

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA111/2018

In the matter between:

BUSINESS UNITY SOUTH AFRICA

Appellant

and

MINISTER OF HIGHER EDUCATION AND

TRAINING

First Respondent

THE NATIONAL SKILLS AUTHORITY

Second Respondent

THE NATIONAL SKILLS FUND

Third Respondent

Heard: 20 August 2019

Delivered: 16 October 2019

Summary: Minister re-promulgating Regulation that was set aside by the Labour Court– issue for determination whether the re-promulgation of the Regulation constitutes irrational or arbitrary action or whether the Minister provided an explanation why the very same regulation had been promulgated in the face of a previous declaration of invalidity.

Held that no clear explanation from the Minister as to what he, as the decision-maker who promulgated Regulation 4 (4) considered had changed in the context giving rise to the decision to promulgate the same regulation...Absent any cogent justification, a decision to eschew an appeal against a judgment of a court and then, shortly thereafter, to reproduce the very same decision which has already

been held to be unlawful, is an action which is manifestly at war with the rule of law. Labour Court's judgment set aside and appeal upheld with costs.

Coram: Davis and Coppin JJA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This dispute requires the answer to one critical question: is the first respondent (the Minister) entitled to promulgate a regulation in exactly the same terms which a court has found to be unlawful.
- [2] The court *a quo* answered this question in the affirmative. The court *a quo* found that the impugned promulgation of the regulation did not offend the principle of illegality, nor did it contravene any of the provision of the Promotion of Administrative Justice Act ('PAJA') and thus "vitate the administrative action taken by the Minister in re-promulgating Regulation 4 (4) in 2016". It is this finding, with the leave of the court *a quo* which has been appealed and, in terms of which appeal, appellant contends the order should be set aside.

The factual background

- [3] The Skills Development Levies Act 9 of 1999 established a compulsory levy scheme in terms of which employees were required to pay levies in order to fund education and training as envisaged in the Skills Development Act 97 of 1998 ('SDA'). The amount payable was calculated at 1% of the total amount of remuneration paid by an employer to its employees. In terms the Sector Education and Training Authority's ('SETA') Grant Regulations Regarding Monies Received by a SETA and Related Matters (published in Government Gazette R713 of 18 July 2005 and amended by Government Notice R88 of 2 February

2007 ('the 2005 Grant Regulations')), an employer who paid the skills development levy could claim 50% of these levies back in the form of a mandatory grant, if it complied with the eligibility criteria as set out therein. These grant regulations were repealed by the 2012 Grant Regulations, which were promulgated in Government Notice R990 of December 2012.

- [4] For the purposes of this judgment, there were two fundamental changes. In the first place, Regulation 4 (4) reduced the mandatory grant that an employer could claim back from 50% to 20% of the total levies paid by the employer. In addition, the 2012 Grant Regulations introduced Regulation 3 (12), in terms of which, a "sweeping mechanism" was introduced which effectively provided that at the end of a financial year, it was expected that a SETA must have spent or committed to spend at least 95% of the discretionary funds available to it by 31 March of each year. A maximum of 5% of uncommitted funds could be carried over to the next financial year. In terms of Regulation 3 (12), the remaining surplus of discretionary funds had to be paid back by the SETA as of 1 October of each year into the National Skills Fund.
- [5] Both of these regulations were the subject of litigation which was heard by Coetzee AJ in the Labour Court on 24 June 2015. The appellants (who were the applicants in that case) applied to review and set aside the 2012 Grant Regulations insofar as Regulations 3 (12) and 4 (4) were concerned. Coetzee AJ upheld their application on two grounds being, that the Minister had failed to consult the National Skills Authority on the content of these Regulations and, particularly on the two regulations regulating the mandatory grant and the sweeping mechanism. In addition, Coetzee AJ found that the reduction of the mandatory grant was irrational "in relation to the stated purpose for the reduction" and further, that the sweeping mechanism was *ultra vires* the relevant provisions SDA.
- [6] The Minister appealed the order of the Labour Court but only against the setting aside of Regulation 3 (12). In the interim, that is on 13 January 2016, the Minister

published Government Notice 239592 in which, after consultation with the Skills Development Authority, he re-promulgated Regulation 4 (4). Hence the appeal against the order of Coetzee AJ did not require this Court to deal with the rationality or reasonableness of Regulation 4 (4) but only with Regulation 3 (12). This Court dismissed the Minister's appeal.

- [7] In essence, the appellant now contends that the judgment of Coetzee AJ was binding insofar as the status of Regulation 4 (4) is concerned. This part of the order had not been overturned on appeal; indeed, an appeal was not lodged by the Minister and hence, in the view of appellant, this precluded the Minister from re-promulgating Regulation 4 (4) in exactly the same terms which the Labour Court had held to be legally wanting.

Issue Estoppel

- [8] The case on appeal raised two legal bases for a decision in favour of appellant, being issue estoppel and the principle of legality. The case presented by appellant did raise the argument of issue estoppel although not in these precise terms nor in any major detail in the written argument received by this Court. Issue estoppel has been described in *Boshoff v Union Government* 1932 TPD 345 at 350 as follows:

'Where the decision set up as *res iudicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms; but, beyond these limits, there can be no such thing as a *res iudicata* by implication. '¹

¹ This is a passage from Spencer Bower *Res Judicata* cited with approval by Greenberg J (as he then was)

- [9] Whatever the debate about whether the court in *Boshoff* developed our law of issue estoppel along the lines of English law, it is clear that the enquiry which a court must now undertake, if the question of issue estoppel arises, is to determine that the parties are the same and whether the same issue has arisen again. See *KBI v Absa Bank Bpk* 1995 (1) SA 653 (A). To determine the application of the doctrine in this case, the only question is whether the dispute is *res judicata*; that is the same disputed issue has already been decided in the judgment of Coetzee AJ and between the same parties.
- [10] A two-stage enquiry is thus mandated: firstly a court is required to determine what was finally decided by the court whose decision is said to have created the bar and, secondly, to examine the essential findings of this judgment and to decide whether any of this findings is also an essential element of the impugned claim or defence.²
- [11] The argument developed by Mr Oosthuizen, who appeared together with Mr Pio on behalf of respondents, was that, even though Regulation 4 (4), as promulgated in 2016 was the same as that which had been set aside by Coetzee AJ, the justification for the re-promulgation had changed, in that the context in which the Minister had made the decision had altered. Accordingly, the doctrine of issue estoppel was not applicable to the present dispute.
- [12] Given the view that I adopt to this dispute, it is unnecessary to decide whether issue estoppel should be applied. My reason is that the principle of legality must apply to the facts as I have outlined them as well to the arguments which were raised by respondents in defence of the judgment of the court *a quo*.

Legality

² See LAWSA Estoppel Volume 18 para 76.

- [13] In the written arguments presented by both of the parties, there was a debate as to whether the provisions of PAJA applied to this case. For the reason that, in view of the court *a quo*, the promulgation of regulations constitutes administrative action as defined in PAJA. In *Mostert v Registrar of Pension Funds* 2018 (2) SA 53 (SCA) at para 8, the Supreme Court of Appeal offered a word of caution as to whether the Constitutional Court decision in *Minister of Health and another NA v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) constituted clear authority for the proposition that the making of regulations by a Minister is administrative action for the purposes of PAJA.
- [14] Mercifully, there is no need in this case to resolve this question to determine where or the balance of authority as divined from the various judgments in the *New Clicks* decisions at the Constitutional Court, may lie. The Constitutional Court in a *Minister of Defence v Motau and others* 2014 (5) SA 69 (CC), unfortunately only in footnote (28), did state that the correct order of inquiry is to determine first whether PAJA applies and then, only if it does not, the Court said that what is demanded in the application of the general constitutional principle of legality which flows from the principle of the rule of law. In this case, the uncertainty regarding the application of PAJA and the clear linkage between the rule of law and the nature of the facts in the present dispute dictates that the enquiry can be conducted on the basis of legality.
- [15] It was agreed by the parties and, correctly so, that the promulgation of regulations is an exercise of public power which cannot be conducted in an arbitrary or rational fashion. As Chaskalson P said in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 148:
- ‘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.'

- [16] The crisp question therefore for determination in the present case is whether the re-promulgation of the Regulation 4 (4) constitutes irrational or arbitrary action or whether the Minister has, in his papers in this case presented sufficient argument to show that there was a different context which prompted him re-promulgate the regulations and hence that he was justified in his apparent circumvention of the order of Coetzee AJ.
- [17] In this connection, the enquiry must now turn to an examination of the answering affidavit of the Minister in which he was required to motivate the basis upon which the promulgation of the same Regulation 4 (4) was rational, notwithstanding the earlier judgment. In his affidavit, the Minister referred to a process of consultation which took place with the National Skills Authority on 11 September 2015 and which consultation was designed to deal with the judgment of Coetzee AJ.
- [18] The Minister then summarised the contents of a series of slides which were prepared for a presentation of 11 September 2015 and which was made by one "Boshoff and Erra at Zimbali KwaZulu Natal". These slides appear in the record as they form part of the Rule 53 record of decision which appears to have been made available to appellant. Thereafter, the Minister's affidavit sets out the contents of a special board meeting of the National Skills Authority of 2 October 2015 and a further meeting of the same authority on 3 November 2015 at which it appeared that the authority supported the Minister with regard to the re-promulgated Regulation 4 (4).
- [19] The affidavit then poses the question "how the issues in the judgment were addresses". To this Minister provides the following answer:

'In terms of the process I have quoted except of the record where 2/3 majority of member of the NSA supported the re-promulgation of Regulation 4 (4). I have referred to all the relevant paragraphs and sub-paragraphs as well as minutes

and memorandum which were directed to myself by both the Chairperson of the NSA and Director-General as well as various minutes of the NSA where such a decision was taken. I refer in this regard to what I have said in the preceding paragraphs when delaying with the record.'

- [20] The only other attempt in his affidavit in which he seeks to answer the question which he posed appears in the following paragraph:

'It is my contention that NSA through this document has supported the process of re-promulgating the Regulation 4 (4) and justification and the rationale for doing so in this document. This document despite attempts by the applicant to canvass a contrary view speaks for itself and should be considered by the court as the basis for the re-promulgation. As I have indicated it addresses the two issues that the court was concerned with during the judgment of August 2015. The two issues were the process that was followed in the promulgation of the 2012 Grant Regulations and whether the Regulations were reasonable and rational. I have in this regard addressed these issues by referring the Honourable Court to the document appearing at pages 33 to 53 of the filed record.' (That is the slides from the presentation of 11 September 2015)

- [21] There is, in short, no clear explanation from the Minister as to what he, as the decision-maker who promulgated Regulation 4 (4) considered had changed in the context giving rise to the decision to promulgate the same regulation and hence a fresh justification for promulgating exactly the same regulation, notwithstanding that it had been held to be unlawful by a court, which judgment had never been appealed. As Joffe J said in *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (t) at 324 F – G:

'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our

established practice would be destroyed. A party would not know what case must be met.'

- [22] Unlike in *Executive Officer, Financial Services Board v Dynamic Wealth Limited* 2012 (1) SA 453 (SCA) at 462, this was not a case where the slides, to which I have made reference, had to be considered as evidence. The issue before this Court is whether the Minister as the decision-maker provided an explanation in his answering affidavit as to his reasons for why the very same regulation had been promulgated in the face of a previous declaration of invalidity. The very least that could have been expected from the Minister was a clear statement in his answering affidavit as to why the context, which would justify the re-promulgation of Regulation 4 (4) had changed sufficiently to render his decision justifiable in the circumstances. The Minister simply repeated aspects from the slides taken from the presentation by Boshoff and Erra, without either comment or any basis as to how he had applied his mind to the contents thereof. In other words, the affidavit merely summarises the contents of slides of a third party which appear earlier in the record.
- [23] It is therefore not possible for this Court to divine the reasons which motivated the Minister, as a decision-maker, to re-promulgate Regulations 4 (4) nor is it possible to assess and interrogate in any meaningful way the cogency of any justification that could have been offered for his decision, and which the Minister, as the basis of clear rules of procedure was obliged to set out in this answering affidavit.
- [24] The principle of legality stems from the overarching principle of the rule of law. Absent any cogent justification, a decision to eschew an appeal against a judgment of a court and then, shortly thereafter, to reproduce the very same decision which has already been held to be unlawful, is an action which is manifestly at war with the rule of law. In this case no clear justification was offered for the decision by the Minister which, absent an explanation in his answering affidavit, flew in the face of a court order. Regrettably no such

justification was set out in clear terms in the answering affidavit deposed to by the Minister. For this reason, the only conclusion to which this Court can arrive, is that the decision to re-promulgate Regulation 4 (4) was irrational and lacking in any legal justification.

[25] For these reasons, the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the Labour Court of 31 August 2018 is set aside and replaced with the following:
 - 2.1 Regulation 4 (4) as promulgated in Government Notice 23 of 2016, published in Government Gazette 39592 in terms of s 36 of the Skills Development Act 97 of 1998 is hereby set aside.
 - 2.2 The first respondent is ordered to pay the costs of this application, including the costs of two counsel.

Davis JA

Coppin JA and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv A Myburgh SC and Adv M Seape

Instructed by Bowman Gilfillan Attorneys

FOR THE RESPONDENTS: Adv MM Oosthuizen SC and Adv P C Pio

Instructed by the State Attorneys