminate the Board membership of the applicants with the second Respondent be and is hereby suspended with effect from 24 March 2023, alternatively from the date of this order.

5.3 That the applicants be reinstated as directors of the second respondent with effect from 24 March 2023, alternatively, the date of this order;

5.4 That the appointment of any directors, if any, in substitution of the applicants, to the board on or after 24 March 2023, is reviewed,

alternatively declared unlawful, and set aside, alternatively, suspended;

5.5 Interdicting and preventing the first respondent from appointing any directors to the board of the second respondent in substitution of the applicants; That the first respondent; and the second respondent only in the event the latter opposes this application, be ordered to pay the costs associated with the relief sought in part A.

B. APPLICANTS' CASE

[6] On 24 March 2023 the first respondent decided to dissolve the board of the second respondent, an administrative action which she communicated to the Applicants the same day. She was purportedly acting within or exercising her public powers as the MEC.

[7] The applicants contend that the action was irrational and is of such a nature that given the available facts, no reasonable administrator would take and as such is liable to challenge under the principle of legality. Furthermore, insofar as the shareholder of the second respondent is the Gauteng Provincial Government, the first respondent did not have the shareholder's resolution to dissolve the board, she dissolved the board on her own whim and ulterior motives.

[8] The applicants further contend that the decision was taken with an ulterior motive in that the first respondent wanted to get rid of the Board so that she paves a way for herself to start afresh the recruitment process for the appointment of the Chief Executive

Officer for the Agency.[1] Her aim is to open an opportunity for an individual she has predetermined or has in mind that she wants to appoint. The said

individual was not among those who were shortlisted and interviewed for the position, for this reason, the first respondent's

decision was influenced by bias. Her decision is therefore unlawful.

[9] When the board did not agree with the first respondent to start the recruitment process afresh as there was no sound reason to do so, the first respondent invoked her powers to dissolve the board. It is the applicants' submission that in this regard the first respondent abused her powers and thus acted unlawfully.

- [10] To underline the arbitrariness and procedural unfairness of the first respondent's conduct, she only afforded the applicants a mere 24 hours in which to make their representations before firing them. That period was unreasonable and wholly inadequate especially in view of the drastic nature and seriousness of the implications of the decision.
- [11] The first respondent, in her letter terminating the board dated 24 March 2023, also states that she is registering a concern on what she terms "material matters" which were raised by some board matters which she regards as having led to a breakdown in relations between her and the board as well as between the shareholder and the board. Said "material matters" are not disclosed, nor are the applicants given any hearing as regards same.

Factual background

- [12] The first applicant was appointed as member and Chairman of the Board of the GGDA on 1 October 2021 by the former MEC for Economic Development, Mr Parks Tau. The GGDA is now under the stewardship of the first respondent.
- [13] The second, third and fourth and fifth applicants were also appointed as members of the board on the same day. The Board is made up of 13 individual members and it was appointed for a three-year term ending on 31 September 2024.
- [14] The Board was functioning effectively and optimally, delivering on both the mandate of GGDA and the strategy developed by the board in May 2022. All indications were that the organization is on track to turning around to reach high performance standards.
- [15] The performance of the board had never been questioned by either by the former MEC, Mr Parks Tau or the first respondent. For instance, in a letter addressed to the first applicant dated 24 March 2023, the first respondent confirmed that the former's leadership skills, style or ability has never been up for debate including her will to ensure that the performance of the organisation improves.
- [16] In October 2022, the Gauteng Provincial Executive Committee went through political changes that saw the former MEC Parks Tau who was the MEC responsible for Economic Development being replaced by the first respondent.
- [17] At the time when the aforesaid changes took place, the GGDA had already finalized the recruitment process for the position of Group Chief Executive Officer (GCEO). The process was overseen by the then MEC Parks Tau or at least his representative, who is the Head of Department of Economic Development in Gauteng.
- [18] The process of recruitment was undertaken in accordance with the provisions of the Transversal Policy on Recruitment and Secondment. It appears that the first respondent takes a view that the Transversal Policy on Recruitment and Secondment is ultra vires on some or other grounds.

- [19] Upon completion of the recruitment process, a submission in the form of an interview report was submitted to the then MEC Parks Tau for him to seek concurrence of the Provincial Executive Committee as per the established norms for the appointment for a GCEO position.
- [20] In turn, the former MEC Parks Tau prepared a memorandum or submission for the Provincial Executive. The changes in the political office occurred before the former MEC Parks Tau could present the memorandum to the Provincial Executive Committee for their concurrence.
- [21] As the successor in title, the first respondent had to be briefed about the process including how it had started and the stage where it was at in order for her to take it forward to conclusion. The first applicant in her capacity as Chairman of the Board met the first respondent on the 10 November
2022. The meeting was an informal meeting at the applicant's request for introductions with a view to get to know the first respondent and her expectations as the new MEC responsible for GGDA.
- [22] At that meeting the first applicant briefed the first respondent about the organization, strategy adopted by the board and performance against this strategy, including the kind of GCEO needed to execute the strategy.
- [23] The first respondent indicated to the first applicant that she had received the briefing documents on the recommended candidate by the Board but that she had no intention to approve the candidate. She indicated that she had another person in mind whom she thought she could rely on to assist her in areas where she felt challenged, such as knowing people in the investment community, she preferred that such person be the one who should be employed as the GCEO. The person she preferred for that position was not among those that had been recommended by the board for the concurrence of the provincial executive.
- [24] The first respondent forwarded the first applicant on WhatsApp the profile of her preferred candidate. The first applicant indicated to the first respondent that this individual was not suitable for the role of the GCEO based on her skills and experience. She did not meet the minimum requirements for the role based on the strategy adopted for the organization. The first respondent said that while she heard first applicant's argument, she wanted her to meet this individual and determine the way forward. She undertook to schedule a meeting between the three of them. The meeting ended at that point.
- [25] The first respondent never scheduled the meeting as undertaken. Instead, the acting GCEO reported to the first applicant that the first respondent wanted to meet him. They met at the first respondent's home where she indicated to him that the board had recommended him for the position of GCEO, but he was not her preferred candidate. The first respondent further indicated to him that she had two other preferred candidates and that she wanted the recruitment process to start afresh and the Acting GCEO was

welcomed to apply if he wanted to.

- [26] As chairperson of the board, first applicant was alarmed by this report because it was a governance protocol violation. The recruitment and appointment of the GCEO is between the Board and the first respondent and the latter was not supposed to have such a conversation with the acting GCEO.
- [27] This triggered the board to write to first respondent on 18 January 2023 to inquire about how far the concurrence process was. The first respondent in response contended that the board's submission was incomplete as it did not include information about the risk presented by the fact that the previous GCEO, who was dismissed, was challenging the dismissal at the CCMA.
- [28] On 05 February 2023, the board responded to first respondent's query and highlighted that there was no risk to the organization because the position was vacant, and it needed to be filled for stability of the organization.
- [29] The first respondent responded per letter dated 22 February 2023, accusing the board of acting outside of its mandate by undertaking the recruitment process because the BLUE IQ Act 05 of 2003 that governs the GGDA states that the MEC appoints the GCEO. She informed the board that she was starting the recruitment process from the beginning, and she would manage it herself. She called upon the board to nominate a board member to represent it in the interview panel that she would be setting up unless the board could prove that the former MEC Parks Tau had instructed the board to follow the recruitment process followed.
- [30] On 25 February 2023, the board, in response to the accusation by the first respondent aforesaid, requested a meeting with her. The idea was to meet with the first respondent in order to understand from her what informed her approach and also an opportunity for the board to explain the decision-making processes followed up to the final stage, including the fact that the former MEC Parks Tau was at all times part of the recruitment process.
- [31] In response to the request for the meeting, the first respondent stated that she found the request for a meeting to be an act of defiance as her instruction was simple. She requested the board to write and explain to her why the board was failing to execute her lawful instruction.
- [32] It appeared strange to the applicants that the first respondent would view the request for a meeting as an act of defiance. There could be no conceivable basis for the first respondent to take this view except if she was already having prejudice towards them as a board.
- [33] The applicants contend that they were not defying the first respondent. All they were insisting on was that the recruitment process had already been initiated and it would amount to wasteful and fruitless expenditure to start a process afresh when everything had been done. The first respondent decided to dissolve the board so that she may appoint the individual whom she has preselected outside the recruitment process.

- [34] On 25 February 2023, the board responded to the first respondent and explained that it was not in defiance, but it was requesting an audience with the first respondent to avoid any misunderstandings that may have arisen from the correspondences.
- [35] The applicants made overtures to the first respondent to invoke the dispute resolution mechanism in the shareholder compact. Whilst the first respondent initially showed interest in this approach, she later pulled out citing a legal opinion that she had received regarding this matter. She required the respondents as individual board members to respond within 24 hours giving her reasons why they should remain as board members.
- [36] By 06:30 on 24 March 2023, the first to fourth applicants had received individual letters from the first respondent in which she communicated her decision to dissolve the board and termination of their membership.
- [37] The first respondent did not give the fifth applicant a letter of termination of his membership of the board. On 25 March 2023, the fifth applicant sent an e-mail to the office of the first respondent informing them that he had not received the letter confirming the dissolution of the board. To date the fifth applicant has not been furnished with the said letter. The first respondent simply did not respond thereto.

The case for urgency

- [38] Submissions for and against urgency were made by counsel for both the applicants and the respondent.
- [39] On behalf of the applicants, it was submitted that the process for the appointment of the GCEO was far advanced by the time the first respondent came into the fray. A presentation had already been made and submitted to her predecessor.
- [40] As at the time this application was heard, the second respondent did not have a board. It also did not have a CEO, notwithstanding the fact that the process to appoint the CEO was finalized as early as July 2022. An advertisement was published over the past weekend for the appointment of the CEO.
- [41] It was submitted on behalf of the applicants that there is a risk that by the time the review is heard, the outcome thereof may be academic.
- [42] The application is in the public interest and this, therefore, buttresses the issue of urgency. The applicants may not get substantial relief should this matter only be heard in due course.
- [43] Counsel for the respondents was of the view that this application is not urgent. The respondents decry the shortness of the timeframes that they were given to respond to this matter and to prepare for court.
- [44] The court exercised its discretion and heard this matter as one of urgency in terms of rule 6 (12) of the uniform rules of court.

The application for an interdict

- [45] The requirements for an interim interdict are well established in our law. They can be summarised as follows: a prima facie right even though open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted; and there is no other satisfactory or adequate remedy available to the applicant, and, that the balance of convenience favours the granting of an interim interdict.[2]
- [46] The central issue to be decided in this application is whether the MEC has the powers to appoint directors and the CEO. Further, whether the board of directors usurped the MEC's powers by leading the process of recruiting the CEO. Consequently, was the MEC justified in dissolving the board, more particularly the applicants.
- [47] Section 8(3) of the Gauteng Growth and Development Agency (Proprietary) Limited Act 5 of 2003 ("the Act") provides that "The MEC must appoint the Board of Directors and the Chief Executive Officer of the Company." Whether this complies with corporate governance norms is doubtful. One would expect the enabling Act to empower the MEC to appoint the board, and provide for the latter, in concurrence with the MEC, to appoint the GCEO. This is not a matter for consideration here.
- [48] It is apparent from a perusal of the Act that the Companies Act 71 of 2008 is applicable to the second respondent. Section 71 (1) Regulates the removal of directors. It reads as follows:
- "despite anything to the contrary in the company's memorandum of incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2)."* (Own emphasis).
- [49] Section 71 (2) provides as follows: "Before the shareholders office company may consider a resolution contemplated in subsection (1) – (a) The director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and (b) The director must be afforded the reasonable opportunity to make a presentation in person or through a representative, to the meeting, before the resolution is put to a vote."
- [50] In *Minister of Defence and Military Veterans v Motau & Another* 2014 (5) SA 69 (CC) the court found that the Minister had the necessary good cause to terminate the services of General Motau and Ms Mokoena as board chairman and deputy-chairman respectively, and that her decision was rational. Under their leadership, Armscor and its Board had failed to effectively fulfil its statutory mandate. However, the majority held that in making her decision, the Minister was required to comply with the process for the dismissal of directors as set out in the Companies Act. Her failure to do so rendered her decision unlawful.

[51] There is nothing before me that suggests that prior to the MEC dissolving the board, that resolutions were taken which entitled the MEC, to dissolve the board. In the absence of a resolution, I must accept the applicants' version that no resolution, at least insofar as it related to dissolution of the board, was obtained.

[52] There are further reasons what features that distinguish the decision in Motau from the current matter. They are:

52.1 In Motau, the Minister had on several occasions expressed her dissatisfaction with the applicants' conduct. They did not attend at least three meetings that she had convened, General Motau responded rather insouciantly to her registering her disapproval for such conduct, reminding the Minister that board members have other business to attend to.

52.2 The applicants' terms had expired by the time the appeal was heard, and the court could not reinstate them. Despite the procedural

defects of her decision, the Minister had substantively good and indeed compelling reasons for terminating the board membership of the applicants.

[53] In the matter under consideration, the reasons for the termination of board membership are hard to fathom. They vary from the MEC alleging "material matters" to her having another candidate for the CEO position in mind and to the allegation that the board's presentation on the recruitment of the GCEO was incomplete.

[54] In the matter under consideration, the following issues render the conduct or actions of the first respondent to be left wanting:

54.1 To the extent that the shareholder of the second respondent is the Gauteng Provincial Government, the first respondent did not have the shareholder's resolution to dissolve the board, in keeping with the requirements of section 71 of the Companies Act.[3] This lends credence to the applicants' apprehension of ulterior motives on the part of the first respondent.

54.2 Upon realizing that the matter between the first respondent and the board had gotten serious and it was clearly a dispute, the board invoked the dispute resolution mechanism in the Shareholder Compact. This was in correspondence dated 13 March 2023, on 16 March 2023, the first respondent acknowledged the dispute and started the process of dispute resolution mechanism. She scheduled a meeting for 24 March 2023, but recanted and withdrew the letter agreeing to the dispute resolution meeting, effectively

canceling the dispute resolution process.[4]

54.3 On 24 March 2023 the first respondent sent out the letters of termination to the first to fourth respondents bar the fifth respondent. Enquiries by the latter as to his status had been met with silence to date.[5] It is thus unclear whether the fifth respondent remains a member of the board or not. This appears to be a rather awkward manner of conducting business.

54.4 The first respondent ignored evidence of the involvement of her predecessor in the recruitment process for the new GCEO. This, despite having called for proof thereof.[6]

54.5 The first respondent refused to meet with the board on more than 3 occasions, thus failing to comply with the shareholder compact.

[55] All these 'reasons' leaves one to reasonably infer the existence of ulterior motives on the part of the first respondent.

[56] One would further expect the political office bearer (MEC) to apply herself more productively in policy formulation and development, rather than being involved in recruitment processes.

[57] The inescapable conclusion in this application, is that the board has unbeknownst to it, through asserting its independence and by being diligent invited the wrath of the first respondent, resulting in its demise.

[58] The issue of costs is next up for consideration. The normal rule applicable is that costs follow the event. In this case, I consider

that it would be unjust for the applicants to be rendered out of pocket in their quest for justice. The first respondent's

approach resulting in this impasse was inordinately harsh and heavy-handed. The court will thus reluctantly[7], express its displeasure by way of a punitive cost order.

[59] In the result, I make the following order:

[60] Pending the finalization of the review envisaged in part B of the notice of motion:

60.1 The first respondent's decision to dissolve the board of the GGDA (the second respondent) and to terminate the board membership of the applicants with the second respondent is hereby suspended with effect from 24 March 2023.

60.2 The applicants be and are hereby reinstated as directors of the second respondent with effect from 24 March 2023.

60.3 The appointment of any directors, if any, in substitution of the applicants, to the board on or after 24 March 2023, is hereby set aside.

60.4 The first respondent is hereby interdicted from appointing any directors to the board of the second respondent in substitution of the applicants.

[61] The first respondent and the second respondent are jointly and severally ordered to pay the costs of this application on a scale as between attorney and client. The one paying, the other to be absolved.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 19 April 2023 Date of Judgment: 18 May 2023 On behalf of the Applicants: Ngeno Mteto Inc Counsel: Adv. M. Majozi On behalf of the 1st and 2nd Respondent: Mncedisi Ndlovu & Sedumedi Attorneys Counsel: Adv. M. Sello SC With Adv. Manala

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 18 May 2023.

- [1] Sibongile Vilakazi's founding affidavit Para 12.
- [2] Webster v Mitchell 1948 (1) SA 1186 (W) as qualified in Gool v Minister of Justice 1955 (2) SA 682 (C).
- [3] Vilakazi's founding affidavit para 11.
- [4] Vilakazi founding affidavit para 45.
- [5] Ibid para 50.
- [6] Vilakazi founding affidavit para 48.
- [7] Public funds are constantly exposed through acts of state functionaries.

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