REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2300/2011

In the matter between:

VELILE BENNET KHUMALO	**Applicant**
and	
MR JOEL SIBUSISO NDEBELE	
MINISTER OF TRANSPORT	**FirstRespondent**
MR GEORGE MAHLALELA	
DIRECTOR GENERAL: DEPARTMENT OF	
TRANSPORT	**Second Respondent**
ROAD TRAFFIC MANAGEMENT CORPORATION	**Third Respondent**
CHAIRPERSON: RTMC	**Fourth Respondent**
SHAREHOLDERS COMMITTEE	**Fifth Respondent**
LETSOALO COLLINS N.O (ACTING CEO: RTMS)	**Sixth Respondent**
REBAONE GAORAELWE N.O (CHAIRPERSON:	
DISCIPLINARY COMMITTEE)	**Seventh Respondent**

Heard: **19 February 2013**

Judgment: 12 April 2013

Summary: Application to declare the appointment of the sixth respondent unlawful and an application to declare the decision of the sixth respondent to investigate and institute disciplinary action against the applicant to be unlawful and invalid. Application dismissed with costs.

JUDGMENT

AC BASSON, J.

Introduction

[1] This is an application for an order declaring the dismissal of the applicant (Mr Velile Bennet Khumalo) unlawful and for an order compelling the Third Respondent to reinstate him and to pay him his salary and all benefits lost from the date of dismissal to date of reinstatement. The applicant also seeks an order declaring the appointment of the Sixth Respondent as CEO unlawful.

[2] The applicant in this matter was previously employed as Manager: Internal Audit at the Road Management Corporation ("the RTMC or the Corporation"). The RTMC is an Organ of State established in terms of the Road Traffic Management Corporation Act, 20 of 1999 (hereinafter referred to as "the Act"). The applicant's appointment was to run for a five year period ending on 30 April 2013.

[3] The applicant was charged with gross misconduct on 3 May 2010 and was subsequently found guilty by a disciplinary enquiry. I do not intend to record what the charges against the applicant were or what the reasons for his guilty finding were as the applicant has elected in these proceedings not to attack the findings of the Chairperson of the disciplinary hearing. Instead, the applicant has now elected to attack the validity of the appointment of the acting CEO who was the person who took a decision to institute disciplinary action against him. In essence, his contention is that because the appointment of the acting CEO is invalid,

the decision to institute disciplinary action against him was, therefore,also invalid.

[4] The date of the applicant's dismissal was 11 October 2010, being the date onwhich an appeal hearing dismissed his appeal. The applicant referred his unfair dismissal dispute to the CCMA but later removed the dispute from the jurisdiction of the CCMA and instead decided to refer his dispute to this Court.

[5] The applicant contended that the appointment of the acting CEO (Mr Letsoalo – the sixth respondent – hereinafter referred to as "Letsoalo") was irregular for want of compliance with the Act. It was further submitted on behalf of the applicant that the decision to appoint Letsoaloand all the decisions taken by him thereafter are reviewable under section 6 of the Promotion of Administrative Justice, Act.[1] The decisions of Letsoalo, according to the applicant, to investigate charges of misconduct against him,institute disciplinary action against him and to dismiss him were*ultra vires* and,therefore,has no legal effect.

[6] It is clear from the papers that the applicant is attacking his dismissal on the basis of the alleged "unlawfulness" of the appointment of the acting CEO (Letsoalo) and not by reason of any attack on the decision of the chairperson who dismissed him. The applicant has also withdrawn any attack on the fairness of his dismissal from the jurisdiction of the CCMA. Whilst the applicant disputes that he is guilty of the charges, he did not content in these proceedings that there was anything irregular about the conclusion reached by the Chairperson of the disciplinary hearing.

[7] Mr Ellis SC appeared on behalf of the first, second and fourth respondents. Mr Hulley appeared on behalf of the third and sixth respondents. Although Mr Ellis SC advanced certain additional arguments, the first, second and fourth respondents made common cause with the submissions advanced by Mr. Hulley. I will refer to the submissions advanced on behalf of the all respondents without

[1] Act 3 of 2000.

distinguishing between the submissions made by Mr Hulley and those made by Mr Ellis SC.

Locus Standi[2]

[8] It was contended on behalf of the respondents that the applicant does nothave neither any *locus standi* nor interest in declaring the appointment of Letsoalo as the acting CEO to be unlawful. This is a valid point and one which is, in my view, dispositive of the present application. The legal position appears to have been first set out in *Patz v Green and Co*[3] where the Court relied upon the English case of *Chamberlain v Chester and Birkenhead Railway Company* where the legal position was set out as follows:

> 'Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage.'

[9] The first part of the English law rule as imported into South African law in the *Patz-* was modified by the Court *Dalrymple v Colonial Treasurer*.[4] The Court in the latter case held that it is not necessary as was set out in English law that a plaintiff who seeks to enforce legislation enacted in the public interest must have an interest greater than that enjoyed by other members of the public. The Court held that South African law 'did not require that the interest of the person suing should be greater or more special than of other members of the public'. In respect of the second

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[2] I have liberally quoted from Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* (5th Edition) Cillliers (eds) *et al* at page 192 – 103 in summarising the legal position.
[3] 1907 TS 427 at 433.
[4] 1910 TS 372 at 380 – 381.

part of the rule, the Appellate Division in *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*,[5] held that:

> '[w]here it appears either from a reading of the enactment itself or from that plus a regard to surrounding circumstances that the legislature has prohibited the doing of an act in the interest of any person or a class of persons, the intervention of the court can be sought by any such person to enforce the prohibition without proof of special damage.'

[10] The rule relating to *locus standi* of a party to prevent any breach of a statute,[6] therefore, appears to be as follows: Firstly, where it appears either from a reading of an enactment or from the surrounding circumstances that the Legislature has prohibited the doing of any act either wholly or partly in the interest of any person or class of persons, any such person can claim an interdict to enforce the prohibition without proof of damage. Secondly, where the doing of an act is prohibited in the public interest, any member of the public who can prove damage or well-founded apprehension of damages, can claim an interdict to enforce the prohibition. An applicant contesting any breach of a statute must either be a member of a special or general class of persons for whose benefit the statute was promulgated. If the applicant does not fall in either category he has no legal standing to enforce the terms of the statute.

[11] I have considered the above and I am of the view that the applicant does not have the necessary *locus standi* to bring the present application. The applicant is not a member of a special or general class of persons for whose benefit the statute was prohibited. Moreover, I am in any event not persuaded that the appointment of Letsoalo was unlawful. I will now briefly consider the lawfulness of his appointment. (I will return to the *locus standi* argument hereinbelow.)

<u>Lawfulness of the appointment of Letsoalo</u>

[12] Was the appointment of Letsoalo unlawful? I am of the view that, on the facts before this Court, the appointment of the acting CEO was in

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[5] 1933 AD 87 at 96.
[6] Where the matter is not concerned with the promotion or protection of constitutional rights.

anyevent not unlawful. Furthermore, as will be pointed out herein below, even if his appointment was initially unlawful, his appointment was subsequently, ratified and all decisions taken by him retrospectively ratified by the Shareholders Committee. Accordingly, it is concluded that there exists no basis on which to conclude that the appointment of the acting CEO was invalid. Consequently, there exists no basis upon which to conclude that the decision to investigate and to institute disciplinary action against the applicant was *ultra vires* and of no legal effect.

[13] For reasons irrelevant to theseproceedings, the Board of the third respondent was dissolved and the CEO (Mr Rakgoale) suspended pending the outcome of a disciplinary enquiry. Rakgoale has since resigned.

[14] The Minister of Transport appointed an acting CEO (Letsoalo) in place of Rakgoale.It is important to note that Letsoalo was only appointed as the acting CEO and not as the permanent CEO. The Minister informed Letsoalo in a letter that‘this serves to inform you that you are hereby appointed as acting Accounting Authority for the Corporation’.

[15] The Minister has, in terms of section 20(3) of the Act, the power to make available the services of an official in the employ of the Department of Transport to the Corporation. Before the Minister may do so, he or she must consult with the Shareholders Committee and the Director-General of the Department of Transport. Furthermore, the official who is made available (in this case Letsoalo) to the Corporation must give his or her written consent. Once the consultation process has been followed, an official from the Department of Transport may be seconded to the RTMC.

[16] According to the papers,the first respondent (“the Minister”) consulted with the Director-General and the consent of Letsoalo was obtained after an invitation was extended to him to take up the position. It, further,appears from the papers that because of the pressing nature of the appointment, the Shareholders Committee was not consulted before the appointment was made. However, on 1 April 2011, in order to put an end to any suggestion that Letsoalo’s appointment was irregular, the

Shareholders Committee (consisting of the Minister of Transport as Chairman, nine provincial members of the Executive Councils of Transport of the various provinces and two Local Government delegates) resolved to ratify and confirm the appointment of Letsoalo with effect from 11 February 2010.

[17] The contention on behalf of the respondents is that the appointment of Letsoalo as the acting CEO was valid and that it was not necessary to have complied with the formalities required for the appointment of a permanent CEO. I will return to this point hereinbelow. What is important, in order to decide this matter, is to determine what the powers of the Shareholders Committee are. The role of this Committee is set out in section 7 of the Act and in terms of section 15(1) of the Act, the Shareholders Committee must appoint a CEO. As will be pointed out herebelow, it is, in my view,clear that section 15(1) of the Act (and the procedures set out in this section) is only applicable where a permanentCEO is appointed. However, the Act (in section 7) also provides for the appointment of personnel to ensure the proper function of the Corporation in the public interest. There is, therefore, in my view, nothing which prevents the Shareholders Committee from appointing an acting CEO as this would ensure the proper functioning of the Corporation in the public interest.

[18] In essence, the applicant's contention is that, when an acting CEO is appointed, the proceduresas contemplated in section 15 of the Act had to be followed and that the failure to follow those procedures rendered the appointment of Letsoalo invalid. I do not agree for the reasons already stated: Section 15 of the Act is, in my view, directed at the appointment of a permanent CEO and not at the appointment of an acting CEO. The contention on behalf of the respondents also is that the procedures as contained in section 7(2) of the Act is applicable when appointing an acting CEO and that it was therefore not necessary to have followed the cumbersome advertising process provided for in section 15 of the Act.

[19] I have considered both sections. Section 15 of the Act deals with the appointment of the CEO of the Corporation and an appointment may only

follow upon an advertising process. Section 7(1), as already pointed out empowers the Shareholders' Committee to ensure the proper functioning of the Corporation. In my view,this implies the power to appoint an acting CEO. Accordingly, I am, therefore, of the view that there is no merit in the contention that the appointment of Letsoalo as acting CEO was invalid.

[20] Turning back to the *locus standi* argument, even assuming that the appointment of Letsoalo was irregular either under section 7(2) or section 15 of the Act, I fail to see what the interest of the applicant is in disputing the appointment. Had the applicant sought an order setting aside the appointment of Letsoalo on the basis that he (the applicant) was running for the post and ought to have been appointed, the position may have been different. Furthermore, if the complaint of the applicant is carefully analysed, it is clear that he is not so much concerned with the appointment of Letsoalo as acting CEO but rather with his decision to cause disciplinary action to be instituted against him which had resulted in his dismissal. It is, accordingly, on that basis that he attacks Letsoalo's appointment.

[21] I am also not persuaded that the provisions of section 7(2) and section 15 of the Act were promulgated for the benefit of any special or general class of persons to which the applicant belongs. Accordingly, I am in agreement with Mr Hulley (as already pointed out) that the applicant has no *locus standi* to attack the lawfulness of the appointment of Letsoalo.

[22] In conclusion, I am not persuaded that section 15 applies to the appointment of an acting CEO as contended by the applicant simply because the process contemplated in this section is cumbersome and time-consuming. In the present instances, exigencies demanded the appointment of an acting CEO to take over the reins in the temporary absence of the CEO. Because the Shareholders' Committee is responsible for directing and guiding "the proper functioning" of the Corporation, it is therefore, in my view, competent for the ShareholdersCommittee to appoint an acting CEO as the appointment of an acting CEO is crucial to the proper functioning of the Corporation. If regard is had to the important functions of a CEO as set out in section

6(5); section 14(2), section 19 and section 20(1) of the Act, it is clear that it must be in the powers of the Shareholders Committee to be able to appoint an acting CEO to fulfil these important duties on a temporary basis until the appointment process for a permanent CEO can be followed. Of particular importance is also the provisions of section 25(1) and section 29(1) of the Act which provides that the CEO is the accounting officer of the Corporation and responsible for managing and controlling the day-to-day affairs of the Corporation. What is further clear from the aforegoing provisions is the fact that the Corporation cannot properly function without the office of the CEO (or an acting CEO in the absence of a permanent CEO). I am, therefore, of the view that the appointment of Letsoalo was not invalid.

[23] However, even if Letsoalo’s appointment was invalid as contended by the applicant, I am not persuaded that his decision to institute disciplinary proceedings against the applicant was null and void. I am in agreement with Mr Hulley that it cannot merely follow that because the appointment of the CEO was invalid that the Legislature also intended that all decisions taken by him are likewise invalid. Can it be said that in the event Letsoalo’s appointment was invalid that the subsequent decision to institute disciplinary action was also invalid? I am of the view that, in the present circumstances, this is not necessarily the case. Firstly, there is no direct prohibition in the Act against the appointment of an acting CEO and secondly, to declare invalid all decisions taken by the acting CEO, will have dire consequences for the Corporation.

[24] Lastly, a point overlooked by the applicant is the fact that the ultimate decision to dismiss him was not taken by Letsoalo but by an independent chairperson. Letsoalo’s role was, therefore, at best tangential. Furthermore, the applicant surprisingly does not attack the decision of the chairperson.So, in my view, that decision should stand.

[25] In respect of costs, I can see no reason why costs should not follow the result including the costs of two counsel. In arriving at a decision in respect of costs, I also considered the fact that the applicant has an alternative remedy at his disposal which is to have approached the

CCMA for relief. Instead of approaching the CCMA, which is the most effective and speedy process, to contest the fairness of his dismissal, the applicant elected to approach this Court with an application that is devoid of any merit.

[26] In the event, the following order is made:

26.1 The application is dismissed.

26.2 The applicant to pay the costs of both counsel including the costs of one senior counsel.

AC BASSON, J

Judge of the Labour Court

APPEARANCES:

For the Applicant: Advocate MS Mphahlele

Instructed by:	Mafuyeka Attorneys
For the third Respondent:	Advocate GI Hulley
Instructed by:	Verveen Attorneys
For the first, second and	
fourth Respondents:	Advocate P Ellis SC
Instructed by:	The State Attorney