

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J604/11

In the matter between:

MINISTER OF HIGHER EDUCATION
AND TRAINING

1st Applicant in the application for leave to appeal

SIHLE MOON

2nd Applicant in the application for leave to appeal

and

SERVICES SECTOR EDUCATION
AND TRAINING AUTHORITY

First Respondent

IVOR BLUMENTHAL

Second Respondent

UASA THE UNION

Third Respondent

FEDERATION OF UNIONS OF
SOUTH AFRICA

Fourth Respondent

CONFEDERATION ASSOCIATIONS
IN THE PRIVATE EMPLOYMENT
SECTOR ("FEDUSA")

Fifth Respondent

ASSOCIATION OF PERSONNEL
SERVICE ORGANISATIONS OF SOUTH
AFRICA ("APSO")

Sixth Respondent

BEVERLY ANN JACK

Seventh Respondent

LEON GROBLER

Eighth Respondent

CLIVE EDWARD WICKS

Ninth Respondent

SHADRACK MOTLOUNG

Tenth Respondent

FEROZA FAKIR

Eleventh Respondent

Date of judgment : 8 June 2011

Date of hearing : 27 May 2011

JUDGMENT

A.C BASSON J:

[1] This is an application for leave to appeal (by the 1st and 2nd applicants – the Minister of Higher Education and Training and Mr. Sihle Moon) against my judgment dated 3 May 2011 in terms of which an order was granted in terms of prayers 2 to 11 of the Notice of Motion. The first and second applicants were also ordered to pay costs of the application jointly and severally the one paying the other to be absolved.

[2] At the heart of this application for leave to appeal is whether the respondents have made out a case in their papers for the

orders that the Court granted them with costs (ad paragraph [2] of the applicant's heads of argument). Leave to appeal is sought against the whole of the judgment and the orders granted by the Court. In this regard it was submitted firstly, that the Court materially misinterpreted sections 9, 10, 11 and 13 of the Skills Development Act 97 of 1998 (hereinafter referred to as 'the SDA') and, secondly, that the Court materially misinterpreted the regulations promulgated in terms of the SDA.

[3] I do not intend for purposes of this brief judgment to repeat the grounds of appeal as they are set out in the application for leave to appeal nor do I intend to revisit the facts and arguments and the factual findings as contained in the judgment.

The test in the application for leave to appeal

[4] It is trite that there is no automatic right of appeal against a judgment of the Labour Court. This much is clear from section 166(1) of the Labour Relations Act 66 of 1995 (hereinafter referred to as the "the LRA") which provides that any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court. In order to be entitled to leave to appeal, an applicant in an application for leave to appeal must satisfy this court that there is a "*reasonable prospect that another court could come to a different conclusion*".

(See *Woolworths Ltd v Matthews* [1999] 3 BLLR 288 (LC).) The test is not whether or not there is a possibility that another court could come to a different conclusion, the test is whether or not there is a reasonable prospect that another court could come to a different conclusion. (See also *Westing House Break & Equipment (Pty)Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) where the Court reiterated the general principle that in order for an applicant for leave to appeal to succeed, the applicant must demonstrate that it has a reasonable prospect of success on appeal. It was also stated that an appeal should be allowed where the matter is of great importance or where the matter is of public importance or where the Court is of the view that the decision might affect other questions. (See in this regard *Moller v Keimoes School Committee & Another* [1911] AD 585.)

Argument

[5] It appears from the oral argument that the main attack on the Court's judgment is the Court's finding that the respondents have succeeded in making out the case pleaded, namely that they have validly constituted their council (referred to in the main application as "*the members' council*") on 12 April 2011. In this regard it was argued that, because the respondents have failed to make out a case (in respect to the establishment of their own council), it therefore followed that the application had to be dismissed on this

ground alone. It was further argued that, although the Court had found that the Minister's actions in establishing the (Minister's) Council was invalid, it did not follow that it also had the effect of making the actions of the respondents in establishing their own Council (the members' Council) valid. The respondents, so it was argued, still needed to demonstrate that their own council was lawfully constituted in terms of the enabling legislation in order to be successful. This, so it was argued, they have failed to do.

Validity of the establishment of the member's council

[6] As already pointed out, Mr. Mokhari on behalf of the applicants submitted that the respondents have not made out a case in the founding papers that the Services SETA's Council (the members' Council) established by the respondents on 12 April 2011 was lawfully constituted nor have they made out a case that the persons listed in annexure "Y" to the founding affidavit are the lawful members of the Services SETA's Council. It was also argued that the appointment of the members' Council did not comply with the very constitution that it relied upon in that the 2002 constitution provides, *inter alia*, for 24 voting members, 7 non-voting members, and 6 discretionary non-voting members.

[7] I am generally in agreement with the submission that in light of the fact that a SETA is a creature of statute, it must strictly comply with the requirements of the law which created it in order for

it to be validly constituted. Similarly, it is accepted that a Council of a SETA is a creature of statute and that it must therefore comply strictly with the requirements of the legislation (the SDA) which created it. Furthermore, I am in agreement that non-compliance with section 11 of the SDA will render the appointed Council invalid and of no force and effect.

[8] In order to consider the merits of this argument in the context of this particular application, it is necessary to have regard to the founding affidavit in order to determine what was in fact pleaded by the respondents and whether or not they have in fact made out a case namely that their Council was established in terms of the provisions of the enabling legislation and in terms of the 2002 constitution. In paragraph [71] of the founding affidavit the following is stated:

“Acting in terms of the Services SETA constitution (annexure “C2”)¹ which remains applicable, the members of the Services SETA, comprising the representatives of organised business and organised labour, have taken the necessary steps on 12 April 2011 to finalise the process of constituting a new Council as the SETA’s accounting authority. They do not recognise the validity of the steps taken by the Minister or the second respondent, including the purported appointment of the second to fifth respondent. Instead they have elected new Council members, whose names are listed in annexure

¹ At the hearing of the matter it was pointed out that the reference to annexure “H2” is clearly a typographical error and that it should have read annexure “C2” which refers to the constitution that was adopted in 2002. At the time of the hearing of the application it was accepted by the applicants that it was a typographical error.

“Y”, which reflects also whether they represent organised business or organised labour (I point out that some of them were purportedly appointed by the Minister. Not only did he not have power to do so, but he also was mistaken as to the constituency which some of them represent. In the process he failed to comply even with the new “model” constitution he has sought to impose. There is also imbalance between business and labour constituencies which is in contravention of the Act)”.

What was therefore pleaded was that the members of the SETA were elected to the council in terms of the 2002 constitution.

[9] The applicants answered to paragraph [71] of the founding affidavit as follows in paragraph [107]:

“I reiterate my submissions that this established SETA is acting contrary to the law and approved constitution of the services SETA. I reiterate the submissions I have already made.”

It is patently clear in my view from a plain reading of the papers that the applicants have not placed in dispute the contention made in the founding affidavit namely that the members’ Council was established in terms of the 2002 constitution. What is placed in dispute is that the Council is acting contrary to the law and the approved constitution. The answering affidavit also does not state that the members’ Council was established contrary to the enabling legislation and the 2002 constitution. In *Administrator, Transvaal, &*

Others v Theletsane & Others 1991 (2) SA 192 (AD) the Appellate Division (as it then was) restated the legal position namely that an applicant must make out its case in the founding affidavit.² In light of the pleadings and especially what is contained in the answering affidavit, I am not persuaded that the respondents (the applicants in the main application) have not made out a case in the founding affidavit in respect of the contention that their (members') council have been validly established in terms of the enabling legislation and in terms of the 2002 constitution.

[10] At this juncture I must also point out that the argument in respect of the validity of the members' Council was not even raised during argument when the (original) application was argued – it was raised for the first time when the application for leave to appeal was argued. I, however, accept in principle that new legal arguments may be raised at subsequent proceedings such as when arguing an application for leave to appeal. It is also accepted that a respondent who files an affidavit and answers to the factual allegations as contained in the founding affidavit is entitled to advance legal contentions in respect of the facts as they appear in the affidavits provided that in raising these legal arguments the applicant is not prejudiced thereby (see in this regard *Angus v Kosviner* 1996 (3) SA

² See *Hart v Pinetown Drive-In cinema (Pty) Ltd* (1972) 1 SA 464 (D). It is trite in our law that if the respondent's answering affidavit fails to admit or deny, or confess and avoid, allegations in the affidavit, the court will for the purposes of an application accept the applicant's allegation as correct. See in this regard *Moosa v Knox* 1949 3 SA 327 (N) at 331.

215 (W) (ad 222G-I).) It is likewise accepted that a respondent has the right to raise an objection *in limine* that the founding affidavit does not make out a *prima facie* case for the relief claimed (see in this regard *Valentino Globe bv v Phillips* 1998 (3) SA 775 (SCA) (ad paragraph 779F). In the present case no such point *in limine* has been raised nor has the applicants demonstrated that the facts as they appear from the papers support the argument that the applicants have not made out a case namely that their council has been validly established in terms of the enabling legislation and the 2002 constitution: The applicants have failed to place the validity of the establishment of the members' Council in dispute and cannot therefore now rely on facts not placed in dispute in the papers. Moreover, it is severely prejudicial to the respondents to raise this issue at the stage when the application for leave to appeal is argued particularly in circumstances where no factual basis for such contention exists on the papers. In this regard Mr. Kennedy for the respondents contended that, if the validity of the establishment of the members' Council was placed in dispute in the answering affidavit, the applicants certainly would have dealt with it in the reply. In light of the fact that the validity of the members' Council was not placed in dispute, the respondents (the applicants in the main application) therefore did not have to place facts before the Court to substantiate the allegation made in the founding papers.

[11] In light of the foregoing I am of the view that this argument is devoid of any merit. I am furthermore also of the view that there exists no reasonable prospects that another Court may come to a different conclusion in respect of the validity of the establishment of the members' Council.

The Minister's Constitution

[12] It was also contended on behalf of the applicants that the Court had misdirected itself in concluding that the Minister appointed his Council in terms of the standard constitution annexed to the answering affidavit as annexure "H2". In this regard it was submitted that annexure "H2" was merely a standard constitution which was never adopted by the Services SETA nor was it approved by the Minister. It was further submitted that annexure "H2" is merely a draft constitution that was circulated for comment by the parties and that it was therefore not a final document. It was also submitted that the court committed a misdirection when it failed to consider annexure "AA13", which is the model constitution which was adopted by the respondents on 24 February 2011. Further in this regard it was submitted that the Court had failed to appreciate the adoption of the constitution annexed to the answering affidavit as annexure "AA13" and the fact that it was binding on the respondents and that they were therefore not entitled to depart from it. The respondents were therefore bound by the 24 February 2011

constitution and not the 2002 constitution as its lifespan had ended on 31 March 2011.

[13] The Court has dealt with this issue in paragraph [27] of the judgment and I do not intend repeating what is stated in the judgment. Suffice to point out that it was common cause on the papers that annexure “H2” was the constitution that was adopted by the Minister. What is now being contended by the applicants is that there was an error in their answering affidavit and that it is in fact clear from the answering affidavit that the constitution of February 2011 is the one that was adopted by the parties.

[14] There can, in my view, be no doubt about the fact, apart from this unqualified admission in the answering affidavit, that it was common cause on the papers that annexure “H2” was the constitution adopted by the Minister and imposed on the SETA. The papers and the annexures thereto also confirm that at least two further drafts of the constitution were submitted *after* the constitution dated 28 February 2011. The letter by Dr. Blumenthal attached to the founding affidavit as annexure “I” refers to a further draft on 18 March 2011 and yet a further draft dated 22 March 2011. It is furthermore clear from this letter that Blumenthal (on behalf of the respondents) had serious concerns about the further drafts that were forwarded to the SETA after the one that was signed in February 2011. Put differently: The fact that further constitutions

were submitted after the constitution dated 28 February 2011 strongly supports the contention that the draft adopted by the Minister could not have been the one dated 28 February 2011. It is accordingly in my view clear from the papers and the annexures thereto that the argument advanced on behalf of the applicants is not supported by the documents.

[15] The applicants are furthermore effectively asking this Court to accept that an erroneous admission has been made in the papers. There is, however, nothing by way of an affidavit on oath to the effect that the admission was in fact erroneously made nor has there been any attempt in offering an explanation as to why that error arose. In this regard the Court was referred to the matter in *Bellairs v Hodnet & Another* 1978 (1) SA 1109 (A) (ad paragraph 1150F – G) where the Court held as follows in regard to admissions made erroneously:

“This vital admission having been raised by the Court during argument on appeal, Mr. Kentridge asked for leave to amend the plea by deletion of the admission. The application was opposed by Mr. O'Donovan. The Court's power, in its discretion to allow amendment of pleadings at any stage of the proceedings, even on appeal, is undoubted. (See Gordon v Tarnow, supra at p. 532.) But, as it has frequently been stated, an amendment cannot be had merely for the asking. This is equally, if not especially, true of a proposed amendment which involves the withdrawal of an admission in such cases the Court will generally

require to have before it a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it.”

[16] In light of the above I am of the view that the applicants should not be allowed to withdraw the said admission in the absence of an application for leave to amend or withdraw the admission having been granted by the Court and for which a satisfactory and *bona fide* explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it, were properly placed before the Court. Furthermore, the facts do not support the contention that the Minister had adopted the constitution dated 28 February 2011 as the new constitution and not the one annexed to the papers as annexure “H2”. I am therefore of the view that there is no basis for the argument advanced on behalf of the applicants namely that the Court was wrong in finding that the constitution as approved by the Minister was in fact the one as contained in “H2”.

[17] It should also be pointed out that the applicants have also failed to advance arguments in respect of the *validity* of the constitution dated 28 February 2011 (annexed as annexure “AA13”). In other words, even if it is to be accepted in the applicants favour that annexure “AA13” was the version approved by the Minister, this does not assist the applicants at all in that the

version signed in February 2011 suffers from similar defects to that suffered by the constitution approved by the Minister annexed to the papers as annexure “H2”. This constitution (attached as annexure “AA13”) also conflicts with the enabling provisions of section 13 of the SDA.

The re-establishment of the SETA on 11 November 2011 in terms of the government gazette No.33756

[18] It was common cause that the Minister had re-established a number of SETAs on 11 November 2010. A lengthy argument was advanced in Court in respect of whether or not the Minister had the power to “*establish*” a Council in terms of section 9(1) of the SDA without a constitution and whether or not the Minister may do so without a constitution and only adopt a constitution at a later date. The question therefore is namely whether it follows that when the Minister *establishes* a Council in terms section 9 (1) of the SDA it must do so *with* a constitution. In this regard the Court was, *inter alia*, referred to what had happened in 1999 when the Council of the SETA was established and Gazetted. More specifically the Court was referred to the fact that only in 2000 did the Minister approve the constitution. The said constitution was gazetted only in 2002. With regard to the re-establishment of the SETA, the argument therefore was that when the Minister re-established the SETA in 11 November 2010 it merely established a Council and that it was not

necessary to do so with a constitution. Life was only breathed into the SETA on 1 April 2011 when the new constitution was adopted. It was also argued that the Court by finding that the 2002 constitution still applied in fact absorbed the Minister's duty to establish a Council *with* a constitution because the 2002 constitution had expired by this time. The Court was consequently strongly urged to find that there is, in light of this argument, a possibility that another Court can interpret the wording of section 9 (1) and especially the word "*establish*" differently and therefore that leave to appeal should be granted.

[19] Again, in order to evaluate this argument, regard should be had to the papers. In paragraph [82] of the founding affidavit the following is stated:

*"There is no substance to the Minister's Council in the correspondence that the Services SETA ceased to exist and was then re-established and that this (somehow) entitled him to impose a new constitution. **The constitution gazetted in 2002 survived the formalities of re-establishment as borne out by past conduct.**"³ In any event, even if the Minister was at large to require a new constitution, he could not impose that unilaterally, especially without a full and fair process of consultation which he failed to provide. Nor was he empowered to impose a constitution the contents of which were in various respects materially inconsistent with the requirements of s 13 of the Act and the*

³ The Court's emphasis.

relevant regulations.”

Furthermore at paragraph 83 the following is stated:

*“I point out further that the so-called ‘re-established’ Services SETA was re-established in terms of the gazette notice of 11 November 2010 (annexure “F3”). **The constitution gazetted in 2002 was then in existence, had been approved, and continued to apply.**⁴ The SETA had assets, personnel and contractual rights and obligations which survived its expiry of office and ‘re-establishment’.”*

In the answering affidavit under the heading “Ad paragraphS 74 to 95” the following is stated:

“107.1 I deny that the Minister acted contrary to the applicable legislative framework in the manner as alleged or in any other manner, or that the second respondent acted unlawfully in regard to Blumenthal’s suspension.”

“107.2 Annexure “T” sets out in broad terms the legal Authority within which the Minister acted. Full legal argument will be made at the hearing of this matter in this regard and with reference to other documents that have been referred to”.

[20] If regard is had to the answering affidavit it is clear that the applicants have again failed to specifically deny the contention

⁴ *Ibid.*

expressly made in the founding affidavit namely that the 2002 constitution had survived the re-establishment of the Council.

[21] I am therefore in light of the foregoing of the view that this argument advanced on behalf of the applicants has likewise no merit.

Validity of the Minister's actions

[22] The Court has found that the constitution imposed upon the Services SETA by the Minister was in fundamental respects in clear conflict with the express requirements of section 13(1)(a)(vi) and (xi) of the SDA. In the judgment it was pointed out that those provisions make it clear that the constitution of a SETA must provide, *inter alia*, that the members of the SETA with voting rights (that is the representatives of organised business and the representatives of organised labour) must elect the persons who are to be members of the SETA's accounting authority (the SETA Council). This section further makes it clear that these representatives must elect the other office bearers and the chief executive officer of the SETA. The Court has, with reference to the SDA and various clauses contained in the constitution, held that the constitution (as annexed to the papers as annexure 'H2' and unilaterally imposed by the Minister on the SETA) is manifestly in conflict with the aforementioned provisions of the SDA. The Court further held that the Minister's actions in appointing the second and further respondents (as sited

in the application) as members of the Minister's Council as well as Dr. Moon as the chairperson, has taken place in clear violation of section 13 of the SDA in that the second and further respondents (as sited in the application) have been appointed by the Minister and not by the members of the Services SETA.

[23] Mr Mokhari in his oral argument wisely stayed away from addressing the validity of the Minister's constitution and the validity of the appointment of the Minister's council. I am, in any event, in agreement with Mr. Kennedy that there is no viable argument to be advanced to overcome this fundamental difficulty.

[24] There is therefore in my view no realistic or reasonable prospect that a higher Court may come to the conclusion that the applicants were correct in defending the Minister's imposition of a new constitution and in appointing the second and further respondents (cited as respondents in the main application) as chairperson and members of a new Council (the Minister's Council) in circumstances where the Minister's actions indisputably were in conflict with the enabling statute.

[25] In the event I am of the view that there is no reasonable prospect that another Court could come to a different conclusion than the conclusion arrived at by this Court.

[26] In the event, the application for leave to appeal is dismissed with costs.

AC BASSON, J

LABOUR COURT

For the applicant: WR Mokhari SC

P Malindi SC

Adv Zulu

Instructed by: The State Attorney

For the respondent: Paul Kenndy SC

Instructed by: Edward Nathan Sonnenbergs Attorneys