

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 7655/2020P

In the matter between:

ZIPHATHE MBONENI CIBANE

FIRST APPLICANT

NONHLANHLA PAMELA HLONGWA

SECOND APPLICANT

and

PREMIER OF THE PROVINCE OF KWAZULU-NATAL

FIRST RESPONDENT

DIRECTOR GENERAL OF THE OFFICE OF THE

PREMIER OF THE PROVINCE OF KWAZULU-NATAL

SECOND RESPONDENT

MEC FOR FINANCE KWAZULU-NATAL

THIRD RESPONDENT

INTEGRITY FORENSIC SOLUTIONS

FOURTH RESPONDENT

THE DEPUTY DIRECTOR GENERAL OF THE

KWAZULU-NATAL TREASURY

(HEAD OF INVESTIGATION)

FIFTH RESPONDENT

ADVOCATE JOE NXUSANI SC N.O.

SIXTH RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

P C BEZUIDENHOUT J:

[1] Applicants are seeking leave to appeal against the dismissal of their application wherein they sought that their suspension be reviewed and set aside, that the adverse findings, remarks and conclusions contained in the forensic report prepared by Fourth Respondent be reviewed and set aside, that Second Respondent's decision to accept the findings in the report and to implement the recommendation be reviewed and set aside and that First and Second Respondents pay the costs of the application. Together with this they seek leave to appeal against the granting of the order in terms of the notice of motion of Fourth Respondent in terms of Rule 6(15) that certain portions in the replying affidavit be struck out. The application is opposed by First and Second Respondent and Fourth Respondent.

[2] In Applicants heads of argument it was submitted that I misdirected myself by not following the decision in *Msiza v Motau* N.O. [2020] ZAGPPHC 366 that Fourth Respondent ought to have listened to Applicants before making any adverse findings. However at the commencement of argument Mr. Pammenter SC brought to the attention of the Court, to which the Court is indebted to him, that that matter went on appeal TO the Full Court in the Gauteng Division Pretoria in the matter of the Presidential Authority of the South African Reserve Bank v *Msiza and Motau* case number A294/2021 delivered on 2 May 2023 and in a majority decision it was found that both the principles of a legality review and a review in terms of PAJA did not apply. The majority held that the *audi alterem partem* did not have to be applied. He however submitted that it must be considered what powers the investigator had. He submitted that treasury regulations applied and disciplinary proceedings were to be held. It was confirmed in the report that it had to institute these proceedings. He submitted that once the report came out it was distinguishable from the *Viking Pony* decision and that I was bound by the decision in *Zululand District Municipality and Others v MEC:*

Cooperative Governance and Traditional Affairs KwaZulu-Natal and Another [2022] ZAKZPHC 19 (6 May 2022) a judgment of Chili J in this division.

[3] He submitted that the report of Fourth Respondent failed to comply with natural justice and that Second Respondent adopted the report to take action on. He submitted that there was no reason for a cautionary suspension.

[4] The Labour Court was not the correct court and that the relief which was being sought in these proceedings were different to that pending in the Labour Court. Further that the suspension period could not be extended by Second Respondent but only by the Chair. The state of emergency did not affect these powers nor the extension of the time limits. The matter before the Bargaining Council was not *lis pen dens* and that leave to appeal should be granted to the Supreme Court of Appeal.

[5] Ms Gabriel SC on behalf of Fourth Respondent stated that Applicants were public sector employees, not municipal employees as in the matter of the Zululand District Municipality nor were they members of the South African Defence Force and were not employed on a contract. It was submitted that a review under PAJA was not possible nor was it a review under the principle of legality. The disciplinary process and the criminal proceedings have commenced and the decision to take disciplinary steps and criminal charges, was made by Fourth Respondent and the report of Fourth Respondent had no external legal effect.

[6] Second and First Respondents submitted that it was *lis pen dens* as the matter was proceeding in the Labour Court and the relief which was claimed there was the upliftment of the suspension the same as in this matter. That matter has not been taken further in the Labour Court and Bargaining Council although evidence had been led there and should first be finalised. Further, that criminal proceedings are pending.

Applicants have been granted bail and therefore the application for leave to appeal should be dismissed. In response Mr. Pammenter SC submitted that *lis pen dens* did not apply and that there was no fair administrative action.

[7] The test in deciding whether to grant leave to appeal or not is set out in section 17(1) of the Superior Courts Act and can be summarised that there are reasonable prospects of success or some compelling reason for it to be heard or conflicting judgments. The test is whether there would be reasonable prospects on appeal. See *Caracto (Pty) Ltd v Independent Advisory (Pty) 2020 (5) SA 35 (SCA)* and *Smith v S 2012 (1) SACR 567 (SCA)*.

[8] The prospect must not be remote but a reasonable chance of succeeding. Can a court of appeal reasonably arrive at a different conclusion? *Camacatsa and Others v African National Congress and Another (2021) ZSCA 31*.

[9] As appears from the Full Court judgment in *Presidential Authority of the South African Reserve Bank v M P Msiza and Adv Matau SC* it is neither a review under PAJA nor is it a legality review. The report by Fourth Respondent was to establish if there was wrongdoing by Applicants. It only compiled the report, which was handed to Second Respondent, who then took further action. As held in paragraph 75 of the said judgment not affording Applicants an opportunity to respond was not irrational and thus passes the test under the legality issue. However in this instance the issue is further that there is already litigation pending in the Bargaining Counsel and the Labour Court relating to the suspension of First and Second Respondents which they have abandoned and which must first be finalised. The matter is further distinguishable in that both Applicants have been charged criminally and therefore are out on bail at present and therefore this will also affect the issue of their suspension. Having now been criminally charged which is a decision, not taken by any of Respondents herein, the issue of their suspension has to an extent in actual fact become academic.

[10] The report was compiled by Fourth Respondent after obtaining information from various people to establish whether there had been any wrongdoing on the part of First and Second Respondents. Besides the fact that as set out a failure not to afford them an opportunity to respond does not make it a review under the principle of legality in this case Applicants were not interviewed because of their aggressive attitude towards Fourth Respondent and its investigators and also their failure to cooperate with them. Accordingly they were not merely ignored but due to their conduct they were not interviewed. Further they have the opportunity in the labour matters in the Bargaining Council and the Labour Court to set out their responses and will even now in the criminal case have such an opportunity.

[11] The facts therefore are firstly distinguishable from that of the Zululand District Municipality case in that there the persons were informed that they would get an opportunity to put their side of the facts but then it was never done. Further in the Msiza matter the majority decision of the Full Court in my view is applicable and not that of the Zululand District Municipality case.

[12] The further issue was the application that was brought by Fourth Respondent that certain portions of the replying affidavit be struck out. As set out in the judgment there was no response thereto by Applicants but merely submissions made at the time of the hearing. I cannot find that there are any prospects of another court coming to a different conclusion due to the manner it was dealt with by Applicants as set out in my judgment.

[13] Having considered the submissions made and also the cases referred to I am of the view that there is no reasonable prospect of another court coming to a different conclusion in this matter.

Accordingly the following order is made:

The application for leave to appeal is refused with costs, such costs to include the costs of senior counsel where applicable.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED:

2 JUNE 2023

JUDGMENT HANDED DOWN:

19 JUNE 2023

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Instructed by:

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