THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 26 November 2020
Status: Immediate

Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs **(Case no 485/2019) [2020] ZASCA 153 (26 November 2020)**

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) upheld the appeals by the appellant with no costs order.

These appeals emanated from two applications launched in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) by the Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs (the MEC), seeking to set aside the appointment of the third respondents in each matter, Mr Langelihle Jili and Philani Sibiya, respectively as Municipal Managers of Nkandla Municipality and Mthonjaneni Municipality. The MEC's basis for seeking the invalidation of the appointments of the respondents was that they did not possess the required minimum experience in a senior management post as stipulated in Reg 17 of the Regulations promulgated under s 54A(8) of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act). The two applications came before Koen J, (the court a quo) and were heard simultaneously

Before the court a quo, a preliminary point of jurisdiction was raised, in terms of which it was asserted that the nature of the dispute did not fall within the jurisdiction of the high court. The court concluded the basis of the challenge to fall squarely within the provisions of s 54A of the Systems Act and accordingly found that it was competent to entertain the applications. As regards the merits, the court a quo found that there was no unreasonable delay in launching the review applications and that the lack of the relevant experience rendered the respondents' appointment unlawful. It set aside the

appointment of the two Municipal Managers with effect from the date of its order. This appeal was with the leave of the court a quo.

Four questions arose for determination in this appeal. First, whether the high court had jurisdiction or whether the dispute resorted within the exclusive jurisdiction of the Labour Court. Second, the effect, if any, of the order suspending the order of constitutional invalidity made by the Constitutional Court in *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs (SAMWU)*. Third, whether the applications for review were unreasonably delayed and whether the review was brought in terms of the Promotion of Administrative Justice Act (PAJA) or the principle of legality. Fourth, whether the two Municipal Managers met the relevant experience requirement.

The appellants' case was that the delay in the review application was unreasonable that it could not be overlooked or condoned. As an alternative argument, the appellants contended that even if it were to be accepted that the unreasonable delay fell to be condoned, this ought not to have led to the setting aside of the two Municipal Managers' appointments, as it was not just and equitable to do so. Further, the appellants contended that the court a quo had no jurisdiction to entertain the dispute and that on that ground alone, the appeal ought to succeed. The SCA noted that s 54A of the Systems Act provided the basis for a challenge to a Municipal Manager's appointment therefore the challenge to the court a quo's jurisdiction was without merit. In terms of the issue whether or not the delay in launching the review applications was unreasonable the appellants submitted that since the MEC failed to take any steps as envisaged in s 54A(8) of the Systems Act within 14 days of receiving the relevant reports, she could not bring the application for review without asking for condonation. The SCA held that there was no obligation on the MEC to delay inordinately on the basis of a desire to seek co-operation with another sphere of government and that she was in a position to have provided explanations for the delay and ought to have done so but did not.

The ancillary issue raised in relation to the issue of delay was whether the MEC's review was grounded on PAJA or the principle of legality. The appellants contended in the court a quo and in this Court that the effect of the principle of subsidiarity in the context of this matter was that should PAJA be applicable to the impugned decision, it would be impermissible for the MEC to have proceeded under the principle of legality. The court a quo observed, correctly in the SCA's view, that as to whether PAJA applied, depended on whether the action sought to be reviewed amounted to 'administrative action' as defined in that Act. It held that the MEC's review was not hinged on PAJA. It therefore concluded that the 180-day period specified in s 7(1) of PAJA was inapplicable in this matter.

The majority of SCA (per Molemela, with Poyo-Dlwati AJA concurring, and Makgoka JA concurring in a separate judgment) held that the circumstances of this case did not warrant that a firm finding be made on whether the review was grounded on PAJA or the principle of legality, as that determination had no bearing on the outcome. The requirement to institute review proceedings without undue delay was intended to achieve both certainty and finality. The court a quo found that the MEC's delays were occasioned by a spirit of co-operation which allowed for latitude for the municipalities in question to

address the lack of experience making the delay reasonable. The majority in the SCA did not agree with that conclusion. It held that s 237 of the Constitution unequivocally stipulates that 'all constitutional obligations must be performed diligently and without delay'. And that it would simply be unreasonable for the MEC to adopt a supine attitude for a long period of time in the guise of affording courtesy to another sphere of government. According to the SCA, condoning the delay could have a significant prejudicial effect on the administration of justice.

In relation to the merits, the court a quo found that there was no real dispute of fact and held that the requirement pertaining to minimum experience had not been fulfilled in respect of both applications. Before the SCA, counsel for the appellants pointed out that the existence of a dispute of fact was raised in the written heads of argument filed on behalf of the appellants and was never conceded before the court a quo. The majority judgment in the SCA was of the view that the circumstances of this case still did not call for the invocation of a remedy setting aside the respondents appointment and it was of the view that it was at large to tamper with the discretion of the court a quo in relation to the appropriate remedy. It held that the appeals ought to succeed and it upheld the appeals with no order as to costs.

The minority judgment (per Ponnan JA with Zondi JA concurring) held that the high court cannot be faulted and the SCA was not to simply interfere with the discretion exercised by the high court. It held that the high court could not be faulted in its conclusion and that the 'applications are not time barred by the provisions of s 54A(8) of the Systems Act'. The SCA in the dissent was unpersuaded that the delay as was found to exist in this case was unreasonable or that any warrant existed for the SCA to interfere with the discretion exercised by the high court to condone the delay. In terms of the jurisdictional challenge the dissent noted that it was difficult to see how a jurisdictional challenge could be successfully maintained in this case. The minority therefore, endorsed the high court's order declaring the appointments invalid, but, unlike the high court, the dissent did not set the appointment aside. In the result, the dissent, save for setting aside paragraph (b) of the order of the court below, it would dismiss the appeal.

In a separate concurring judgment, Makgoka JA concluded that given the inordinate delays on the part of the MEC to judicially review the appointments of the municipal managers, coupled with the fact that she offered no explanation for the delays, the high court's discretion in seemingly condoning the delays, was not judicially exercised. The SCA was therefore entitled to interfere in the decision of the high court.