



REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2422/11

In the matter between:

**THE HOSPITAL ASSOCIATION OF
SOUTH AFRICA**

First Applicant

**THE NATIONAL UNION OF PUBLIC
SERVICE AND ALLIED WORKERS**

Second Applicant

and

**THE MINISTER OF HIGHER
EDUCATION AND TRAINING**

First Respondent

**THE HEALTH AND WELFARE
SERVICES SECTOR EDUCATION AND
TRAINING AUTHORITY**

Second Respondent

NOZIPHO JANUARY-BARDILL

Third Respondent

THEMBI MATHENJWA

Fourth Respondent

SHEILA BARSELL	Fifth Respondent
EMMA ZONDO	Sixth Respondent
FAZEELA FAYERS	Seventh Respondent
HITLA SKITLA	Eighth Respondent
PAT MOTUBATSE	Ninth Respondent
REHMETH FAKROODEEN	Tenth Respondent
ELSETTE STRACHEN	Eleventh Respondent
WANDILE MONTJANE	Twelfth Respondent
ARISTIDES SEIRLIS	Thirteenth Respondent
IVEDA SMITH	Fourteenth Respondent
ROEDOLF VAN LOGGENBERG	Fifteenth Respondent
DEREL SHAEDLOW	Sixteenth Respondent
MARGARETHA SMITH	Seventeenth Respondent

Heard: 18 December 2013

Delivered: 13 May 2014

Summary: Review of administrative decisions brought in terms of section 33(2) of the SDA. Labour Court having jurisdiction- Minister extending Second respondent's term to 31 March 2016- Minister approving second respondent's new constitution and appointing constitutive members -Minister exceeding his powers as 2005

constitution still valid- Minister's decisions set aside- Minister given four months to allow nomination of members. Review application granted with costs.

JUDGMENT

MATYOLO AJ

Introduction

- [1] This is an application to review and set aside the actions of the First Respondent, (*the Minister*) of the 08 April 2011 in imposing the new standard constitution on the Health and Welfare Services Sector Education and Training Authority and appointing the Third to Seventeen Respondents as members of the training authority.
- [2] The facts in this matter are largely common cause and as a result, I need only to set out a short synopsis of the overall picture.

Material facts

- [3] It appears that on or about 8 April 2011, the Minister took a decision in terms of which he promulgated the applicability of the standard constitution to all SETAs and appointed the Third to the Seventeenth Respondents as members of the Second Respondent.
- [4] The Health and Welfare Services Sector Education and Training Authority (*HWSETA*) was until the Minister's decision governed by Clauses 9 and 10 of the 2005 constitution which provided the constituent parts and representation for the establishment of an Executive Committee respectively.
- [5] It is common cause that in February 2010, the Minister extended the operation of the HWSETA to 31 March 2011 and a further extension period was given by the Minister

on 11 November 2010 for the period 1 April to 31 March 2016. During the periods of extension, the affairs of the HWSETA were, as earlier indicated, governed by its 2005 constitution.

- [6] Sometime during November 2010, the Minister published a proposed draft model of a constitution for adoption by all Sector Education and Training Authorities (“SETAs”) which, if adopted, would govern the affairs of the SETAs that would have adopted it.
- [7] The Minister, acting in terms of sections 9 and 13 of the Skills Development Act 97 of 1998 (SDA) approved all constitutions of the SETAs and appointed the chairpersons and members effectively substituting the 2005 constitution of the HWSETA and removing its members, substituting them with the Third to Seventeenth Respondents. It is these actions of the Minister that the Applicants seek to have reviewed and set aside on the basis that they are unlawful and were effected in a manner that is inimical to the proper exercise of administrative powers.

The issue

- [8] The Applicants seek to have the Minister’s actions reviewed and set aside on the following grounds:
 - (i) The grounds set out in PAJA
 - (ii) The Minister’s actions are *ultra vires* his powers as the Minister was not authorised by the SDA in that, the Minister did not follow the mandatory requirements of the SDA that are required under section 13(1); the Minister failed to follow a fair procedure in taking the decisions; the decisions were taken for reasons other than those authorised by the SDA; the Minister’s decisions contravened the provisions of the SDA and the Minister approved a constitution that is in conflict with the SDA and that the decisions are unconstitutional.

- (iii) The decisions of the Minister are unlawful if regards is had to the provisions of subsections 6(2)(a)(i); (b), (c), (e), (f), (h) and (i) of PAJA.
- (iv) The decisions and the manner in which they were taken offend against the rule of law and the principle of legality.

Submissions and arguments

- [9] The Applicants referred the Court to the Judgment of Basson J in *Services Sector Education and Training Authority and Others v Minister of Higher Education and Training and Others*¹ in which, the Court found *inter alia*, that:

‘It is a fundamental requisite of not only the constitutional rule of law but of administrative law that a Minister can only take specific action if he or she has the necessary authority to do so...’

They argued that the Minister was not empowered by the SDA to do what he did on 8 April 2011 and their application was aimed at having those actions reviewed and set aside.

- [10] The Applicants further submitted that this application was launched within 180 days in line with the provisions of PAJA. They argued further that the Minister was invited to undo the changes he had introduced and remedy what the Applicants viewed as an unlawful conduct and provide reasons. It was argued further for the Applicants that in terms of section 5(3) read with 5(4) of PAJA if an administrative body fails to provide adequate reasons for an administrative action, that administrative action must be presumed to have been without good reason. The Applicants argued that the Minister failed to provide them with reasons for his actions.

- [11] The Applicants argued further that what the Minister did was not within his powers as it was not provided for in the SDA and the later amendments were only presented for

¹ (2011) 32 ILJ 2225 (LC).

public comment after the Minister had already acted.

- [12] Mr Leech, for the Applicants, referred the Court to the provisions of section 31 of the SDA and argued that on a proper reading of the section, this Court is the only court to which the Applicants could have come to for this kind of application. Section 31(2) in particular provides *inter alia* that, “the labour Court may review any act or omission of any party person in connection with this Act on any grounds permissible in law”. He argued that this should clarify any issues relating to the jurisdiction of this Court.
- [13] The Court was also referred to the decisions of the *Constitutional Court in Chirwa v Transnet Ltd*² and *Gcaba v Minister for Safety and Security*³ and two decisions of this Court in *National Bargaining Council for the Clothing Manufacturing Industry (Cape) and Others v Zietsman NO and Others*⁴ and *De Villiers v Head of Department of Education Western Cape Province* in which the Court concluded that the non-applicability of PAJA is limited to employment and termination of employment.
- [14] Mr Leech, for the Applicants further referred the Court to the Constitutional Court decision in *Minister of Health and Another NO v New Clicks South Africa (PTY) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)*⁵ where the court held *inter alia* that, at para 95:

‘PAJA is the national legislation that was passed to give effect to the rights given in section 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.’

- [15] The Applicants argued further that what was before Court is a case of powers purportedly exercised under the SDA which is quintessentially administrative action

² 2008 (4) SA 367 (CC).

³ 2010(1) SA 238(CC).

⁴ (2013) 34 ILJ 151(LC).

⁵ 2006 (2) SA 311(CC).

and secondly was a publication of regulations.

- [16] The Applicants further argued that if the Minister's actions are set aside there will be no prejudice and that if there should be any, the Court can give a period of 120 days to allow the Minister to remedy the situation by allowing the process of nominations and appointments to be finalised as this was a better proposition than allowing a perpetuation of an unlawful act.
- [17] In relation to issue of non-joinder raised by the Respondents in the papers, It was argued no proper case was made for non-joinder as the interest of the non-joined litigants had not been explained.
- [18] In answering, Mr Mokhare confirmed that the factual matrix relating to the actions of the Minister on or about 8 April 2011 before this Court is uncontested as it appears that the Minister started a process of attempting to reconfigure the SETAs.
- [19] He argued that the process was all inclusive and the Applicants participated but could not agree with the adoption of the standard constitution and the appointment of new members. He also argued that it does not appear that the Applicants deny the fact nor do they challenge the establishment or re-establishment of the SETAs by the Minister which became effective from 1 April 2011 and would come to an end on 31 March 2016. He argued that what he understood as the issue for the Applicants was the approval of the standard constitution and the appointment of Third to Seventeenth Respondents. In addition to this, the Applicants seek the people who were members on 7 April 2011 to be declared the lawfully appointed and the constitution that was in place should be declared the sole valid and lawful constitution of the Second Respondent.
- [20] The Respondents argued further that the lifespan of the 2005 constitution was extended by the Minister until 31 March 2011 and it follows that by 7 April 2011, there was no 2005 constitution as it automatically expired on 31 March 2011 and the

membership automatically expired with effect from 1 April 2011. There was therefore no 2005 constitution on 8 April 2013 as it lapsed when its extended lifespan expired.

- [21] It was argued further that the Applicants would need to demonstrate that there was a further extension beyond 31 March 2011 and if there was no such further extension, they cannot lawfully ask the Court to appoint members into the SETA when their term of office came to an end and this Court cannot therefore be asked to breath life into the 2005 constitution which was modified on 31 March 2011.
- [22] The Respondents argued further that in terms of the 2005 constitution, a member is entitled to hold office for five years after which he is eligible for appointment and there is no case made out in the papers that those members were in fact appointed after the expiry of their term of office on 31 March 2011. Similarly, it was argued that no evidence is contained in the papers showing that there were elections in which these members were elected as they were required to, three months before the expiry of their term, to have called for nominations.
- [23] This argument, was to show that in as far as the Applicants seek an order that those members must be declared by this Court to have been the lawfully appointed members of the authority that it cannot be countenanced as it is not competent for this Court to grant an order that those persons were lawful members of the authority on 7 April 2011.
- [24] He also argued that in so far as the Applicants seek to have the 2005 constitution to be declared the sole valid and lawful constitution, that prayer must fail as the 2005 constitution lapsed on 31 March 2011. It has never been extended by the Minister and there is nothing to show that in terms of the constitution the members of the authority took any decision or resolution extending its lifespan.
- [25] Mr Mokhare indicated that after having had a relook at section 31 of the SDA, he had no issue with this Court's jurisdiction and the issue that remains was whether the

review was brought in terms of PAJA or whether it is a review permissible in law and if it were a review permissible in law, it would have to have been brought within a reasonable time and in this instance section 145 of the Labour Relations Act gives guidance in providing that the review must be brought within six weeks though section 158 does not provide time frames within which the review must be brought.

- [26] He argued further that he would not take issue if the Applicants argued that their review application has been brought within a reasonable time but was firm in the argument that it cannot be review brought under PAJA but is a review that has been brought, "*under any other law*" and that it was a common law review *sui generis* which has been provided for in the legislation or under the principle of legality but cannot be brought under PAJA. Mr Mokhare indicated that he would not take issue if condonation was granted as the matter was an important one and has to be dealt with on its merits.
- [27] Mr Mokhare also indicated that it is not the Respondents' argument that the amendments in the SDA had the effect of making the Minister's "allegedly unlawful" actions lawful and indicated that he agreed with the Applicants' argument that the law is clear on the point that an unlawful decision cannot be made lawful by a subsequent amendments but he maintained that the decision of the Minister which is the subject of this application was not unlawful as it was taken after consultation and was accepted across the board but for only two SETAs being the Applicants and the services SETA.
- [28] Mr Mokhare argued further that the Minister would suffer prejudice if the Minister's actions complained about were to be reviewed and set aside as that would have the effect of disrupting all the SETAs as the Applicants prayer does not limit the Court to setting aside the constitution in as far as it applies to them and that even if the order of the Court would apply only to them, if the standard constitution is declared invalid it will affect the other SETAs as they have organised their affairs in accordance with

the standard constitution and for this reason argued that even if the decision of the Minister is found to be invalid, the Court must condone the invalidity as there will be more harm if the Court sets the Minister's action aside. The Court may acknowledge the invalidity of the decision without setting it aside.

- [29] It was argued further that the Minister would not reinstate the constitution of 2005 as it expired on 31 March 2011 and on that basis, it was prayed that the application should be dismissed and costs should follow the result.

Analysis

- [30] The facts in this matter, as indicated elsewhere in this judgment are largely common cause and in seeking to have the decision of the Minister reviewed and set aside, the Applicants have brought this application on the basis of the provisions of section 33(2) of the SDA. In the papers before Court, the Respondents had objected to the jurisdiction of this Court. However, during his argument Mr Mokhare indicated that on his second reading of the provisions of the section, he conceded that this Court indeed has jurisdiction. I must say that the concession was well made.
- [31] The other issue was whether the application was brought in terms of the Labour Relations Act 66 of 1995 as amended in which case it would be a review brought on either section 145 or section 158. If that were so, the Respondents argued that the application was late and the Applicants ought to have filed an application for condonation.
- [32] Section 145 exclusively deals with the review of arbitration awards and would find no application in the matter before this Court. Section 158(1) on the other hand provides *inter alia* that:

‘The Labour Court may—

- (h) review any decision taken or any act performed by the state in it's

capacity as employer, on such grounds as are permissible in law..

(j) deal with all matters necessary or incidental to performing functions in terms of this act or any other law.'

Both subsections are silent on the time frames within which such an application should be brought before Court. In such circumstances, the Courts have indicated that such applications should be brought within reasonable time frames.

- [33] The Applicants on the one hand argued that this application has been brought in terms of PAJA and that it was brought within the 180 days time limit set out in PAJA and therefore there is no need for a condonation application.
- [34] In dealing with this issue, I need to first deal with the applicability of PAJA as the Respondents had argued that PAJA is not applicable in the current dispute. Having been referred to the decisions of the Constitutional Court in *Chirwa v Transnet*; *Gcaba v Minister of Safety, Minister of Health and Another v New Clicks (supra)* and indeed this Court in *National Bargaining Council for the Clothing Manufacturing Industry (Cape) and Others v Zietsman NO and Others* and *De Villiers v Head of Department of Education, Western Province*, I find that PAJA is applicable in this matter.
- [35] In this matter, the Minister was clearly exercising his powers in terms of the SDA and his actions constituted an exercise of administrative authority which is within the purview of PAJA. The source of the Minister's power in this matter is legislation, the SDA. This much is clear from the Respondents' own arguments that the Minister's actions were not unlawful as he was empowered by the SDA. This clearly indicates that in his actions on 8 April 2011, the Minister was exercising his administrative powers in terms of the SDA. It is for these reasons that, I find that PAJA is applicable and with that there is no need for a condonation application as the application was

brought within the requisite 180 days time limit provided for therein.

- [36] Having looked at the SDA, the piece of legislation which it is argued is what empowered Minister to act as he did, I cannot find any support for the authority to act in the manner he acted, consequently I find that the Minister was not empowered and his actions fall to be reviewed and set aside.
- [37] I cannot find any reason for not continuing with the 2005 constitution in line with extension given by the Minister for the period up to March 2016. To this end, the Minister is given a period of four months from the date of this judgment to allow for nomination of members in accordance with previous extensions.
- [38] Accordingly, I make the following order :
- (i) The decision of the Minister taken on 8 April 2011 and published and implemented under Government Notice No 316 in Government Gazette No 34202 in which the Minister approved the Second Respondent's Constitution is reviewed and set aside.
 - (ii) The decision to appoint the Third to Seventeenth Respondents by the Minister is also reviewed and set aside. The Minister is given four months within which period the Second Respondent is to be reconstituted in accordance with the 2005 Constitution by appointing members in accordance with that Constitution.
 - (iii) The Minister is directed to effect the nomination process for new members in accordance with the 2005 Constitution in line with his extension of the term which expires in March 2016.
 - (iv) The Respondents are ordered to pay the costs including costs of the two counsel.

Matyolo AJ

Acting Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

FOR THE APPLICANT:

Adv B .E Leech SC with Adv M Kgatle

Instructed by Werksmans Attorneys

FOR THE RESPONDENTS:

Adv W Mokhare SC with Adv M Zulu and Adv M Qofa

Instructed by The State Attorney