

Who can appoint commissions of enquiry?

CONDUCTING A 'SECTION 106 INVESTIGATION'

Minister of Local Government, Housing and Traditional Affairs (KwaZulu-Natal) v Umlambo Trading 29 CC, [2007] SCA 130 (RSA)

If the member of a province's executive council (MEC) responsible for local government suspects maladministration, fraud, corruption or any other serious malpractice in a municipality, that MEC must designate a person or persons to investigate the matter. This judgment of the Supreme Court of Appeal deals with the rules that must be followed by the MEC in ordering such an investigation.

Law

The Municipal Systems Act provides that the applicable provincial law on commissions of enquiry determines how a 'section 106 investigation' must be conducted and what the powers of the investigators are. If there is no provincial legislation, the national Commissions Act (Act 8 of 1947) is applicable.

In this case, there was applicable provincial legislation. The KwaZulu-Natal Commissions Act (Act 3 of 1999) provides that the Premier may by proclamation in the *Provincial Gazette* appoint a commission. The Premier may define its terms of reference and make rules on how it goes about its work. The Premier may also appoint a secretary and designate a chairperson of the commission. The Act provides that a commission of enquiry has the power to subpoena persons to attend hearings or produce documents.

Facts

The MEC for local government in KwaZulu-Natal appointed Manase & Associates (Manase), a local law firm, to investigate tender irregularities by sending a letter to Manase. A subpoena that claimed to be in terms of section 106(2) of the Systems Act and the KwaZulu-Natal Commissions Act was served by Manase on the company, requesting financial and banking information.

Arguments and judgment

The company applied to the Court to have the investigation halted and the MEC's decision to appoint Manase set aside. It relied on the MEC's failure to adhere to the KwaZulu-Natal Commissions Act in launching and conducting the investigation.

The Court agreed with the company. The KwaZulu-Natal Commissions Act vests the power to appoint commissions of enquiry in the Premier. The Court held that, in terms of the KwaZulu-Natal Commissions Act, the MEC had no power of his own to appoint a commission of enquiry. Furthermore, it held that there had been no publication of the 'investigation' or 'commission' in the *Provincial Gazette* as required by the KwaZulu-Natal Commissions Act. Neither the topic of the investigation nor the terms of reference had been defined. No regulations had been issued by the Premier and no secretary or chairperson had been appointed, let alone published in the *Provincial Gazette*. The MEC himself did not have the power to issue subpoenas.

The subpoenas that Manase had issued and served on Umlambo were thus unlawful and set aside by the Court.

Comment

A section 106 investigation is an important instrument in the hands of the provincial government to get to the bottom of alleged irregularities in a municipality. It is the most intrusive form of 'monitoring' permitted by law because persons can be subpoenaed to appear before the commission or produce documents. The Court made it clear that the exercise of any public power is only legitimate when it is lawful.

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