



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA87/2018

In the matter between:

IVEDA VALERIA SMITH

Appellant

and

NATIONAL LOTTERIES COMMISSION

First Respondent

KGOANA MAMOGALE: CHAIRPERSON OF

THE DISCIPLINARY HEARING

Second Respondent

Heard: 06 June 2020

Delivered: 25 June 2020

Coram: Davis, Sutherland JJA and Savage AJA

JUDGMENT

SUTHERLAND JA

Introduction

- [1] Who may dismiss Mrs Smith? That question is the origin of the controversy in this curious case.

- [2] The options are the National Lotteries Commission (NLC) or the Minister of Trade and Industry (MTI). The NLC tried to discipline Smith for an alleged material non-disclosure upon taking up “employment” with it. The sanction upon a finding of guilt would almost certainly be dismissal as Smith fulfilled a role requiring the utmost integrity as a member of the NLC’s distributing agency. At the disciplinary enquiry, Smith advanced the contention that the NLC had no power to discipline her; rather the MTI had to be privy to such a decision and hence the institution by the board of NLC of a disciplinary enquiry into her alleged conduct was unlawful. The chair dismissed the point and held that she was an employee of the NLC ,and therefore, the NLC had the power to discipline and dismiss.

- [3] Smith then brought an application before the Labour Court in which the relief sought was a review of the chair’s decision, a declarator that the NLC “has no right and/or jurisdiction to institute disciplinary proceedings against [her], a member of the distributing agency” and a declarator that the proceedings instituted by the NLC are unlawful.

- [4] It is the order and judgment of the Labour Court that are before this court. The outcome of those proceedings brought under section 158 (1) (h) of the Labour Relations Act 66 of 1995 (LRA) was that the Labour Court dismissed the application. The grounds for dismissal were twofold. The primary ground was that there was a material non-joinder in that the MTI was not a party. The secondary reason was a decision based on the court’s discretionary power not to grant an interdict; in this case, premised on the notion that Smith should exhaust her remedies available to her to challenge any adverse outcome of the disciplinary proceedings rather than litigate *in media res*. Who has the power to dismiss Smith was not decided.

- [5] The matter has been addressed in this court under the circumstances that have prevailed as a result of the Covid 19 pandemic and the lockdown imposed. By agreement of the parties, this court dealt with the matter without the benefit of oral argument and relying entirely on the heads of argument filed.

The Context of the controversy

- [6] The NLC is a statutory body and an organ of state. It came into being pursuant to the provisions of the Lotteries Act 57 of 1997. Its function is self-evidently to run the lottery. This involves receiving large sums of money. Also, it must pay prize-winners. Moreover, the purpose of the statute is to raise huge sums of money to distribute to worthy causes.

- [7] The distribution of money to charities and other selected beneficiaries is obviously sensitive and susceptible to corrupt practices. As part of a system of checks and balances, the function of the selection and distribution is ring-fenced. An entity called the “distributing agency” in terms of section 22(3), is responsible for considering, evaluating and adjudicating “an application for a grant or following a recommendation of funding of worthy good causes from the Commission after research conducted in terms of this Act.” Section 26A then provides that:

‘The distributing agency contemplated in section 22(3) shall be-

(a) appointed by the Minister in terms of this Act; and

(b) accountable to the board.’

- [8] Section 26F provides that:

‘The distributing agency is accountable to the board and the board may-

(a) determine the operational policy for the performance of all financial, administrative and clerical functions of the distributing agency;

(b) determine or direct or order the performance of any other matter or research intended to enhance the optimum functioning of the board and the distribution of grants;

(c) ensure that the distributing agency performs its function independently and without fear, favour or prejudice; and

(d) ensure that the distributing agency adheres to any policy, directive or code of ethics approved by the board and applicable within the public sector.'

[9] The institutional relationship between the Board of the NLC and the distributing agency is thus clear from these provisions of the Lotteries Act

[10] Who are the persons who serve in the distributing agency? Section 26 B (2) – (4) provides for the power to appoint members and the methodology thereof:

'(1)

(2) The number of the distributing agency members in each category shall be determined by the Minister after consultation with the board in line with the size of the funds in such category: Provided that such number shall not exceed nine in each category.

(3) Members of the distributing agency shall be appointed for a period of five years, which may be renewed only once, to serve on a full-time basis as members of the distributing agency and staff members of the Commission responsible for adjudication of applications for grants or recommendations of funding of worthy good causes received from the Commission.

(4) The Minister may, after consultation with the board-

(a) appoint persons with suitable combination [sic] of qualifications, skills and expertise to consider, evaluate and adjudicate applications for grants or recommendations of funding of worthy good causes received from the Commission on such terms and conditions determined by the Minister in consultation with the Minister of Finance; and

(b) designate one person from amongst the members of the distributing agency as a full-time chairperson, for a non-renewable period of five

years on such terms and conditions determined by the Minister in consultation with the Minister of Finance.

(5)'

- [11] Smith was a person who the MTI appointed pursuant to the power conferred in section 26B (4). This is the font of her case: the MTI appointed her, and *ergo*, no-one else can dismiss her. The argument she advances elaborates on this theme and despite several allusions to members of the distributing agency being accountable to the Board, being staff members of the NLC, parties to employment contracts with the NLC, the thesis is advanced that these circumstances are trumped by the power vested in the MTI which, properly interpreted, includes a critical involvement in any discipline to be instituted, absent which, such proceedings are null and void.

The non-joinder issue

- [12] This point, as already stated, was the issue on which the case was decided *a quo*.
- [13] The appellant has quibbled about the point being taken *mero motu* by the court *a quo* and the absence of an opportunity to postpone the matter to join the MTI. These grumbles fail on the facts. The NLC raised the issue. The court offered an opportunity to apply for a postponement which was not taken up.
- [14] To decide this point, it was unnecessary to decide whether the contention advanced by Smith is correct. Rather, the true enquiry into the joinder question is simply whether the MTI was a necessary party if the argument was to be advanced that no discipline could take place without the MTI's involvement because this was a competence reserved for the MTI.¹
- [15] In my view, it is not enough to say that no relief is sought against the MTI, as is contended on behalf of Smith, to substantiate the absence of the MTI as a party

¹ The necessity test for non-joinder: see, eg: *Judicial Service Commission and Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at esp para 12.

to the proceedings. In the context of the controversy, were a court to hold that the NLC had no power to discipline a member of the distributing agency, it could only reach that conclusion by determining that the power to do so is vested in the MTI. It would never be palatable that, having succeeded in obtaining a declarator excluding the authority of the NLC to discipline, that in subsequent proceedings, the MTI adopted a stance which denied that the authority to discipline vested in that office.

[16] Accordingly, the decision of the Labour court is correct. The MTI must be joined in proceedings to decide whether that office or the NLC has the power to discipline members of the distributing agency. Axiomatically, it is inappropriate to decide the question of who may discipline the members of the distributing agency.

[17] On this ground, the appeal must fail.

[18] Both parties seek a costs order. In accordance with those wishes, costs shall follow the result.

The order

The appeal is dismissed with costs.

Sutherland JA

Davis JA and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv NH Maenetje SC and Adv AM Pheto,
Instructed by Kalamore Chipu Attorneys.

FOR THE RESPONDENT: Adv PM Kennedy SC,

Instructed by Hogan Lovells SA Inc.