



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 157/14

In the matter between:

LINDIWE CINDI AND 27 OTHERS

1st to 28th Applicants

And

MINISTER OF ARTS AND CULTURE

First Respondent

PAN SOUTH AFRICAN LANGUAGES BOARD

Second Respondent

MXOLISI ZWANE

Third Respondent

46 OTHERS

4th and further Respondents

Heard: 22 October 2015

Delivered: 27 October 2015

JUDGMENT

VAN NIEKERK J

[1] The applicants seek an order in the following terms:

1. Condoning the late filing of this application;
2. Declaring unlawful and invalid, the appointment of the third respondent;
3. Reviewing and setting aside the second respondent's appointment as Administrator or Acting CEO of the second respondent;
4. Declaring unlawful and invalid the restructuring undertaken by the second and third respondents;
5. Reviewing and setting aside the restructuring in the second respondent by the third respondent;
6. Declaring unlawful and invalid the appointment of 4th to 48th respondents;
7. Declaring unlawful and invalid employment contracts entered into by and between the second respondent and 4th to 48th respondent;
8. Reviewing and setting aside the employment contracts entered into between the second and all 4th to 48th respondent;
9. That the first, second and third respondent are ordered and directed to pay the costs of this application, on a scale as between attorney and client, jointly and severally...

[2] The material facts are canvassed in the papers and I do not intend to repeat them here. For present purposes, it is sufficient to note that the events that form the subject of the present application occurred in a particularly unhappy period in

the second respondent's history. More directly, the present application has its roots in the applicants' dissatisfaction at the appointment of the third respondent as caretaker CEO of the second respondent in June 2012 and a restructuring of the second respondent that the third respondent attempted to introduce, as well as his appointment of the 4th to 48th respondents.

- [3] The applicants contend that the appointment of the third respondent was invalid because he was appointed by the first respondent rather than the second respondent's board as required by s 10 of the Pan South African Language Board Act 59 of 1995 (the Act). The applicants submit that the third respondent's invalid appointment had the consequence that he lacked the necessary powers and authority to embark on a restructuring of the second respondent and to appoint the 4th to 48th respondents, with the result that their contracts of employment are invalid.
- [4] When the matter was called, it transpired that not all of the parties' representatives had been provided with a full set of the papers. At a case management meeting held in 2014, a timeline was introduced, amongst other things, to regulate the filing of a record and affidavits. For reasons that are not entirely clear to me, that intervention failed to expedite the hearing and certain of the affidavits were filed only during the week in which the matter had been set down.
- [5] In the circumstances, it was agreed with the representatives of all of the parties that the matter would proceed only in respect of certain points in *limine* raised by the first respondent. The first respondent contends that in 2012 the North Gauteng High Court (per Mokgoatlheng J) dismissed an application filed by an employee of the second respondent, one Mxolisi Feni, in which it was sought, amongst other things, to set aside the third respondent's appointment as administrator and acting chief executive officer of the second respondent, and to review and set aside his appointment as the executive authority of the second respondent. The first respondent avers that the court held, in relation to the merits of the application, that the reference to s 10 of the Act was misguided, and

that the first respondent was authorised in the circumstances in terms of section 49 of the PFMA to appoint an accounting authority, and that the third respondent's appointment was validly made in terms of that section. The first respondent contends that the relief sought in the present application is similar both in fact and substance to the application brought before the High Court and that the High Court's judgment is accordingly dispositive of the dispute that served before this court.

- [6] In addition, the first respondent contends that since it is common cause that the third respondent is no longer the acting CEO and accounting authority of the second respondent the dispute presented by the current proceedings, i.e. the first respondent's decision to appoint the third respondent, has become moot. It is not in dispute that in 2014, a new board was appointed by the first respondent and that in 2015 the board appointed a chief executive officer, who has assumed office.
- [7] There was consensus during the course of argument that in respect of the relief sought in prayers 4 and 5 of the notice of motion (those prayers that concern the proposed restructuring of the second respondent by the third respondent) that the application was indeed moot, since the new board had reversed the attempts by the third respondent to introduce a new organogram or restructuring of the second respondent's operation. I need say no more about those prayers.
- [8] In respect of the relief sought in the remaining prayers, the court raised the issue of jurisdiction and in particular, whether the provisions of s 157 of the Labour Relations Act, or of any other law, conferred jurisdiction on this court to determine what on the face of it, appeared to be a dispute concerning the validity of an appointment made by the first respondent in terms of legislation that fell outside of the purview of this court's interest. The court suggested that on the papers, what the applicants appeared to seek was an administrative law review of the third respondent's appointment and the determination of what ultimately appeared to be a dispute between one group of employees (the applicants) and another (the 4th to 48th respondents). It transpired during the course of the

hearing that the second respondent has terminated the employment of the 4th to 48th respondents and that three separate actions of been instituted in this court to challenge that termination.

- [9] This court is a creature of statute. Section 157 of the LRA provides that it has exclusive jurisdiction in respect of all matters that in terms of the LRA or any other law are to be determined by the court. The court also has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the constitution where that violation arises from employment or labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as an employer, and the application of any law for the administration of which the Minister of Labour is responsible.
- [10] Jurisdiction is to be determined on the basis of the pleadings (see *Gcaba v Minister of Safety and Security* [2009] 12 BLLR 1145 (CC)). The relief sought in prayers 2 and 3 of the notice of motion, as I have mentioned above, seek to have the appointment of the third respondent declared unlawful and invalid, and to have his appointment reviewed and set aside. In support of these prayers, the case made by the applicants is that the second respondent is a creature of statute and that in terms of s 10 (1) of the Act, the board of the second respondent is enjoined to appoint a CEO at its first meeting or as soon as practicable thereafter. That section further provides that the CEO must in consultation with the Minister appoint staff to assist with the work arising from or connected with the performance of the functions of the second respondent.
- [11] The submission made by the applicants is that only the CEO is recognised by the Act to be the administrative head of the second respondent and only the CEO is entitled to appoint staff. It is submitted further that the third respondent's appointment was made in breach of the provisions of s 10 (1) of the Act and that in consequence, he could not validly assume the powers conferred on a CEO. Further, it is contended that there is no provision in the Act for the appointment of an acting or caretaker CEO or administrator and to the extent that the third

respondent was so appointed, the first respondent exercised powers that he did not have and that the third respondent's appointment is therefore invalid.

- [12] While not clearly articulated in the founding affidavit, the basis of the attack on the third respondent's appointment appears to be one based on the principle of legality. The wording of prayer 3 might suggest that what is sought in addition is a review and setting aside of the appointment associated with an administrative law remedy. There is no particular reference in the pleadings to the Promotion of Administrative Justice Act but of course, there is a close relationship between the grounds for review under that Act and the content of the legality principle. What matters for present purposes is whether it can be said that in the present instance, the pleaded claim is one in respect of which this court has jurisdiction either because the LRA or some other law require this court to determine that matter, or because the cause of action pleaded by the applicants bring their claim within the purview of s 157 (2) of the LRA.
- [13] In relation to the first enquiry, there is nothing in the LRA that requires the present dispute to be determined by this court. Indeed, the LRA broadly contemplates that this court is empowered to determine disputes between employers and employees that the Act or some other statute require to be adjudicated by the court. There is no statutory provision that requires that this court determine any dispute about the validity of an appointment by a minister of the chief executive officer of the second respondent. Insofar as s157 (2) provides that this court has jurisdiction in respect of any alleged or threatened violation of a fundamental right where that arises from employment, or any dispute over the constitutionality of any executive or administrative act or conduct, the applicants do not make a case to the effect that the first respondent's conduct in appointing the third respondent is a threatened violation of any fundamental right, or that it arises from employment and labour relations, or that it is an act or conduct committed by the state in its capacity as an employer. The applicant's claim, as I have indicated, is no more than that the first respondent's appointment of the

third respondent constituted a breach of s10 of the Act because that section did not empower him to make the appointment.

- [14] During argument, Mr Faku, who represented the applicants, could do no more than submit that the consequences of the third respondent's appointment relate to employment and employment relationships. This is not the case pleaded, nor is it sufficient in itself to confer jurisdiction on this court. The case that the applicants have pleaded is that by appointing the third respondent, the second respondent breached the provisions of a statute that requires the appointment to be made by the second respondent's board and by no-one else. It follows that insofar as prayers 2 and 3 are concerned, this court has no jurisdiction to entertain the present application.
- [15] Turning then to prayers 6, 7 and 8, the relief sought, in broad terms, is that the appointments of the 4th to 48th respondents and their contracts of employment with the second respondent are unlawful and invalid. The validity of a contract of employment is a matter over which this court potentially has jurisdiction, by virtue of s 77 (3) of the Basic Conditions of Employment Act, 75 of 1997. In such instances, the dispute between the parties must necessarily arise from a contract of employment. The relief sought in prayers 6, 7 and 8 is predicted on the relief sought in prayers 2 and 3. In other words, the applicants' case is that the fourth and further respondents were invalidly appointed because, and only because, of the third respondent's invalid appointment. This much is apparent from paragraph 8.1.13 of the founding affidavit where the deponent avers that the appointment of the fourth and further respondents is unlawful and invalid *'for the reason of the fact that the third respondent was not properly appointed and has no powers or authority to make the appointments and that due processes were not followed in their appointments'*. Although the applicants seek to set aside the contracts of employment of the fourth and further respondents, their cause of action is manifestly not one based on the application of any contractual principles. For these reasons, s 77(3) of the BCEA has no application and in the absence of any case made out that would otherwise bring prayers 6, 7 and 8

within the scope of s 157 (1) or (2), this court has no jurisdiction to entertain them.

[16] It is therefore neither necessary nor appropriate for me to consider the defences of *res judicata* or issue estoppel and in particular, whether the judgment by the High Court is dispositive of the applicants' contention that the third respondent and the 4th and further respondents were invalidly appointed by the first respondent and the third respondent respectively. In consequence, it follows that this issue remains alive for other purposes, particularly in any proceedings in which the validity of the appointments concerned is raised by way of a cause of action in respect of which this court is empowered to exercise jurisdiction. The validity of the appointments of the third and 4th to further respondents and the consequences of the High Court's judgment may well constitute a collateral issue that this court will be required to decide. For present purposes however, given the causes of action on which the applicants rely and my finding that this court lacks jurisdiction to determine them, I need say no more about the merits or otherwise of that defence.

[17] Finally, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs by reference to the requirements of the law and fairness. I must necessarily take into account that this is a long-standing dispute in which the applicants seek to have their grievances regarding events concerning the third respondent's appointment and its consequences addressed. This dispute is by no means resolved and in my view, the appropriate order should be that each party bears its own costs.

[18] For the above reason, I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Mr. T Faku, Faku Attorneys

For the First Respondent: Adv. T Ntsonkota instructed by Cheadle Thompson and Haysom Inc.

For the Second Respondent: Adv. D J Vetten instructed by Makhafola Verster Attorneys

For the Third Respondent: Mr. M B Mokoena, MB Mokoena Attorneys

For the Fourth and 16th Respondents: Mr. M B Mokoena, instructed by Maluleke Seriti Makume Matlala Inc.

For Further Respondents: Adv. L Maunatlala instructed by Majang Inc. Attorneys