



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

CASE NO: J2981/14

In the matter between:

NEHAWU obo

RICHARD MOKHOKOANA & OTHERS

Applicant

and

THE PAN SOUTH AFRICAN

LANGUAGE BOARD

respondent

First

MINISTER OF ARTS AND CULTURE

Second respondent

Application heard: 6 June 2018

Judgment delivered: 13 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application for a declaratory order that the employment contracts entered into between the applicant's members (the employees) and the respondent remain valid and enforceable. By agreement, the second respondent was joined to the proceedings and abides by the decision of the court.
- [2] The factual background is not in dispute. The first respondent is a statutory body created by the Pan South African Language Board Act, 59 of 1995. In June 2012, the then Minister of Arts and Culture dissolved the first respondent and appointed a Mr Mxolisi Zwane as the caretaker chief executive officer. The first respondent was reconstituted some two years later, in June 2014, when Zwane was removed from office and a new board appointed. The first respondent's view, briefly stated, is that the minister acted ultra vires when he appointed Zwane, that Zwane 'entrenched himself' as the board of the organisation and acted as if vested with the roles of accounting officer and accounting authority, and that in this period, he appointed some 40 employees without there being posts established and without a budget.
- [3] In these circumstances, on 28 November 2014, the first respondent resolved that it would not recognise any employment contracts entered into during the period when Zwane was the caretaker CEO. The then acting CEO, Mr Z Feni, distributed a memorandum on 1 December 2014 recording that the board had resolved not to recognise all appointments and employment contracts entered into by Zwane, since Zwane had no authority to make the appointments on behalf of the board. Further, the board resolved that all of the affected individuals were not entitled to any further remuneration, with effect from December 2014. However, employees would be paid for the month of December as a goodwill gesture. Letters signed by Feni, with substantially the same content as the

memorandum, were addressed to each of the affected employees on the same date.

- [4] The basis for the applicant's claim is apparent from paragraphs 25 and 26 of the founding affidavit. Under the heading 'Applicant's argument in support of the order sought', the applicant avers the following:

25. As set out in the Notice of Motion the Applicant seeks an order declaring that its members' employment contract with the Respondent remains valid and enforceable and as such they should resume their duties with the Respondent from the date of this order is granted.

26. In support of this order the Applicant argues that the Respondent was wrong in law to take the view that all employment contracts entered into and between Zwane, acting on behalf of the Respondent and the Applicant's members, are null and void for the following reasons:

26.1 the decision by the Minister to dissolve the then PanSALB and appoint Zwane as the caretaker CEO was an administrative act/decision

26.2 on the assumption the Respondent is correct in arguing the Minister acted ultra vires when appointing Zwane, which is denied, the respondents cannot simply overlook the administrative act of the Minister and in so doing, the consequential acts of Zwane (in particular entering into employment contracts on behalf of the Respondent), until such time as the administrative act of the Minister is set aside by a court in proceedings for judicial review.

Therefore the Minister's decision to appoint Zwane and the consequential effects of such a decision remain valid and in effect. Put differently even an unlawful administrative act is capable of producing legally valid consequences until the unlawful act is set aside by a court of law.

26.3 It cannot be disputed that the Minister's decision to appoint Zwane has not been set aside by a court of law, albeit this is the same legal

issue pending before this court in another application referred to elsewhere in this affidavit.¹

26.4 On this basis and on the respondent's very own argument, its resolution to declare the employment contracts of the Applicant's members null and void has no legal effect.

26.5 As a legal consequence to the above, the members' employment contracts with the respondent remain valid and enforceable.

- [5] During argument, I raised with the applicant's counsel the cause of action on which the applicant relied. I did so because it seemed to me that the applicant's claim was one that conflated a claim in administrative law with one that concerns an alleged unfair dismissal. In the heads of argument, the applicant's counsel submitted that there are three legal questions that arise for decision – first, whether the applicant's members were employees of the respondent; secondly, whether the letter addressed to them by the respondent constituted the dismissal and if so, whether the dismissal was fair; and thirdly, whether the respondent was entitled to cancel all of the employment contracts concluded by Zwane.
- [6] The applicant's counsel conceded that to the extent that the applicant in its heads of argument sought a determination as to whether any of the employees were unfairly dismissed, that was not a case that had been made on the papers. In any event, a claim of unfair dismissal flies directly in the face of prayers 1.1 to 1.3 of the notice of motion, i.e. that the employees' employment contracts remain in force, that they remain employees of the respondent and that they be entitled to resume their duties. Further, none of the jurisdictional prerequisites for a claim

¹ This is a reference to *Lindiwe Cindi & 27 others v Minister of Arts and Culture & others* (unreported, J157/14, 27 October 2015) in which this court dismissed an application brought by a number of the respondent's employees who contended that Zwane's appointment was invalid with the consequence that the contracts of employment of the 4th to 48th respondents were invalid. (The 4th to 48th respondents in that matter are in essence the same group of employees who are represented by the applicant in the present matter.) The court held that it had no jurisdiction to review and set aside Zwane's appointment on the grounds that the appointment constituted a breach of s10 of the Pan South African Language Board Act.

of unfair dismissal (a prior referral to conciliation, the existence of a dismissal and the assertion of a reason for dismissal that would confer jurisdiction on this court) have been established

[7] To the extent that the applicant's claim is that the employees' contracts of employment were validly concluded and remain in force because Zwane was validly appointed (at least in administrative law and until that appointment is set aside), this is no more than an application of what is often referred to as the *Oudekraal* principle, following the judgment by the Supreme Court of Appeal in *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA). The assumption that underlies the applicant's case is that a decision by the minister to appoint Zwane as the caretaker CEO of the respondent constitutes administrative action. The definition of administrative action (assuming that the applicant relies on the Promotion of Administrative Justice Act; this much is not apparent), is notoriously difficult to apply. It is well-established that it is the function rather than the functionary that is important when assessing the nature of the action in question. The mere fact that a member of the executive exercises the power concerned is not in itself determinative; a determination must necessarily be made on a case-by-case basis (see *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC), at paragraph 36 and 37, referring to *President of the Republic of South Africa v South African Rugby Football Union and others* 2000 (1) SA 1 (CC)). The source of the power is a relevant but not decisive factor, as is the nature of the power, its subject matter and whether it involves the exercise of a public duty. (See *SARFU* at para 141.) The applicant has made no averments to support its contention that the minister's decision was administrative in nature.

[8] Section 157(1) and (2) of the LRA establish the jurisdiction of this court. The court is a creature of statute, and has no jurisdiction beyond that conferred by the LRA or any other law. The court's limited jurisdiction to entertain claims that are of an administrative law nature is established by s 157 read with s 158 (1)(h),

which empowers the court to review any decision taken or act performed by the state in its capacity as employer, on such grounds that are permissible in law. But the jurisdictional footprint that applies necessarily limits judicial intervention to employment-related decisions taken or acts performed by the state. The minister's decision to appoint Zwane as a caretaker CEO does not fall into this category, certainly not in respect of any employment relationship to which the employees were party.

[9] To the extent that the applicant's case is that the respondent was first required to set aside what it contends to be the unlawful appointment of Zwane before it was entitled to terminate the employees' contracts of employment, this submission ignores the fact that in having made the appointments, Zwane did not exercise any administrative powers since he was not exercising a public power or performing a public function in terms of any empowering provision. The respondent's decision to terminate the contracts was rooted in the application of common law principles in terms of which the respondent contends that Zwane had no authority to contract.

[10] Confronted with these difficulties, counsel then took a different tack, and submitted that the applicant's cause of action was contractual in nature, and sought a declaratory order that the employees had concluded valid contracts of employment with the respondent, and that that the contracts had been terminated by the respondent. Counsel relied on the notice of motion and paragraphs 6 and 25 of the founding affidavit which respectively read follows:

6. This is an application for a declaratory order declaring that the contract entered into between the Applicants and the Respondent is enforceable and that the Applicants were (sic) employees of the Respondent before their unfair dismissal...

25. As set out in the Notice of Motion the applicant seeks an order declaring that its members' employment contract with the Respondent remains valid and

enforceable and that as such they should resume their duties with the Respondent from the date of this order is granted.

- [11] While the stated purpose of the application and the description of the notice of motion as recorded above might foreshadow a claim cast in contractual terms, the case made on the papers is rather different, especially if regard is said to paragraph 26 of the founding affidavit and referred to above. It is clear from that provision that the true nature of the applicant's claim is that until Zwane's appointment is set aside by court of law, his appointment remains valid, as do any employment contracts entered into by him on behalf of the respondent.
- [12] In any event, nowhere in the founding papers is there any reference to s 77(3) of the Basic Conditions of Employment Act, the statutory provision that confers jurisdiction on this court, concurrently with the civil courts, to hear and determine any matter concerning a contract of employment. There is no reference to any breach of any employment contract by the respondent, nor is there any reference to any election by the employees to accept the respondent's repudiation and cancel the contract, or to hold the respondent to the contract. There are no averments that deal with the issue of Zwane's authority, either actual or ostensible, to conclude agreements on the respondent's behalf. On the contrary, the case put up by the applicants (made clear by paragraph 26 of the notice of motion), is limited to the assertion that the contracts were and remain valid on account of Zwane's appointment never having been reviewed and set aside. In short, the applicant's contractual claim is stillborn.
- [12] For all of the above reasons, the application stands to be dismissed.
- [13] Section 162 of the LRA confers a wide discretion on the court to make orders for costs according to the requirements of the law and fairness. In my view, the application is nothing short of misguided, and the interests of the law and fairness are best satisfied by costs following the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. L Maunatala instructed by Majang Inc

For the respondent: Adv. C Bester instructed by Bowmans Inc.