

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Reportable

Case

No: J677/2011

In the matter between:

SERVICES SECTOR EDUCATION AND

TRAINING AUTHORITY

IVOR BLUMENTHAL

UASA THE UNION (“UASA”)

FEDERATION OF UNIONS

OF SOUTH AFRICA (“FEDUSA”)

CONFEDERATION OF ASSOCIATIONS

IN THE PRIVATE EMPLOYMENT

SECTOR (“CAPES”)

ASSOCIATION OF PERSONNEL

SERVICE ORGANISATIONS OF

SOUTH AFRICA (“APSO”)

BEVERLEY ANNE JACK

LEON GROBLER

CLIVE EDWARD WICKS

SHADRACK MOTLUONG

FEROZA FAKIR

1st Applicant

2nd Applicant

3rd Applicant

4th Applicant

5th Applicant

6th Applicant

7th Applicant

8th Applicant

9th Applicant

10th Applicant

11th Applicant

And

**THE MINISTER OF HIGHER EDUCATION
AND TRAINING**

1st Respondent

ACTING DIRECTOR

HIGHER EDUCATION AND TRAINING

2nd Respondent

SIHLE MOON

3rd Respondent

SHAKEEL ORI

4th Respondent

NOLWANDE MANTASHE

5th Respondent

MZWAMADODA WISEMAN DINWA

6th Respondent

ASHLEIGH CLAIRE VAN GREUNEN

7th Respondent

KIM VELTMAN

8th Respondent

PATRICK MAHUBELA

9th Respondent

PAM SNYMAN

10th Respondent

ADENE PRINGLE

11th Respondent

JOYCE MHLONGO

12th Respondent

JOYCE DIMAKATSO SEEMA

13th Respondent

JUDGMENT

GUSH J.

1] This is an urgent application brought by the applicants' for the following relief:

1 Permitting this application to be heard as a matter of urgency

and dispensing with the ordinary period and notice requirements of the rules;

2 reviewing and setting aside the purported appointment by the first and second respondents of the third respondent as the administrator for the Services Sector Education and Training Authority ("Services SETA");

3 Reviewing and setting aside the first respondent's decision to direct the second respondent - and of the second respondent to act in terms of such direction - to issue Government Notice 372 in Government Gazette 34245 of 21 April 2011, and setting aside that notice as invalid.

4 Reviewing and setting aside the second respondent order purporting to direct the transfer of all funds in the Service's SETA's bank account to the National Skills Fund.

5 Directing the first and second respondents to take all necessary measures immediately to ensure the retransfer all funds which had been transferred from the Services SETA's bank account to the National skills fund, pursuant to the said Gazette Notice, back into the Services SETA's bank account.

6 Declaring that the administration and control of the affairs of

*Services SETA and its assets, personnel and operations, lawfully vest not in the third respondent (purportedly as administrator) but in the Council of the Services SETA as elected by members of the Services SETA on 12 April 2011, under the chairpersonship of the seventh applicant and the vice chairpersonship of the eighth applicant (subject to the Judgment and Order of this Honourable Court in case number **J604/2011**)*

7 Ordering those of the respondents as may oppose this application, to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

8 Granting the applicants further or alternative relief"

- 2] The application was opposed by the first second and third applicants.
- 3] The parties agreed that the matter was urgent and I agree.
- 4] The parties to the application are as follows:

(i) Applicants:

- a) the first applicant is a duly established sector education and training authority in accordance with the provisions of section 9 of the Skills Development Act¹ (the Act);

¹ Act 97 of 1998

- b) the second applicant is employed by the first applicant as its chief executive officer;
- c) the third applicant is a registered trade union and one of the employee representative members of the first applicant
- d) the fourth applicants is a union federation to which various registered unions are affiliated including the third applicant and is a member of NEDLAC and holds a seat on the National Skills Authority;
- e) the fifth applicant is a representative body of employers engaging industries covered by the first applicant and is a member of business Unity South Africa which sits on NEDLAC and has a seat on the National Skills Authority;
- f) the sixth applicant is an association representing personnel service organisations and is a member of the first applicant and the fifth applicant and holds a seat on the National Skills Authority
- g) the seventh applicant is a member of the executive committee and management committee of the fifth

applicant and is a member of the first applicant's council and chairperson thereof;

h) the eighth applicant is the chief operating officer of the third applicant and a member and vice chairperson of the first applicant's council;

i) the ninth applicant is the chief executive officer of the Contractors Plant Hire Association and is a member of the first applicant's council;

j) the tenth applicant is an official of the third applicant and a representative of organised labour and a member of the first applicant's council;

k) the 11th applicant is the president of the beauty health and skincare employers Association and is a representative of organised business and a member of the first applicant's council.

(ii) Respondents who oppose the application are:

a) the first respondent is the Minister as defined in the Act viz. the Minister of Higher Education and Training;

b) the second respondent is the Acting Director-

General in the Department of Higher Education and Training as defined in the Act and referred to in section 15 of the Act;

c) the third respondent is the person appointed as administrator of the first applicant by the second respondent as directed by the first respondent.

(iii) The remainder of the respondents are variously members elected to the council of the first respondent or appointed by the Minister to a council the details of which are dealt with below.

- 5] On 20 April 2011 the second respondent, having been so directed by the first respondent, caused a notice to be published in the government Gazette of the 21 April 2011 suspending the accounting authority of the first applicant, directing that the funds in the first applicant's bank account be transferred to the National which Skills and Fund and appointing the third respondent as an administrator with powers and duties which are set out in a schedule to the notice.
- 6] In suspending the accounting authority of the first applicant and in appointing the third respondent the second respondent recorded in

the notice that he was so acting by virtue of the powers vested in him by section 15(2) of the Act and as directed by the first respondent in terms of section 15(1) and section 15(4) of the Act.

- 7] The first applicant's Accounting Authority is its council.
- 8] The relevant sections of the act read as follows:

Section 15

1) the Minister may, after consultation with the National Skills and Authority and the SETA in question, direct the Director – and General to appoint an administrator to take over the administration of a SETA or to perform the functions of a SETA if –

- a. the SETA fails to perform its functions;*
 - b. there is mismanagement of its finances is;*
 - c. ... ;*
 - d. the SETA has failed to comply with the service level agreement; or*
 - e. the SETA has failed to comply with an instruction issued by the Minister in terms of section 14 A.*
- 2) The Director-General must publish a notice in the Gazette appointing an administrator and in that notice the director-*

general –

a. must determine the powers and duties of the administrator, which may include a performance by the administrator of the SETA's functions in terms of the Public Finance Management Act;

b. may suspend or replace one or more of the members of the seta for a reason contemplated in subsection (1) (a) to (e);

c. ... ; and

d. may direct the transfer of all or some of the funds in the SETA's bank account to the National Skills Fund

3) ...

*4) The Minister may act in terms of subsection (1) without consulting the National Skills authority and the SETA in question if there is financial mismanagement of the SETA **and** the delay caused by the consultation would be detrimental to the SETA's capacity to perform its functions.(my emphasis)*

9] In essence the applicants' application is founded on the averment that the first respondent did not comply with the provisions of section

14A or 15 of the act in that not only was there no financial mismanagement of the first applicant but that the first respondent had not consulted as is required by the Act. The applicants averred that accordingly the directive issued by the Minister (first respondent) to and the action taken by the Acting Director-General (second respondent) in accordance therewith should be reviewed and set aside.

- 10] Specifically, in argument, Mr. Kennedy, on behalf of the applicants, submitted that in order to comply with section 15 of the Act, the first respondent was obliged, before issuing the directive to the second respondent to appoint an administrator to take over the administration of the SETA, by virtue of the provisions of that subsection to first consult with the National Skills authority and the SETA in question. If however, as is the case in this matter, the first respondent wished to act in terms of subsection (1) without consulting the National Skills Authority or the SETA as envisaged by section 15(4), he could only do so if in addition to *“financial mismanagement of the SETA”* *“the delay caused by the consultation would be detrimental to the SETA's capacity to perform its functions”*²

- 11] It was common cause that the first respondent had not consulted with

² Section 15(4) of the Act

either the National Skills Authority or the SETA in question. The notice the second respondent published in the Government Gazette expressly refers to section 15(4) as the authority the first respondent relied on in issuing the directive.

12] As far as the second respondent's authority to suspend the accounting authority of the first applicant and direct the immediate transfer of all the funds in the the first applicant's bank account to the National Skills Fund this authority is naturally dependent upon the validity of directive issued by the first respondent.

13] In the answering affidavit filed on behalf of the first second and third respondents the deponent sets out the reasons why the first respondent directed the second respondent to appoint an administrator in terms of section 15(1)³. These reasons are:

- (i) financial mismanagement;
- (ii) *"There had to be someone who runs the affairs and functioning of the [first applicant] authoritatively;*
- (iii) *"There has to be someone running the [first applicant] authoritatively from the date of judgment and to the date of judgment in any field that may be instituted by any of the parties"*

³ Answering affidavit para 18

(iv) *“In the event that the court in the first application holds that neither accounting authority was properly or legally appointed, it is required that an Administrator authoritatively run the affairs and functioning of the [first applicant] until the [first respondent] has concluded the processes of appointing a new Accounting Authority.*

- 14] Whilst it is clear from the respondents’ answering affidavit that the first respondent relied on financial mismanagement of the first applicant it could only have been mismanagement of which the first respondent was aware at the time he issued his directive to the second respondent. The second respondent issued the notice of appointment of the administrator on the 20 April 2011 which was published on 21 April 2011 at a time when he had some time earlier appointed the third respondent as the chairperson of the first applicant’s council and had in fact appointed a new council.
- 15] The respondent avers that the financial mismanagement was based payments being made by what it refers to as the **“renegade council”**.
- 16] The payments referred to are listed in an annexure to the answering affidavit and conspicuous by its absence is any reference to any specific complaint relating to any payment. A perusal of these

payments reveals that they are all payments which would be reasonably be made by the first applicant in the normal course of events.

17] The respondents raise two specific instances of payments which they allege are irregular. The first relates to payments made to the applicants' attorneys. The allegation made regarding the irregularity of these payments is not supported by any documentation or affidavit and in any event the allegation is adequately answered by the applicants. The applicants in their replying affidavit point out that the attorneys in question have acted for some time for the first applicant, were appointed in accordance with the first applicants procurement policies and explain the how and the reason why the payments were made.

18] The second instance refers to payments made to a security company appointed to protect employees of the first applicant in circumstances where the third respondent and persons engaged or appointed by him have assaulted and threatened these employees. As with the allegation regarding the payments made to the attorneys this allegation too is unsubstantiated and the applicants' have provided an adequate explanation for the payments made.

- 19] In the circumstances I am not persuaded that there was any financial mismanagement which justified the first respondent invoking the provisions of section 15(4) of the Act.
- 20] Even had I found that there was financial mismanagement the first respondent would have been obliged to establish that to consult as required by section 15(1) would have resulted in a delay which in turn would be detrimental to the first applicant's capacity to perform its functions.
- 21] I wish therefore to deal briefly with the averments made by the respondents which I have referred to in paras 13(ii) (iii) and (iv) above. The respondents do not in any way suggest that it was for these reasons that the first respondent did not consult as the delay the consultations would have caused would have been detrimental to the SETA's capacity to perform its functions. The only suggestion made is that the first applicant required "*someone running [it] authoritatively*" generally and specifically "*from the date of judgment*". There is no mention of any delay or for that matter any detrimental consequences that would result from consulting with the parties referred to in section 15(1).
- 22] As far as the reference to the judgment is concerned, in a related

LABOUR COURT

matter under case number **J604/2011** the same applicants as in this matter approached this court as a matter of urgency to inter alia review and set aside the first respondents appointment of the third respondent as chairperson of the first applicant's council; reviewing and setting aside the appointment by the first respondent of the new council and the imposition of a new constitution declaring the first applicant's elected council to be validly constituted and interdicting the second and further respondents from interfering with the functions of the applicant.

23] This application was considered by the Honourable Judge Basson on 20 April 2011 who reserved her judgment. This was same day that the second respondent issued the notice appointing the administrator

suspending the first applicant's accounting authority and directing the transfer of all the first funds in to the National Skills Fund.

24] In so far as the first respondent wished to rely on the possible outcome of Basson J's reserved judgment and his fears of a finding that "*neither accounting authority was properly or legally appointed*"

these fears were proved groundless.

25] On the 3 May 2011 the day before this application was heard Basson J handed down her judgment granting the applicants' application inter alia declaring the "**renegade council**" to be the legitimate council.

26] At the conclusion of the hearing of the matter I invited both counsel to file supplementary heads of argument should they so wish.

27] The respondents' have filed supplementary heads. In the heads the respondents' counsel argue that as the appointment of the administrator was made before the judgment of Basson J was handed down the first respondent was only suspending the accounting authority (council) he had appointed himself. In the circumstances as this council was found not to have been validly appointed the reason for the application had fallen away and that it should be dismissed with costs.

28] This suggestion clearly has no merit.

29] The applicants pointed out in their papers that the funds had not at the time of hearing been transferred but the account had been frozen. The applicants asked that the relief they sought in this regard be amended to accommodate the circumstances.

30] As far as costs are concerned both parties argued that costs should follow the result and I see no reason why this should apply.

31] In the circumstances I make the following order.

- (i) The order is granted in terms of paragraphs 1, 2 and 3 of the notice of motion;
- (ii) In the event that the funds in the first applicant's bank account have been transferred to the National Skills Fund I grant prayers 4 and 5;
- (iii) In the event that first applicant's bank account has been frozen I order in so far as it is necessary that the bank account be unfrozen;
- (iv) The first and second respondents are to pay the costs of this application the one to pay the other to be absolved.

GUSH J

Date of Hearing : 4 May 2011

Date of Judgment : 6 May 2011

Appearances

For the Applicant : Adv P Kennedy SC

Instructed by : Edward Nathan Sonnenbergs Inc

For the Respondent: Adv G Malindi SC with him Adv M Zulu.

Instructed by : The State Attorney