



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1150/15

Not Reportable

In the matter between:

NATIONAL GAMBLING BOARD

Applicant

and

S M MANUEL

Respondent

Heard: 16 October 2015

Delivered: 01 December 2015

JUDGMENT

BOYCE, AJ

Introduction

[1] The applicant has launched an application in this Court for the following relief:

- '1. Reviewing and setting aside the applicant's decision to appoint the respondent as a Stakeholder Manager on 21 August 2014.

2. Setting aside the contract of employment concluded between the applicant and the respondent on 29 January 2015.
3. Costs of the application, including the costs of two counsel, in the event of the application being opposed.'

- [2] The deponent to the founding affidavit of the applicant is Caroline Kongwa who is the Accounting Authority and Administrator of the applicant, appointed as such by the Minister of Trade and Industry.
- [3] The application before me is predicated on the applicant's averments that the respondent's appointment and subsequent employment contract were preceded by numerous irregularities pertaining to the respondent's appointment and fraudulent misrepresentations by him, which induced the applicant to conclude the employment contract in question.
- [4] Although paragraph 3.4 of the respondent's answering affidavit states that the Labour Court does not have jurisdiction to determine the applicant's application, this point was (wisely in my view) abandoned by the respondent at the hearing of the matter. The parties were, accordingly, *ad idem* that this Court has the necessary jurisdiction to determine the application and, if a case is made out, to grant the relief sought.
- [5] The abovementioned irregularities and misrepresentations which preceded the respondent's appointment as the Stakeholder Manager and the conclusion of the contract of employment are clearly set out in the applicant's founding affidavit. The respondent's answering affidavit (which responds to most of the allegations in the founding affidavit with the statement: The contents of these paragraphs are noted) states very little besides raising a number of points *in limine*. What I was, consequently, left with *apropos* the alleged irregularities and misrepresentations was the following:
- '1. The respondent did not timeously or at all submit an application to be appointed to the post of Stakeholder Manager.
 2. Despite the respondent's failure to apply for the post, the acting Chief Executive Officer (CEO) at the time, Miss Muzwayine, prevailed upon

the HR practitioner, Miss Ntshaba, and the respondent's name was included in the shortlist for the post.

3. The shortlist for the post recorded incorrectly that, *inter alia*, the respondent had the following educational qualifications and experience:

- 3.1 B Com Degree – UNISA (current);
- 3.2 Diploma in Senior Management Programme – University of Pretoria;
- 3.3 13 years relevant experience.

4. According to the respondent's *Curriculum Vitae* (CV), which was e-mailed to the applicant by Muzwayine, the respondent falsely represented therein that he had been awarded a Diploma in "Senior Management Programme" by the University of Pretoria.

5. The respondent did not meet the following requirements for the post which are pertinently set out in the advertisement for the post:

- 5.1 AB Degree or equivalent from an accredited and reputable institution (SAQA)";
- 5.2 At least 5 years appropriate experience in management position and in similar position.'

- [6] The respondent's answering affidavit states, in response to the applicant's averments that the respondent "fraudulently represented" in his CV that he had a Diploma in Senior Management Programme from the University of Pretoria, that he did not have five years appropriate experience in a management position:

'The contents of this paragraph is denied in that the issue of the Diploma and the Certificate was clarified during the interview and furthermore the respondent will stand by the questions and answers which were raised during the interview.'

- [7] The respondent's answering affidavit states, in response to the averment in paragraph 31 of the founding affidavit that paragraph 6.16 of the Recruitment and Selection Policy provides for termination of an employment contract where

the employee fails to disclose critical information or where serious irregularities rendering the employee unfit for appointment are revealed, that:

'The contents of this paragraph is denied in that the respondent is not aware of any critical information that he failed to disclose and which resulted in serious irregularities.'

[8] In response to the averment in the founding affidavit that the respondent's appointment and employment contract ought to be reviewed and set aside as a result of the "irregularities, improprieties and illegalities", the respondent states in the answering affidavit:

- '1. It is the duty of the applicant to do a proper diligence on the appointment of its employees;
2. The applicant ought to have foreseen from the beginning especially from the record of the interview proceedings in that the allegations as stated in this application are true and she ought not to have concluded a contract of employment with the respondent.'

[9] Faced with numerous allegations of material irregularities and misrepresentations concerning his appointment and employment contract, most of which were unchallenged by the respondent, the respondent chose to raise the following points *in limine*:

- '1. Notice of motion is defective;
2. Misjoinder;
3. *Locus standi*;
4. Jurisdiction;
5. Conflict of interest.'

[10] As stated above, the respondent abandoned the point *in limine* pertaining to "jurisdiction". The remaining points *in limine* should, in my view, have also been abandoned as they were spurious and entirely without merit. The said points *in limine* are considered seriatim below:

- '1. Notice of motion is defective: The erroneous reference, in the founding affidavit, to Rule 7A (1) (b) instead of Rule 7A (8) (b) obviously does not render the notice of motion defective.
2. Misjoinder: The "interviewing panel" which interviewed applicants for the post of Stakeholder Manager was comprised of individuals employed by the applicant, and it is simply absurd to contend that the "interviewing panel" ought to have been joined as a party in the application.
3. *Locus standi*: The respondent's submission that the deponent to the applicant's founding affidavit (Caroline Kongwa) is "not authorized to bring this application on behalf of the applicant" is clearly without substance. Kongwa states in paragraph 1.2 of the founding affidavit that she is "the Accounting Authority and Administrator of the National Gambling Board (NGB) appointed as such by the Minister of Trade and Industry", and this is, significantly, admitted by the respondent in his answering affidavit.
4. Conflict of interest: The fact that Kongwa signed the employment contract (in her capacity as a co-administrator of the applicant at the time) and she is also the deponent to the founding affidavit (in her capacity as the Accounting Authority and Administrator of the applicant) does not, by any stretch of the imagination, create a conflict of interests. Kongwa acted in her capacity as the Administrator of the applicant when she signed the respondent's employment contract and when she deposed to the founding affidavit, and she never purported to act as the employer of the respondent, or as the applicant itself in the present matter. The point *in limine* pertaining to "conflict of interest" was, consequently, devoid of substance.'

[11] Having regard to the foregoing, overwhelming evidence that the respondent's appointment as a Stakeholder Manager and the conclusion of his employment contract were preceded by material irregularities and misrepresentations, it is plain that both his appointment and employment contract are illegal and fall to be set aside. Section 77(3) of the Basic Conditions of Employment Act 75 of 1997 provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. The present application undoubtedly concerns a contract of employment and

this Court, accordingly, has the necessary jurisdiction to determine the matter. The Labour Court, moreover, has, in addition to its other powers set out in Section 158 of the Labour Relations Act 66 of 1995 (the LRA), the power to “review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law” (*vide* Section 158 (1) (h) of the LRA). The applicant, having been established as a juristic person by the National Gambling Act 33 of 1996 and having been retained as such in terms of Section 64 of the National Gambling Act No. 7 of 2004, is considered to be an Organ of State and its decisions or acts, in its capacity as an employer, may, therefore, be reviewed on grounds permissible in law in terms of Section 158(1)(h) of the LRA.

- [12] Besides the abovementioned legislation, which clearly makes provision in certain circumstances for the review and/or setting aside of an appointment and/or contract of employment, it is also significant that the applicant's Recruitment and Selection Policy makes specific provision for the termination of an employee's employment contract where there has been serious irregularities or a failure to disclose information. Paragraph 6.16 of the Recruitment and Selection Policy aforementioned states, *inter alia*:

‘The Board reserves the right to disqualify the candidate's application and/or terminate the employee's services where the employee failed to disclose critical information to the Board or where serious irregularities which render the candidate unfit for appointment are revealed.’

Costs

- [13] The applicant was represented, at the application *in casu*, by two counsel and its notice of motion sought for the respondent to be ordered to pay the costs of the application including costs of two counsel only (*my emphasis*) in the event of opposition thereof. Despite being acutely aware that his appointment and employment contract were preceded by serious irregularities, misrepresentations and having little more than a few spurious points *in limine* to raise in order to attempt to oppose the relief sought by the applicant, the respondent nevertheless opposed the application which had been launched by

the applicant. This decision was ill-considered in the extreme and there is no reason why costs should not follow the result.

[14] In the premises, the following order is made:

1. The decision by the applicant dated 21 August 2014 to appoint the respondent as a Stakeholder Manager is reviewed and set aside;
2. The contract of employment concluded between the applicant and the respondent on 29 January 2015 is set aside;
3. The respondent is ordered to pay the costs of the application, including the costs consequent upon the engagement of two counsel.

Boyce, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate DT Skosana SC and Advocate N Gwala

Instructed by: The State Attorney

For the Respondent: Advocate O Mabaso

Instructed by: Mthembu Sibiya attorneys

LABOUR COURT