



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Reportable

Case No.: 939/2020

Matters heard on: 10 October 2024

Judgment delivered on: 19 November 2024

In the matter between:

NTOMBIZINE MADYIBI

First Applicant

MAUDLINE MABI

Second Applicant

And

MINISTER OF WATER AND SANITATION

First Respondent

**DIRECTOR-GENERAL IN THE DEPARTMENT
OF WATER AND SANITATION**

Second Respondent

AMATOLA WATER

Third Respondent

**THE BOARD OF AMATOLA WATER LISTED
IN ANNEXURE "A"**

Fourth to Fourteenth Respondent

JUDGMENT

Introduction

[1] The applicants are former members of Amatola Water Board who were appointed as such by the former Minister of Water and Sanitation, Ms Lindiwe Sisulu on 5 August 2021. Applicants contend that they received letters of termination penned and signed by the Minister of Water and Sanitation, Mr Senzo Mchunu on 18 January 2022, terminating their respective memberships to the Amatola Water Board. Letters of termination are annexed to the applicants' papers.

[2] The applicants contend that the termination of their respective memberships was unlawful as it breached the principle of legality. It is further submitted that the applicants did not know that their appointments as Board members did not comply with the requirements for such appointments. As private parties they were not privy to the internal protocols, processes, decisions and arrangements of the Ministry that preceded their appointments by the Minister.

[3] Underpinned by the aforesaid brief factual scenario, the relief sought was to the effect that the Minister's decision to terminate applicants' membership of the Amatola Water Board be declared as unlawful and accordingly set aside. The applicants, as a consequence of that sought to be reinstated as Board members of the Amatola Water Board. The applicants seek damages they might have suffered as a result of termination of their membership aforesaid, and an order of costs.

[4] The applicants contend that prior their appointments as Board members there was a long recruitment process which started in 2020 which was the following: advertisements, submissions of application documents, establishment of interview panel by the Minister, interviews on Microsoft Teams. The interview for the first applicant was conducted on 21 November 2020 and for the second applicant was conducted on 13 March 2021. As a result of these processes the applicants were appointed and assumed their duties.

[5] On 15 October 2021, prior to the termination of the applicants' membership, the Minister served a notice in terms of which the applicants were called upon to show cause why their membership cannot be terminated. They were invited to furnish their written reasons within seven days of receipt of the letter/notice. It does not appear that the notice was heeded. No response or reasons had been forthcoming. On 18 January 2022 the Minister terminated applicants' membership aforesaid in terms of the letter or notice. In what follows I deal with the contents of the letter.

[6] The material and relevant parts of the Minister's letter dated 18 January 2022 to the first applicant reads as follows:

'4.... However, considering that the seven (7) days provided has lapsed and I remain uninformed of your views. Therefore, I am taking advantage of this opportunity to terminate your membership of the Amatola Water Board for the following reasons:

(i) That your appointment was flawed in that it did not follow the process prescribed by the Water Services Act 1997 (Act No 108 of 1987), in that you were not nominated and seconded as required in terms of item 3 of Schedule 1 of the Act. There are stringent procedures for nomination up until to the final stage of appointment to a Water Board. For example, in terms of item 3 of Schedule 1 (5) of the Water Services Act, the following is provided:

(5) Every nomination of a person for appointment of a Water Board must be signed by a proposer and a seconder, none of whom may be a nominee and must contain the nominee's signed acceptance. No person may nominate or second more than one person.

It is clear from the above that appointing a candidate to a Water Board which he/she has never been nominated and seconded for

negates the object of item 3 of Schedule 1 of the Water Service Act in particular item 3(5).

- (ii) There is an institutionalised cabinet policy which requires that once the Minister approves the recommended candidate for appointment following compliance with Section 35 read with Schedule 1 procedure of the Water Service Act; and*
- (iii) That you were never interviewed for the position as it is required in terms of the WSA.*

(5) Section 35(5) of the WSA empowers me to terminate membership of board members. It is on the basis of the aforesaid reason and the power bestowed on me that I take this opportunity to terminate your membership of the Board. I have therefore, based on the above, painstakingly taken a decision to terminate your board membership in terms of Section 35(5) of Water Service Act 108 of 1997.

(6) I take this opportunity to thank you for serving the Amatola Water Board albeit for a short period of time and wish you the best in your future endeavour.'

Second applicants' letter is, to a large extent, to the same effect

[7] The contents of the termination letter quoted above bring into sharp focus the provisions of Water Services Act 108 of 1997 (the Act). It appears that the Minister, when terminating applicants' membership was invoking the provisions of the Act.

[8] The Minister deposed to an answering affidavit. The essence of his submission is that the appointment of the applicant was irregular and/or unlawful for it did not comply with the imperative provisions of the Act. He further submits that he acted in terms of the Act when terminating the applicants' membership, he acted and exercised the power he has in terms of the Act and related enactments. Accordingly, he submits that his action was lawful.

Discussion/analysis and legal framework

[9] There are instances where a member of Water Board can cease to be a member. Those instances are set out in Water Services Act¹. The relevant subsection is worded as follows:

‘(1) A member of a Water Board ceases to hold office—

(a)

(b)

(c)

(d)

(e) if his or her appointment has been terminated in terms of Section 35(5) of the Act.’

This is a general provision applicable to all members of the Board. Item 4 of Schedule 1 of the Act deals with the termination of term of office of board members as the heading suggests.

[10] The Minister is invariably empowered to remove the Board members in terms of Section 35(5) of the Act, which provides as follows:

‘(5) The Minister may terminate the appointment of any or all the members of a Water Board.’

In what follows I aptly deal with the provisions of Interpretation Act².

[11] Section 10 of the Interpretation Act provides:

‘(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

¹ Item 4 of Schedule 1 of Water Service Act 108 of 1997.

² Interpretation Act 33 of 1957.

(2) Where a law confers a power, jurisdiction or right, or imposes a duty or the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder.

(3) Where a law confers a power to make rules, regulations or by-law, the power shall, unless the contrary intention appears, be construed as including a power exercisable to like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-law.'

[12] Even prior to the advent of the Constitutional dispensation, powers conferred on the administrators were inevitably accompanied by an implied duty to exercise power³. Placket J in Vumazonke⁴ appositely observed as follows:

'35 Public powers and functions . . . are given to administrative official for a purpose: they are intended to be exercised in the furtherance of the of the public interest.'

[13] The aforesaid statement of law is internationally acclaimed. In Julius v Lord Bishop of Oxford⁵ where it was held that:

'Where a power is deposited with a public officer for the purpose of being used for the benefits of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court shall require it to be exercised.'

³ Chatabac v Union Government (Minister of Justice) and Registrar of Ascatics 1911 AD 13 at 13; Luynch v Union Government (Minister of Justice) 1929 AD 281 at 285; also Baxter L Administrative Law (1984) at 414.

⁴ Vumazonke and others v MEC for Social Development and Welfare for Eastern Cape 2005 (6) SA 229 (SE) paragraph 35.

⁵ Julius v Lord Bishop of Oxford [1880] 5 AC 214 at 225.

[14] It is without a doubt that the resolution of the dispute between the parties herein inevitably engages the interpretation of the provisions of Water Services Act 108 of 1997. As Wallis JA in *Natal Joint Municipality Pension Fund v Endimeni Municipality*⁶ observed:

‘18 . . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rule of grammar and syntax, the context in which the provision appears the apparent purpose to which it is directed and the material known to those responsible for its production . . .’

[15] One of the reasons for the termination of applicants’ membership to the Water Board is non-compliance with item 3(5) of Schedule 1 of the Water Services Act 108 of 1997. That reason is set out in paragraph 4 of the letter or notice of termination dated 18 October 2022. The item requires that *“every nomination of a person for appointment to a Water Board must be signed by a proposer and a seconder. None of whom may be the nominee, and must contain the nominee’s signed acceptance. No person may nominate or second more than one person”*.

[16] Applicants’ papers are silent about the manner in which they were nominated, or whether there was any nomination process taken place which was seconded. Because there was no mention of the nomination, as a corollary applicants’ papers are devoid of the identity of persons nominating them. This failure is fatal to applicants’ application. The applicants content themselves in stating that they were appointed as members of Amatola Board pursuant to a long recruitment process. That does not address the requirements of item 3(5) of Schedule 1 of the Water Services Act.

⁶ *Natal Joint Municipality Pension Fund v Endimeni Municipality* 2012 (4) SA 593 at 603 paragraph 18.

[17] The provisions of item 3(5) of Schedule 1 of Water Services Act are couched in peremptory terms. That is so because of a mere use of the word “must” in the text. A statutory requirement construed as peremptory needs exact compliance for it to have the stipulated legal consequences.⁷ As a general rule, non-compliance with peremptory provision results in nullity.⁸ Any purported compliance falling short of that is a nullity.⁹ I reiterate that the use of the word “must” in the text is a strong indication that the provision is peremptory and it consequently requires exact compliance.¹⁰

[18] I am constrained to mention that applicants’ letter of termination was referred to in the applicants’ founding affidavit papers and annexed thereto as annexure E1 and E2, respectively. The applicants had ample opportunity to deal with the reasons set out in the letters in their founding affidavit but failed to do so. It is therefore justifiable to infer from that failure that the applicants were never nominated in writing as envisaged in item 3(5) of Schedule 1 of Water Services Act. A strong indication that the nomination must be in writing is borne out by the facts that the proposer and the seconder are required to sign the nomination. Requirement of signature denotes that nomination must be in writing. Applicants’ papers are devoid of an allegation that they were nominated in writing.

[19] The applicants confine themselves in the following allegations in the founding affidavit:

‘20 The applicants did not know that the Board appointments did not comply with the requirement for such appointments. The applicants aver that the appointments by the Minister were in order.

21 The appointments of the applicants did not breach the Act.

⁷ GM Cockram: Interpretation of Statutes, Third Edition, page 163.

⁸ LAWSA: Volume 25 Part 1 page 399 paragraph 366.

⁹ Shalala v Klerksdorp Town Council and Another 1969 (1) SA 582 (T) at 587 A-C.

¹⁰ Maguma v Station Commander, Fleet Street Police Station and Others (EL 683/2023) [2024] ZAECELLC 8 (19 March 2024) paragraph 51.

22 The first respondent effected the termination of the Board memberships of the applicants before they received the letters of termination that were dated 18 January 2022.

23 The applicants as private parties were not privy to the internal protocols, processes, decisions and arrangements of the ministry that preceded the appointment by the Minister.'

[20] Save for the bare allegation that applicants' appointments were in order, the applicants deal with the pertinent allegation that their appointments did not comply with the provisions of Water Services Act by saying that they were not aware of respondents' internal protocols and processes for proper appointment as Board members. That does not make their appointments lawful. On this basis, I find that applicants' appointments were unlawful. The provisions of Section 35(5) of Water Services Act were properly invoked in the circumstances.

[21] The second reason cited in the letter of termination is that the applicants were not interviewed for the position as it is required in terms of Water Services Act. In the answering affidavit the Minister expatiate on this ground and states as follows:

'17.1 The applicants should not have been appointed as Board members at Amatola Water Board. They were nominated for Lepelle Water Board and not for Amatola Water Board. Furthermore, they attended interviews only for Lepelle Water Board and not for Amatola Water Board.

17.2 Accordingly their appointment was not in compliance with the provision of Section 35 read with Schedule 1 of the Act. On this ground alone, the review application should be dismissed with costs order.'

[22] In paragraph 11 of the founding affidavit the applicants assert as follows:

'11 The appointments on 5 August 2021 were a sequel to a long recruitment process which was started in 2020 with responses to advertisements, submissions of all application documents by the applicants, establishment of

interview panels by the Ministry, virtual interview which were conducted via Microsoft Teams. The interview for the first applicant was held on 21 November 2020 and for the second applicant on 13 March 2021.'

[23] Whilst it is admitted in reply that second applicant was nominated for and interviewed for Lepelle Northern Water Board, the first applicant states that she was nominated for Amatola Water Board on 10 March 2020 and was interviewed for Amatola Water Board on 21 November 2020. The replying affidavit raises a number of issues that deserve serious attention.

[24] I have stated above that no case made out in the founding affidavit that the applicants were nominated. A case about nomination is built only in the replying affidavit, which is impermissible. The second applicant was not nominated for Amatola Water Board, but for Lepelle Water Board and was further interviewed for Lepelle Northern Water Board. It would be absurd that a nominee can be nominated for one Water Board and be taken to serve in another Board for which he or she was not nominated. Equally, an interview for one Water Board cannot conceivably be taken to be an interview for another and different Water Board. Nominations and interviews for appointment to a specific Water Board depend on the needs of that specific Water Board. Nominations, interviews and nominees cannot validly be transferred to a Water Board which was not involved in them. This is the second reason for rejection of applicants' version emerging from reply.

[25] With regard to the first applicant, there is a massive dispute of fact as to whether her nomination and interview was for Amatola Water Board or Lepelle Water Board. The dispute is irresolvable on these papers. In that case respondents' version must prevail.¹¹

[26] Harms DP observed:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the

¹¹ Palscon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 A at 634-5.

circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where the motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavit, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter justify such order¹².

[27] Even if one may wish to take a benevolent stance to consider a case made out in the replying affidavit¹³, that there was a nomination of the first applicant¹⁴ for Amatola Water Board, such nomination is without a seconder as contemplated by item 3(5) of Schedule 1 of the Water Services Act. That is not compliant with the imperative statutory provisions relating to nomination.

[28] Diemont JA in the matter of Mistry¹⁵ aptly observed as follows:

'When as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is. As was pointed out by Krause J in Pountes' Trustee v Lahenas 1924 WLD 67 at 68 and has been said in many other cases ". . . An applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.'

[29] This trite principle was quoted by Dukada J in Nkume v TransUnion Credit Burear (Pty) Ltd and Another¹⁶ in this division. The applicants are not legally permitted to build a case in reply. That has serious repercussions on the common law principle or "*Audi Alteram Partem Rule*" as the respondent would not have an

¹² National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) paragraph 26.

¹³ Which has not been made out in the founding affidavit.

¹⁴ Annexure H1-6.

¹⁵ Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635 H – 636 A.

¹⁶ Nkume v TransUnion Credit Burear (Pty) Ltd and Another 2014 (1) SA 134 (ECM) paragraph 7.

opportunity to deal with those new allegations. That would result in the unfairness in the proceedings.

Conclusion

[30] Judicial review is concerned with determining whether the impugned acts were made within the ambit of the empowering legislation, and in accordance with the precepts of such law, in particular, and the Constitution in general¹⁷. Public or state functionaries must confine themselves within the limits of the empowering provisions when performing public function or exercising power. The primary function of the court is to ensure that those who are charged with the duty to perform public functions in terms of the legislation act within the parameters of the law¹⁸. Courts have a duty to ensure that the limits to the exercise of public power are not transgressed.¹⁹

[31] In this case, when the applicants were appointed to be the Board members of Amatola Water Board, the erstwhile Minister did not act within the parameters of the law. The erstwhile Minister failed to confine herself within the limits of the empowering provision when appointing the applicants. The empowering provision requires that a nomination must be signed by the proposer and also by the seconder, which did not happen as I have adumbrated above. Mandatory provisions were transgressed by the then Minister.

[32] Under Common Law, necessary preconditions that must exist before an administrative power can be exercised are referred to as “*jurisdictional facts*”. In the absence of such preconditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all.²⁰ The decision maker is dependent on

¹⁷ MEC for Environmental Affairs and Developmental Planning v Clarrison's CC 2013 (6) SA 235 SCA paragraph 18; Magqazana v Buffalo City Metropolitan Municipality and Another (EL 1386/2023) [2024] ZAECELLC 7 (5 March 2024) paragraph 19.

¹⁸ Mwelase v Minister of Social Development and Others (CA74/16) [2018] ZAECMHC 16 (22 March 2018) paragraph 25; Baxter: Administrative Law page 305.

¹⁹ Minister of Social Development and Another v Mpayipheli (CA 135/16) [2018] ZAECMHC 31 (26 June 2018) paragraph 18.

²⁰ Kimberly Junior School and Another v Head of the Northern Cape Education and Others 2010(1) SA 217 (SCA); 2009 (4) All SA 135 (SCA) paragraph 11.

the existence of the necessary preconditions or jurisdictional facts for a proper and valid exercise of power.

[33] The erstwhile Minister, when exercising a power to appoint the applicants lacked the necessary precondition or jurisdictional fact relating to the written nomination and a seconder thereto. The erstwhile Minister should not have exercised a power to appoint the applicants as she did not have such a power in the absence of the necessary preconditions.²¹

[34] “*Jurisdictional facts*” refer broadly to preconditions or conditions precedent²² that must exist prior to the exercise of the power and procedures to be followed, or formalities to be observed, when exercising the power: Subjective jurisdictional facts in the case of preconditions and procedural jurisdictional facts in the case of procedural requirements and formalities. These facts are jurisdictional because the exercise of power depends on their existence or observance, as the case may be. See Cora Hoexter: Administrative Law in South Africa, Second edition paragraph 290. The erstwhile Minister lacked substantive jurisdictional fact relating to the necessary precondition of a valid written nomination signed by a proposer and a seconder.

[35] There are two categories of jurisdictional facts that can be encountered in the empowering legislation. The first category is described as objective jurisdictional facts, and the second one is described as subjective jurisdictional facts. This case is less about subjective jurisdictional facts. It is more about objective jurisdictional facts. Objective jurisdictional facts include the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. If it is found that the objective jurisdictional fact did not exist, equally it must be found that the exercise of the power was invalid.²³

[36] Section 165(2) of the Constitution provides:

²¹ Paola v Jeeva N.O. 2004 (1) SA 396 (SCA) paragraphs 11, 14 and 16.

²² Union of Refugee Women v Director: Awate Security Industry Regulatory Authority 2007 (4) SA 395 (CC) paragraph 78.

²³ South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 31 (C) at 34-35; President of RSA v South African Football Union 2000 (1) SA 1 (CC) paragraph 168.

'2 The courts are independent and subject only to the Constitution and the Law, which they must apply impartially and without fear, favour or prejudice.'

In our democratic order, it is the duty of courts to apply and enforce legislation. If the validity of legislation is not impugned, there can be no justification for not enforcing it. Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the Constitution. It is a basic principle of our law that a court can never lend its aid to the enforcement of an illegal act.²⁴ The court has a duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention²⁵. In the final analysis applicant's appointment was contrary to the doctrine of legality and therefore cannot be countenanced.

[37] Applicants' counsel strongly contended that if the Minister was of the view that the appointment of the applicants was unlawful, he should have approached this court for a review of the erstwhile Minister's decision appointing the applicants. He further stated that the conduct of the Minister amounted to self-help. I do not agree.

[38] The legislature expressly empowers the Minister to remove Board members. The Minister may terminate the appointment of any or all the members of a Water Board²⁶. Equally, a member of a Water Board ceases to hold office if his or her appointment has been terminated in terms of Section 35(5) of the Act²⁷.

[39] In *casu*, applicants' appointments contravened the provisions of item 3 (5) of Schedule 1 of the Water Services Act of 1997. It is that contravention that triggered the operation of Section 35(5) of the Water Services Act. Accordingly, I find that the Minister is statutorily empowered to terminate membership of the Board members should a reason to do so arise. The court, as it is always warned, cannot usurp that power. Baxter²⁸ aptly puts it:

²⁴ Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 paragraphs 58, 77 and 99.

²⁵ Lester v Ndlambe Municipality 2015 (6) SA 283 (SCA) paragraphs 26, 27 and 28.

²⁶ Section 35(5) of Water Services Act 108 of 1997.

²⁷ Schedule 1 (4)(e) of Water Services Act 108 of 1997.

²⁸ Administrative Law page 305.

‘Without statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the courts were to do this, it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation²⁹.’

[40] I am alive that this was said in administrative decision context, but it applies in equal or more force on the facts of this case or on the decision statutorily taken by the Executive Authority. It does not matter that the power is administrative or executive, what is important is that “*All public power must be sourced in Law*”³⁰. I therefore find that the termination of applicants’ membership was effected by the Minister in terms of the empowering provision and was therefore lawful.

Costs

[41] The general rule is that costs must follow the result. I see no reason why costs should not follow the event. In the light of the fact that the applicants failed in their application, I find that they are liable to pay costs of this application, jointly and severally, the one paying the other to be absolved.

Order

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

[42.1] The application is dismissed.

[42.2] The applicants are ordered to pay costs of this application jointly and severally, the one paying the other to be absolved.

A S ZONO

²⁹ National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) paragraph 44.

³⁰ AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC) paragraph 68.

ACTING JUDGE OF THE HIGH COURT

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