



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Case no: J 1307/12

In the matter between:

BANDA GABRIEL TSIETSI

Applicant

and

MMABANA ARTS, CULTURE &
SPORTS FOUNDATION

First Respondent

TEBOGO MODISE (N.O.), MEC OF
SPORT, ARTS & CULTURE NORTH
WEST

Second Respondent

Heard: 11 June 2012

Delivered: 22 June 2012

Summary: (Urgent – interim relief – *locus standi* of MEC).

JUDGMENT

LAGRANGE, J

Background

- 1] This is an urgent application in which the applicant seeks the following relief, pending the outcome of review proceedings to:
- 2] declaring his suspension invalid, unlawful and of no legal force and effect and setting it aside, alternatively uplifting it with immediate effect;
- 3] ordering the first respondent to reinstate the applicant immediately and to forthwith comply with his contract of employment and conditions of service, and
- 4] interdicting the respondents from terminating his contract of employment for any unlawful reason or contrary to the purposes of section 13 (2) (c) of the Mmabana Arts, Culture and Sports Foundation Act, 7 of 2000, pending the final determination of his application in the case number J1308/12 of 28 May 2012.
- 5] For good measure, and as an alternative to the last prayer, the applicant sought the urgent determination of his application under case J1308/12, and similar interim relief to that mentioned above.
- 6] The relief sought under case J1308/12 is in essence the same as the interim relief, except in final form, with an additional prayer to declare the applicant's employment as the Chief Financial Officer ('the CFO') of the first respondent lawful.

Material facts

- 7] For the most part, the material facts relevant to the application of common cause. From mid October 2011 until the end of March 2012, the applicant provided financial services to the Foundation through his own company, Maemo Business Processes Consulting (Pty) Ltd, which included the work of the Foundation's CFO. This contract was to run from

17 October 2011 to 30 April 2012. Coincidentally, the applicant was also offered employment as an acting CFO of the Foundation on a month-to-month basis commencing on 18 October 2011 at a salary of R864,000-00 per annum. The applicant simply reasserts in his replying affidavit, that he was engaged through the services of his company to perform the work, and never explains how he came to be offered the employment contract, which was signed by the acting CEO of the Foundation, Mr T Motlhamme, on October 2011, the very same day the consultancy contract was concluded by the acting CEO and the applicant, acting on behalf of his firm.

- 8] The consultancy contract took effect on 17 November 2011, so it appears on the face of the documents that the applicant was employed as an acting CFO for one month before the consultancy contract took effect. The monthly consultancy fee in terms of the contract was R 72,000, which was exactly the same as the monthly salary the applicant would have received as an acting CFO.
- 9] During the first quarter of the same year the applicant applied for a position as CFO at Setsoto Local Municipality and was advised in the middle of March that he had been successful. He then notified the responsible MEC, Mr PChauke, and the CEO of the Foundation, Mr TMotlhamme, that he could no longer continue rendering services to the Foundation.
- 10] The position of CFO of the Foundation was advertised, but before the normal recruitment process was completed the applicant was fortunate enough to secure employment as an acting CFO of the Foundation for a fixed term period of three years starting on 1 April 2012. The ostensible reason for bypassing the ordinary recruitment process was that the Foundation could not afford to lose the applicant as he was performing a critical function. Although it was argued that the reference to an acting position was a mistake, it is noteworthy that this mistake was repeated in the contract of employment which also referred to the applicant being employed as an acting CFO. In the preamble of contract of employment

it is recorded that the Foundation was represented by Motlhamme, as the CEO, "as mandated by the MEC of Sports, Recreation, Arts and Culture, Hon. H Chauke in his capacity as the Board."

11]On the same day he was appointed to the Foundation and despite the 'critical' function he supposedly performed for it, the applicant was informed by the MEC that he was being seconded to act as the CFO of the Department of Sport, Recreation, Arts and Culture ('the Department') with effect from 2 April 2012 until further notice. The MEC's letter also advised that he was expected to assist the Foundation when required, but that in order to perform his responsibilities properly he would be required to dedicate much of his time to the Department.

12]Sometime after this, Chauke was replaced by Ms T Modise as the MEC for the Department, the second respondent in this matter. On 9 May 2012 she sent the applicant a letter which read:

"This letter serves to inform you that after careful consideration I have decided to terminate your secondment to the Department of sport, arts and culture and from Mmabana with immediate effect.

Whilst I am still reviewing your appointment with Mmabanayou are requested not to revert back to the institution until further notice.

Thank you very much for the contribution you have made in the Department."

(Emphasis added)

13]On 15 May 2012, the applicant sent a letter through his erstwhile attorneys, Goldberg Attorneys, in which they pointed out that the applicant, was employed on a fixed term contract of three years and called upon the MEC to reverse the decision to terminate his employment. Clearly, the applicant initially misconstrued the import of the MEC's initial letter, believing that his employment by the Foundation rather than his secondment to the Department had been terminated. The following day, the MEC wrote again to the applicant regarding his

possible termination of appointment as acting chief financial officer of the Foundation. After pointing out that the Foundation was established by the North-West provincial legislature in the Mmabana Arts, Culture and Sport Foundation Act, 7 of 2000, ('the Mmabana Act') the letter continues:

"3 the said Act makes provisions for, inter-alia, the composition and establishment of members of the board of directors to oversee the affairs of the Mmabana Foundation and take all necessary decisions in the best interests of the art, culture and sporting fraternity within the North West province.

4 In the absence of a Board of Directors, the responsible member of the executive Council is clothed with the necessary authority to substitute and act on the board's stead and thereby takes all necessary decisions on behalf of the board.

5 In pursuance of the objectives of the board and as more fully contained in section 13 of Act 7 of 2000, the Acting Chief Executive Officer caused an advert to be published in various publications, including the City Press of 11 March 2012, whereat applications were invited to fill the vacant position of Chief Financial Officer of the Mmabana Foundation.

6 The closing date for the application sought as alluded to above was the 30th March 2012.

7. Notwithstanding the advertisement as for stated, the Acting Chief Executive Officer of the employment as the Acting Chief Financial Officer on a fixed term contract of employment for a period of three years, effective 1 April 2012.

8 It is my considered view that the conduct of the acting chief executive officer as adumbrated in paragraph 7 above did choose to capitalise that not only amount to a deliberate abuse of the powers vested on him by the act but also amounted to a flagrant disregard of the recruitment process of the Mmabana Foundation and borders not only on possible nepotism but had overtones of

corruption.

9 *My aforesaid conclusion is based on the fact that it is unheard of and highly unusual for an acting appointment to be made on a fixed term contract of three years with an option to renew, especially in a public entity like the Mmabana Foundation.*

10. *I therefore consider your appointment to be unlawful and void ab initio for non-compliance with the purports and objectives of section 13 of act 7 of 2000 as well as the recruitment process of the MX Foundation.*

11. *You are therefore afforded an opportunity to show cause, by not later than Monday, the 21st May 2012 at 10h00, as to why I should not terminate your purported appointment as the Acting Chief Financial Officer of the Mmabana Foundation forthwith in accordance with the provisions of section 13 (2) (c) of Act 7 of 2000.”*

14]In a replying letter of 21 May 2012, the applicant refused to take up the invitation to provide reasons for not terminating his appointment, because he was of the view that he had already been dismissed. It was only when he consulted his present attorneys of record on 23 May 2012 that he was made aware that no final decision had been made to dismiss him, but that he clearly had been suspended. On the same day a letter was sent to the MEC demanding that his services not be terminated and that he be immediately allowed to return to work at the Foundation. No reply was forthcoming by 25 May 2012 as requested and the applicant then launched this application on 29 May for a hearing on 31 May 2012.

Merits

Urgency

15]I am satisfied that between 21 May and 29 May 2012, the applicant acted with sufficient urgency in bringing this application, though the initial

hearing date should not have been scheduled a mere two days after launching the application. However, in view of the postponement of the hearing until 11 June 2012 the second respondent had more time to file an answering affidavit and was not prejudiced in that regard.

Prima facie right

16]The central issue concerning the intrinsic merits of the applicant's entitlement to remain in his job are inextricably entangled with the question whether or not his appointment, and his suspension, or alternatively termination, was lawful. This is directly linked to the authority of the erstwhile MEC to mandate his appointment and the current MEC to terminate or suspend it. The applicant also raised the issue of authority in relation to the current MEC's authority to oppose his application. In order to deal with this issue, the legislative framework must be outlined.

The Mmabana Act 7 of 2000

17]The preamble to the Mmabana Act, identifies among other objectives of the legislation the following:

“for purposes of developing the artistic and sporting talents of the people of the Province; to assist in the development, fostering and promotion of culture through development of individuals and groups of people interested in the arts, cultural and sporting activities; to provide for the management and control of the Mmabana Arts, Culture and Sport Foundation through the establishment of the Board of Directors;...”

(emphasis added)

18]Section 1 of the Act identifies the CEO as the Executive Director of the Foundation appointed in terms of s 14 of the Act, and the responsible member as the MEC. Section 2(3) of the Act provides:

“(3) From and after the commencement of this Act and subject to the provisions contained herein, the Foundation shall be controlled and represented by the Mmabana Arts, Culture and Sport Foundation Board of Directors as hereafter provided, and all acts of that Board shall be deemed to be acts of the Foundation.”

(emphasis added)

19]In terms of s 3 (1) of the Act, after advertising vacancies for the board, the MEC appoints the board consisting of at least six members, which includes the CEO as Executive Director and *ex officio* member of the board, for a period of three years on terms and conditions determined by the MEC. Section 8(4) of the Act further provides that the CEO has no voting powers on the board. Under the provisions of section 5(1) of the Act, the powers of the board include, among others :

“5 (1) In addition to the powers and functions conferred and imposed on the Board elsewhere by or in terms of this Act, or any other law, the Board shall, subject to the provisions of this Act, have all such powers and be charged with all such functions and duties as are necessary for the purpose of promoting the objectives of the Foundation as stated in section 2(2), and in order to duly and effectively manage, control and promote the affairs, business and interests of the Foundation, and, without derogating from the generality of the foregoing, the Board-

(a) may enter into contracts and conclude agreements and generally perform such acts and do such things as may be necessary for the proper exercise of its functions and duties;

...

(f) *shall be responsible for laying down and approving procedures, rules and regulations for the proper management of the Foundation;*

...

(h) *shall,; subject to the provisions of section 11, determine all matters relating to the terms and conditions of service of any officer or employee of the Foundation, and all matters relating to the disciplining of staff and their suspension from office or the termination of their services.*”

(Emphasis added)

20] There are other provisions pertaining to the Executive Director’s appointment which should be mentioned. Section 8(1) and 8(1)(b) provide that the Executive Director is only appointed by the MEC “in consultation with” the Board and “the procedure followed by the Board and the Responsible Member in the appointment of the Executive Director shall be in accordance with the principles of transparency and consultation.” Further, Executive Director “shall be the accounting officer for the Foundation and, subject to the control of the Board, be the Chief Executive Officer of the Foundation:..”¹ Lastly, s8 (4) provides that the board may delegate any of its powers, functions or duties in terms of the Act to the Executive Director.

21] As regards other staff of the Foundation, s 13(1) provides that the staff establishment consists of such posts “as the Board in consultation with the Responsible Member may from time to time determine” and s 13(2) provides that the board may make appointments to the posts.

22] It is common cause that at all relevant times, no board of the Foundation has been constituted. Before the application was launched, the second respondent took the view that she had the necessary authority to act in

¹ S 8(1)(b) of the Act

the board's stead, but in her answering affidavit she conceded she did not. Anomalously, the second respondent purported to give notice in her answering affidavit to terminate the applicant's contract having not adopted this course of action previously despite her letter giving the applicant an ultimatum to give reasons why she should not do so. The applicant in turn objects to this step arguing that it is in breach of the interim rule issued on 31 May 2012, by Cele C, in terms of which the applicant was interdicted from doing so, pending the final determination of the matter.

23]By contrast, the applicant contends that his appointment was valid because as the preamble to his contract makes clear, it was concluded between him and the acting CEO, Motlhamme, who was acting on the specific mandate of the erstwhile MEC. In other words, the source of authority for his appointment rested on the authority of the MEC to appoint him. The applicant adopts the argument initially made by the second respondent in her letter of 16 May 2012, namely that in the absence of a Board of Directors, the responsible member of the executive Council is clothed with the necessary authority to substitute and act on the board's stead and thereby takes all necessary decisions on behalf of the board.

24]In support of this argument, the applicant claims that the MEC fulfils the functions of the board in its absence as the MEC stands in the same relation to the Foundation, which is a corporate body, as a sole shareholder does to a company. The MEC must fulfil the functions of the board because the MEC appoints the board.

25]As an alternative argument about the source of the MEC's authority, the applicant relies on the provisions of s 49(1) of the Public Finance Management Act 1 of 1999.

26]In the further alternative, the applicant claims that even if his appointment is invalid, it must stand until such time as it is set aside on

review.

27]Clearly, whether or not the MEC has authority to act in the board's stead, has implications for the validity of actions taken by the former and current MEC in relation to the applicant's appointment and suspension, or alternatively, termination of his services.

28]According to the applicant it also has implications for the second respondent's authority to oppose his application. Before turning to the consequences of there being no duly appointed board, it is appropriate at this juncture to address the current MEC's alleged lack of authority to oppose the application.

Applicant's in limine objection: MEC's lack of authority to oppose

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30]In his replying affidavit, the applicant seizes on the second respondent's change of view about her legal authority to act in the board's stead if no board was appointed. Although the applicant does not subscribe to this view himself, as he maintains he was lawfully appointed by the acting CEO fulfilling the mandate of the former CEO, he argues, in effect, that if he is wrong, then the application cannot be opposed by the second respondent as she has no more authority than the previous MEC to act on behalf of the Foundation. As such she has no authority to oppose the application.

31]In this respect, I agree with the second respondent that the applicant is confusing the issue of whether the MEC has *locus standi* to oppose his

application, with the question of whether she has authority to act on behalf of the Foundation (the first respondent). The second respondent's *locus standi* does not rest on whether or not she may act in the name of the first respondent.

32] Rather it lies in her interest as the MEC as the member of the provincial executive committee responsible for the Foundation. In relation to the appointment of the board and the CEO these are matters that the MEC has a direct hand in terms of the provisions of the Mmabana Act. The determination of the staff establishment for the Foundation is something that the board is supposed to determine in consultation with the MEC. The MEC must approve the banking arrangements for the investment of funds which are surplus to the Foundations immediate expenditure requirements, and is responsible for tabling the Foundations audited statements to the provincial legislature for scrutiny.²

33] Where the MEC has reason to believe that acts have been done in the Foundation's name which are at odds with the legislative framework or good governance of the Foundation for which she bears political executive responsibility, then clearly she has an interest in intervening where the internal governance mechanisms are not functioning. In this instance, her concern is that the appointment of the applicant took place despite the application process for obtaining potential candidates being incomplete. In terms of her accountability as the responsible member of the executive to the provincial legislature, she can be called to answer for poor governance of the Foundation, particularly where she has failed to appoint a board³. As the member of the executive committee identified in

² S 16(1) of the Mmabana Act.

³ For example, an MEC can be called to account by the provincial legislature which has a constitutional obligation to oversee the functions of the executive. Section 114(2) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') provides that :

"a provincial legislature must provide for mechanisms-

(a) to ensure that all provincial executive organs of state in the province are accountable to it; and

(b) to maintain oversight of-

the Mmabana Act as the responsible member, she would have the primary responsibility as a member of the provincial executive committee for fulfilling the committee's constitutional function of implementing the Mmabana Act.⁴

34]I am satisfied that the second respondent has a real and substantial interest in proceedings which raise the issue of the validity of a senior appointment to the Foundation and which also has financial implications for the Foundation. Accordingly, quite apart from the fact that she is cited by the applicant as a respondent, she has *locus standi* to be a party to these proceedings in any event, even if she cannot claim to act for the Foundation itself.

The authority to appoint Foundation staff

35]As mentioned, it is common cause that no board was appointed at all material times relating to the applicant's employment as CFO of the Foundation. It is also clear in terms of s 13(2) of the Act, that the body given the power to appoint staff is the board, once staff posts have been determined by the board in consultation with the MEC under s 13(1). The board does have the power to delegate its functions to the Executive Director under s 12(4), but if the board does not exist he or she cannot exercise any delegated power from it to make staff appointments. Moreover, an executive director can only be appointed by the MEC in consultation with the board. In the absence of a board, the appointment of a CEO in the absence of the board cannot be valid.

(i) the exercise of provincial executive authority in the province, including the implementation of legislation; and

(ii) any provincial organ of state."

4 Under s 125(2)(a) of the Constitution, the general functions of provincial executive committees assigned by s 125(2) of the Constitution include the responsibility "to implement provincial legislation in the province".

36]It is understandable that the applicant seeks to impute authority, which is not sourced in the statute, to the MEC to assume the board's responsibility to appoint staff. If he had to rely on the Mmabana Act as the source of the MEC's power to do so and to delegate that authority to the CEO there is nothing on which he can ground his claim to have been properly appointed. Plainly it is the provisions of that Act which sets out who may appoint staff. It is equally plain, in the absence of a duly constituted board, there is no other person or body who or which is empowered by the statute to perform that function.

37]It is one thing to acknowledge that the MEC has responsibility to establish the board in accordance with the requirements of the Act, it is quite another to impute to the MEC the authority to run the Foundation in the place of a properly constituted board, if he or she fails in his duty to appoint one. The applicant can cite no provision of the Mmabana Act and provides no alternative basis why, on a proper interpretation of the statute, such a power must be implied because it is reasonably necessary to fulfil the objects of the legislation. The Act does provide the means for the MEC to staff the organisation, by establishing the board and appointing an Executive Director in consultation with the board through a process which is consultative and transparent. Accordingly, there is no need for an MEC to resort to some other mechanism for the appointment of staff, where it is the MEC's own inaction which prevents that mechanism being used.

38]Clearly, if the merits of the validity of the applicant's entitlement to his appointment have to be considered he will face considerable difficulty in asserting his claim. So to the brief analysis above reveals the second respondent's own difficulties in asserting a right to act on behalf of the first respondent.

Consideration of the MEC's attack on the validity of the applicant's appointment.

39]The applicant is asserting a right to give effect to a contract of employment, pending the ultimate determination of the validity of that contract. The second respondent has directly challenged the enforceability of that contract on the basis that it was concluded without the necessary authority. The applicant has two responses to this. Firstly, he argues that if the validity of the contract is in issue, that can only be decided if the applicant brings an application to invalidate it. Otherwise, like all potentially invalid administrative action it remains effective until a court decides otherwise. Secondly, he argues that the second respondent is estopped from denying the validity of the applicant's appointment in view of her predecessor's actions. For the reasons which follow it is not necessary to consider the latter argument.

40]The general statement of principle to the effect that an administrative act remains valid until set aside, is not in contention. The issue in this case is whether the second respondent was entitled to raise the invalidity of the applicant's appointment as a defence in these proceedings. In the SCA decision in ***Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA)** the court set out the applicable principles governing when the validity of an administrative act can be pronounced upon by a court if a party raises it as a collateral attack which the court characterised as a "challenge to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act."⁵ The SCA held that a collateral challenge would be available in the following circumstances :

"It is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act."

⁵ At 244,[32] and fn 22

41] In this instance, it is the MEC who seeks to set aside the action of her predecessor, so it is the administrative authority seeking to correct its own actions. Whatever the substantive merits of her claim to invalidate the applicant's employment might be, I think that she ought to have launched proceedings to set aside the previous decision rather than proceeding to act on the basis of the correctness of her views on the invalidity of the applicant's appointment.

42] When this matter was heard on 11 June, the second respondent belatedly handed up a notice of motion to review and set aside the applicant's appointment as a matter of urgency, relying on the allegations made in its answering affidavit. The intention of doing so was presumably to cure any failure to have brought such an application in the event that a collateral attack on the validity of the applicant's appointment is not permissible in the circumstances. The applicant retorted that the MEC could not terminate his services in the face of the interim rule issued on 31 May 2012, in terms of which the MEC was interdicted from terminating the applicant's contract of employment for any reason not recognised by law, pending the final determination of the matter. I agree that the MEC's purported termination flies in the face of that order, for the very same reason that I do not think a collateral attack is permissible. As the MEC obviously believes that she may presume the original appointment to be invalid, and therefore her purported termination of his employment is one that would be valid in law, I doubt that her action can be construed as an act of contempt. In any event, that is not something I need to determine in these proceedings.

43] While there is nothing in principle that would prevent the applicant launching her counter-application on an urgent basis to set aside the decision of her predecessor, that is a matter which the applicant clearly had not had a reasonable opportunity to consider and respond to as a distinct claim before 11 June 2012, even if the counter application essentially arises from the same factual circumstances and raises issues already on the table in this application. Accordingly, that counter application was brought on insufficient notice and must fall to be

dismissed for lack of urgency in the sense that the notice of the application was too short.

44]In the absence of being able to entertain a collateral attack, I am bound to accept that the applicant was appointed for a three year period by the former MEC and until that action is set aside as invalid I must accept, albeit reluctantly, that his appointment stands. Moreover, since the second respondent has not appointed a board, and since she cannot fulfil its functions in its absence, she cannot act in the first respondent's name, even though she has standing to act in her own capacity. It follows also that the MEC had no authority to suspend the applicant as she purported to do, and she can be interdicted from attempting to do so.

45]As the matter stands before me now, the MEC cannot act in the first respondent's name and therefore has no authority to suspend or terminate his services. In so far as the first respondent can be represented by the acting CEO, it is not opposing the relief sought. In any event whether or not he is any better placed to speak on the first respondent's behalf, the MEC cannot, so the matter remains unopposed by the first respondent. The MEC is not without a remedy as she can still apply to set aside his appointment for want of validity. For the reasons mentioned I was not willing to entertain her urgent application to do so in the proceedings of 11 June 2012, but there is no reason, in principle, why such an application could not be re-launched on more adequate notice.

Relief

46]Since the applicant has essentially been able to avoid the collateral

attack there is no reason to grant the interim relief sought, as I believe he has demonstrated a clear right not to be suspended or dismissed by the MEC acting on behalf of the first respondent.

47]The applicant has brought these proceedings pending the outcome of his application under case J 1308/12 to have his employment as acting CFO declared valid and lawful, which he seeks to have heard on an urgent basis. I agree that this matter should be accelerated, in view of the seniority of the post he holds and the cost of his remuneration to the first respondent. Accordingly, it will be appropriate in my view to set the main application down on a relatively urgent basis.

Costs

48]Although the applicant is successful in obtaining interim relief, I believe that the equity and fairness of a cost award will be easier to decide when the main application is heard and the substantive merits are decided. Accordingly, costs will not be determined at this juncture.

Order

49]In light of the above, an order is made in the following terms:

- a. It is directed that the Applicant's application under case number J 1308/12 dated 28 May 2012, be finally determined as a matter of urgency on 27 July 2012 at 10h00 or as soon thereafter as the matter may be heard;
- b. The respondents are restrained and interdicted from terminating the applicant's contract of employment for any reason(s) not recognised by law or contrary to section 13(2)(c) of the Mmabana Arts, Culture and Sports Foundation Act 7 of 2000 pending the final determination of the matter on 27 July

2012.

- c. The respondents are directed to comply with the Applicant's contract of employment, annexed as Annexure "C" to the Applicant's founding affidavit pending the final determination of the matter on 27 July 2012.

50]The second respondent's counter application to set aside the applicant's appointment as invalid is dismissed solely for not satisfying the requirements of urgency.

Costs are reserved.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: M G Hitge instructed by Scholtz Attorneys

SECOND RESPONDENT: F A Boda with A Mosam instructed by KMT
Attorneys

