



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Minister of Local Government, Housing & Traditional Affairs (KwaZulu-Natal) v Umlambo Trading 29 CC [2007] SCA 130 RSA

Media Statement

Today the SCA held that, in order for a person(s) appointed to investigate maladministration, fraud, corruption or other serious malpractice in a municipality in KwaZulu-Natal to have the power to subpoena witnesses and documentation, a commission of inquiry must be appointed by the Premier of the province by proclamation in the *Provincial Gazette* in terms of section 2 of the KwaZulu-Natal Commissions Act 3 of 1999 ('the KZN Commissions Act'). The SCA accordingly dismissed an appeal by the Minister of Local Government, Housing and Traditional Affairs (KwaZulu-Natal) ('the MEC') against a judgment of the Durban High Court (Nicholson J) in terms of which subpoenas issued by a firm of chartered accountants, Manase & Associates ('Manase'), were set aside.

In late 2003, as part of a program called the Mayor's Container Initiative, the Ilembe District Municipality ('the Municipality') called for tenders for the conversion of recycled shipping containers into spaza shops, salons and other work places. Umlambo Trading 29 CC ('Umlambo') was awarded the tender. On 7 June 2005 the MEC, purporting to act in terms of section 106(1)(b) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'), appointed Manase to conduct an investigation into the Mayor's Container Initiative within the Municipality. According to Manase's letter of appointment from the MEC, the provisions of the KZN Commissions Act applied to this investigation. One of the partners of Manase, Mr K Hariparshad, then contacted Umlambo's sole member, Ms S Singh, informing her that he was conducting the investigation and that he required certain information and documents, including Umlambo's original founding statement and any amendments to this and Umlambo's bank statements. Umlambo's attorney required Manase to request the information in writing and stated that Manase was not entitled to the bank statements. In response, Manase served a subpoena on Singh, in her capacity as Umlambo's sole member. This subpoena claimed to be 'in terms of section 106(2) of the Local Government: Municipal Systems Act, read with section 4(1)(a) of the KwaZulu-Natal Commissions Act, Act 3 of 1999'. The subpoena required the production of all the documentation already requested, *except* the bank statements. Umlambo supplied the documentation required.

The bank statements were then sought by Manase by way of a separate subpoena served on Nedbank, Umlambo's bankers. In subsequent correspondence between Umlambo's attorney and Manase, Manase refused to produce its letter of appointment from the MEC on the grounds that the

MEC had expressly prohibited its dissemination. Manase stated that it was entitled to subpoena witnesses and documents in the exercise of its powers derived from section 106(1)(b) of the Systems Act and section 4(1)(a) of the KZN Commissions Act. Nedbank did not want to become involved in litigation, so Umlambo ultimately approached the Durban High Court, seeking to stop the whole 'investigation'. The MEC was granted leave to intervene and attached Manase's letter of appointment to its affidavit, stating that the need for confidentiality regarding its contents had passed.

Nicholson J considered the wording of section 106(2) of the Systems Act, which provides that, 'in the absence of applicable provincial legislation', certain sections of the Commissions Act 8 of 1947 (the National Act) apply to an investigation in terms of section 106(1)(b) 'with the necessary changes as the context may require'. The learned judge concluded that, in this case, there was 'applicable provincial legislation' in the form of the KZN Commissions Act and that the provisions of the Provincial Act thus applied. The court concluded that the subpoenas issued to Umlambo and to Nedbank were fatally defective as they had not been preceded by the proper appointment of a commission by proclamation in the *Provincial Gazette*. All the other deficiencies in the subpoenas flowed from that fatal flaw. Nicholson J therefore ordered that the subpoenas be set aside and that the MEC pay the costs of Umlambo's application.

On appeal, the SCA emphasised that it is a fundamental principle of the rule of law that the exercise of public power is only legitimate where it is lawful. The SCA held that the MEC had no power to appoint a commission; this power vested in the Premier. His appointment of Manase as a 'commission was thus unlawful. Furthermore, as the MEC also had no power to issue subpoenas, his purported delegation of that power to Manase was likewise unlawful. It agreed with the finding of the High Court that, as the subpoenas which Manase had purported to issue and serve on Umlambo and Nedbank were not preceded by the proper appointment of a commission by proclamation in the *Provincial Gazette*, as required by section 2 of the KZN Commissions Act, and as Manase had no authority to issue any subpoena, these subpoenas were unlawful. That, in the view of the SCA, was the end of the matter. The MEC's appeal was thus dismissed with costs.

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