

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case number: **2023/2012**

In the matter between:-

S.S. MOGOERA - LEEPILE

First Applicant

K.P. MOKOENA

Second Applicant

M.P. KAMBULE

Third Applicant

P.M. MOTSITSI

Fourth Applicant

and

**THE FREE STATE GAMBLING AND
LIQUOR AUTHORITY**

First Respondent

**MEC: FREE STATE DEPARTMENT OF
ECONOMIC DEVELOPMENT, TOURISM &
ENVIRONMENTAL AFFAIRS**

Second Respondent

CORAM: SNELLENBURG, AJ

JUDGMENT: SNELLENBURG, AJ

HEARD: 13 JUNE 2013

DELIVERED: 24 OCTOBER 2013

- [1] The applicants apply, by way of motion procedure, for orders
- (i) that the first respondent, the Free State Gambling and Liquor Authority, be ordered in specific performance of an agreement concluded between it and the National Education, Health and Allied Workers Union and the Public Services Association on 13 September 2010, to place each of the four individual applicants in the employment positions identified and earmarked for them with the first respondent;
 - (ii) that the applicants be allowed to perform their services in terms of their individual employment agreements with the first respondent, and
 - (iii) that first respondent be ordered to pay the cost of the application, save in the event that second respondent opposes the application in which event the applicants seek an cost order jointly and severally, the one to pay the other to be absolved.
- [2] The Free State Liquor Board, as constituted by the Free State Liquor Act 3 of 2007, was de-established and its functions absorbed in terms of the Free State Gambling and Liquor Authority Act 6 of 2010 [the FSGLAA] which commenced on the 11th of June 2010.
- [3] In terms of the FSGLAA the Liquor Board and Gambling Authority were amalgamated.
- [4] Section 142(b) of the FSGLAA, before amendment, provided that all employees of the Liquor Authority and the Free State Gambling and Racing Board must be transferred to the First Respondent.

- [5] Prior to amalgamation and in compliance with Section 197 of the Labour Relations Act 66 of 1995, the first respondent, the National Education Health and Allied Workers Union [NEHAWU] and the Public Services Association [PSA] entered into an agreement [the agreement].
- [6] The agreement is a so-called migration and placement agreement which was ostensibly signed on behalf of the Free State Gambling and Liquor Authority on the 13th of September at Bloemfontein and on behalf of NEHAWU on the same day. The copy of the agreement appended to the papers was not signed on behalf of the PSA nor does it appear to have been ratified by the authorised structure.
- [7] The respondents do not deny the existence of the agreement. From the facts in the papers that are either common cause or which cannot be denied it appears that the agreement did come into existence and that performance in terms of the agreement did take place, barring of course the dispute in this matter. I therefore accept that the agreement did come into existence for purposes hereof.
- [8] In the agreement, migration and placement are referred to interchangeably to mean the process of appointing, placing, or repositioning employees from one post or position in an existing organisational structure to another position in a new structure within the Free State Gambling and Liquor Authority, all of which are governed by the principle that strategy defines structure,

function defines roles and persons to fulfil the role within the old structure into the new structure.

- [9] Transfer is likewise defined as a transfer of contracts of employment that arises because of the merger into Free State Gambling and Liquor Authority by operation of law in terms of Section 197 of the Labour Relations Act 66 of 1995, e.g. transfer to the Free State Gambling and Liquor Authority.
- [10] The purpose of the agreement is set out in clause 4 thereof stating, *inter alia*, that the agreement seeks to ensure the permanent placement of employees as far as possible by means of migration and placement to posts provided for in terms of the new organisational structure that arose out of the merger of the erstwhile Liquor Authority and Gambling into FSGLA. Future migrational placement of employees will thereafter be determined and guided by the applicable conditions of employment or policies adopted from time to time by the FSGLA.
- [11] Application of the agreement is defined or set out in clause 5, assuming that the agreement applies to all employees employed by the Gambling and Racing Board and Liquor Authority at commencement of the agreement, who are or who may potentially be affected by merger and the Free State Gambling and Liquor Authority new organisational structure. The agreement applies to placement of employees within the Liquor Authority and Gambling and Racing Board, it being understood and accepted that transfers of staff e.g. the transfer to the Free State Gambling and Liquor

Authority, will be dealt with in accordance with the applicable legislation, most notably, Section 197 of the Labour Relations Act.

- [12] It is the respective applicants' case that they were all employed by Free State Liquor Board and, as such, that the collective agreement is applicable to them.
- [13] The applicants state that in lieu of the fact that they were employed by the Free State Liquor Board and were included in an organogram which was appended to the agreement, that as such that they are entitled to an order that the first respondent comply with the agreement and, as stated, place them in employment positions identified and earmarked for them within the first respondent. They request that they be allowed to perform the services in terms of the individual employment agreements with the first respondent.
- [14] The applicants furthermore state that they were told to remain at the erstwhile offices of the Liquor Authority, Bloemfontein, but that all the office automation and tools required for performance of their functions were removed by the first respondent. Although they have continued to receive their salaries, they have not been able to perform any functions.
- [15] The applicants referred a dispute in terms of the agreement on 5 March 2012 and in their words they 'received no joy'.
- [16] The dispute was thereafter referred to the General Public Services Sectoral Bargaining Council. The Applicants state that this dispute

has not been resolved and is still pending, but they contend that it pertains only to benefits that have been withdrawn. It is therefore their case that the process is irrelevant for purposes of adjudication of the present application.

[17] It is the applicants' case that the agreement was entered into and concluded to their benefit and as such they are entitled to the orders for specific performance thereof.

[18] The respondents state that the applicants were all employed by the Free State Department of Economic Development, Tourism and Environmental Affairs [the Department]. The respondents state that all four the applicants were seconded to the Free State Liquor Authority in terms of Section 15(3)(a) & (b) of the Public Services Act Proclamation 103 of 1994. This is not denied by the applicants.

[19] It is thus the respondents' case that the agreement does not apply to the applicants as they are not employees of the Gambling Racing Board and Free State Liquor Authority. The respondents also state that the applicants have not been placed in the present organisational structure and that there are no positions available in the structure in any event. The respondents contend that the second respondent is entitled to absorb the applicant within the Department who employs them. The second respondent deposed to the fact that the applicants have not lost their employment benefit within the relevant Department and that they have at all relevant times been paid by the Department. The Department is entitled to instruct them to remain in the offices where they are

until such time as proper arrangements are made for the absorption within the Department. In the alternative the Respondents aver that specific performance is a discretionary remedy and that in the circumstances of the matter the Court should elect not to exercise its discretion in favour of the applicants. The respondents' canvassed certain other defences as well which, in light of the findings below, need not be dealt with.

[20] The respondents have appended the current organisational structure evidencing the fact that the Applicants have indeed not been absorbed into the first respondent's organisational structures.

[21] On evaluation the facts of the matter I am not satisfied that the applicants have made out a proper case for relief that they pray for. This conclusion is premised on the following findings:

21.1 It is common cause that the applicants were indeed appointed by the Free State Department of Economic Development, Tourism and Environmental Affairs. They were not employed, alternatively was an employment contract never entered into and concluded between them and the erstwhile Free State Liquor Authority.

21.2 It is common cause between the parties that the applicants were seconded by their employer, the relevant Department, to the Free State Liquor Authority during 2008.

[22] To my mind, the fact that the applicants were seconded to the Free State Liquor Authority and would receive day to day instructions

from the Free State Liquor Authority with regards to performance of duties does not *per se* bring about an employment agreement between the Free State Liquor Authority and them. It therefore does not necessarily mean that they are 'employed' by the said entity. I am astute to the fact that these are motion proceedings. I am not satisfied on the evidence presented that I can find that the applicants were employed by the Free State Liquor Authority and that the collective agreement would indeed be applicable to the respective applicants.

[23] The finding in this regard must, as far these are motion proceedings, not be seen as being *res iudicata* of this issue. It will have the effect of an order of absolution of the instance.

[24] The applicants suffer no prejudice currently save that they wait to be utilised. On their version they have referred a dispute with regards to certain benefits which they aver has been unilaterally taken away from them, to the relevant Bargaining Council and that matter is still pending.

[25] In light of my findings above it is not proper, nor necessary to consider any other issue, save the matter of costs.

[26] For the aforementioned reasons I am inclined to dismiss the application, subject to the qualification that the order will not have the effect of finally disposing of the dispute between the parties. It has the effect of an order of absolution of the instance.

[27] The general rule with regards to cost is that it follows the event.

- [28] In this matter and for the reasons that follow I am of the view that the interests of justice will be best served if the normal order with regards to cost is departed from.
- [29] When the applicants, through Legal Wise, placed the first respondent on terms with regards to the agreement on which they rely, the second respondent relied on the amendment of Section 142 of the FSGLAA, which amendment was subsequently not even argued on behalf of the respondents. The fact is that none of the defences raised in the answering affidavit was preferred in reaction to the letter of demand.
- [30] Counsel on behalf of the Respondents conceded that the Court may take this aspect into consideration in adjudicating what a just cost order in this matter would be if the application is dismissed.
- [31] Conversely, the applicants, after receipt and perusal of the answering affidavit, saw fit to persist with the application. I am alive to the fact that the applicants have in fact not made out a case for the relief they seek. But they were not favoured with the true grounds on which the respondents would oppose the application. I am also aware of the fact that the applicants are salaried persons who have lost some of their benefits and that they are not being utilised notwithstanding receiving a salary. Their stance that they want to be utilised is commendable. They may very well have elected to go about things in a very different manner had they been afforded a proper response to their

demand. They may also have elected to rather pursue other remedies.

[32] I am also of the view that the obligation to put forward the terms of the applicants' employment in this matter rested equally on the applicants and the respondents who should without ado be able to produce and disclose the same. It does not alter the applicable principles in adjudication of the matter, but it certainly contributed to the eventual fate of the matter.

[33] In light of the aforementioned I am of the opinion that the just and equitable award of cost in this matter would be that each party should pay his / its own cost.

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

1. The application is dismissed;
2. Each party is to pay his / its own cost of the application.

N. SNELLENBURG, AJ

On behalf of the 1st, 2nd and
3rd applicants:

Adv. S. Grobler
On instruction of:
Qwelane Theron & Van Niekerk
BLOEMFONTEIN

On behalf of the 4th applicant:

Adv. S. Grobler
On instruction of:
Ponoane Attorneys
BLOEMFONTEIN

On behalf of the 1st &
2nd respondents:

Adv. D.T. Skosana
On instruction of:
State Attorney (IP Gough)
BLOEMFONTEIN

NS/sp