

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 89564/14

3/5/2017

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED
	
SIGNATURE	DATE
	2/5/2017

In the matter between:

**ASSOCIATION OF TEST PUBLISHERS OF
SOUTH AFRICA**

APPLICANT

and

**THE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

1ST RESPONDENT

THE MINISTER OF LABOUR

2ND RESPONDENT

**THE HEALTH PROFESSIONALS COUNCIL OF
SOUTH AFRICA**

3RD RESPONDENT

J U D G M E N T

MALI J

- [1] This is an application for an order declaring Proclamation 50 published in Government Gazette 37871 null and void and of no force and effect.
- [2] The applicant is a voluntary association, which is a non-profit organisation representing providers of tests and assessment tools and services related to education, employment, certification / licensing or clinical issues. It further describes itself as representing the South African stakeholder group that specializes in developing, importing, validating, providing training in and distributing tests and assessments used in a variety of contexts in South Africa. According to the applicant, its membership comprises of the most prominent and reputable test publishers in South Africa.
- [3] On 16 January 2014 the Employment Equity Amendment Act ("*EE Amendment Act*") was passed by Parliament and published in the Government Gazette 37238. Section 30 of the Employment Equity Act ("*EE Act*") read as follows:
- "this Act is called the Employment Equity Amendment Act 2013, and comes into operation on a date proclaimed by the President by proclamation in the Gazette".*
- [4] On 25 July 2014 Proclamation, 50 duly signed by the President of the Republic of South Africa ("*The President*"), the first respondent and the Minister of Labour ("*The Minister*") the second respondent was

published in the Government Gazette 37871. The President determined 1 August 2014 as the date of operation on which the EE Amendment Act would come into operation.

- [5] Prior the amendment by the EE Amendment Act, referred to above, section 8 of the EE read as follows:

"8 Psychological testing and other similar assessments

Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

- (a) has been scientifically shown to be valid and reliable;*
- (b) can be applied fairly to all employees;*
- (c) is not biased against any employee or group."*

- [6] From 1 August 2014 Section 4 of the EE Amendment Act read as follows:

"8 Psychological testing and other similar assessments

Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

- (a) has been scientifically shown to be valid and reliable;*

- (b) *can be applied fairly to all employees;*
- (c) *is not biased against any employee or group; and*
- (d) ***has been certified by the Health Professions Council of South Africa established by section 2 of the Health Professions Act, 1974 (Act 56 of 1974), or any other body which may be authorised by law to certify those tests or assessments.***

[Para. (d) added by s. 4 of Act 47 of 2013 (wef 1 August 2014).]"

- [7] The EE Amendment Act accordingly introduced section 8 (d) as an additional requirement in that psychological testing and other similar assessment be certified by the third respondent.

ISSUE

- [8] The issue to be determined is whether Proclamation 50 published in Government Gazette 37871 on 25 July 2014 ("*Proclamation 50*") is null and void and of no force or effect to the extent that it brings into operation the amendment of section 8 of EE in terms of section 4 of the EE Amendment Act.

LAW

- [9] It is firmly established that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality which is part of that law. This principle was entrenched in the case of **Pharmaceutical Manufacturers of South Africa in Re Exparte President of the Republic of South Africa**¹. In that matter the President by Proclamation in the Government Gazette had brought into operation the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998. The act in question was brought without any schedules to the Act or regulations having been made. The court held:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

- [10] The court *inter alia* stated the following:

¹2000 (2) SA 674 (CC).

"The decision to bring the Act into force before the regulatory framework was in place, viewed objectively, is explicable only on the grounds of error. There is no dispute about this..."

- [11] In determining the rationality of the Executive's action the test is also emphasised in **President of the Republic of South Africa and others v South African Dental Association of South Africa and another**² wherein the following is held:

"This Court must therefore determine whether the President's decision is rationally related to the purpose for which the power was given. This is an objective enquiry, unaffected by any good intentions the President may have had."

MOTIVATION FOR THE EE AMENDMENT ACT

- [12] The purpose of the President' power to bring the EE Amendment Act into operation cannot be understated. The importance and the intended good in bringing the EE Amendment Act into operation cannot be explained more than it is, as will be shown below.
- [13] It is common cause that during the process of developing the EE Amendment Act in question the third respondent made a submission to the Department of Labour Parliamentary Committee on Labour. In the said submission the third respondent recorded in paragraph 2 as follows:

² CC 201/14 at paragraph 14 page 9

"development of psychological testing in South Africa developed in an environment that was characterized by the unequal distribution of resources based on racial categories (black, coloured, Indian and white). Consequently, psychological testing was used as a tool to perpetuate the colonial and apartheid myths of white supremacy and black inferiority. The advent of a democratic dispensation saw the transformation of psychology to a profession that started to be responsive to the socio- cultural needs of South African people".

[14] Second and third respondents allude to the importance of EE Amendment Act. In the affidavit of the second respondent the significance of the EE Amendment Act is emphasised. It is stated that the EE Amendment Act is concerned with workplace advancement of employees from designated groups and the equal and non-discriminatory treatment of all employees.

[15] It is further stated that from historical experience is that certain psychological tests applied were not properly and scientifically adapted to the cultural diversity of South Africa, tended to unfairly discriminate against certain groups or individuals and/or were applied to discriminate in this way. This had the effect that certain groups or individuals were unfairly excluded from employment by the use of psychological tests and other similar assessments. Third respondent recognised the question of test classification to be controversial as far back as April 2006.

ARGUMENT

- [16] On behalf of the applicant it is submitted that the President's decision to put the EE Amendment Act into operation was irrational and failed the constitutional requirement of legality in that the introduction of section 8 (d) is premature. The reason behind the submission is that there is no framework in place regulating the certification of psychological testing and other similar assessments by the third respondent. There is no test in place that has been certified as a psychological test. Accordingly there is therefore nothing to be certified by the third respondent.
- [17] The applicant is offended by the coming into operation of the amendment in that the introductory paragraph of section 8 of the EEA refers to "psychological testing and other similar assessments" and the fact that no mention was made in the proposed new section 8(d) of the EE Amendment Act as to the type of tests that needed to be certified by the third respondent.
- [18] The applicant further complains that there is no regulatory structure in place publishing the objective criteria for the classification of assessment as psychological assessments or as "*similar assessments*". The board of the third respondent does not make a distinction between psychological and non-psychological tests. The complaint is further that there are no published objective standards or

criteria rationally determined against which tests are rated for certification.

- [19] Prior to the amendment of the EE Act by the EE Amendment Act, the third respondent classified psychological tests and not psychometric tests. Furthermore third respondent neither **certified** psychological or psychometric tests. In certain instances third respondent issued a certificate confirming **classification** of a psychological test. (own emphasis).
- [20] It is further submitted that amendment had the effect of immediately prohibiting the use of tests which were then being used without first having established procedures and criteria to obtain certification of such tests. What further exacerbates issues is that the introduction of section 8 (d) has the effect that in any psychological test or other similar assessment that has not been certified by the third respondent, the use of that test or assessment is prohibited.
- [21] The oral submission on behalf of the applicant is that there is nobody or institution in place to conduct the certification of tests. The only certification available or being conducted is certification for classification purposes which is done by Psychometrics Committee of the Professional Board. By implication the third respondent is not empowered to certify the Health Act, it is clothed with the authority to certify the Equity Act. Respondent's counsel objected to this submission because it is not in the founding affidavit. I fully agree with

respondent the applicant should stand by their submissions in the founding affidavit.

- [22] It is not in dispute that before the promulgation of section 50, on 8 August 2013, the applicant made a submission to the Parliamentary Portfolio Committee for Labour. The purpose of the said submission was to raise concerns that no mention was made in the proposed new section 8 (d) of the EEA as to the type of tests that needed to be certified by third respondent. It would seem that no satisfactory consideration answer was given to the said comments.
- [23] Submissions on behalf of the respondents are that there is an enabling framework for the application of the amendment, therefore the decision of the President is not irrational. The system used by the third respondent prior the amendment is still applicable. There is a Policy in place consisting of the existing material applied by the third respondent known to everybody, there should arise no confusion.
- [24] Regarding the above submissions respondents referred to the case of **Natal Joint Municipal Pension Fund and Endumeni Municipality ("Endumeni")**³. In Endumeni the court is enjoined to look at the existing material known. The material known in this matter does not support the purpose for which the policy referred to by the respondent. Firstly the applicant's complaint is wider than requiring a policy document. It concerns the entire framework that encapsulates

³ [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

relevant regulations. Secondly even if the said policy bears any relevance , same deals with classification of tests and not certification of psychological test. Certification is a gravamen of this matter.

[25] The respondents did not address the question of distinction between psychological and non-psychological tests. Without fear of repetition, it would seem that the framework required is very nuanced and comprehensive in that what is needed *inter alia*, is the publication of information in regard to the information that needs to be included as evidence for the certification of tests by test developers or publishers and timelines regarding the process of certification of tests submitted for certification.

[26] According to the applicant on 20 November 2014 third respondent confirmed that its professional board was still in the process of developing new regulations relating to the development, control and classification of Psychological tests. It was stated that the said regulations were in draft form and should be finalised in 2015. It has been submitted on behalf of the respondents that the making of new regulations is intended to improve the current regulatory framework. I cannot accept this contention, the current regulatory framework or policy does not provide for certification of Psychological tests. In that event there is nothing to improve if there has been nothing established from the onset.

- [27] It is conceded by the respondents that other similar assessments which are not psychological assessments are not covered by the Policy in place. There is therefore no infrastructure and neither framework for same. In essence the respondents concedes the invalidity of the promulgation in question in respect of similar assessments.

EXISTENCE OF FRAMEWORK FOR CERTIFICATION OF PSYCHOLOGICAL TESTING

- [28] What remains to be determined is whether there is a framework for certification of psychological testing. It is apparent from the submissions that the policy referred to by the respondents as the existing material is designed for the classification for the purpose of evaluation of psychological testing not for certification of same. There is no classification leading to certification of psychological testing.
- [29] According to the undisputed version of the applicant, the applicant once resorted to court per case number 12942/09. The issue pertained to the lack of clarity in the issued certificate of the third respondent. The Notice published by the Board of the third respondent was declared to be void and of no force and effect. It would seem that the issue has not yet been resolved. The same pattern emerges in the present matter.

- [30] Oral submissions on behalf of the respondents are that the words "*certify*" and "*classify*" bear one meaning. What has always been classified could simply be certified. It therefore follows that there is a grapple with the meaning of the two words, "*certify*" and "*evaluate*".
- [31] The EE amendment Act does not make provision for the definition of the word "*certify*". The Concise Oxford Dictionary meaning of the word *certify* is (i) formally attest or confirm, (ii) officially recognize as possessing certain qualifications or meeting certain standards and (iii) officially declare insane. THESAURUS meaning of the word "*certify*" is (i) establish reality, (ii) consent, (iii) verify, (iv) prove, (v) qualify, (vi) make certain, (vii) inform, (viii) confirm, (ix) prove true, (ix) guarantee.
- [32] The Concise Oxford Dictionary meaning of "*evaluate*" is (i) form an idea of an amount, (ii) number or value of assets, (iii) Mathematics find a numerical expression or equivalent for (an equation, formula, or function). Thesaurus meaning of *evaluate* is (i) rationalize, (ii) enumerate, (iii) measure, (iv) estimate, (v) criticize, (vi) price.
- [33] The traditional approach, the golden rule, to interpreting a document is that ascertaining the intention of the parties to a contract the words used in it must be given their ordinary grammatical meaning. The exercise is conducted with application of the rules of grammar, dictionary meaning assigned to them in previous judicial decisions unless such words lack clarity or are incapable of bearing more than

one meaning; in which event the evidence of surrounding circumstances/ background facts should be considered.

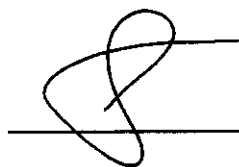
- [34] The word used in the EE Amendment Act is clearly "*certify*". It is apparent from the dictionary meaning as indicated above that it does not mean the same thing as "*classify*". Furthermore reading the EE Amendment Act as a whole and the circumstances attendant upon its coming into existence, the apparent purpose to which the provision appears ; in the present case even if more than one meaning was possible the legislature could not have intended to use the words classify and certify interchangeable. See Endumeni above.
- [35] As was earlier indicated, the promulgation of the Act in question brings into effect the prohibition of the use of tests without being certified, resulting into the illegality of uncertified psychological testing by the third respondent. The purpose for which the power is given to the third respondent is certification of psychological testing and similar assessments; there is no room for errors and or mishaps when the issue gets finally addressed. Rationality must prevail.
- [36] Certification is the highest standard of compliance set in any environment, it follows that certainty is a non- negotiable. In *casu* regulatory structure dealing with classification and certification of psychological tests is of necessity. This is in order to give effect to the

requirement in the amended Section 8 of the EE Act that tests and assessments be classified as psychological tests and be certified by the third respondent.

[37] Accordingly, the President's decision was irrational and therefore invalid.

[38] In the result the following order is made;

1. That Proclamation 50 published in Government Gazette 37871 on 25 July 2014 is null and void and of no force or effect to the extent that it brings into operation the amendment of section 8 of Employment Equity Act, Act 55 of 1998 in terms of section 4 of the Employment Equity Amendment Act, 2013, Act 47 of 2013.
2. That Section 8 of the Employment Equity Act, Act 55 of 1998 as it pertained on 31 July 2014 continued, and continues, unabated as from the aforesaid date.
- 3 That this order be published by way of one notice in the Government Gazette, and a notice in each of the Sunday Times, Rapport and City Press.
4. That the respondents are ordered to pay costs of this application, costs to be paid jointly and severally the one paying the other to be absolved. Costs to include the cost of Senior Counsel.

**N.P. MALI****JUDGE OF THE HIGH COURT****Counsel for the Applicant:****Adv. Maritz SC****Instructed by:****MACROBERT INC****Counsel for the 1st & 2nd Respondents:** **Adv. Maenetje SC****Instructed by:****THE STATE ATTORNEY****Counsel for the 3rd Respondent:****Adv. Makgalemele****Instructed by:****GILDENHUYS MALATJI INC****Date of hearing:****29 & 30 November 2016****Date of Judgment:****3
2 May 2017.**