

In the matter between:

MINISTER OF HEALTH AND OTHERS

APPELLANTS

and

TREATMENT ACTION CAMPAIGN AND OTHERS

RESPONDENTS

In re:

MEC FOR HEALTH, KWAZULU-NATAL

APPELLANT

and

**THE GOVERNMENT OF KWAZULU-NATAL
REPRESENTED BY THE PREMIER**

RESPONDENT

APPELLANT'S SUBMISSIONS

Introduction and Background

1 It is necessary at the outset to state that it is our view as well as that of the present Appellant (the MEC) that this application should be heard separately from and before the main appeal which will be heard on the 2nd and 3rd May 2002. It is, accordingly, proposed that this application should be heard on or before the 30th

April 2002.¹

- 2 In August 2001, the Respondents made application to the High Court for various orders against the Appellants (the main application). The MEC was cited in his official capacity as the Fifth Respondent in that application. He opposed the application and had an affidavit filed on his behalf. He further appointed the State Attorney to represent him in the proceedings.
- 3 The application was heard on 26th and 27th November 2001. The Court handed down judgment on 14th December 2001 (the main judgment).
- 4 On or about the 2nd January 2002, the Appellants, including the MEC, lodged an application for a certificate in terms of Rule 18 of the Rules of the above Honourable Court (the Rules) to appeal directly to the above Honourable Court against the main judgment. The Court *a quo* granted a positive certificate on 11th March 2002.
- 5 On Friday the 27th February 2002 Attorneys Larson Bruorton & Falconer Inc. filed in the High Court a “NOTICE OF INSTATEMENT AS ATTORNEYS OF RECORD”. The Notice reads:

¹ The Affidavit of Zweli Mkhize, p 7 of the Application, para 16

“KINDLY TAKE NOTICE that the Fifth Respondent hereby appoints the undermentioned offices as its attorneys of record and appoints the undermentioned address for service of all processes, notice and documents herein.”²

6 On the same day the said attorneys filed an affidavit of the Premier.³ The affidavit did not accompany any notice of motion. The Premier states in his affidavit that:

“I make this affidavit on behalf of the Government of the Province of KwaZulu-Natal of which the MEC for Health, KwaZulu-Natal forms a part. In so far as may be necessary, and given the impact of the relief sought upon the use of public resources in the Province, I seek intervention in these proceedings on behalf of the Government of Province of KwaZulu-Natal.”⁴

7 In the meantime the Respondents had also brought an application to execute the main judgment pending the appeal (the execution application).

8 The application for a certificate as well as the execution application were set down for hearing on the 1st March 2002. The Premier stated the following concerning

² pp 1- 2 of the Record, at p 2

³ pp 4 - 5 of the Record

⁴ The Premier’s Affidavit, p 6 of the Record, para 2. But for the Premier’s averment there was no evidence indicating that the Executive Council of the province of KwaZulu-Natal had authorised the Premier to act on behalf of the province in the matter. The MEC was clearly not aware of such decision. The indications in the light of the submissions made on behalf of the Premier at the hearing, were that the Premier was acting on the basis of his understanding of s 125(1) of the Constitution in terms of which the Executive Authority of the province vests in him.

the said applications:

“In so far as the application for leave to appeal is concerned, whilst I do not support the application, I respectfully abide the decision of the Honourable Court.

In regard to the application that leave be granted to execute Orders 1 and 2 made by his Lordship Mr Justice Botha on 14 December 2001 I support this application, subject to certain qualifications dealt with hereunder.”⁵

- 9 On 28th February 2002 the MEC filed an affidavit. As regards the application for a certificate and the execution application the MEC said:

“... I do not support the Premier in his view concerning the Applications for Leave to Appeal and Leave to Execute the judgment pending the appeal. I fully support the Application for Leave to Appeal and oppose the Application for Leave to Execute pending the appeal.”⁶

- 10 The MEC said further that he had not withdrawn the authority and mandate of the State Attorney to act on his behalf and that he had not appointed the attorneys Larson Bruorton & Falconer Inc or any other firm of attorneys to act on his behalf. He challenged Larson Bruorton & Falconer Inc. to produce proof that he had authorised them or any one from their firm to act on his behalf.⁷ He also states that he does not agree with the contents of a letter sent by an attorney Mr Patrick Falconer (Falconer) of Larson Bruorton & Falconer Inc. to the State Attorney

⁵ The Premier's Affidavit, pp 6 - 7 of the Record, paras 4 - 5

⁶ The Affidavit of Zweli Mkhize p 46 of the Record, para 5

asking the latter to withdraw as his representative.⁸

⁷ The Affidavit of Zweli Mkhize, p 47 of the Record, para 6 - 7

⁸ The Affidavit of Zweli Mkhize p 48, para 6, Annexure "ZM1" of the Affidavit of Zweli Mkhize, p 48 of the Record

11 On the 1st March 2002 the Premier was represented in the Court *a quo* by the attorney Falconer and Mr Unterhalter SC. The first issue that arose for decision was whether the Premier was correctly before Court and if not, whether he should be allowed to intervene. After hearing argument on this issue Botha J made a decision allowing the Premier to intervene. In coming to this conclusion Botha J found, *inter alia*, that “ ... **the decision taken to intervene in this matter is not a decision as contemplated in section 140(1) (of the Constitution). It is not a decision taken in terms of legislation and it has no legal consequences *per se*.**”⁹ Botha J was immediately asked to clarify his decision. This he did. In clarifying his judgment Botha J said:

“The meaning of the judgment, if I had not made it clear enough, is that the province of KwaZulu-Natal is now represented by the person in whom the Executive Authority in that province vests and that is by the Premier of the province himself. In other words the representation of the province by the member of the Executive Council for Health has lapsed, the principal has taken over.”¹⁰

⁹ The judgment dated 1st March 2002, p 11 of the Application Bundle, lines 14 - 16

¹⁰ The judgment dated 1st March 2002, p 12 of the Application Bundle, lines 20 - 25

12 It is clear from the judgment that Botha J substituted the Government of the province of KwaZulu-Natal represented by the Premier for the MEC as the Fifth Respondent in the matter. Although Botha J did not state that this substitution applied to all the applications in this matter, namely, the main application, the execution application and the applications for leave to appeal against the main judgment, he clarified this to be the case in his judgment concerning the application for a certificate.¹¹

13 Botha J relied on the law of agency to arrive at the conclusion that the Premier should substitute the MEC as the Fifth Respondent in this matter.¹²

The Leave to Appeal

14 The MEC applies for leave to appeal against the decision.

15 The Premier filed a notice of opposition opposing the application for a certificate in terms of Rule 18 of the Rules. He, however, did not file an affidavit in support of his opposition. In the result, it is submitted, that the evidence of the MEC must be accepted.

16 It is either common cause or not seriously contested that:

¹¹ The judgment dated 16th April 2002, p 30 of Application Bundle, lines 19 - 21

¹² The judgment dated 1st March 2002, p 11 of the Application Bundle, lines 1 - 2

16.1 this matter is one of extreme importance to the functioning of the national and provincial departments of health and the powers and authority of the provincial MECs in general and the MEC in particular *vis-a-vis* those of the Premier;¹³

¹³ Affidavit of Zweli Mkhize, p 25 of Application Bundle, para 22

16.2 it is a constitutional matter of substance that warrants the attention of the above Honourable Court¹⁴;

16.3 the evidence in this application is sufficient to enable the above Honourable Court to deal with and dispose of the matter without having to refer the matter back to the Court *a quo*¹⁵;

16.4 this application is incidental to the main application which is to be heard on the 2nd and 3rd May 2002¹⁶;

16.5 it is in the interests of justice that leave to appeal directly to the above Honourable Court be given.

17 The MEC contends that there is a reasonable prospect that this Honourable Court will reverse or materially alter the decision if leave to appeal directly to it is given.

¹⁴ Affidavit of Zweli Mkhize, pp 24 - 25 of Application Bundle, para 18 and paras 23 - 24, The judgment dated 16th April 2002, at p 31 of the Application Bundle, lines 8 - 10

¹⁵ The judgment dated 16th April 2002, p 31 of the Application Bundle, lines 10 - 12

¹⁶ Affidavit of Zweli Mkhize, p 24 of Application Bundle, para 20

The Court *a quo* agreed with this and issued a positive certificate.¹⁷

18 It is, therefore, submitted that leave to appeal directly to the above Honourable Court should be granted.

The Appeal

¹⁷ The judgment dated 16th April 2002, p 31 of the Application Bundle, lines 12 - 16

19 The Premier does not contest the following facts¹⁸:

19.1 Larson Bruorton and Falconer Inc. sought to “instate” themselves as attorneys for the MEC;

19.2 the MEC had not co-signed any decision of the Premier to appoint any attorney, including Larson Bruorton Falconer Inc to represent him in his capacity as MEC for Health in the province;

19.3 the MEC had not co-signed any written decision of the Premier to intervene or substitute himself (the Premier) or the Government of the KwaZulu-Natal province as the Fifth Respondent in any of the applications in this matter as contemplated in s 140(2), or at all;

¹⁸ Affidavit of Zweli Mkhize, p 23 of Application Bundle, paras 13 - 15

20 It is further common cause that the Premier did not make any application to the Court *a quo* to substitute himself or the Government of the KwaZulu-Natal province for the MEC.¹⁹

21 Accordingly, the Court *a quo* erred in firstly, allowing the Premier to intervene and secondly, in substituting the MEC with the Premier.

The Constitution

22 In terms of s 125(1) the Executive authority of a province is vested in the Premier of that province. The Constitution does not, however, envisage that the Premier exercise that authority on his own or without consulting with the Executive Council. Section 125(2) provides that the Premier exercises the executive authority together with the other members of the Executive Council.²⁰

23 In terms of s 132(1) the Executive Council of a province consists of the Premier as head of the Council, and no fewer than five and no more than ten members

¹⁹ Affidavit of Zweli Mkhize, p 23 of Application Bundle, para 16

²⁰ The Final Constitution appears to have retained the requirement in the Interim Constitution that the Premier has to act in consultation with the Executive Council in the exercise of all the powers other than those conferred on him specifically by Constitution. See Chaskalson, et al, *Constitutional Law of South Africa*, Juta, at 4 - 16, para 4.5(a)(iii).

appointed by the Premier from among the members of the Provincial Legislature. In terms of s 132(2) the Premier appoints the Executive Council members, assigns their powers and functions, and may dismiss them.

- 24 In terms of s 133 the members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier and are accountable collectively and individually to the legislature for the exercise of their powers and functions.
- 25 In terms of s 137 the Premier may, *inter alia*, by proclamation transfer to a member of the Executive Council “any power or function entrusted by legislation to another member”, and in terms of s 138 the Premier may temporarily assign to a member of the Executive Council any power or function of another member who is absent from office or is unable to exercise that power or perform that function.
- 26 The Constitution does not expressly provide that the Premier can, after having assigned a function to an executive member, still exercise that function.
- 27 Section 140 of the Constitution provides:
- “(1) A decision by the Premier of the province must be in writing if it-**
 - (a) is taken in terms of legislation; or**
 - (b) has legal consequences.**
 - (2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member.**

(3)

(4)”

28 It is clear from the Constitution that a function is not delegated by the Premier to another executive member, but that there is an assignment of such function. It is important to draw a distinction between delegation and assignment. In the case of delegation it is arguable that the executive power over a delegated function remains with the delegator.²¹ The Constitution expressly deals with assignment as opposed to delegation.²² According to the learned author, Baxter:

“When powers are assigned the authority and duty to exercise them and the responsibility for their exercise, is transferred in full. A less complete transfer powers is delegation, in terms of which one public authority authorizes another to act in its stead.”²³

29 Section 140 contains checks and balances to, *inter alia*, prevent excesses. It is clearly aimed at preventing a Premier from arbitrarily interfering with the assigned functions of an MEC.²⁴

²¹ See Chaskalson et al, (ibid), 4 - 17. Also See *Executive Council, Western Cape Legislature v President of RSA* 1995 (4) SA 877 (CC) at para 173

²² See section 132(2)

²³ Baxter Lawrence, *Administrative Law*, Juta 1984 at p 432

²⁴ See Chaskalson et al, see n 20 (*supra*)

30 It is further submitted that a member of the Executive Council such as the MEC is neither an agent of the Premier, nor is the Premier his principal. The principles of the law of agency have no application in determining the Constitutional position of a member of the Executive Council *vis-a-vis* the Premier.

31 In executing the function assigned to him by the Premier in terms of the Constitution, a member of the Executive Council is not acting as an agent of the Premier.

32 Section 125 of the Constitution expressly provides:

**“(1) The executive authority of a province is vested in the Premier of that province.
(2) The Premier exercises the executive authority, together with the other members
of the Executive Council, by _ ... “**

33 There is no provision that the other members exercise such authority on behalf of the Premier.

34 The Court *a quo*, accordingly, erred in regarding the MEC as an agent of the Premier.

35 It is further submitted that s 140 was applicable to the Premier’s intervention, in that:

35.1 The Premier took a decision to intervene in this matter which concerns a function assigned to the MEC.

35.2 *Further, or alternatively,*

35.2.1 the Premier took a decision in the exercise of what he perceived to be his powers in terms of the Constitution *qua* Premier. The Constitution is “legislation”;

35.2.2 alternatively, the decision of the Premier clearly had legal consequences;

35.2.2.1 the Premier was substituted for the MEC in all the applications in this matter;

35.2.2.2 the substitution of the Premier’s also determined the fate of the execution application and the appeal insofar as it pertained to the Fifth Respondent.

36 It is clear that the decision of the Premier related to a function assigned to the MEC.

37 It is further common cause that the Premier did not comply with s 140.

- 38 In the premises, the decision of the Premier to intervene was unconstitutional and invalid.
- 39 The learned judge in any event erred in substituting the Premier for the MEC particularly since there was no application for such substitution before the Court. The substitution by the Court was, in the circumstances, invalid.
- 40 For the aforementioned reasons it is submitted that the above Honourable Court should set the decision of Botha J aside.
- 41 In the event of the above Honourable Court setting aside the decision of Botha J, the MEC will be supporting the application for leave to appeal and the appeal against the main judgment, and we will be making the same submissions on behalf of the MEC as we do with regard to the other Appellants.

MTK Moerane S.C.
P Coppin
B Vally
Counsel for the Respondents
23rd April 2002
Chambers