



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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MEC for Economic Development, Gauteng and Another v Sibongile Vilakazi and Others (783/2023)
[2024] ZASCA 126 (17 September 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal with costs, including the costs of two counsel, where so employed. It further set aside and substituted the order of the Gauteng Division of the High Court, Pretoria (the high court).

The appellants are the Member of the Executive Council for Economic Development, Gauteng, (the MEC) and the Gauteng Growth and Development Agency (Proprietary) Limited (the Agency), a company established in terms of the Gauteng Growth and Development Agency Act (Proprietary) Limited Act 5 of 2003 (the Act). The respondents were members of the Agency's board of directors until 24 March 2023, when the MEC, being of the view that the relationship between her and board members had broken down irretrievably, terminated their directorships and dissolved the board.

The respondents, aggrieved by the MEC's decision, approached the high court, inter alia, for an order reviewing and setting aside that decision. The high court found for the respondents and ordered that: (a) the MEC's decision to terminate the directorships of the respondents was suspended with effect from 24 March 2023; (b) the respondents were reinstated as board members with effect from the same date; and (c) the MEC was interdicted from appointing any board members in substitution of the respondents. The high court also ordered the appellants, jointly and severally, to pay the respondents' costs on the attorney and client scale, basing the punitive costs order on a finding that, in dissolving the board, the MEC was motivated by ulterior purposes.

The material facts leading up to the application above are as follows. On 1 October 2021, the MEC's predecessor, Mr Parks Tau (Mr Tau) appointed the respondents as members of the Agency's board of directors for a period of three years in terms of s 8 of the Act. He also appointed the first respondent as the Chairperson of the board. In terms of s 8(2) of the Act, the MEC also has the power to appoint the Agency's Group Chief Executive Officer (the GCEO).

By the time that the MEC had replaced Mr Tau as responsible member of the executive council, the board had already commenced the recruitment process for the appointment of a new GCEO. Upon completion of the recruitment process, the board submitted a report to Mr Tau recommending the appointment of the acting GCEO, Mr Simphiwe Hamilton (Mr Hamilton), on a five-year fixed term contract. Mr Tau concurred with the board's recommendation and, on 27 September 2022, he prepared

a memorandum to the executive council recommending that Mr Hamilton be appointment as GCEO. However, before he could present the memorandum to the executive council, the Premier announced a reshuffling of the executive council. Mr Tau was removed as MEC of Economic Development and replaced by the current MEC.

On 10 November 2022, the first respondent, in her capacity as Chairperson of the board, met with the MEC to introduce herself, and to brief her regarding organisational strategy and the profile of the preferred new GCEO. At that meeting, the MEC informed the first respondent that she already had a person in mind for the position of GCEO. The MEC's preferred candidate was not amongst those who had been interviewed and shortlisted by the board.

There then followed extensive correspondence between the board and the MEC, in which the latter asserted her statutory powers to appoint the GCEO and the former insisted that it was a matter jointly for the board and the MEC. On 22 March 2023, the MEC wrote to the board members informing them of her unwillingness to submit to dispute resolution process as agreed earlier. She further informed them that they were required to submit written reasons, by 17h00 on 23 March 2023, why they should not be removed as board members.

Only the first, fourth and fifth respondents submitted representations before the deadline, and, on 24 March 2023, the MEC wrote to them informing them that she was of the view that there had been a breakdown of trust, the relationship between her and the board was no longer functional and she had therefore decided to terminate their directorships. She also wrote to the second and third respondents on the same day confirming that they had failed to submit representations and informing them of the termination of their directorships. It was this event that caused the respondents to approach the high court as stated above.

The three issues before the SCA related to: (a) whether the order of the high court was a 'decision' as contemplated in terms of contemplated in s 16(1)(a) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) and is appealable; (b) whether the appeal has been rendered moot as the respondents' terms of office as board members will expire on 31 September 2024; and (c) depending on the findings in respect of (a) and (b), whether the respondents satisfied the requirements for an interim interdict.

On the first issue, the SCA found that on the facts before it, there can be little doubt that the order is appealable because the high court's judgment purported to make final pronouncements regarding virtually all the issues that will fall for decision in the review application. The SCA found that the suspension of the MEC's decision to dissolve the board and the reinstatement of the respondents, as board members, had immediate and substantial consequences for the second appellant. The SCA consequently concluded that that the order of the high court is a 'decision' contemplated in s 16(1)(a) of the Superior Courts Act.

With regards to the question of mootness, the SCA held that there are various compelling factors that militate against a finding of mootness because, first, even though the high court's order was framed as an interlocutory order, it was final in effect. Second, the SCA pointed out that, upon the expiry of their terms of office, the respondents will become eligible for re-appointment for another term. And third, the SCA concluded that the high court's finding that the MEC had acted maliciously and for ulterior reasons was the basis for imposing the punitive costs order. That was also a final decision which would prejudice the MEC in her defence in respect of the review application.

The SCA held that, on the common cause facts, the respondents have failed to prove prima facie rights; the scales had been tipped comprehensively in favour of the appellants in respect of the other requisites for interim relief; and that the interim re-instatement of the respondents was legally inconsequential and had no practical effect. In addition, the respondents also failed to establish that they would suffer irreparable harm if the interim relief was not granted and to show that there were reasonable prospects that they would succeed in the review application.

In the result, the SCA upheld the appeal with costs, including the costs of two counsel, where so employed, set aside the order of the high court and replaced it with an order dismissing the application for interim relief.

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