



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 747/2021

In the matter between:

**MEMBER OF EXECUTIVE COUNCIL RESPONSIBLE
FOR LOCAL GOVERNMENT, WESTERN CAPE**

APPELLANT

and

MATZIKAMA LOCAL MUNICIPALITY

FIRST RESPONDENT

CHARL STRYDOM N O

SECOND RESPONDENT

ESTELLE MYNHARDT N O

THIRD RESPONDENT

Neutral Citation: *MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others* (747/2021) [2022] ZASCA 167 (30 November 2022)

Coram: Plasket, Hughes and Mabindla-Boqwana JJA and Basson and Mali AJJA

Heard: 10 November 2022

Delivered: 30 November 2022

Summary: Constitutional law – provincial government powers in relation to local government – s 106(1) of the Local Government: Municipal Systems Act 32 of 2000 – appointment of investigation into maladministration, fraud, corruption or other serious malpractice in a municipality – Member of the Executive Council may, in terms of s 106(1), appoint investigators to investigate allegations of theft.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hockey AJ sitting as court of first instance):

1 The appeal is upheld.

2 Paragraphs 3, 5 and 6 of the high court's order are set aside and paragraph 3 is replaced with the following:

‘3.1 The applicant's application is dismissed with costs, including the costs of two counsel.

3.2 The respondent is directed to pay the applicant's costs in respect of the applications to amend the notice of motion and to strike out.’

JUDGMENT

Plasket JA and Basson AJA (Hughes and Mabindla-Boqwana JJA and Mali AJA concurring)

[1] In terms of s 106(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), when a Member of the Executive Council responsible for local government in a provincial government (the MEC) has reason to believe that certain forms of abuse of power have occurred or are occurring in a municipality, they may appoint one or more persons to investigate and report on the allegations. The section reads as follows:

‘If an MEC 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) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or

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

[2] In this appeal, the MEC for Local Government in the Western Cape provincial government appointed two people in terms of s 106(1) – the second and third respondents (the investigators) – to investigate allegations relating to a number of abuses of power, including the theft of municipal money, in the Matzikama Local Municipality (the municipality). The appeal concerns a narrow but important issue, namely, whether s 106 empowers an MEC to appoint an investigation into criminal conduct other than fraud or corruption, which are specifically mentioned in the section. In order to answer the question raised, it is necessary to interpret s 106(1) and to consider the judgment in *City of Cape Town v Premier, Western Cape, and Others*,¹ a matter that Hockey AJ in the Western Cape Division of the High Court, Cape Town (the high court) considered himself bound by.

Litigation history

[3] In September 2019 eight complaints concerning misconduct in the administration of the municipality were brought to the attention of the MEC. They included the alleged irregular appointment of certain individuals without having the requisite qualifications, the irregular appointment of two family members of the mayor, the alleged theft of municipal funds in the amount of R 320 000 (the theft allegation) and irregular payments made to a former ward councillor. After considering the complaints and after having afforded the municipality an opportunity to make representations as required by s 106(1)(a) and s 5 of the Western Cape Monitoring and Support of Municipalities Act 4 of 2014, the MEC took a decision on 21 September 2020 that six of those allegations to which the municipality had given an inadequate explanation should be investigated by the investigators. One of these complaints related to the theft allegation.

[4] The municipality launched an urgent application against the MEC and the investigators to interdict the implementation of the MEC’s decision, pending the completion of a process of inter-governmental dispute resolution in terms of the

¹ *City of Cape Town v Premier, Western Cape, and Others* [2008] ZAWCHC 52; 2008 (6) SA 345 (C) (*City of Cape Town*).

Intergovernmental Relations Framework Act 13 of 2005 (the Framework Act). In the alternative, it sought to review and set aside the MEC's decision. The MEC launched a counter-application in which he sought an order that the municipality, and all those working for it, be directed to cooperate with the investigators.

[5] The municipality's case changed fundamentally. It abandoned reliance on the Framework Act as the basis for an interim interdict and applied to amend its notice of motion to convert its case into a review of the MEC's decision. Its application to amend was granted. A second interlocutory application, brought by the MEC to strike out matter from the municipality's replying affidavit, was substantially unsuccessful.

[6] After the interlocutory issues had been dealt with, the key issue before the high court was whether the MEC had reason to believe that 'maladministration, fraud, corruption or any other serious malpractice' had occurred or were occurring in the municipality. The high court was satisfied that the MEC had carefully considered all the complaints with the information at his disposal and that he had 'reason to believe that serious malpractice has occurred or was occurring when he made the decision to initiate the investigation'. It accepted that the MEC did not act with an ulterior motive when he took the decision. It concluded that all of the allegations were of such a serious nature that it could not be said that, if found to be true, they did not constitute one or more of the forms of misconduct that may trigger a s 106(1) investigation. The high court dismissed the municipality's application (save in respect of the theft allegation) and granted the MEC's counter-application. It made an order that each party pay its own costs.

[7] The high court, relying on the judgment in *City of Cape Town*, held that the MEC had no power in terms of s 106(1) to refer the allegation of theft for investigation 'especially in light of the fact that this issue had already been referred to the police for criminal investigation'. The upshot of this finding is that allegations of criminal conduct in a municipality, with the exception of fraud and corruption, may not be referred for investigation in terms of s 106(1).

[8] The MEC sought and was granted leave to appeal against the setting aside of the referral of the theft allegation to the investigators, as well as against the costs

order. These were embodied in paragraphs 3, 5 and 6 of the high court's order. It dismissed the municipality's application for leave to appeal against the dismissal of the bulk of its application and granted the MEC's counter-application. This appeal was unopposed and was disposed of in terms of s 19(a) of the Superior Courts Act 10 of 2013. I turn now to the issues that require determination.

The exclusion of theft from the investigation

City of Cape Town

[9] In *City of Cape Town*, the MEC had appointed an investigation in terms of s 106(1) into certain alleged criminal conduct within the city and in a second municipality. The Premier then appointed a commission, in terms of the Commissions Act 8 of 1947, to investigate the same conduct. He later dissolved the commission and simultaneously appointed a second commission with the same terms of reference. When he did this, the high court held, it had the effect of dissolving the s 106(1) investigation too.² The issues for determination, when the city applied for the setting aside of the appointment of the second commission, were whether the Premier could appoint a commission to investigate local government affairs otherwise than through s 106(1); and whether the Premier had appointed the commission for an ulterior motive.

[10] During the course of reasoning that the appointment of the commission was invalid on both accounts, the court made certain observations concerning s 106(1). These included that it was undesirable for a commission to investigate criminal conduct because this blurred the lines between the functions of the police and the executive.³ More importantly, however, the court held:⁴

'A power on the part of the Premier to appoint a commission to investigate suspected criminal conduct in relation to a municipality, independently of the provisions of s 106 of the Systems Act, would again result in the provisions of this section becoming superfluous. In such an event, the Premier would be entitled to appoint a commission to investigate suspected criminal conduct of whatever nature, and not merely fraud and corruption in relation to a municipality. This would not only intrude upon the autonomy of the police to perform such a function, but also the autonomy of local government.'

² Ibid para 34.

³ Ibid para 154.

⁴ Ibid para 155.

[11] The court also held in the following paragraph that the effect of s 106 'is to limit the power of the Premier to appoint a commission of inquiry, with coercive powers, to investigate only the crimes of fraud and corruption in relation to a municipality.'⁵

[12] What stands out in the *City of Cape Town* judgment is that no contextual process of interpreting s 106 was undertaken by the court. Instead, it appears to have simply accepted that only the crimes of fraud and corruption may be investigated in terms of s 106. In order to determine whether this conclusion is correct, and hence the correctness of Hockey AJ's setting aside of the referral of the theft allegation for investigation, it is necessary to interpret s 106(1). We turn now to that exercise.

The scheme of s 106

[13] The power conferred upon the MEC by s 106(1) of the Systems Act is dependent on the jurisdictional fact that the MEC has reason to believe that maladministration, fraud, corruption or any other serious malpractices had occurred or were occurring in the municipality. If this jurisdictional precondition is satisfied the MEC may appoint an investigation.⁶ The MEC's belief is objectively justiciable. That means that the belief must be based on reasonable grounds.⁷

[14] Section 106(1) must be construed within the broader context of the Constitution and the Systems Act. On a general level, the constitutional values and principles governing public administration set out in s 195 of the Constitution are implicated. The Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education KwaZulu-Natal*⁸ emphasised that where 'a responsible functionary is enlightened of a potential irregularity, s 195 [of the Constitution] lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues' and that this duty 'is founded, *inter alia*, in the emphasis on accountability and transparency in

⁵ Ibid para 156.

⁶ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818F-I.

⁷ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 578B-D and 579D-F; *Democratic Alliance Western Cape and Others v Minister of Local Government, Western Cape and Another* 2005 (3) SA 576 (C) para 25.

⁸ *Khumalo and Another v Member of the Executive Council for Education KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 35.

s 195(1)(f) and (g) and the requirement of a high standard of professional ethics in s 195(1)(a)'.

[15] Section 40 of the Constitution created government 'as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'. Section 151(3) provides that a municipality 'has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution'. Section 155(6) provides for the establishment and monitoring of municipalities by provincial governments. The section says:

'Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must –

- (a) provide for the monitoring and support of local government in the province; and
- (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.'

[16] Section 125 allocates a number of functions to provincial governments. Section 125(2)(g) allows for executive authority to be exercised by 'performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament'. Section 105 of the Systems Act assigns a monitoring function to provincial executives in respect of local governments. Section 105(1) states:

'The MEC for local government in a province must establish mechanisms, processes and procedures in terms of section 155(6) of the Constitution to-

- (a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
- (b) monitor the development of local government capacity in the province; and
- (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.'

[17] It is within this legislative context that s 106 is located. It is part of the system for the monitoring, by provincial executives, of local governments so that the performance of local governments may be strengthened and improved, and municipal officials be held accountable for their administration. Section 106 is therefore a mechanism by which an MEC may investigate allegations that serious problems have

arisen relating to the administration and governance of a municipality. The purpose of activating the mechanism is to obtain the necessary facts so that the source of the problem can be identified, with a view to remedying the weakness in the system.

[18] Section 106(1), when it refers to the crimes of fraud and corruption, does not state expressly that only these crimes, and no others, may be investigated in terms of the section. We would have expected this to have been stated clearly had that been the intention of the legislature. The terms ‘maladministration’ and ‘serious malpractice’ are broad enough to encompass both conduct that is criminal and conduct that is not. For instance, the theft of money from a municipality by a municipal official is, without doubt, a serious malpractice.

[19] The restricted interpretation of the section by the high court would have to rely on a tacit exclusion of crimes other than theft or corruption, being read into the section. There is no indication, whether from the context that we have outlined above or from the provision itself that this was intended. Indeed, there are strong indicators that pull in the opposite direction.

[20] First, such an interpretation is arbitrary and could lead to arbitrary results. It is arbitrary because there is no apparent basis why investigators may investigate allegations of fraud or corruption but not, for instance, theft. Its arbitrariness of result may be illustrated by the following example: if investigators were appointed to investigate allegations of fraud, and they found that the evidence they uncovered proved theft, the restricted interpretation would mean that they could not report their findings to the MEC because it would be beyond the scope of their mandate. They would have to report that they found no evidence of fraud.

[21] Secondly, the restricted interpretation, as the above example illustrates, would undermine the purpose of s 106. Only some forms of maladministration and serious malpractices could be investigated and remedied, while those forms that are tainted by criminality could not be. On the face of it, the more serious forms of maladministration and serious malpractice would in this way be shielded from investigation. When viewed in the context sketched above and of s 106 being a

purpose-built mechanism not only for monitoring and strengthening of local government but also for accountability, the restricted interpretation is not a sensible meaning to give to the section.

[22] Thirdly, it seems to us that the exclusion of all criminal conduct apart from fraud and corruption from investigation may well have the effect of rendering s 106 investigations a dead letter. The Local Government: Municipal Finances Management Act 56 of 2003 creates, in s 173, a broad range of criminal offences related to maladministration of municipal finances. Other local government statutes, including the Systems Act, create even more offences related to the way in which municipalities are administered. Their combined effect is that a large swathe of maladministration has been criminalised. The restricted interpretation would block s 106 investigations into the very matters that it was meant for.

[23] Finally, the concerns expressed by the court in *City of Cape Town* about the blurring of the lines between the executive and the police are, in our view, more apparent than real. A criminal investigation and a s 106 investigation serve very different purposes. One is aimed at detecting and punishing crime while the other, as we have explained, is concerned with monitoring, remedying the problems identified and holding municipal officials to account. Furthermore, specific, objectively justiciable jurisdictional facts have to be present before the power to appoint investigators is triggered. And administrative justice principles – whether in terms of the Promotion of Administrative Justice Act 3 of 2000 or the principle of legality – are designed to prevent any abuse of discretion on the part of MECs. In particular, they may not exercise their powers for an improper purpose or an ulterior motive, in bad faith or unreasonably. *City of Cape Town* is itself a good example of this.

[24] For all of the above reasons, we conclude that s 106(1) does not mean that only the crimes of fraud and corruption may be investigated and that other crimes, such as theft, may not be. That means that we are of the view that *City of Cape Town* was wrongly decided in this respect. It follows that the high court in this

matter erred in excluding from the investigation the theft allegations. The result is that the MEC's appeal on the merits must succeed.

Costs

[25] As stated above, two interlocutory applications served before the high court. They were an application brought by the municipality to amend its notice of motion, which was granted, and an application brought by the MEC to strike out several paragraphs of the municipality's replying affidavit, which was refused (save for one paragraph). The court then dismissed the municipality's application, save for the theft allegation, and granted the MEC's counter application. The high court held that each party should pay its own costs. Two reasons were furnished for this order. First, the MEC was 'mostly successful in his opposition to the final interdict' but 'substantially unsuccessful' in opposing the application to amend and the application to strike out. Secondly, both parties were litigating with public funds.

[26] A court of appeal will only interfere with the exercise of a discretion regarding costs in circumscribed instances⁹ and would be slow to substitute its own decision simply because it does not agree with a permissible option chosen by the lower court.¹⁰ It will, however, interfere if the court's discretion was exercised on the basis of wrong principles. In this matter, the high court equated the municipality's limited success on the two procedural points with the MEC's substantive success on the merits. It also took into account the irrelevant fact that public funds were used by both parties. The high court misdirected itself in both respects, meriting interference on appeal. The costs order therefore falls to be set aside and must be replaced with a costs order in favour of the MEC on the merits, but the municipality's success in the interlocutory applications must also be accounted for in the order that we make.

The order

[27] In the result, the following order is made:

- 1 The appeal is upheld.

⁹ *Public Protector v Commissioner for the South African Revenue Service and Others* [2020] ZACC 28; 2022 (1) SA 340 (CC) para 31.

¹⁰ *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC) para 113; *Public Protector v South African Reserve Bank* [2019] ZACC 19; 2019 (6) SA 253 (CC) para 144.

2 Paragraphs 3, 5 and 6 of the high court's order are set aside and paragraph 3 is replaced with the following:

'3.1 The applicant's application is dismissed with costs, including the costs of two counsel.

3.2 The respondent is directed to pay the applicant's costs in respect of the applications to amend the notice of motion and to strike out.'

C PLASKET
JUDGE OF APPEAL

A C BASSON
ACTING JUDGE OF APPEAL

APPEARANCES

For Appellant: Karrisha Pillay SC (with her Cecily-Ann Daniels)

Instructed by: State Attorney, Cape Town
State Attorney, Bloemfontein

For Respondents: No appearance