



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA82/2014

In the matter between:

MINISTER OF HIGHER EDUCATION & TRAINING

Appellant

and

THE HOSPITAL ASSOCIATION OF SOUTH AFRICA

First Respondent

THE NATIONAL UNION OF PUBLIC SERVICE &

ALLIED WORKERS

Second Respondent

THE HEALTH & WELFARE SERVICES SECTOR

EDUCATION & TRAINING AUTHORITY

Third Respondent

NOZIPHO JANUARY BARDILL AND

FOURTEEN OTHERS

Fourth Respondent

Heard: 19 August 2015

Delivered: 08 December 2015

Summary: Lawfulness of the Minister establishment of SETA in terms of the Skills Development Act – Minister allegedly extending the period of HWSETA – admission made in affidavit confirming extension – Principle that a factual

admission made by a party in an affidavit will be binding on such party and he/she may not adduce evidence to contradict the admission. Court having discretion to release such party from the admission when erroneously made. Evidence notwithstanding admission showing that the Minister not extending HWSETA but establishing the HWSETA for 60 months – admission not binding - Minister's act of establishing the HWSETA invalid because not in accordance with the SDA. Appeal upheld with costs - Labour Court's order on the validity of the establishment of the HWSETA upheld but suspended for four months in order to allow the Minister to validly establish the HWSETA.

Coram: Tlaetsi DJP, C J Musi et Coppin JJA

JUDGMENT

C J MUSI JA

[1] The Labour Court (Matyolo AJ) made the following order:

- '(i) The decision of the Minister taken on 8 April 2011 and published and implemented under Government Notice No 316 in Government Gazette No 34202 in which the Minister approved the Second Respondent's Constitution is reviewed and set aside.
- (ii) The decision to appoint the Third to Seventeenth Respondents by the Minister is also reviewed and set aside. The Minister is given four months within which period the Second Respondent is to be reconstituted in accordance with the 2005 Constitution by appointing members in accordance with that Constitution.
- (iii) The Minister is directed to effect the nomination process for new members in accordance with the 2005 Constitution in line with his extension of the term which expires in March 2016.
- (iv) The Respondents are ordered to pay the costs including costs of the two counsel.'

- [2] The appellant (the Minister) being dissatisfied, appeals, with the leave of the court a *quo*, against the order. Although the appeal was initially directed at the entire order, upon reflection it seems, the Minister changed his stance, during argument before us and directed his attack only against paragraphs (ii) to (iv) of the order.
- [3] The Skills Development Act (SDA)¹ was, *inter alia*, enacted to provide an institutional framework to devise and implement national, sector and workplace strategies to develop and improve skills of the South African workforce and to provide for learnerships that lead to recognised occupational qualifications.
- [4] The sector education and training authorities (SETAs) are the primary vehicles utilised to achieve the objectives of the SDA.² The Minister may establish a SETA with a constitution for any national economic sector.³ A SETA may consist only of members representing organised labour, organised employers and relevant government departments. The Minister may if he/she considers it appropriate and after consultation with the members mentioned above also include any interested professional body or any bargaining council with jurisdiction in the economic sector.⁴
- [5] The Health and Welfare Sector Educator and Training Authority (HWSETA or the third respondent) was established by the Minister in terms of section 9(1) of the SDA. It was cited as the second respondent in the court a *quo*.
- [6] The Hospital Association of South Africa (HASA or first respondent) represents the overwhelming majority of owners and operators of private hospitals and clinics nationally. When the application was launched it represented 210 of the 245 private hospitals and clinics operating in South Africa, when the application was launched. It therefore represented the majority of employers in private hospitals and clinics.

¹ Act No. 97 of 1998.

² The functions of the SETAs are set out in section 10 of the SDA. In terms thereof a SETA must *inter alia* develop and implement a sector skills plan and promote learning programmes.

³ See section 9(1) of the SDA.

⁴ Section 11 of the SDA.

- [7] The National Union of Public Service and Allied Workers (NUPSAW or the second respondent) is a registered trade union representing persons employed in the health sector. The first and second respondents are important stakeholders in the health sector.
- [8] In terms of section 13(1) of the SDA, the Minister must approve the constitution of a SETA for the purposes of its establishment. The Minister, in terms of section 13(2) of the SDA, after consultation with a SETA, may amend its constitution in the prescribed manner.
- [9] The constitution of the HWSETA, which was published on 8 September 2005, in Government Gazette No 28005, recognised the first and second respondents as members of the HWSETA. In terms of clause 9(2) read with clause 9(2)(a) of the constitution, a member of the HWSETA holds office for a period of five years and is eligible for re-appointment at the end of that period. The member shall however vacate the office if he is properly removed by the HWSETA, resigns or dies. Members of the HWSETA were duly approved in terms of the 2005 constitution. Their tenure would therefore end on 31 March 2010.
- [10] It is common cause that the HWSETA was duly established by the Minister in 2005. It is further common cause that on 5 February 2010, the Minister properly extended the HWSETA's establishment to 31 March 2011. The 2005 constitution governed the affairs of the HWSETA during that period.
- [11] The first and second respondents alleged that the Minister further extended the HWSETA's establishment on 11 November 2010, from 1 April 2011 to 31 March 2016, during which period the 2005 constitution would have applied. This was admitted by the Minister in his answering affidavit but later disavowed. I deal with this aspect later in this judgment.
- [12] During November 2010, the Minister published a draft constitution for adoption by all SETAs. The draft constitution was designed to be a model constitution, which, if adopted, would govern the affairs of the SETAs that adopted it. The Minister requested the SETAs and their members to comment on the draft constitution.

- [13] The HWSETA was of the view that nothing in their 2005 constitution offended against or was not in compliance with the SDA. The HWSETA objected to the Minister's and the Department of Higher Education's approach of attempting to foist the draft constitution on the HWSETA. Neither the Minister nor the Department, seemingly, heeded the objections.
- [14] During November 2010 to March 2011, various versions of the draft constitution were published on behalf of the Minister. This all happened without proper consultation.
- [15] On 8 April 2011, the Minister, without consulting with the members of the HWSETA, published a list of names of members for the HWSETA in Government Gazette 34202; Government Notice No 316. Needless to say, none of those persons were nominated by the first or second respondent. The list also did not contain any representatives of either of the aforementioned respondents.
- [16] The notice reads as follows:
- 'I, Bonginkosi Emmanuel Nzimande, Minister of Higher Education and Training, has approved the constitutions of the respective Sector Education and Training Authorities (SETAs) established in terms of Government Notices No 1055, No 1056 and No 1057 published in Government Gazette No 33756 of 11 November 2010. The respective constitutions were approved by me in terms of section 13(1) and section 9(1) of the Skills Development Act 1998, in accordance with the approval status as referred to in schedule 1.
- I hereby appoint the chairpersons and members of the respective Accounting Authority for the specific Sector Education and Training Authorities (SETAs) as set out in schedule 1 in accordance with the constitution of the respective SETA. The chairperson and members as contained in schedule 1 are appointed for the period indicated in the said schedule.'⁵
- [17] Notice No R1055 published in Government Gazette No 33756 of 11 November 2010 reads as follows:

⁵ The schedule *inter alia* contains the names of the fourth to eighteenth respondents. They were all appointed from 1 April 2011 to 31 March 2016.

'I, Bonginkosi Emmanuel Nzimande, Minister of Higher Education and Training, after consultation with the National Skills Authority, has under section 9(1) of the Skills Development Act, 1998 read with Government Notice No R1082 of 7 September 1999 as amended, established the Sector Education and Training Authorities (SETAs) as indicated in schedule 1 from 1 April 2011 to 3 March 2016 with a (sic) jurisdiction as indicated in schedule 2...'

- [18] Private hospitals and clinics, in terms of schedule 2 to the notice fall under the jurisdiction of the HWSETA.⁶ The SDA was amended by the Skills Development Amendment Act 26 of 2011, which was passed by the legislature on 27 March 2012 but only became effective on 11 May 2012. The standard constitution for SETAs was published under Government Notice 369 in Government Gazette 35336 of 11 May 2012.⁷
- [19] In the court *a quo*, the Minister resisted the review application on numerous grounds. The court *a quo* rejected all the Minister's defences. Although the Minister attacked all the court *a quo*'s findings in his grounds of appeal, he jettisoned most of them during argument. Mr Hulley, on behalf of the Minister, who was briefed after the Minister filed heads of argument prepared by another counsel, filed supplementary heads of argument directed exclusively at paragraphs (ii) to (iv) of the order of the court *a quo*. In argument before us, Mr Hulley correctly conceded that paragraph (i) of the court *a quo*'s order is, on the facts and the law, unassailable.
- [20] Mr Hulley submitted that the court *a quo* misunderstood the nature of the Minister's decision because the court *a quo* assumed that the Minister had amended the 2005 constitution of the HWSETA whereas the Minister in fact established a new HWSETA. He further submitted that the orders compelling the Minister to reconstitute the board of the HWSETA in accordance with the 2005 constitution are wrong because the court *a quo* wrongly assumed that the constitution of the HWSETA had been extended until 2016 by the Minister.

⁶ See schedule 2 SETA number 11 Sector code 9311B and 9319F.

⁷ The Amendment Act is therefore irrelevant for the determination of the dispute before us because it does not have retrospective effect or application.

[21] It is apposite to deal with the issue of the Minister's admission before discussing and deciding the issues raised by the Minister. The Director-General of the Department of Higher Education and Training expressly admitted, in the answering affidavit, that the Minister extended the HWSETA's establishment on 11 November 2010 from 1 April 2010 to 31 March 2016. The Minister filed a confirmatory affidavit confirming, by implication, the admission made by the Director-General. The Minister did not, in any way or form, seek to withdraw the admission. A factual admission made by a respondent in an answering affidavit will be conclusively binding on such respondent and such party may not adduce evidence to disprove or contradict the admission. In *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd*,⁸ it was said:

'In regard to counsel's first submission, I do not agree that the admission was not a formal admission. It was made in the counterstatement as a formal admission of an allegation made in the statement of particulars, and it constituted what *Wigmore on Evidence* vol IX paras 2588-90 calls a 'judicial admission'. Such an admission is binding upon the party making it, i.e. it prohibits any further dispute of the admitted fact by the party making it and any evidence to disprove or contradict it (para 2590). Compare *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531-2 where Davis AJA said:

"Wigmore (loc cit), speaking of judicial admissions in general refers to the Court's discretion to release a party from the consequences of an admission made in error. It does not seem to me that such a discretion could be exercised, in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading...Here, there has at no stage been any such application to amend. But it is only right to add that in any case I see no valid grounds for thinking that there has been any error."⁹

[22] Section 15 of the Civil Proceedings Evidence Act¹⁰ provides that it shall not be necessary for any party in civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such

⁸ 1994 (2) SA 588 (A).

⁹ At 605H – J.

¹⁰ Act 25 of 1965.

proceedings. A properly made formal admission or judicial admission is therefore beyond proof and disproof.

[23] An admission has serious and important consequences and implications for the party making it. In *AA Mutual Insurance Association Ltd v Biddulph*,¹¹ it was said that “it must clearly and unequivocally appear from the pleadings that the alleged admission was made expressly or by necessary implication, or according to rule 22(3), by omitting to deny or deal with the relevant allegation of fact...”¹² Schwikkard and van der Merwe state that before an admission can be treated as a formal admission, the maker of the admission must intend it to be an admission of a fact which s/he does not wish to dispute.¹³

[24] We must therefore consider whether the Minister made a clear and unambiguous admission. If there was such an admission and it was made in error, the court has discretion to release a party from the consequences of an admission made in error. In *Gordon v Tarnow*,¹⁴ Davis AJA was of the view that the discretion to release a party from the consequences of a judicial admission made in a pleading can only be granted by amending the pleading.

[25] In *Canaric NO v Shevil's Garage*,¹⁵ however, it was stated that where it is clear, after a full investigation, that an admission was made contrary to the facts and where injustice will result from an adherence to the admission, it was to be disregarded.¹⁶ As stated above, there was no application to withdraw the admission in the court *a quo* or before us. We must therefore have regard to the entire answering affidavit to discern whether a clear and unambiguous judicial admission had been made.

[26] In the answering affidavit, the Director-General testified that:

¹¹ 1976 (1) SA 725 (A).

¹² At 375.

¹³ Schwikkard *et al Principles of Evidence* 2nd Ed (Juta 2002) at page 440.

¹⁴ *Supra*

¹⁵ 1932 TPD 196 at 198.

¹⁶ See also *Frosso Shipping Corporation v Richmond Maritime Corporation* 1985 (2) SA 476 (C) at 485C-D.

'In any event, the 2005 constitution lapsed automatically on 31 March 2011 and was never renewed. The applicant's submitted a new constitution for adoption by the Minister.'

[27] At paragraph 32 of the answering affidavit, he stated that:

'Further to the above, the term of office of the members of the previous accounting authority lapsed on 31 March 2011 when the previous authority lapsed and when the constitution lapsed.'

[28] He further stated, at paragraph 75 of the answering affidavit that:

'I admit the publication on 8 April 2011 of the list of members of the HWSETA in the Government Gazette. The persons appointed by the Minister as members of the HWSETA did not have to be persons nominated by the HWSETA. They were appointed in terms of the standard constitution approved by the Minister which replaced the 2005 constitution.'

[29] The above mentioned paragraphs clearly show that the Minister, contrary to the admission made, was of the view that the 2005 constitution had lapsed on 31 March 2011 and could not be extended beyond that date.

[30] There is another strange feature in this case. The first and second respondents did not, in their founding papers, rely on the Government Notice of 11 November 2010 for their assertion that the Minister extended the HWSETA to 31 March 2016. Before us, it was submitted on behalf of the first and second respondents that the Government Notice of 11 November 2010 effected the extension. I accept that they relied on the said notice without expressly mentioning it.

[31] The notice reads that the Minister has established the HWSETA in terms of section 9(1) of the SDA from 1 April 2011 to 31 March 2016. Section 9(1) of the SDA reads as follows:

'(1) The Minister may, in the prescribed manner, establish a sector education and training authority with a constitution for any national economic sector.'

Section 13(1) on the other hand provides as follows:

'(1) For the purpose of the establishment of a SETA, the Minister must approve the constitution of the SETA.'¹⁷

[32] The regulations promulgated in terms of the SDA reads as follows:

'2. Application for establishment as SETA

- (1) Any body, which consists of the members contemplated in section 11 of the Act, may apply to the Minister to be established in terms of section 9(1) of the Act as a SETA.
- (2) An application in terms of subregulation (1) must include –
 - (a) ...
 - (b) ...
 - (c) The constitution of the proposed SETA which specifies the matters referred to in section 13(3)(a)(i) to (xii) of the Act ...

3. Establishment of SETA

- (1) The Minister may direct the Director-General to invite by notice in the Gazette interested parties to comment on an application made in terms of regulation 2 within 30 days from the date of publication of the notice.
- (2) After consultation with the National Skills Authority and considering every comment received pursuant to a notice published in terms of subregulation (1), the Minister may establish a SETA for the national economic sector or sectors applied for by issuing a certificate of establishment as a SETA.
- (3) Subject to subregulation (4) and regulation (v) a certificate of establishment as a SETA is valid for a period of 60 months from the date on which it was issued.
- (4) The Minister may, after consultation with the National Skills Authority and by notice in the Gazette extend the period of 60 months referred to in subregulation (3).
- (5) The provisions of the Public Finance Management Act apply to the period of extension contemplated in subregulation (4).

4. Renewal of certificate of establishment

¹⁷ This was done and the approval was published in Government Notice R1082 in Government Gazette 20442 of 7 September 1999 as amended by Government Notice R106 in Government Gazette 27254 of 4 February 2005.

- (1) A SETA may apply to the Minister for a renewal of its certificate of establishment as a SETA at least 12 months before the expiry date of the certificate of establishment.
- (2) If the Minister is of the opinion that a SETA applying for a renewal of its certificate of establishment is not complying or is unable to comply with any provisions of the Act or these regulations, the Minister may extend the period of 60 months by such additional period as he or she considers necessary to enable the SETA to comply with the relevant requirements in full.
- (3) If the Minister extends the period of 60 months in terms of subregulation (2), the relevant SETA must submit again an application for renewal at least 12 months, or such shorter period as the Minister may determine, before the expiry of the period so extended.
- (4) Regulations 2 and 3 apply with changes required to an application for renewal.'

[33] It is common cause that the procedure prescribed by the regulations was not followed prior to the Minister establishing the HWSETA by Government Notice R1055 of 11 November 2010. There was no application in terms of regulation 1 for the establishment of a SETA in terms of section 9(1) of the SDA. There was no notice published in the Government Gazette in terms of regulation 3(1).

[34] The HWSETA submitted its new constitution and board member nominations on 23 March 2011 to the Minister. However, the Minister rejected both the new constitution and the nominations. The standard constitution was only published in Government Notice 369 in Government Gazette 35336 of 11 May 2012.

[35] In terms of section 13(1) of the SDA, the Minister must approve the constitution of a SETA for purposes of establishing it. When the Minister established the HWSETA by way of Government Notice R1055 of 11 November 2010, he could not have approved any constitution because there was none for him to approve.

- [36] The notice does not purport to extend the HWSETA but establishes it for a period of 60 months. If it was an extension of 60 months one would have expected the Minister to say so because he has the power to extend the initial period of 60 months. The Minister expressly purported to establish the HWSETA for 60 months by way of the Notice of 11 November 2010. The Minister's act of establishing the HWSETA was not in accordance with the SDA and the regulations. The Minister's act was therefore invalid.
- [37] Objectively speaking, the admission that there was an extension from 1 April to 31 March 2016 is incorrect. Having regard to the totality of the answering affidavit, it is also clear from the context thereof that the Minister denied that there was an extension.
- [38] Where it is objectively demonstrated from the papers, without additional evidence, that an admission was erroneously made it would be unfair to hold a party to such an admission. The context of the answering affidavit also ineluctably lends itself to the conclusion that such admission was erroneously made. There was no judicial admission of the kind mentioned in *Gordon v Tarnow* or *AA Mutual Insurance* made in this matter. There is no need in law, justice or fairness to hold the appellant to the admission. In light of all this, it is clear that there was no need to apply to withdraw the admission.¹⁸
- [39] The admission also conflicts with the contents of the government notice. In terms of section 5 of the Civil Proceedings Evidence Act,¹⁹ we may take judicial notice of a government notice and its contents. Section 5 reads as follows:
- '1 Judicial notice shall be taken of any law or government notice, or of any other matter which has been published in the Gazette.
 - 2 A copy of the Gazette, or a copy of such law, notice or other matters purporting to be printed under the superintendence or authority of the Government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be."

¹⁸ *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) at 437C-D.

¹⁹ *Supra*.

- [40] The Minister wrongly admitted that the HWSETA was extended to 2016 whereas his notice of 20 November 2010 clearly states that he established the HWSETA. The context and contents of the answering affidavit, as a whole, read with the government notice of November 2010, show that the admission was not a clear and unambiguous admission in light of the other denials of the Minister, in the same pleading wherein the alleged clear and unambiguous admission was made.
- [41] The upshot of all this is that the 2005 constitution lapsed on 31 March 2011. Nothing could thereafter be done in terms of that constitution. The terms of the respective board members who were appointed in terms of the 2005 constitution also came to an end on 31 March 2011.
- [42] Reverting to the impugned notice of 8 April 2011. Mr Hulley correctly conceded that this notice was unlawful and invalid. He submitted that it ought to be set aside. I agree. In short, the Minister wrote a single standard constitution for all SETAs; he approved the constitutions; he appointed the chairpersons and members of the SETAs; he did not consult with members of the HWSETA and there was no application for the establishment of a HWSETA at the time that the Minister purported to establish one. The Minister's actions were contrary to the SDA and the regulations promulgated in terms thereof. The Minister's actions were not authorised by the law that he purported to have used as authority for his unlawful act.
- [43] The notice of 8 April 2011 ought therefore to be set aside. Paragraphs (ii) and (iii) of the court *a quo*'s order should also be set aside because the 2005 constitution lapsed on 31 March 2011.
- [44] This Court, like the court *a quo*, has discretion to grant an order that is just and equitable including an order declining to set aside the administrative action complained of.²⁰

²⁰ See *Bengwenyama Minerals (Pty) Ltd and Others v Gemorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at paras [82] – [85], *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at paras [29] and [56].

- [45] A lot of water has flowed under the bridge since the Minister's unlawful act. The HWSETA as constituted by the Minister has functioned unaffected by the review application. The parties are *ad idem* that it would take approximately four months to lawfully set up the HWSETA. The SDA was amended after the review proceedings were instituted. The Minister would have to act in accordance with the amended legislation.
- [46] It would be just and equitable under these circumstances to suspend the order that I intend to make. The Minister ought to pay the costs of the appeal. It is clear that the Minister's unlawful act and his initial refusal to accept the unlawfulness of his act only to partially capitulate on appeal is the main reason why this matter was taken so far. Although both parties were partially successful on appeal, equity and the law dictates that the Minister should pay the costs of the appeal. There is no reason to interfere with the court a *quo*'s costs order.
- [47] The appeal succeeds to the following extent:
- (a) Paragraphs (ii) and (iii) of the order of the court a *quo* are set aside.
 - (b) Paragraph (i) of the court a *quo*'s order is suspended for a period of four months from the date of this judgment for the Minister to establish a HWSETA in terms of the law.
 - (c) The Minister is ordered to pay the costs of the first and second respondents, including the costs of the two counsel.

C J Musi JA

Tlaletsi DJP and Coppin JA concurred with C J Musi JA.

APPEARANCES:

FOR THE APPELLANT:

Adv. G. I Hulley SC

Instructed by the State Attorney Johannesburg

FOR THE RESPONDENT:

Adv. B. E. Leech and Adv. M.C. Kgatla

Instructed by Werkmans Inc.

Sandton