

2/12/2010
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER: 74720/09

In the matter between:

NTOMBENHLE ROSEMARY NKOSI

And

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ YES
(3) REVISED.	☐ YES
2/12/2010 DATE	<i>Shg.</i> SIGNATURE

THE PAN AFRICAN LANGUAGE BOARD

1ST RESPONDENT

PROF S NGUBANE

2ND RESPONDENT

PROF Z T MOTSA

3RD RESPONDENT

ADV M MDLUDLU

4TH RESPONDENT

PROF A LOTREIT

5TH RESPONDENT

M F SADIKI

6TH RESPONDENT

G T J GUMEDE

7TH RESPONDENT

P S SOBAHLE

8TH RESPONDENT

B E DRUCHEN

9TH RESPONDENT

DR E MALETE

10TH RESPONDENT

PROF M MOJALEFA

11TH RESPONDENT

DR M YOYO

12TH RESPONDENT

MINISTER OF ARTS AND CULTURE

13TH RESPONDENT

JUDGMENT

TLHAPI J

[1] This is an application seeking the following relief:

- “(a) Declaring that the Board is/was not properly constituted in terms of section 5(7) and section 6 of the Act when it took the purported decision to suspend the applicant.
- (b) Reviewing and setting aside the purported decision of the Board to suspend the applicant.
- (c) Interdicting the Board from proceeding with the intended disciplinary action against the applicant.
- (d) Uplifting the suspension of the applicant with immediate effect.
- (e) Costs of the application.”

[2] The application was opposed by the respondents. No confirmatory affidavits in respect of the 3rd to the 12th respondents were attached to the answering affidavit of the second respondent despite the latter purporting to depose on their behalf. The matter was set down by the applicant on the 30 March 2010 for hearing on the opposed roll of the 8 November 2010. No practice note or heads of argument were filed on behalf of the applicant. On the morning of the 8 November 2010 I was approached by counsel for the applicant and counsels for the first to the twelfth and the thirteenth respondents for the matter to stand down to 11H30 because the parties were engaged in discussions. When the matter resumed counsel for the applicant was absent and after two adjournments I was informed that the said counsel had indicated that he had not been properly briefed to attend to the matter, the applicant and her attorneys having approached him only on Friday the 5 November 2010.

Mr Sambo, an attorney on behalf of the applicant was present and he applied for a postponement of the matter. This was opposed by the respondents and I ruled that the matter be proceeded with. Mr Sambo made representations on behalf of the applicant on the issues raised in the application.

[3] The applicant was appointed on a fixed term contract as chief executive officer of the first respondent. The contract was to run from 5 March 2007 to the 4 March 2012. A precautionary suspension of the applicant was issued, (pending the outcome and report of a forensic investigation) on the 20 February 2009. On the 11 September 2009 the suspension was extended until the finalization of the disciplinary enquiry. This application was launched on the 4 December 2009.

The applicant contended that :

- 3.1 the current board was appointed in 2008 and that its first Board Meeting, held on the 10 June 2008, was not presided over by the Chief Justice as stipulated in section 6(1) of Act 59 of 1995 (the Pan African Language Board Act, hereinafter referred to as the 'Act') but by Dr Jokweni, the Chief Director, National Language Services, Arts and Culture,
- 3.2 The Board was inaugurated on the 10 June 2008, before the names of the Board members were gazetted in terms of section 5(7) of the Act, that the members were not sworn into office by the Chief Justice as contemplated by the Act, therefore the Board was not properly constituted under the Act, and that the Board conceded such fact in its minutes dated the 19 and 20 February 2009
- 3.3 that on the 18 December 2008 the Board adopted a moratorium on inter alia all suspensions, which moratorium would have expired in June 2009;

furthermore that the Board acted ultra vires as discipline was a 'line function and administrative in nature and in terms of the Act, administrative functions of the Board' fell under her control; She was suspended for suspending Advocate Feni, a senior legal advisor.

- 3.4 if the adoption of such moratorium was valid, it was still in force when she was suspended.
- 3.5 that the Board had no power to suspend or to institute disciplinary action against her in that it had acted ultra vires

[4] The second respondent contended that:

- 4.1 the matter related to an unfair labour practice, that this court did not have the required jurisdiction to adjudicate, because the applicant was obliged in terms of the Labour Relations Act 66 of 1995, to refer the dispute to the CCMA or relevant Bargaining Council.
- 4.2 that this application was bad in law in that the applicant had failed to comply with the provisions of rule 53 of the Rule of Court and that no good cause **existed** for such non-compliance.
- 4.3 that the application lacked material facts and grounds to sustain a judicial review and that it was not clear from the application whether the review was instituted in terms of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) or in terms of section 158 (1) (g) of the Labour Relations Act or the common law;
- 4.4 that applicant had inordinately delayed the launch of this **application**;
- 4.5 that as and when this application was launched the applicant had already **referred** the dispute to the CCMA and that the matter was settled on the basis

that the applicant would remain suspended with full remuneration until the disciplinary hearing had been concluded and, that the issue of the extension of applicant's suspension had also been adjudicated upon by the Labour Court; furthermore that the dispute before the CCMA and the Labour Court was based on the same cause of action and applicant sought the same relief she was claiming in those matters. in this application.

- [5] The issues to be determined are that of (a) the legality of the Board when the decision to suspend was taken and (b) that the decision to suspend be reviewed and the disciplinary action against the applicant be interdicted.

Legality of the Board

- 1 section 5 (1) (a) of the Act provides:
‘ The Minister after having followed the procedure provided for in subsection (3) shall appoint no fewer than 11 and no more than 15 persons as members of the Board’
- 2 Section 5 (1) (b) of the Act provides:
‘The chief executive officer shall be a member of the Board by virtue of his or her office’

The provisions of section 5(1) (a) are peremptory; all members of the Board except for the chief executive officer are appointed in accordance with the procedure section 5 (3) of the Act which provides that:

- (a) the Minister in conjunction with the Portfolio Committee appoints an ad hoc committee responsible for inviting nominations from the public

(b) the Portfolio Committee in a consensus seeking manner with the ad hoc committee shall shortlist and cause the individuals so shortlisted to be interviewed in a public and transparent manner

(c) a final shortlist be presented to the Minister who in consultation with the Portfolio Committee appoints members of the Board; in terms of section 5(5) of the Act a member shall be appointed for a term of five years and; on the expiration of the terms be eligible for appointment for another term only; if the office becomes vacant before expiration of the term another person may be appointed subject to the provisions of section 5 (1) (a) of the Act

- 3 Section 5 (7) of the Act provides for the publication by the Minister of the appointment of a member of the Board in the Gazette by stating the date of appointment and in the case of a member appointed to fill a vacancy on the Board also state the term of office.
- 4 Section 6 (1) of the Act provides that the Chief Justice shall preside at the first meeting of the Board and that at such meeting members of the Board are to elect one of their number to be chairperson of the Board and another one to be deputy chairperson.
- 5 Section 6 (2) of the Act provides that the first chairperson and first deputy chair person shall hold office for a term of not more than two years after which an election shall be held annually.
- 6 Section 6 (5) of the Act provides for the election of a new chairperson or deputy chairperson in circumstances where such offices have become vacant as occasioned by circumstances as provided for in section 6(4) (a) to (e); the function for the election a new chairperson and the process are

conducted by the chief executive officer

- 8 Section 10 (1) and 10 (1) (a) of the Act provides that the Board shall at its first meeting or as soon as is practicable thereafter appoint a chief executive officer who, in consultation with the Minister appoint such staff necessary to assist with the functions of the Board, and the chief executive officer is appointed by the Board in accordance with the regulations made Minister in terms of section 10(7) of the Act.

- [6] It was contended by the thirteenth respondent that the meeting of the 10 June 2008 was the Board's 58th meeting and not its first as averred by the applicant. Having regard to the above provisions, the founding affidavit as at paragraph 12 , the thirteenth respondent's answering affidavit as at paragraph 18.1 and the applicant's reply thereto, I find sufficient confirmation that the meeting of the 10 June 2008 was not the first respondent's first Board meeting as envisaged by the Act. The applicant does not dispute the fact that the first respondent had been in existence since the Act came into operation. In fact it had been so for at least twelve years before the applicant's appointment as chief executive officer. The applicant does not explain what prevailed before the meeting of the 10 June 2008 regarding the situation of the Board and its members. She had been in her position since March 2007. She was only suspended during February 2009. Having regard to the Act and the purpose for which the first respondent was established, the applicant and the first respondent could only have fulfilled the functions for which the first respondent was established with the existence of the Board. In order for me to find in favour of the applicant in respect of the first prayer I would have to find that the Board had not been properly constituted since the 10 June 2008. This would result in the absurd situation of nullifying all the functions of the Board including those of the applicant since that

8.

time. I am of the view that this is not what was intended by the applicant as gleaned from this application and from the urgent application which was heard by the Labour Court after the suspension was extended (which application was dismissed with costs). I am therefore not satisfied that the applicant has made out a case to support a finding that the Board had not been properly constituted when a decision to suspend her was taken.

Reviewing and setting aside the decision to suspend

[7] After the first letter of suspension was issued, applicant referred a dispute of an unfair labour practice to the CCMA. According to the Certificate of Outcome, annexure '1' the dispute remained unresolved as at 2 April 2009 and the dispute was referred to arbitration. Thereafter and on the 8 June 2009, a settlement was reached and this was followed by an application to the Labour Court in order to make the said settlement an award in terms of section 142A of the Labour Relations Act 66 of 1995. The applicant does not state whether this application was proceeded with, or abandoned or what the outcome of the application to the Labour Court was. It is not clear whether the applicant re-referred the same dispute and why this very same dispute was placed on the arbitration roll of the CCMA before it was struck off on the 21 August 2009. On the 11 September 2009 the suspension was extended. The applicant approached the Labour Court on an urgent basis and applicant sought the following relief:

“(a) Declaring the extension of the suspension of the Applicant by the Respondent

as unlawful and unfair.

- (b) Declaring the extension of the suspension of the Applicant by the Respondent to be substantively and/or procedurally unfair.”

[8] Having regard to the founding affidavit, and as submitted on behalf of the second and thirteenth respondents it is not clear on what basis the applicant deems this court to have jurisdiction to review and set aside her suspension, for example, she has not demonstrated that the suspension constituted administrative action and that it was determinable under PAJA and therefore reviewable by this court; she has not made out a case to show that the matter was reviewable under the common law. It was evident from her conduct since suspension that she considered the dispute regarding her suspension to be determinable under the LRA. She also entered into a settlement agreement as contemplated in the LRA. The precautionary suspension and the extension of such suspension being intertwined, the suspensions cannot be adjudicated separately. In both instances and as demonstrated above, applicant challenged the procedural and substantive fairness of her suspension by availing herself to the dispute resolution procedures under the LRA. Furthermore, the applicant has not advanced reasons why the urgent application before the Labour Court was dismissed with costs.

[9] In **Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC)** at paragraph 75 Van Der Westhuizen J states:

“ In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the

applicant has chosen to invoke the court's competence. While the pleadings-including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits-must be interpreted to establish what the legal basis of the applicant's claim is.....If however the pleadings properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction."

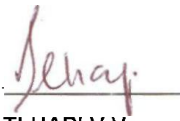
[10] In my view, the thrust of applicant's complaint was rooted in the alleged 'violation to the right to fair labour practices', it being the suspension and what the applicant believed to be an unreasonable time frame within which the disciplinary action taken against her was expected to be finalised. In *Gcaba supra* the approach to be adopted by this court was settled and at paragraph 70 it is stated:

"Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it."

The LRA charts the process to be followed until such time that a dispute is adjudicated by the Labour Court and this is so even where an unfair labour practice is alleged. I therefore conclude that the applicant has failed to make out a case for the review and setting aside of her suspension.

[11] In the premises the following order is made:

" application is dismissed with costs"

A handwritten signature in red ink, appearing to read 'T. Lhapi', is written over a horizontal line.

TLHAPI V V

(JUDGE OF THE HIGH COURT)

ATTORNEYS FOR THE APPLICANTS : SAMBO-MLAHLEKI ATTORNEYS

ATTORNEYS FOR THE RESPONDENT : MKETSU & ASSOCIATES INC