



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2023-070358 &

CASE NO: 2023/071032

- (1) REPORTABLE: **NO.**
(2) OF INTEREST TO OTHER JUDGES: **NO.**
(3) JUDGMENT : **2 AUGUST 2024**

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CASE NO 2023-070358

In the matter between –

JET EDUCATION SERVICES NPO

Applicant

And

THE MANUFACTURING ENGINEERING AND
RELATED SERVICES SECTOR EDUCATION AND
TRAINING AUTHORITY

Respondent

Consolidated with –

CASE NO 2023/071032

THE MANUFACTURING ENGINEERING AND
RELATED SERVICES SECTOR EDUCATION AND
TRAINING AUTHORITY

Applicant

AND

JET EDUCATION SERVICES NPO

Applicant

JUDGMENT

(Heard 1 August 2024)

Snyckers AJ:

INTRODUCTION

1. Two consolidated applications served before me. One, the JET application, was brought by JET Education Services NPO, a non-profit organisation active in the education sector. The other, the SETA application, was brought by the Manufacturing, Engineering and Related Services Sector Education and

Training Authority ('MerSETA'). MerSETA is established in terms of the provisions of the Skills Development Act 97 of 1998 ("SDA").

2. The applications concerned a series of transactions concluded between JET and MerSETA between 2018 and 2022. These transactions related to the PSET CLOUD Project, a project in relation to which MerSETA provided funding for the performance of services by JET.
3. The Project was to be completed in phases. Addenda and new contracts were concluded to regulate the deliverables and funding as the Project developed. On 4 April 2023, MerSETA, having notified JET on 30 March 2023 that the Project was suspended and all work should cease, notified JET that the contracts were void and terminated with immediate effect, on the strength of a forensic report said to have been received by MerSETA. This notification was the basis for the two applications.
4. The JET application was one brought under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It contended that the termination of the contracts constituted unlawful administrative action and should be declared unlawful. It had, however, "accepted" what it contended was the repudiation (of contract) entailed by such unlawful termination. It sought an order that the court award it some R19m in what it called 'liquid damages' by way of an appropriate remedy.

5. The SETA application was a so-called self-review. It asked that the decisions to award to JET the funding for Project be declared unlawful and invalid and be set aside.¹
6. The applications were consolidated by order of this court (Vally J) on 21 February 2024.
7. The papers in the applications spanned some 2000 pages.
8. Amongst the papers, from page 1815 onwards, appeared a supplementary affidavit from JET uploaded on Caselines on 18 June 2024.
9. The supplementary affidavit referred to two developments. One is directly relevant to this judgment. The relevant development was a judgment handed down in this court on 8 March 2024 by Moorcroft AJ. It was attached to the supplementary affidavit. This judgment has since been reported as *Manufacturing Engineering & Related Services Sector Education and Training Authority v Social Enterprise Trust* (2024) 45 ILJ 1330 (GJ).
10. The judgment in question concerned what I shall call the SET Project. It was a project funded by MerSETA on the basis of contracts concluded with SET. The judgment concerned an application for self-review by MerSETA of the decision to conclude the agreement regulating the SET project.
11. In the instant case (the JET matter), the self-review is very squarely founded on a forensic report. There are disputes concerning the status and character of

¹ The relevant prayer in the “Republished Notice of Motion” of 7 December 2023 reads as follows: “the decision(s) by the applicant to award discretionary grant(s) to the respondent... is declared unlawful and invalid and is reviewed and set aside.”

this report, and, of course, its contents and findings, but for present purposes these are irrelevant. The report deals with several projects funded by MerSETA. Its bulk deals with the SET project. But it also deals with the PSET CLOUD Project concluded with JET. In both cases the conduct of the Chief Operations Officer of MerSETA, Ms Nomvete, was central to the grievances of MerSETA about the contracts concluded with SET and JET. The other development referred to in the supplementary affidavit, to which brief reference is made above, is the report of 8 April 2024 issued after the disciplinary proceedings initiated against Ms Nomvete, which were pending at the time of the SET judgment. That report found Ms Nomvete not guilty of all charges. It also mentioned that the charges against Ms Nomvete in relation to the JET contracts² had been withdrawn by MerSETA. It does not say why.

12. In the SET judgment, Moorcroft AJ held that the self-review before him fell within the provisions of section 31(1) of the SDA. That subsection confers exclusive jurisdiction on the Labour Court *“in respect of all matters arising from this Act”*. Moorcroft AJ found that the self-review was a matter arising from the SDA. He held *“discretionary grants are allocated in terms of the Skills Development Act.”*³ He referred the application to the Labour Court in terms of s31(3) of the SDA. He also gave a punitive costs order against MerSETA.

13. In the supplementary affidavit, JET adopts the attitude that the effect of the SET judgment is that the MerSETA self-review in relation to the JET Project should follow the same fate as its self-review in the SET judgment. It contends,

² Charge 10.

³ Paragraph 11.

however, that the JET application should not suffer that fate, because “*JET does not rely on the SDA in any way for [its] relief*”. It therefore persists in seeking its relief in this Court, but contends that the SETA application should be referred to the Labour Court.

14. On 22 July 2024, I, at that stage not having seen the contents of the supplementary affidavit,⁴ asked the parties to address me at the hearing *inter alia* on the question whether, in light of certain decisions to which I referred them,⁵ the termination decision was governed by the law of contract or was a matter of administrative law. I mention this because this question assumed prominence, especially in the argument advanced by Mr Maodi for MerSETA, in the jurisdictional question the subject-matter of this judgment, as will appear in what I say below.

PROCEDURE ON JURISDICTION ISSUE

15. In the hearing before me on 29 July 2024,⁶ Mr Bishop, who appeared for JET, and Mr Maodi, for MerSETA, were *ad idem* that I needed to consider and rule upon the jurisdictional issue first, before I could hear the merits of either application. This was obviously correct.

⁴ The practice notes and heads of argument were uploaded on Caselines before the SET judgment and before the supplementary affidavit, and were not updated after them, and only a full reading of the papers before the hearing revealed the existence of these developments.

⁵ *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA) and *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA).

⁶ By then my reading of the papers had included the supplementary affidavit containing the SET judgment.

16. Mr Bishop submitted that this court had jurisdiction to determine the JET application, but not to determine the SETA application. Mr Maodi submitted that this court had jurisdiction to determine both applications.

17. Both parties accepted after some debate that it would be inappropriate, if I were to accept JET's submissions on jurisdiction, for me to refer the SETA application to the Labour Court while continuing there and then to hear the JET application. There were several reasons for this, including that my findings on the merits of the JET application could contradict findings by the Labour Court on the merits of the SETA application – in circumstances where the merits were essentially mirror-images of each other, at least to a very substantial degree. Furthermore, since the SETA application attacked the coming into being of the contracts, and the JET application their termination, it made sense to await a finding on the lawfulness of their coming into being before it became necessary to consider the lawfulness of their termination. Ultimately, again after some debate, neither party saw the consolidation as an insuperable obstacle to a splitting of the applications, with one being referred to the Labour Court and the other being retained in this court but postponed pending the determination of the Labour Court on the other, if the jurisdictional question were to be answered differently for the two applications.

18. Both parties accepted that, if the finding was that the court lacked jurisdiction on both applications, it was appropriate to employ the empowering provisions of section 31(3) to refer the applications to the Labour Court, rather than to dismiss them for want of jurisdiction. There was much debate about costs, which will be dealt with below.

JURISDICTION AND SECTION 31 – ‘MATTERS ARISING FROM THIS ACT’

19. Section 31(3) of the SDA provides as follows:

“Subject to the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters arising from this Act.”

20. The noun used is “matter”. This noun is repeated in subsection (3) that deals with the referral power of the court:

“If proceedings concerning any matter contemplated in subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer the matter to the Labour Court.”

21. In order to determine the scope of the ouster in section 31(1), one must accordingly determine what is encompassed by the notion “matter”, and what by the requirement that it be “arising from” the SDA.

22. These questions must be determined in order to consider the cogency of an argument that a cause of action not founded upon the SDA, nor engaging with

its provisions (or with those of subordinate legislation promulgated under it), is not covered by the ouster in s31(1). Only if such an argument is cogent could there be any merit in the contention that the JET application is not covered by the ouster because it is not founded on the SDA.

23. In argument before me on the jurisdiction question, Mr Bishop for JET, while not abandoning his submission that the ouster did not apply to the JET application, advanced only arguments that supported the application of the ouster to both applications. Put differently, the submissions he advanced as to why the SETA application was covered by the ouster applied equally to the JET application. Mr Bishop did not press the submission that he did not abandon, nor insist that any distinction was in fact cogent.

Submission

24. Mr Maodi for MerSETA, at least initially, relied primarily on consent, or submission, to jurisdiction on the part of JET as a basis for precluding it from objecting to jurisdiction, and submitted that this applied to both applications. Mr Bishop correctly submitted that parties could not competently confer jurisdiction on the High Court in the teeth of a statutory exclusion such as that in s31(1), and referred in this regard to *Snyders v De Jager*.⁷ I have little hesitation in rejecting an argument that, if a “matter” is covered by section 31(1), the parties

⁷ 2016 (5) SA 218 (SCA), para 8.

can nevertheless competently confer jurisdiction on the High Court over such “matter”, and demand the court hear them, by submission to jurisdiction.

“Matters arising from the SDA”

25. In the SET judgment, Moorcroft AJ said that the words “*arising out of*” denoted “*a causal connection between the Act and the harm complained of*”.⁸ The words used in section 31(1) are “*arising from*”.

26. The judgment then appears necessarily to imply that this causal connection was present in a case relating to the lawfulness of a decision by a SETA to give a discretionary grant, due to the finding in paragraph 11 that discretionary grants were allocated in terms of the SDA. I may note that the SETA application in the instant case is to have “*the decision(s) to award discretionary grant(s) to the respondent*” self-reviewed.

27. Mr Maodi submitted in the instant case that MerSETA’s case was not exclusively based on the SDA, but was instead also based on section 217 of the Constitution (I will come to the argument on contract below), and this meant the ouster did not apply. This same argument was rejected by Moorcroft AJ in the SET judgment, who held that even if the causes of action relied upon

⁸ Paragraph 13, citing, albeit concededly in a different context, *National Housing and Planning Commission v Van Nieuwenhuizen* 1952 (4) SA 532 (T) and *Jacobs v Auto Protection Insurance Co Ltd* 1964 (1) SA 690 (W). *Jacobs* dealt with the need for an injury to “arise out of” the driving of a vehicle, and it was held that this required at least *some* causal connection between the driving and the injury. *Van Nieuwenhuizen* is not of much assistance as the statutory words at issue there were “for or in connection with”, and the Afrikaans words (considered in the judgment) “vir of in verband met”.

included s217 and other legislation, this did not mean the ouster ceased to apply.⁹ Although in this regard Moorcroft AJ also invoked the principle of subsidiarity, holding that the primary legislation that was pertinent was the SDA, even if this in turn gave effect to constitutional imperatives,¹⁰ the main reason Moorcroft AJ rejected the multiple cause of action argument was that *“the relief sought by the applicant relates to matters arising from the Act”*.¹¹ This must mean that Moorcroft AJ held that, whatever the cause of action was, if it related to a matter that arose from the SDA, with *“arising from”* implying some causal connection, then the ouster applied. It also implies a reading of the term “matter” that extends beyond the cause of action involved and encompasses the dispute and facts giving rise to the relief sought.

28. Mr Maodi did not seek to distinguish the SET case. He conceded that, if that decision was correct, then it applied to this case. He submitted, however, that it was wrong. I am bound to follow the SET judgment unless I am persuaded that it is clearly wrong.

29. The important question to determine is whether the ouster applies only to causes of action founded in the SDA, or that engage its provisions or those of its subordinate legislation,¹² on the one hand, or, on the other hand, applies to all causes of action that relate to matters that arise from the SDA in the causal sense required in the SET judgment.

⁹ Paragraph 16.

¹⁰ Paragraphs 17 and 18.

¹¹ Paragraph 16.

¹² A challenge to the legality of the Grant Regulations promulgated under s36 of the SDA, for example, would obviously and uncontestedly fall within the ambit of the s31(1) ouster – as in *Business Unity SA v Minister of Higher Education & Training & Others* 92015) 36 ILJ 3057 (LC), para 25.

30. The next question would then be whether the causes of action in the instant case engage the provisions of the SDA, if one assumed a narrower construction of the ouster for purposes of answering the first question.
31. I debated with Mr Maodi the problem MerSETA faced in that its self-review was a public-law legality review, invoking, as one of the main grounds for the unlawfulness of the decisions to give the discretionary grant, the fact that the provisions of the “Grant Criteria and Guidelines” were not followed in respect of the JET grants. These Guidelines are issued as part of the implementation by MerSETA of its duties and powers to determine discretionary grants in terms of the Grant Regulations promulgated in terms of s36 of the SDA. Even if one were to adopt a narrow construction of the requirement of the ouster in s31(1) to encompass only causes of action that engage the SDA, therefore, the basis, or at least a substantive basis, upon which MerSETA brings its application for self-review would appear undeniably to be one grounded in the SDA through its subordinate legislation.
32. Mr Maodi was driven to submit that, if the ouster applied to those causes of action that engaged the SDA, and this included the causes of action based on non-compliance with the Guidelines, the court would still retain jurisdiction over those causes of action that did not, such as s217 of the Constitution, and, in particular, the more appropriate contractual lens through which to view the matter, in light of the authorities on contract and administrative law to which I had referred the parties.

33. Neither application was framed in contract. But Mr Maodi submitted that, after reflection upon the query directed at the parties, MerSETA's submission was that the contractual lens was indeed the more appropriate lens through which to view the matter, and this meant that it did not entail a matter engaging the provisions of the SDA. He invoked reasoning reflected in the *Cape Metropolitan Council* decision referred to above to the effect that the mere fact that statutory provisions constituted the authority upon which a contract was concluded did not mean conduct in terms of that contract was administrative action as opposed to contractual conduct.¹³ The submission was that matters of pure contract were not covered by the ouster in s31(1) and that, properly viewed, however the applications were framed, they were matters of pure contract.

34. To assess this submission is it not necessary, nor in the circumstances appropriate, for me to resolve the question whether the termination decision ought more appropriately to be treated as one in contract or one in administrative law, and in the process to confront the uncertainties that remain in relation to such questions after the *SANPARKS* decision.¹⁴ It is very difficult to make the SETA self-review one of pure contract – as it deals with the legality of having made a decision to offer a discretionary grant, i.e. the decision to conclude the contract, rather than with the legality of conduct as a contracting party, which the decision to terminate could be, invoking *Cape Metropolitan Council*. It would be very difficult, in my view, to ignore the public law character of the decision to offer the grant, and to fail to recognise that it is governed by

¹³ See *Cape Metropolitan Council* para 11.

¹⁴ 2018 (5) SA 177 (SCA): “There is no bright-line test for determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party” – para 37 of the separate concurring judgment of Navsa JA and Davis JA.

the provisions of the regulations promulgated under the SDA, which would make it a matter arising from the SDA, even on a narrow construction of that phrase as covering only causes of action engaging the SDA, as opposed to all causes of action related to matters arising from the SDA in a causal sense. In the interesting use of language employed by the Labour Court in *Services Sector Education & Training Authority & Others v Minister of Higher Education & Training & Others (1)*,¹⁵ the grant authorisations were “*actions taken in connection with the provisions of the SDA*”.¹⁶

35. But in any event, I believe that the proper construction of the term “matter” in section 31 is wider than a cause of action engaging the SDA and encompasses all disputes that relate causally to the SDA or functions performed under the SDA. That would cover the instant disputes between the parties, at least because the grants purport to be the fulfilment by MerSETA of its statutory mandate under the SDA as regulated by the Grant Regulations, and the matter relates directly to the legality of the grants – both in respect of the decision to give them and the decision to terminate them.

36. In this regard, Mr Bishop emphasised the practical and conceptual difficulties that a narrow reading of the term “matter” or the term “arising from” would entail and the strong likelihood that the legislature intended the term “matter” to have a broad enough sweep to enable a dispute related to SDA functions to be determined fully and properly by the Labour Court instead of having portions of the dispute fall under the jurisdiction of the Labour Court and portions under

¹⁵ (2011) 32 ILJ 2225 (LC)

¹⁶ Paragraph 10.

that of the High Court, depending on the extent to which the statutory functions are directly engaged by the cause of action in question. This is a persuasive argument in favour of a broad interpretation of the phrase “matter” such as I find was at least necessarily implied in the finding in the SET judgment.

37. We debated the question where one would draw the line in ousting the jurisdiction of this court when it came to contracts concluded by SETAs. An example Mr Maodi offered was one for the painting of the wall of one of the buildings occupied by the SETA. The attraction of the logic of the argument is that, at some point, in relation to some contracts, the mere fact that the SETA, which is charged with statutory functions under the SDA, is the entity that concludes the contract, cannot make disputes about that contract “matters that arise from the SDA”.

38. One may accept that there should indeed conceptually be such a point while also accepting the *Sorites* paradox¹⁷ that the logical difficulty of locating this point does not mean the transition from SDA arising matters to non-SDA arising matters, when it comes to SETA contracts, does not exist.

39. I agree with Mr Bishop that, whatever contracts concluded by a SETA may be regarded as so far removed from the SDA as not to be capable of being regarded as matters arising from the SDA, the contracts in this case are not amongst them.¹⁸ The contracts in this case concern the very core of the

¹⁷ It is impossible to say at what point (i.e. after exactly how many grains) adding another grain of sand to a few grains of sand would turn the collection of individual grains into a heap of sand. Nevertheless, the real distinction between the concept of a heap of sand and the concept of some grains of sand does not collapse due to this impossibility.

¹⁸ An interesting question in this regard relates to the jurisdictional issue that was decided in *Naicker v Services Sector Education and Training Authority* Case no. 15635/2013, [2015] ZAGPJHC 186 (Keightley J), 27 August 2015, about the concurrent jurisdiction of the Labour Court and High Court in relation to

statutory mandate the SETA discharges under the SDA – the grants it provides in terms of the statutory framework of the SDA. These are matters arising from the SDA, and disputes about their origin and termination are matters arising from the SDA as contemplated in s31(1).

40. Mr Maodi submitted that in the instant case the grievance is that the contract in question was concluded outside the framework of the SDA – it was therefore precisely *not* concluded in the discharge of the SETA's mandate, and for this reason not a matter arising from the SDA. This may at first blush sound attractive, but it would logically mean that the characterisation of a dispute as to whether it arises from the SDA or not would depend on the outcome of the dispute as to whether the provisions of the SDA were in fact properly applied or not – if they were, it would be a matter arising from the SDA, and if they were not, it would not be. This cannot be a tenable basis upon which to include or exclude “matters” from the ambit of the jurisdiction ouster in s31(1).

41. I am therefore of the respectful view that the judgment in the SET matter is correct on this score, and that both applications before me are “*matters arising from*” the SDA as contemplated in s31(1), meaning this court lacks jurisdiction over either application. In the circumstances it would in my view be appropriate to exercise the power under section 31(3) and refer both applications to the Labour Court, as was done in the SET matter on the application in question there.

certain contractual issues that also engaged the provisions of the Basic Conditions of Employment Act. The employer was a SETA, yet it was not suggested that s31(1) ousted the High Court's jurisdiction, despite the fact that the employment contract in question was arguably one “arising from the SDA”, and a dispute about it therefore arguably a “matter arising from the SDA”. Mr Maodi invoked this authority, if not exactly on this particular point.

COSTS

42. Both parties failed in their applications in this court, as the court declined to accept jurisdiction over each application.

43. In the SET matter, it appears that SET took the jurisdiction point both before and after it filed its answering papers to the SETA application, but MerSETA persisted with its application. This led Moorcroft AJ to make a punitive cost order against MerSETA. Moorcroft AJ held that the court retained the jurisdiction, in referring the matter to the Labour Court, to make a cost order in the process. The costs awarded in SET appear to me to have been all the costs of the application, not only the costs wasted in the High Court – significant costs, no doubt the bulk of the costs incurred in the application, would have been incurred in an application that was to serve in the Labour Court, and were not wasted.

44. In the instant case, it would ordinarily, following the usual principles, appear to me to make sense to reserve the costs of the applications for the determination of the Labour Court, as such costs would have been incurred in applications that ultimately ended up serving before that Court as the court of proper jurisdiction, save to order each losing party to bear the wasted costs incurred in the High Court (i.e. the costs incurred in relation to this hearing) relating to its own application.

45. But I was referred to correspondence that had passed between the attorneys after the supplementary affidavit was uploaded that has a significant bearing on the issue of costs.
46. The supplementary affidavit was uploaded on the 18th of June 2024.
47. On 20 June, Mr Maodi's firm wrote to JET's attorneys and intimated that the supplementary affidavit might have rendered the matter not ripe for hearing. The response this elicited was an invitation to seek a postponement and to tender costs, on the basis that JET was ready to proceed. On 21 June 2024, MerSETA through its attorneys proposed that steps be taken to have both applications transferred to the Labour Court by agreement. This elicited no response from JET. This exchange does not form part of the uploaded papers, but it was common cause that its essence had been accurately conveyed to me from the bar.
48. It seems undeniable that, had MerSETA's proposal been taken up, no costs would have been wasted after 21 June in having the matter argued in this court, only to be referred to the Labour Court after argument in this court.
49. I can see no reason, and Mr Bishop did not offer a persuasive one, why JET should not be responsible for those wasted costs. I agree with Mr Bishop that it would not be fair to label JET's conduct in this regard as reprehensible or vexatious and I cannot lose sight of the fact that the party that argued strenuously that this court did indeed possess jurisdiction was MerSETA, not JET, which was the argument that ultimately did not prevail. A punitive order against JET would accordingly not be called for, in my view.

50. In the circumstances it would be appropriate to direct JET to pay the wasted costs incurred in this Court, but to reserve the remaining costs of both applications for determination by the Labour Court.

51. Mr Maodi submitted that the appropriate scale for an order, if not given on an attorney-client basis, would be scale C, given the complexity of the matter. I do not think scale C is warranted for the wasted costs occasioned by the hearing on jurisdiction – and such complexities as the matter may possess on the merits remain preserved in the applications that are now referred to the Labour Court. It appears to me that scale B is an appropriate scale.

52. The following order is made:

- A. The consolidated applications (2023-070358 and 2023/071032) are referred to the Labour Court in terms of section 31(3) of the Skills Development Act 98 of 1997.
- B. Save as provided in C below, the costs of the referred applications are reserved for determination by the Labour Court.
- C. JET is directed to pay all costs occasioned by both applications from 21 June to the hearing, inclusive, on a party and party basis, on scale B.

F Snyckers

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION JOHANNESBURG

The orders in this judgment were handed down in open court by being read into open court on 2 August 2024 and this judgment was subsequently uploaded onto Caselines; the date of the judgment is accordingly 2 August 2024

Heard on: 1 August 2024

Delivered: 2 August 2024

Counsel for the Applicant (JET):

A Bishop

Instructed by:

Dewey Mclean Levy Inc

Counsel for the Respondent (MerSETA):

TJ Maodi (attorney)

Instructed by:

TJ Maodi Inc