

IN THE LABOUR COURT OF SOUTH AFRICA

**HELD AT JOHANNESBURG**

**CASE No: J677-2011**

**In the matter between:**

**SERVICES SECTOR EDUCATION AND  
TRAINING AUTHORITY**

**First Applicant**

**IVOR BLUMENTHAL**

**Second Applicant**

**UASA THE UNION**

**Third Applicant**

**FEDERATION OF UNIONS  
OF SOUTH AFRICA (“FEDUSA”)**

**Fourth Applicant**

**CONFEDERATION OF ASSOCIATIONS  
IN THE PRIVATE EMPLOYMENT  
SECTOR (“CAPES”)**

**Fifth Applicant**

**ASSOCIATION OF PERSONNEL  
SERVICE ORGANISATIONS OF  
SOUTH AFRICA (“APSO”)**

**Sixth Applicant**

**BEVERLY ANN JACK**

**Seventh Applicant**

**LEON GROBLER**

**Eighth Applicant**

**CLIVE EDWARD WICKS**

**Ninth Applicant**

**SHADRACK MOTLOUNG**

**Tenth Applicant**

**FEROZA FAKIR**

**Eleventh Applicant**

**And**

**MINISTER OF HIGHER EDUCATION  
AND TRAINING**

**First Respondent**

**ACTING DIRECTOR OF HIGHER  
EDUCATION AND TRAINING**

**Second Respondent**

**SIHLE MOON**

**Third Respondent**

**SHAKEEL ORI**

**Fourth Respondent**

**NOLWANDE MANTASHE**

**Fifth Respondent**

**MZWAMADODA WISEMAN DINWA**

**Sixth Respondent**

**ASHLEIGH CLAIRE VAN GREUNEN**

**Seventh Respondent**

**KIM VELTMAN**

**Eighth Respondent**

**PATRICK MAKHUBELA**

**Ninth Respondent**

**PAM SNYMAN**

**Tenth Respondent**

**ADENE PRINGLE**

**Eleventh Respondent**

**JOYCE MHLONGO**

**Twelfth Respondent**

Date of Hearing : 2 June 2011

Date of Judgment : June 2011

ruling on leave to appeal and application to execute

**Gush, J**

1. This matter concerns an application by the respondents for leave to appeal against my judgement handed down on 6 May 2011 and an application by the applicants for leave to execute my judgment, which the parties agreed should be heard together. In the judgment the respondents apply for leave to appeal against, I granted the applicants the following order:

1. 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”);

2. 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.
3. 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 and in the event that the funds in the first applicant's bank account have been transferred to the National Skills Fund;
4. 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;
5. In the event that first applicant's bank account had been frozen ordering in so far as it is necessary that the bank account be unfrozen; and
6. That the first and second respondents were to pay the costs of the application the one to pay the other to be absolved.

2. The respondents grounds of appeal were:

1. "The prematurity of the application" in that in the light of the judgment by Basson J in case number J604/2011 handed down prior to 6<sup>th</sup> May 2011 that Government Notice no. 372 published in the Government Gazette of the 21 April 2011 was no longer of any force or effect.
  2. That I erred in finding that there was no financial mismanagement as was required for the 1<sup>st</sup> respondent to have acted in terms of section 15(4) of the Skills Development Act; and
  3. That the Minister was entitled to have acted in terms of Section 15(4) without having to consult the relevant SETA or the National Skills Authority in that the 1<sup>st</sup> respondent had deliberately not consulted as it was implied or implicit that *"any delay caused by the consultation with the National Skills Authority and the SETA in question would be detrimental to the SETA's capacity to perform its functions"*.
3. In support of the first ground of appeal the applicants' argued that the notice 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, was directed only at the council appointed by the first applicant. The applicants' averred that in the circumstances once the appointment of that council was set aside (by virtue of the judgment of Basson J in case number J604/2011) the suspension of the accounting authority

and appointment of the administrator ceased to be of any force of effect.

4. This supposition neither accords with the notice which appeared in the government gazette nor with the answering affidavit put up by the respondents.
5. The notice in the government gazette is general in its application and applies simply to the “accounting authority”. More importantly the applicants’ answering affidavit does not suggest any way whatsoever that the 1<sup>st</sup> respondent only intended to suspend the council he had appointed. In fact the respondents’ answering affidavit stated specifically that the:

*“Appointment of the administrator was imperative for the following reasons*

1. *There had to be someone who runs the affairs and functioning of the [first applicant] authoritatively;*
1. *There has to be someone running the [first applicant] authoritatively from the date of judgment and to the date of judgment in any appeal that may be instituted by any of the parties;*
2. *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.*

3. Despite the contention that the appointment of the administrator was of no force and effect and submitting that the judgment in this matter was academic, respondents' counsel advised the court during argument that the administrator was in fact in office and performing those functions set out in Government Notice 372 in Government Gazette 34245 of 21 April 2011.
4. The second ground of appeal is that I erred in finding that there was which would justify the 1<sup>st</sup> respondent invoking section 15(4) of the Skills Development Act.
5. Even if I was wrong in so finding, the provisions section 15(4) of the Act require not only that there are no financial irregularities but also that the 1<sup>st</sup> respondent first consult with the National Skills Authority unless *"the delay caused by the consultation would be detrimental to the SETA's capacity to perform its functions"*.
6. This is the respondents' third ground of appeal. Viz: is that I erred in finding that the 1<sup>st</sup> respondent, having failed to consult, had not made out a case that *"any delay caused by the consultation with the National Skills Authority and the SETA in question would be*

*detrimental to the SETA's capacity to perform its functions*". The respondents submitted that it was implicit or implied in its case that to consult would have caused a delay which would have been "*detrimental to the SETA's capacity to perform its functions*"

7. This is neither implicit nor implied.
8. In fact the deponent to the respondents' answering affidavit admitted that "*no attempt whatever has been made to consult with the National Skills Authority ...*"<sup>1</sup> It appears from the papers and from counsel's argument that the decision not to consult was a deliberate decision and was not made for the reasons stipulated in section 15(4) of the Skills Development Act.
9. Counsel for the respondent submitted, referring to paragraph 74.2 of the respondents' answering affidavit, that in fact the 1<sup>st</sup> respondent "*did not think it wise to consult the National Skills Authority on this matter since, in his view, it was sub judice.*" This in no way whatsoever suggests that the 1<sup>st</sup> respondent was concerned that consulting National Skills Authority would cause a delay or that it would be detrimental to the 1<sup>st</sup> applicants' capacity to perform its functions.

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10. In order for the respondents to succeed with application for leave to appeal it must be shown that there is a reasonable possibility that another court may come to a different conclusion.<sup>2</sup>
  11. Regarding the respondents first and main ground of appeal viz that my judgment was academic in the light of the Basson J's judgment; the respondents have persisted in giving effect to the notice in the government gazette (which I set aside for want of compliance with the provisions of section 15(4) of the Skills Development Act.)
  12. Whilst I may have been incorrect in finding that there was no there was no "financial mismanagement" it is clear even from the respondents own papers that the 1<sup>st</sup> respondent did not consult with at least the National Skills Authority, if not the Services Seta, and that the reason for not consulting had nothing to do with any "delay" or detriment "*to the SETA's capacity to perform its functions*"
  13. In the circumstances I am not satisfied that the respondents have succeeded in establishing there is a reasonable possibility that another court may come to a different conclusion.
  14. The second part of this matter concerns the application by the applicants' to execute or to enforce the judgment pending the outcome of this application and any subsequent application for leave to appeal (petition).
  15. It is so that a party seeking to execute must bring a special application to do so and it has been held that:  
  

*"...Generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no*
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*effect can be given thereto, except with the leave of the Court which granted the judgment.”<sup>3</sup>*

16. In considering such an application the court set out the factors to be taken into account :

*“The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised... This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgment.... In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances and, in doing so, would normally have regard, inter alia, to the following factors:*

1. *The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;*
2. *The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;*

3. *The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g to gain time or harass the other party; and*
  4. *Where there is the potentiality of irreparable harm of prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.”<sup>4</sup>*
  5. The respondent’s primary ground of appeal was that the reason for the judgment had fallen away and therefore that the applicants’ application should have been dismissed. That being so, there can be no prejudice or irreparable harm to the respondents should the judgment be enforced pending the final outcome of this matter.
  6. Irrespective of the outcome of this application, the application for leave to appeal or the application for leave to appeal against the judgment of Basson J, if such circumstances occur in the future that warrant the 1<sup>st</sup> respondent acting in accordance with section 15(4) of the Skills Development Act there is no reason why the 1<sup>st</sup> respondent cannot do so, in compliance with the Skills Development Act.
  7. In the light of the respondents’ averment that the judgment is academic and in the absence of any suggestion that to grant the applicants leave
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to execute would cause “*irreparable harm*” or prejudice and coupled with the respondents lack of prospects of success on appeal, there is no reason why the applicants’ application should not be granted

8. On 7<sup>th</sup> June 2011 the respondents filed a supplementary affidavit dealing with issues first raised by the applicants in its replying affidavits in this application. These issues concerned firstly the withdrawal as the attorneys for the 2<sup>nd</sup> applicant by the attorneys for the applicants following the resignation by the 2<sup>nd</sup> applicant as CEO of the 1<sup>st</sup> applicant; and secondly regarding monies transferred from the from the 1<sup>st</sup> applicants account to cover the administrators administration costs.
9. The judgment in this matter does not in any way relate to the 2<sup>nd</sup> applicant nor does the relief granted affect the 2<sup>nd</sup> applicant. The 2<sup>nd</sup> applicant only filed a confirmatory affidavit in the main application and did not file any affidavit in the application for leave to appeal or the application to execute.
10. Regarding the second matter I agree with the averment made in the respondents supplementary affidavit that this is not an issue which is relevant for the purposes of determining the applicants’ application for leave to execute the judgment.
11. As far as costs are concerned there is no reason why costs should not follow the result in both applications.
12. In the circumstances I make the following orders:
  1. The respondents application for leave to appeal is dismissed with costs;
  2. The applicants’ application for leave to execute the judgment is granted with costs and it is accordingly ordered that Government

Notice 372 in Government Gazette 34245 of 21 April 2011 shall not be implemented and shall have no force or effect until the matter is finally disposed of by the Labour Appeal Court.

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**GUSH J**

**Appearances**

For the Applicants (Save for the second applicant for whom there was no appearance) : 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