THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 487/06
Reportable

In the matter between

THE MINISTER OF LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS (KWAZULU-NATAL)	Appellant
and	
UMLAMBO TRADING 29 CC	First Respondent
MANASE & ASSOCIATES	Second Respondent
NEDBANK LIMITED	Third Respondent
ILEMBE DISTRICT MUNICIPALITY	Fourth Respondent

Before**:** Howie P, Van Heerden, Jafta, Mlambo and Cachalia JJA

Heard: 18 September 2007

Delivered: 28 September 2007

Summary: *Local Government: Municipal Systems Act 32 of 2000, ss 106(1)(b) and (2) – appointment of person(s) to investigate maladministration, fraud, corruption or other serious malpractice in a municipality in KwaZulu-Natal – in order for investigator to have powers of subpoena, commission must be appointed by the Premier by proclamation in the Provincial Gazette in terms of s 2 of the KwaZulu-Natal Commissions Act 3 of 1999*

Neutral Citation: This judgment may be referred to as *Minister of Local Government, Housing & Traditional Affairs (KwaZulu-Natal) v Umlambo Trading 29 CC* [2007] SCA 130 (RSA)

VAN HEERDEN JA:

[1] This is an appeal against a judgment of the Durban High Court in terms of which subpoenas issued by the second respondent, Manase and Associates, a firm of chartered accountants, were set aside. The subpoenas were purportedly issued during the course of a forensic investigation and required the first respondent, Umlambo Trading 29 CC, a close corporation, and its bankers, Nedbank Limited (the third respondent), to produce certain documents, including bank statements. The High Court (per Nicholson J) ordered the appellant, the Minister of Local Government, Housing and Traditional Affairs, who was an intervening party before it, to pay the first respondent's costs. The appeal is before us with the leave of the court below.

[2] I will for the sake of convenience refer to the appellant as the MEC, the first respondent as Umlambo, the second respondent as Manase, the third respondent as Nedbank and the fourth respondent, the Ilembe District Municipality, as the Municipality.

[3] During November 2003, the Municipality called for tenders for the conversion of recycled shipping containers into spaza shops, salons and other work places. This was part of a program called the Mayor's Container Initiative. Umlambo was awarded a tender for the supply of 44 recycled containers.

[4] On 7 June 2005, the MEC appointed Manase to conduct an investigation within the Municipality. The relevant part of the MEC's five-page letter of appointment reads as follows:

'I have to inform you that the Minister of Local Government, Housing and Traditional Affairs has, in terms of section 106(1)(b) of the Local Government: Municipal Systems Act No. 32 of 2000, approved your appointment as the Investigator to conduct a forensic investigation within the Ilembe District Municipality to cover the following matters over the periods specified below . . .

. . .

The provisions of the KwaZulu-Natal Commissions Act No. 3 of 1999 apply directly to the above investigation and you are, herewith, requested to report directly to the Department, as your employer in this matter, regarding all progress with your investigation. . . '

[5] Pursuant to this, Mr Krumchund Hariparshad, one of the partners of Manase, telephonically contacted Umlambo's sole member, Ms Seetha Singh, informing her that he was conducting an investigation into the Mayor's Container Initiative and that he required the following information:

(i) Umlambo's original founding statement and any amendment thereto;

(ii) a paid-up cheque;

(iii) a list of authorised signatories to Umlambo's bank account;

(iv) the physical address of Umlambo at which the containers were being refurbished;

(v) Umlambo's bank statements.

[6] Umlambo's attorney responded on its behalf, requiring Manase to make the request for the information in writing and stating that Manase was not entitled to the bank statements. On 14 June 2005, Manase responded by serving on Singh, in her capacity as Umlambo's sole member, one of the subpoenas in issue, signed by Hariparshad as 'partner'. The subpoena claimed to be 'in terms of section 106(2) of the Local Government: Municipal Systems Act, Act 32 of 2000 ('the Systems Act') read with section 4(1)(a) of the KwaZulu-Natal Commissions Act, Act 3 of 1999'. It required the production of all the documents referred to in the preceding paragraph, save for the bank statements. On 20 June 2005, Umlambo supplied the documentation required, under cover of a letter addressed to Manase by the close corporation's attorney.

[7] The bank statements were sought by Manase by way of a separate subpoena which was served on Nedbank. By this time Umlambo's attorney had begun to question the legality of Manase's conduct and of the entire investigation and had, in various letters to Manase, sought the production of its letter of appointment and the names of the chairperson and secretary of the 'commission'.

[8] In subsequent written communications, Manase refused to produce its 'engagement letter', stating that the MEC had expressly prohibited its dissemination and that release of the letter might be prejudicial to the rights of the Municipality. Relying, so it was contended, on its powers of subpoena derived from s 106(1)(b) of the Systems Act and s 4(1)(a) of the KwaZulu-Natal Commissions Act 3 of 1999 ('the KZN Commissions Act'), Manase asserted that:

'In terms of the powers granted to us as Commissioners of Enquiry, we are entitled to call and subpoena witnesses and documentation, lead evidence and clarify matters beyond a reasonable doubt.'

[9] Manase further indicated that it was concerned about 'material misrepresentations' that might have been made to the Municipality in relation to the Mayor's Container Initiative. It now appears from Manase's answering affidavit (deposed to by Hariparshad) that these 'misrepresentations' related to Umlambo's empowerment credentials and to what had been communicated in that connection to the Municipality when the tender fell to be considered. Hariparshad also entertained a suspicion that a corrupt relationship existed between Umlambo and employees of the Municipality, because the tender had been awarded to Umlambo although it had only ranked eighth on the list of tenderers.

[10] Umlambo challenged the legal authority of the 'commission', but Manase persisted with its request for the bank statements whilst declining production of the letter of appointment. It informed Umlambo that 'specific individuals from Manase & Associates, who will be undertaking the investigation, are assigned the powers of a Commissioner of Enquiry' and that 'the commissioners are Messrs Hariparshad, Roopram and Oosthuizen'. The latter two, it must be noted, are not partners of Manase.

[11] Nedbank did not wish to become embroiled in litigation. In the result, Umlambo approached the High Court seeking to halt the 'investigation' in its entirety. The MEC sought and was granted leave to intervene. In the affidavit filed on the MEC's behalf, deposed to by Mr Lionel Pienaar, the General Manager: Local Government (KwaZulu-Natal), it was contended that the KZN Commissions Act was applicable, with the 'necessary changes as the context may require', as provided for in s 106(2) of the Systems Act. The letter of appointment was annexed to the MEC's affidavit, Pienaar stating that 'the need for confidentiality regarding the contents of the same has now passed'. Manase indicated that it would abide the decision of the court, but it filed Hariparshad's affidavit 'to advise the court' of the reasons for the issue of the subpoenas.

[12] In its replying affidavit, Umlambo attempted to amend significantly the fairly wide relief which it had sought, as well as the grounds on which it had initially relied. In effect, the relief that Umlambo sought in its amended form was for an order reviewing and setting aside Manase's appointment by the MEC.

[13] In dealing with the legality of the steps taken by the MEC, Nicholson J commenced with a consideration of the applicable legislation. First, he had regard to ss 106(1)(b) and (2) of the Systems Act which read as follows:

'(1) If an MEC [Member of a provincial Executive Council] has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must –

(a) . . .

(b) if the MEC considers it necessary, designate a person or persons to investigate the matter.

(2) In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), and the regulations made in terms of that Act apply, with the necessary changes as the context may require, to an investigation in terms of subsection (1)(b).'

[14] The High Court concluded that it was clear that, in terms of section 106(2) of the Systems Act, the relevant provisions of the Commissions Act – national legislation – applied only in the absence of 'applicable provincial legislation'. There was no doubt that, in this case, there *was* applicable provincial legislation in the form of the KZN Commissions Act. The provisions of the Provincial Act thus applied and it was accordingly necessary to ascertain whether the actions complained of by Umlambo were authorised in terms thereof. In that regard, Nicholson J stated:

'It seems to me that a contextual reading of the subsection does not allow such an interpretation. Clearly it was envisaged that provincial legislation would be promulgated which would be applicable. Such legislation is now in place.[1] Until such legislation was enacted the national Act was made applicable, with the necessary changes as the context required in the meantime. That seems to be to be the sensible and proper interpretation of the plain meaning of the words.'

That, one would have thought, would have been the end of the matter. However, notwithstanding his having expressed himself quite firmly on

[1] It should be noted that, by the time the Systems Act came into operation on 1 March 2001, the following eight out of the nine provinces of South Africa had legislation dealing with commissions appointed by the relevant Premier in terms of s 127(2)(e) of the Constitution (s 147(1)(d) of the Interim Consitution): the Provincial Commissions Act 3 of 1994 (Eastern Cape); the North West Commissions Act 18 of 1994; the Northern Cape Commissions of Inquiry Act 4 of 1996; the Provincial Commissions Act 1 of 1997 (Gauteng); the Commissions Ordinance 5 of 1954 (Free State), as amended by the Commissions Ordinance Amendment Act 4 of 1998 (Free State); the Western Cape Provincial Commissions Act 10 of 1998; the Mpumalanga Commissions of Enquiry Act 11 of 1998 and the KwaZulu Natal Commissions Act 3 of 1999. In the remaining province, the Northern Province, corresponding legislation was promulgated in 2001 in the form of the Northern Province Commissions of Inquiry Act 4 of 2001. See further in this regard 2(2) *Lawsa* 2ed (2003) paras 196–216.

that issue, the learned judge nonetheless remarked that the interpretation of the subsection was not 'absolutely clear'. He thus considered himself compelled to decide the matter on the basis that the provincial Act also applied 'with the necessary changes as the context may require'.

[15] Section 2(1) of the KZN Commissions Act provides that –

'The Premier may by proclamation in the *Provincial Gazette* of the Province of KwaZulu-Natal –

(a) appoint a commission;

(b) define the matter to be investigated by the commission and the terms of reference of such commission;

(c) make regulations –

(i) providing for the procedure to be followed at the investigation and for the preservation of confidentiality; and

(ii) providing generally for all matters which he or she considers necessary or expedient to prescribe for the purposes of the investigation;

(d) appoint a secretary to the commission, and such other officials as he or she may deem necessary to assist the commission; and

(e) designate any member of the commission as the chairperson of that commission.'

A ‘commission’ is defined to mean a commission appointed under s 127(2)(e) of the Constitution, in terms of which a Premier is responsible for appointing commissions of enquiry for his or her province.

[16] It was common cause that there had been no publication of the ‘investigation’ or ‘commission’ in the *Provincial Gazette*. No matter for investigation or terms of reference had been defined, no regulations had been made, and no secretary or chairperson had been appointed, let alone published in the *Provincial Gazette*.

[17] The principle of legality lies at the centre of the appeal. It is a fundamental principle of the rule of law that the exercise of public power is only legitimate where it is lawful. It is central to our constitutional order that the legislature and the executive are in every sphere constrained by the principle that they may exercise no power and perform no function beyond those conferred on them by law. (See in this regard *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*.[2])

[18] The MEC had no power to appoint a commission; this power vested in the Premier in terms of the applicable legislation. His appointment of

[2] 1999 (1) SA 374 (CC) paras 56 and 58.

Manase as a ‘commission’ was thus unlawful. Moreover, as the MEC also had no power to issue subpoenas, his purported delegation of that power to Manase or anyone else was likewise unlawful. That, it seems to me, is the short answer in this appeal.

[19] Furthermore, section 4, which was expressly relied upon by Manase and the MEC, provides that a commission shall have the power to subpoena any person to attend a sitting of the commission in order to give evidence or to produce any book, document or object before the commission at the time and place specified in the subpoena. The court below considered that no such place had been specified in the subpoenas in question and that, for that reason alone, they were probably defective.

[20] Moreover, s 4(2) provides that a subpoena shall be signed and issued by the secretary of the commission, and shall be served by the secretary or any person authorised by the secretary to do so, in the same manner as a subpoena for the attendance of a witness at a criminal trial in the High Court. As no secretary had been appointed, plainly there could not have been compliance with this provision. The signature of Hariparshad or a member of his staff could thus obviously not suffice.

[21] Importantly, the court below expressed the view that the MEC was entitled in terms of s 106(1)(b) of the Systems Act to appoint a person to

investigate the maladministration and/or corruption he believed was taking place in the Municipality, but that once the appointed investigator required powers of subpoena, the only viable route open to the MEC was to approach the Premier with a request for the proper appointment of a commission in terms of s 2(1) of the KZN Commissions Act.

[22] The court below went on to hold that the failure properly to appoint a commission by proclamation in the *Provincial Gazette* and all the other deficiencies to which I have already alluded could not be regarded as 'necessary changes required by the context of the appointment of an investigator' in the present case.

[23] 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. The court thus ordered that the subpoenas be set aside and that the MEC pay the costs of Umlambo's application. In that, the court was correct.

[24] The KZN Commissions Act [3] certainly constitutes 'applicable provincial legislation' as contemplated by s 106(2) of the Systems Act. Moreover, having regard to the ordinary grammatical meaning of s 106(2), it is clear that it is only in the *absence* of applicable provincial legislation that ss 2 to 6 of the (national) Commissions Act, apply, 'with the necessary changes as the context may require', to an investigation in terms of s 106(1)(b). The quoted phrase does not to my mind apply to any 'applicable provincial legislation'. Nicholson J was quite correct in his conclusion that this is 'the sensible and plain meaning' of the words of s 106(2). This being so, it was not necessary for him to have considered whether the failure to comply with the KZN Commissions Act in the respects set out above could be accommodated within the ambit of the quoted phrase.

[25] As the subpoenas which Manase 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 s 2 of the KZN Commissions Act, and as Manase had no authority to issue any subpoena, these subpoenas were unlawful and were correctly set aside by the court below.

[3] As also the other provincial statutes referred to in n 1 above.

Order

[26] In the circumstances, the appeal is dismissed with costs.

B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:
HOWIE P
JAFTA JA
MLAMBO JA
CACHALIA JA