



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY.

Reportable

Case No: 2356/2017

In the matter between:

JOHN TLHOBOGANG GOEIEMAN

APPLICANT

And

NORTHERN CAPE GAMBLING BOARD

FIRST RESPONDENT

**MEC: DEPARTMENT OF FINANCE, ECONOMIC
DEVELOPMENT AND TOURISM
NORTHERN CAPE**

SECOND RESPONDENT

Heard: 18 February 2019

Delivered: 31 May 2019

Judgment

Phatshoane ADJP

The background:

- [1] This is an application by Mr John Tlhobogang Goeieman, the applicant, to review and set aside the decision by the Northern Cape Gambling Board ("the Board"), the first respondent, terminating his contract of employment. He entered into employment with the Board on 13 February 2012 as a licensing & investigation manager. He was appointed to act as the chief executive officer (CEO) of the Board with effect from 01 June 2013 until 30 June 2014.

- [2] On 10 December 2015 the applicant was suspended from the services of the Board. Two months later, on 10 February 2016, he received a notice calling upon him to attend a disciplinary hearing on various acts of misconduct he allegedly committed while he was the acting CEO. The charges he faced included corruption; maladministration; gross negligence in performing his duties; soliciting funds for a third party; and putting the name of the Board into disrepute.
- [3] The applicant explained that on the dates in respect of which his disciplinary enquiry was scheduled to be heard, 14 and 15 April 2016, he received a telephone call from the MEC for the Department of Finance, Economic Development and Tourism, Northern Cape ("the MEC for Finance"), the second respondent, requesting that "the parties convene a meeting in order to resolve the matter." On this basis, his union representative sought a postponement of the disciplinary hearing which was refused by the chairperson of the tribunal. The hearing proceeded in his absence and on 07 June 2016 the chairperson issued a ruling dismissing him from the services of the Board. Three days later, on 10 June 2016, he received a letter from the CEO of the Board which communicated the decision of the Board to terminate his services. This is the impugned decision.
- [4] The Acting CEO of the Board, Ms Lesego Seametso, attested to the answering affidavit on behalf of the Board. She disputed that the applicant and his union requested a postponement of the disciplinary hearing. They abandoned the enquiry without the approval of the chairperson following their unsuccessful bid to have the chairperson recuse himself. In light of this, she says, the disciplinary hearing proceeded in the applicant's absence.
- [5] On 11 June 2016 the applicant lodged an internal appeal against the decision of the Board. Save to acknowledge receipt on 19 August 2016, the office of the MEC for Finance did not revert to him with regard to his appeal or its outcome. He also lodged a complaint with the Office of the Public Protector in June 2016 and requested that the Public Protector investigate whether the Board was properly constituted when it dismissed him. In addition, during December 2016, he filed an unfair dismissal dispute with the Commission for Conciliation Mediation and Arbitration ("the CCMA").

- [6] The Public Protector found the applicant's allegation, that the Board was not properly constituted, to have been substantiated. It reasoned that the Department of Finance, Economic Development and Tourism, Northern Cape, had flouted the Northern Cape Gambling Act, 3 of 2008 ("the Gambling Act") in appointing the Board.
- [7] Based on the findings by the Public Protector the applicant abandoned his alleged unfair dismissal dispute he lodged with the CCMA and approached this Court for redress. He contended that the decision of the Board is susceptible to being reviewed and set aside in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").
- [8] Ms Seametso says that the Public Protector did not engage the Board prior to settling its report. She urged that the report not be considered for purposes of this judgment as the Public Protector had failed to observe the *audi alteram partem* principle. In any event, she contended, the report is vague, incomplete and irregular because it does not set out how the conclusion reached therein was arrived at. For instance, she explained, the Public Protector does not specify to what extent the Board members were disqualified to hold office.

The analysis:

- [9] The Board took a point *in limine*, contending as it were, that the review was lodged 12 months following the impugned decision, and therefore, outside the 180 days provided for in PAJA. In explaining the delay the applicant states that he received the Public Protector's report on 07 April 2017 which triggered the filing of the present review. On 10 May 2017 his erstwhile attorneys, Phakedi Attorneys, directed a letter to the respondents which highlighted, *inter alia*, that the Board was improperly constituted when it took the impugned decision. The MEC for Finance was requested to give audience to the applicant with a view to finding a solution to the apparent impasse. In view of the fact that his attorneys did not provide him with a progress report he approached a new set of attorneys, Gqadushe Attorneys, during June 2017, who also let him down. He consulted his current attorneys in August 2017. In view of the prodigious record that had to be

obtained his attorneys were only able to settle the application and file it on 06 October 2017.

- [10] Section 7(1) of PAJA does not provide that an application must be brought within 180 days after an applicant became aware that the administrative action was tainted by irregularity. The clock starts to run when the reasons for the administrative action becomes known (or ought reasonably to have become known) to the applicant.¹ In this case, as I see it, the clock started ticking when the report of the Public Protector came to the applicant's attention. He filed the review approximately 182 days following receipt thereof, only two days outside time allowed in PAJA. Regard being had to the insignificant delay and the plausible explanation proffered condonation should be granted. To hold otherwise will manifestly defy the tenets of justice.
- [11] The main thrust of Mr Motlounge's argument, for the respondents, is that this review raises a quintessential right to fair labour practice which ought to be resolved in terms of the dispute resolution mechanisms provided for in the Labour Relations Act, 66 of 1995 ("LRA"). He argued that the applicant was found guilty, during his disciplinary hearing, on various acts of misconduct which are serious in nature. The termination was fair and lawfully effected based on the outcome of the disciplinary proceedings.
- [12] Mr Motlounge contended that the jurisdiction of this Court to determine the application is ousted because the Labour Court has exclusive jurisdiction to determine the review. He drew support for his argument from *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*.² Ms Stanton, for the applicant, in her countervailing argument contended that this review is founded on s 6 of PAJA.
- [13] *Sidumo* (supra) largely dealt with the review of arbitration awards issued by CCMA and the review test applicable to those awards. In that case it was held, *inter alia*, that a commissioner conducting a CCMA arbitration is performing an

¹ *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at 238 para 41

² 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC).

administrative function and that PAJA did not apply to arbitration awards issued in terms of the LRA. The case before us does not concern the review of an arbitration award issued by the CCMA or any other related forum. *Sidumo* is thus distinguishable. The dictum relied upon by the respondents in that case finds no application here.³

[14] Jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case. Where a challenge is mounted against the Court's jurisdiction the applicant's pleadings are the determining factor and must be interpreted to establish what the legal basis of the claim is. Where 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.⁴

[15] As already alluded to, the applicant abandoned the dispute he filed with the CCMA when he became privy to the findings of the Public Protector that the Board was improperly constituted when it took the decision to terminate his services. His grounds of review draws its origin from those findings. He contended that the Board acted unreasonably and unlawfully in terminating his services because it had no authority to do so by reason of not being properly constituted in terms of s 3 of the Gambling Act.

[16] Section 1 of PAJA provides:

'(A)ministrative action means any decision taken, or any failure to take a decision, by —

(a) an organ of state . . .

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect'

³ The dictum in paras 88-102 of *Sidumo* judgment.

⁴ See *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) 263D-G para 75

[17] Although not pertinently raised by the parties, it is important to consider whether the impugned decision was administrative in nature and whether it involved exercising a public power or performing a public function in terms of an empowering provision. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*⁵ the Constitutional Court held that the test for determining whether conduct constitutes 'administrative action' is not dependent on whether the action concerned is performed by a member of the executive arm of government. The question is whether the task itself is administrative or not. The Constitutional Court further held that the implementation of legislation is an administrative responsibility which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33 of the Constitution⁶. Action taken in carrying out the responsibility to develop policy or initiate legislation cannot be construed as being akin to administrative action for the purposes of s 33. See also *Minister of Defence and Military Veterans v Motau and Others*⁷ where the following was said:

[44] In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers — the source of the power and the extent of the discretion afforded to the functionary — are ancillary in that they are often symptoms of these bigger questions.'

[18] What is central to the present review is the implementation of a provincial legislation, Northern Cape Gambling Act, 3 of 2008, by the MEC for Finance. On the basis of what is enunciated in the above case law I am of the view that the impugned decision constitutes an administrative action which is justiciable within the purview of PAJA.

⁵ 2000 (1) SA 1 (CC) at 67 paras 141-142

⁶ Section 33 of the Constitution of the Republic of South Africa Act, 108 of 1996 provides in part that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

⁷ 2014 (5) SA 69 (CC) at 86 para 44

[19] Section 3 of the Gambling Act provides:

‘3. Composition of the Board.—

- (1) The Board consists of no more than 8 members appointed by the responsible Member, with due regard to women and disabled persons, of whom—
 - (a) one member must be admitted to practise as a legal practitioner in the Republic and has, for a cumulative period of at least five years after having so qualified, practised as a legal practitioner or performed services related to the application or administration of the law;
 - (b) one member must be qualified as an accountant or auditor in the Republic and has, for a cumulative period of at least five years after having so qualified, practised as an accountant or auditor;
 - (c) not more than three members must, with due regard to regional, social, religious and other community interest in the Province—
 - (i) have proven business acumen or applicable knowledge or experience in the field of community and socio-economic development; and
 - (ii) be fit and proper to represent the community at large; and
 - (d) not more than three must be appointed by virtue of their proven business acumen and knowledge of the gambling industry.’

[20] Section 7 provides:

- “(7) Before being appointed a member of the Board the candidate must submit to the responsible Member an affidavit in which such candidate declares that he or she—
 - (a) is eligible for such appointment; and
 - (b) is not disqualified in terms of this Act from such appointment.”

[21] In summarising its findings as contained in its report the Public Protector partly stated the following:

- “5.1.1.1 that the Board consist of six members including the CEO.
 - 5.1.1.2 that all members submitted affidavits as required by the Act.
 - 5.1.1.3 that all members submitted curriculum vitae.
 - 5.1.1.4 that out of all the members only two did not submit their certificates to enable this office to confirm their alleged qualifications. These are Ms Katz and Mr Andrews.
 - 5.1.1.5 that with regard to specific qualifications required by the act only the chairperson of the Board has the required qualification and experience to be a member of the Board, together with Mr Thobeli and Mr Hendricks.
 - 5.1.1.6 that Mr Thobeli and Mr Hendricks both qualify for the requirement of community development and Mr Kgoabone (chairperson) qualifies for the legal practitioner’s requirement.
 - 5.1.1.7 that the rest of the members do not qualify to be members of the Board.
 - 5.1.1.8 that Ms Katz worked as the PA to the CEO of the Free State Gambling and Racing Board. This does not qualify her for the requirement of the person having proven business acumen and knowledge of the Gambling industry....
7. The CEO has a total of five years and two months working experience, of which only 3 years and 2 months at management level.
 8. That makes the CEO’s appointment irregular and unfair as according to the Act such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act..

Our preliminary findings in this matter was that the complaint was founded because the constitution (the composition) of the NCGB (Northern Cape Gambling Board) was done *ultra vires* the law as envisaged in the Northern Cape Gambling Act. Further that the CEO of the Board was improperly appointed as stated above.

However, during the investigation it was also established that the MEC has disbanded the Northern Cape Gambling Board and that the CEO has resigned from his position. This office will not continue with the final report as the remedial action that was to be recommended has already been implemented.”

[22] As already highlighted, the respondents took issue with the acceptance by this Court of the Public Protector’s report as evidence of its non-compliance with the Gambling Act. It is important to state that the findings of the Public Protector are dealt with perfunctorily by the respondents in their papers. They are challenging the procedure that was followed leading to the issuing of that report as opposed to the substantive basis of the report. In other words, nothing is averred by the respondents to the effect that the report was factually or legally incorrect or irrational.

[23] The Public Protector is not cited as a party in this proceedings. The procedure it followed leading to its report is also not apparent from the papers. However, it would appear from the excerpt referred to earlier, that the Public Protector sought some information, for instance, academic certificates from the members of the Board.

[24] The function of the Public Protector is to investigate, report on and remedy maladministration. It is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order.⁸

[25] The effect of the Public Protector’s power to order remedial action that has to be taken by the defaulting organs of state was determined in *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and*

⁸ See *Minister of Home Affairs and Another v Public Protector* 2018 (3) SA 380 (SCA) at 390 para 37

*Others*⁹, and *Economic Freedom Fighters v Speaker, National Assembly and Others*¹⁰. The SCA remarked as follows in *Minister of Home Affairs and Another v Public Protector*:¹¹

'[5]....In effect, the SABC (SCA) held, and the *Economic Freedom Fighters* case confirmed, that the *Oudekraal* principle [*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)] applies to decisions of the Public Protector: her decisions cannot be ignored (or trumped by parallel processes) and unless they are set aside on review, they must be obeyed and given effect to. In this sense, they are binding and not mere recommendations.'

[26] The principles established in the above cases apply squarely to the present matter. It was not up to the respondent to simply remain supine and argue that the Public Protector's report is vague, incomplete and irregular without having challenged and set it aside by means of a review.

[27] The persons identified as comprising the Board are intended to achieve a balanced Board with the necessary skills and expertise to meet the purpose. The Board has a regulatory statutory architecture to which it owes its existence and from which its powers and obligations are derived.¹²

[28] The principle of legality is an incidence of the rule of law. The legislature, the executive and judiciary are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.¹³ Seen in this context, the decision of the Board does not withstand scrutiny.

[29] The Board acted irregularly in terminating the applicant's services when its own composition was fraught with irregularities. An invalidly constituted Board would not be in a position to take a valid decision. As a consequence of this, any decision taken by it will be unlawful and invalid. To borrow from Innes CJ in

⁹ 2016 (2) SA 522 (SCA) ([2015] 4 All SA 719

¹⁰ 2016 (3) SA 580 (CC) (2016 (5) BCLR 618

¹¹ 2018 (3) SA 380 (SCA) at 382G-383A para 5

¹² *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 28 and para 34.

¹³ *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA)

*Schierhout v Minister of Justice*¹⁴ what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done. The ineluctable implication of this is that the decision ought to be reviewed and set aside.

[30] If an application in the normal course for the review of administrative action succeeds, the default position is that an applicant is entitled to no more than the setting aside of the impugned decision and its remittal to the decision maker to apply his or her mind afresh. Only in exceptional cases would the Court arrogate the decision to itself by substituting the administrative decision or correcting a defect resulting from the administrative action.¹⁵ This is not an exceptional case and neither is the decision capable of being substituted and/or corrected. I make the following order.

Order:

1. The decision by the Northern Cape Gambling Board, the first respondent, dated 10 June 2016, in terms of which Mr John Tlhobogang Goeieman's (the applicant's) contract of employment was terminated, is reviewed and set aside.
2. The first respondent and MEC for the Department of Finance, Economic Development and Tourism, Northern Cape, the second respondent, are to pay the costs of the application on party and party scale, jointly and severally, the one paying the other to be absolved.



Phatshoane ADJP
Northern Cape Division, High Court.

¹⁴ 1926 AD 99 at 109

¹⁵ See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (fn2) at 2437 para 98.

O'Brien AJ concur in the Judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPLICANT:

Adv A Stanton

Instructed by Duncan & Rothman

FOR THE FIRST AND

AND SECOND RESPONDENTS:

Adv SE Motloung

Instructed by Office of the State Attorney