IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2493/18

In the matter between:

GAUTENG TOURISM AUTHORITY **Applicant**

and

KOMANE NCHABELENG **First Respondent**

FEZILE NGQOBE **Second Respondent**

KHEHLA MTHEMBU **Third Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Fourth Respondent**

Heard: **14 November 2019**

Delivered: **14 February 2020**

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicant seeks a declaratory order that;

1.1 The second and third respondents acted *ultra vires* in recommending and approving the splitting of the position of Company Secretary as well as the offer of employment to the first respondent as Manager: Legal Support.

1.2 The Chairperson of the Board of Directors lacked the authority to authorise the splitting of the position of Company Legal Secretary and to offer the first respondent the position of Manager: Legal Support;

1.3 The offer of employment to the first respondent as Manager: Legal Support was unlawful and therefore null and void *ab initio*, and thus such a decision be reviewed and set aside.

1.4 The probationary period of the first respondent as a Company Secretary came to an end in September 2017 by agreement between the parties as well as envisaged in the Performance Management Policy of the applicant;

1.5 The fourth respondent (CCMA) not to set down the matter and/or continue with arbitration proceedings until the determination of the current application.

[2] The second respondent filed a notice to abide by the Court's decision having also withdrawn his initial opposition to the application. The third respondent had also withdrawn his opposition to the application and filed a notice to abide.

[3] The background to this dispute as can be gleaned and summarised from the applicant's founding affidavit is as follows.

3.1 The applicant is a listed public entity body in Schedule 3 of the Public Finance Management Act[1]. The first respondent (Nchabeleng) was offered a contract of employment on 12 September 2016 as Company Secretary of the applicant. He had accepted the offer on 14 September 2016 and commenced his duties on 1 October 2016. The contract of employment made provision for a three months' probation period, and for Nchabeleng to report to the applicant's Chief Executive Officer and the Board.

[1] Act 1 of 1999

3.2 On 17 October 2016, the applicant entered into a further contract of employment with Nchabeleng, which confirmed *inter alia*, the three months' probation period, and the termination of the contract of employment at the applicant's discretion if Nchabeleng's work was not satisfactory at the end of that probation period.

3.3 On 14 March 2017, some two months after the expiry of the probation period, the third respondent (Khehla Mthembu), who is the erstwhile Chairman of the Board; the Deputy Chairman, (Dr Lulama Zitha), and the Chief Executive Officer (Sipho Ngwenya), conducted a probation evaluation for Nchabeleng, after which he was allocated an overall score of 47%. The accompanying general comments made by the panel were not complimentary of Nchabeleng's performance. It was noted *inter alia* that his learning potential was low; that he may not be motivated going forward; he struggled with particular complex and challenging tasks associated with the position he occupied, which might have long term impact as he took longer to complete tasks; and that his administration skills and competencies did not meet the requirements of the position.

3.4 On 30 May 2017, Nchabeleng's probation period was accordingly extended for another three months, effective from 1 June 2017 to 31 August 2017. This was as a result of the poor performance outcome of his probation assessment. The panel further took a decision that a monthly probation assessment would be conducted over the extended three months by the second respondent (Mr Fezile Ngqobe), who was the Executive in the CEO's office. Ngqobe was further delegated to develop a performance contract with Nchabeleng. The Chairperson of the Board was also to assess Nchabeleng based on Ngqobe's report. Flowing from the extension, a three months' probation contract was then signed with Nchabeleng, which had specific deliverables and target dates.

3.5 On 18 September 2017, Ngqobe assessed Nchabeleng and prepared a report on 28 September 2017 which he forwarded to the Chairman of the Board and the CEO. In the report it was indicated that Nchabeleng was asked to rate himself on the various aspects of the job as per the performance contract, and was further requested to produce evidence in that regard. Having rated himself, Nchabeleng subsequently met with Ngqobe, and the two of them agreed and noted that some deliverables were achieved, whilst others were not. It was noted and agreed that Nchabeleng could not deliver on tasks such as developing the applicant's legal framework policy, contract administration policy and charter by deadlines set for June and July 2017.

3.6 Ngqobe in his report agreed that Nchabeleng was lacking on the administrative support of the Board relating to minute taking and other related matters pertaining to the Board administration. Ngqobe further agreed with Nchabeleng that there would be no extension of the probation period, and that despite Nchabeleng lacking in certain areas, he should be given an opportunity to grow within the legal support function. In order to achieve that goal, Ngqobe with Nchabeleng agreed that the current position of Company Secretary was to be split into two functions, *viz*, Board Secretariat and Legal Manager. HR was to be then directed to conduct a job evaluation of the two positions as per the legislature and relevant policies and provide a report in that regard. Ngqobe accordingly forwarded these recommendations to the Chairperson of the Board, and further recommended that Nchabeleng be appointed as Manager: Legal Support, and to sign a new contract of employment as well as performance contract.

3.7 The recommendations were approved by the Chairperson of the Board on 29 September 2017. A new Board of Directors was subsequently appointed in October 2017. At a Board meeting held on 31 October 2017, the new Board took a resolution that the submissions on the appointment of the Board Secretary should be deferred to the Social Ethics & Governance Committee, and noted that the Company Secretary was moved to another position, and that a Ms Motsileng should provide secretariat support to the Board and its committees.

3.8 The Board on 29 November 2017 discussed the performance of Nchabeleng as Company Secretary, and flowing therefrom, a performance enquiry was held on 15 May 2018. The enquiry was recommended by a firm of attorneys (Solomon Holmes). The outcome of the enquiry through its Chairperson (Adv. W Hutchinson), was effectively to confirm the agreement between Nchabeleng and Ngqobe to split the position of Company Secretary into two, and to offer the position of Manager: Legal Support, to Nchabeleng, with his commencement date being 1 October 2017.

3.9 The new Board subsequently sought and obtained legal opinion on the issue of Company Secretary as well as the approval of the recommendations by the old Board. Legal opinion was obtained from Counsel on 3 July 2018 and such an opinion was presented at a special Board meeting of 13 July 2018. Flowing from that legal opinion, the Board took a resolution to issue a letter informing Nchabeleng that it would not give effect to the decision of the erstwhile Chairperson of the Board to split the position of Company Secretary into two, and to offer him the position of Manager: Legal Secretary, without following recruitment processes.

3.10 Upon receipt of the letter, Nchabeleng referred a dispute to the CCMA on 8 August 2018 alleging that his unfair dismissal that took place on 30 July 2018

[4] In his answering affidavit, Nchabeleng raised various preliminary points, including that;

4.1 The application was defective in that it was late in view of the recommendations of the Chairperson of the Board having been made on 13 October 2017. The application was however only brought on 20 November 2018, and no reasons for the delay were furnished.

4.2 The Court lacks jurisdiction to determine the dispute since the recommendations sought to be reviewed and set aside was approved by the Board which had the power to do so.

4.3 The review sought is governed by the Promotion of Administrative Justice Act, [2] and ought to have been brought under Rule 53 of the Uniform Rules of Court

[5] In respect of the merits of the application, Nchabeleng contended that;

5.1 Despite the recommendations to split the position of Company Secretary into two, he was never appointed as Manager: Legal Support, and was never presented with such an offer.

5.2 His probation period came to an end on the last day of August 2017, and his contract of employment as Company Secretary was terminated on 31 July 2018 in terms of a letter he had received on 30 July 2018. The termination of his contract as Company Secretary was the subject of the referral of his dispute to the CCMA.

5.3 He denied having signed a probation agreement or having failed to perform as alleged by the applicant.

5.4 In February 2018, and following a performance enquiry, the Board had resolved to disapprove the recommendation to split the position of Company Secretary into two, and therefore the recommendations by the Chairperson of the Board to split the position of Company Secretary had no consequence having been reviewed and set aside by the new Board.

[6] In the replying affidavit, the applicant conceded that Nchabeleng could not have been appointed to a position that did not exist, and that the new Board never approved his appointment to the non-existing position of Manager; Legal Support. It nonetheless contended that the reason for this application was also the agreement reached between Nchabeleng and Ngqobe during the performance enquiry of May 2018, which created the position of Manager: Legal Support with effect from 1 October 2017.

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[2] Act 3 of 2000

[7] It needs to be said at the onset that there are several worrying features about this application which on the common cause facts, raises questions about the practical effect of the order sought by the applicant. The fact that Nchabeleng did not oppose orders sought under sub-paragraphs 1.1 – 1.3 of the Notice of Motion does not imply that they ought to be automatically granted. It is in this regard that I do not even consider it necessary to determine the preliminary points raised by or on behalf of Nchabeleng.

[8] A significant portion of the parties' submissions and averments pertained to issues surrounding Nchabeleng's alleged poor performance, and to the extent that those issues are matters to be ventilated at arbitration, it is not necessary for this Court to be burdened with them.

[9] In my view, central to the determination of this application is whether the decision to split the position of Company Secretary into two was given effect for the purposes of this review application. In this regard, it becomes irrelevant in my view, as to whether it was Ngqobe and/or Mthembu that had taken the decision to split the position. Equally irrelevant is the agreement entered into between Nchabeleng and Ngqobe to split the position of Company Secretary and to offer him the position of Manager: Legal Support, which agreement was confirmed in the performance enquiry report of Adv. Hutchinson. That agreement was in a form of recommendations which the old Board had to consider, and had a non-binding effect.

[10] In any event, from the applicant's own averments, it is apparent that Ngqobe's role was merely to make recommendations flowing from the performance assessment, and it was Mthembu as the Chairperson of the Board that had approved the recommendations on 29 September 2017. Ngqobe's role therefore to the extent that he was delegated to performance assess Nchabeleng and his recommendations in that regard cannot be equated to a decision subject to a review.

[11] A second consideration is that on the applicant's own version, and flowing from the performance enquiry and Adv. Hutchinson's report, the new Board took a resolution to issue a letter on 30 July 2018 informing Nchabeleng that

the resolution of the old Board to split the position of Company Secretary was unlawful and would not be given effect to. In effect the new Board overturned the resolution/decision of the old Board to split the position into two and to offer Nchabeleng the non-existing position of Manager; Legal Support. The decision equally nullified any agreement between Nchabeleng and Ngqobe as rubber-stamped by Adv. Hutchinson. In effect the decision taken by Mthembu whether as an individual or as part of the Board of Directors is for all intents and purposes, a nullity.

[12] Nchabeleng has not challenged the new Board's resolution not to implement the split in the position of Company Secretary and to appoint him in the non-existing position of Manager: Legal Support, nor has he indicated any inclination to do so in view of the substance of his case before the CCMA. Furthermore, his case before the CCMA is to challenge the fairness of his dismissal as Company Secretary, and I did not understand his case, before the CCMA that he had laid claim to the position of Manager: Legal Support.

[13] It was correctly pointed out on Nchabeleng's behalf that what the applicant seeks to do is to review its own decision. It is ordinarily permissible for the applicant to do so especially in circumstances where the impugned decisions may be considered unlawful or where it is in conflict with statutory requirements. It is however doubted that any purpose would be served with such an approach, in circumstances where the very same decision sought to be reviewed, was not in any event implemented nor given effect to by a new Board as in this case, or where Nchabeleng has not challenged the resolution or decision of the new Board not to implement the recommendations of Ngqobe as approved by Mthembu, or where there is no discernible prejudice, or threat of prejudice to the applicant as a consequence of the impugned decision.

[14] Any doubts about lack of any threats of prejudice to the applicant as a consequence of Mthembu's approval of Ngqobe's recommendations are put to rest by Nchabeleng's own version that he was never offered, nor did he take up the non-existing position of Manager: Legal Support. This is notwithstanding the Hutchinson's report of May 2018 that there was an

agreement that he would be offered such a position with effect from 1 October 2017.

[15] In summary, the impugned decision or approval of Mthembu of the recommendations to split the position of Company Secretary into two, and to offer Nchabeleng a non-existing position has effectively been superseded by the subsequent decision of the new Board not to implement it. Even if it was argued that the original decision is still standing, that decision is of little or no relevance at all to the resolution of a dispute between the parties that is currently before the CCMA.

[16] It follows that any order to declare that Ngqobe and Mthembu acted *ultra vires* in recommending and approving the splitting of the position of Company Secretary and further to offer the position of Manager: Legal Support to Nchabeleng, is clearly academic on the basis that on the facts before the Court, it is apparent that Ngqobe did not take any decision that can be said to be subject to a review by this Court and furthermore, the decision of Mthembu is effectively a nullity following from the resolution of the new Board not to approve and implement it. Equally so, the question as to when Nchabeleng's probationary period as Company Secretary came to an end is an issue to be ventilated before the CCMA. In any event, on his own version, his probationary period came to an end at the end of August 2017.

[17] It follows in the light of the above conclusions that the application ought to be dismissed, and there is no reason either in law or fairness, why Nchabeleng should not be entitled to the costs of this application.

[18] Accordingly, the following order is made;

<u>Order:</u>

1. The applicant's application is dismissed with costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv. SB Nhlapo, instructed by the State Attorney.

For the First Respondent: Adv. KG Mapotse, instructed by PJ Mathebula Attorneys