THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 113/20

In the matter between:

CONSTRUCTION EDUCATION AND TRAINING AUTHORITY (CETA)	**First Applicant**
WEBSTER MFEBE N. O	**Second Applicant**
and	
MINISTER OF HIGHER EDUCATION, SCIENCE AND TECHNOLOGY	**First Respondent**
DIRECTOR GENERAL, HIGHER EDUCATION AND TRAINING	**Second Respondent**
NATIONAL SKILLS AUTHORITY	**Third Respondent**
SABELO WASA	**Fourth Respondent**

Heard: **20 February 2020**

Delivered: **25 February 2020**

Summary: Legality review – urgently enrolled by a court order. *Quare*: has the requirements of section 15 (4) of the Skills Development Act No. 97 of 1998 (SDA) been complied with in order to legalise the actions of the Minister in appointing an administrator to take over the functions of the CETA or not?

Consultation with the relevant bodies is of paramount importance before the power to appoint an administrator is exercised. Should the functionary avoid this paramount duty, detriment to the capacity to perform the functions ought to be demonstrated. Held: (1) The decision taken by the Minister on 29 January 2020 is hereby reviewed and set aside. (2) The appointment of Sabelo Wasa (fourth respondent) is hereby reviewed and set aside. (3) It is declared that the suspension of the Accounting Authority (AA) is of no legal force and effect and thus uplifted with immediate effect, entitling the members of the AA to continue with their statutory functions. (4) The Minister to pay the costs of this application.

JUDGMENT

MOSHOANA, J

Introduction

[1] The application before me is effectively a legality review. The single issue to be determined by this Court was succinctly spelled out in the supplementary founding affidavit deposed to by the second applicant before me. In simple terms, the issue is whether the first respondent, the Minister of Higher Education, Science and Technology (the Minister) acted within the confines of the law or not. If the Minister did, that is the end of the matter for the applicants. Equally, if the Minister did not, then his decision is bound to be set aside purely on application of the principle of legality and rationality.

Background facts

[2] Briefly, the facts pertinent to this single legal issue are that on 14 December 2019, the Minister addressed correspondence to the Construction, Education and Training Authority (CETA) through its Chairperson, Mr Raymond Cele (Cele). In the correspondence, the Minister tabulated a catalogue of allegations, which allegedly demonstrated lack of governance at the CETA. Having done that in conclusion the Minister stated the following:

> "Therefore, to mitigate against exacerbating the risk of <u>further contravention which will result to a total collapse of the CETA</u> operations, <u>I am considering to apply section 15 (4) of the Act</u>, as a matter of urgency. But <u>before I can make a decision, the Accounting Authority is directed to respond and advise me, why I should not impose section 15 (4) of the Act to the CETA."</u>

[3] On 10 January 2020, Cele provided a lengthy and detailed response or advice, as requested by the Minister. In the response, gross financial mismanagement was accepted to be factually present. On 29 January 2020, the Minister communicated a decision to the following effect*: "I have taken a decision to put the CETA under administration in terms of section 15 (4) of the Act <u>so that an independent investigation can be conducted</u>."*

[4] It baffles this Court as to why did the Minister not seek a similar advice from the National Skills Authority (NSA). Aggrieved by the decision set out above the applicants, on 6 February 2020, approached this Court for an urgent relief. The urgent relief was dismissed by my brother Van Niekerk J. In the interim, the decision was gazetted; the fourth respondent was appointed and the Accounting Authority was stripped of powers to take financial decisions during the reign of the fourth respondent. On 7 February 2020, this Court made an order firstly dismissing the urgent relief and secondly directed the Registrar to have this review enrolled within a stated expedited period. Indeed, the Registrar enrolled this application on 20 February 2020 as directed by

the Court. In the interim, owing to the developments that occurred (gazette being issued; appointment of the administrator and stripping of financial powers), the applicants amended the notice of motion in order to seek a relief in line with those developments. It does appear that the parties quibbled over the issue of hearing the matter within 14 days. Such a quibble culminated in an application seeking to vary the court order. This Court dismissed the said application.

[5] A point of *locus standi* was also raised and dismissed by this Court. After hearing submissions from both parties, it emerged that the issue that there was financial mismanagement became common cause. The issue that remained for determination is the other jurisdictional leg of the powers emanating from section 15 (4) of the Skills Development Act[1] (SDA) – *"and the delay caused by the consultation would be detrimental to the SETA's capacity to perform its functions."*

[6] In this judgment, attention would be directed to this sole jurisdictional leg.

<u>Evaluation</u>

[7] It is common cause before me that the Minister did not consult with the CETA and the NSA before directing the Director General to appoint the fourth respondent to take over the administration of the CETA. During argument, an attempt was made by Mr Motau SC, appearing for the Minister, to suggest that consultation as statutorily required happened. In that argument, he was referring to the Minister's correspondence to Cele and the response thereto. I must point out, the consultation contemplated in section 15 (1) is of paramount importance. It ought to happen before the statutory powers (directing the Director General to appoint an administrator to take over the administration of a CETA or to perform the functions of a CETA) are exercised.

[1] No. 97 of 1998.

[8] However, the alleged consultation punted for by the Minister's counsel was one aimed at giving the CETA *audi alteram partem* before exercising the extreme powers set out in section 15 (4) of the SDA. Such is not the consultation contemplated in section 15 (1) of the SDA. In any event, the Minister made it very clear in that correspondence that he does not intend to follow section 15 (1) but to follow section 15 (4) which permits the Minister to dispense with the statutory consultation requirement. In my view, a submission that there was consultation at least with the one body contemplated in section 15 (1) – which is not compliant in any event – is contradictory and actually unhelpful but damaging to the Minister's case.

[9] I now turn to the jurisdictional leg relevant in this judgment. Before I consider the Minister's case in this regard, I have the following to say. In my view, the usage of the phrase "*would be detrimental*" in the section suggests that the bar or threshold is set high. The Minister is behooved to demonstrate a detriment as a matter of fact and not speculation that would arise. The dictionary meaning of the word detrimental means injurious; hurtful or causing damage; harm; diminution or loss. Thus, the Minister, in my view, is exalted to show the injury or loss that would occur if the consultation process, as required, is undertaken. Put it differently, the Minister must provide reasons why the important process of consultation should be discounted.

[10] During argument, Mr Motau SC, directed the attention of this Court to the evidence laid out in paragraphs 14 – 31 of the answering affidavit deposed in opposition to the dismissed urgent relief. Having had regard to the evidence, the Minister does not tell this Court why before 29 January 2020, consultation would have been detrimental to the CETA's capacity to perform its functions[2]. All this Court is told is the history of the

[2] The functions of a SETA are spelled out in section 10 of the SDA. As an example, the Minister must demonstrate that if consultation happen, the SETA would not have the capacity to (a) develop a sector skills plan; (b) implement the skills plan; (c) promote learning programmes; (d) register agreements; (e) perform delegated functions; (f) collect levies; (g) liaise with the NSA; (h) submit budgets and financial reports; (i) liaise with provincial offices and labour centres; (j) appoint staff and (k) perform duties in terms of this Act and related Acts.

corporate governance and the lack thereof since 2017. The issue is not about the corporate governance or lack thereof, the issue is, if the Minister complies with the statutory consultation process, there would be injury caused to the capacity to perform the statutory functions directly by consulting. There is no evidence to support this possibility. It is not enough for the Minister to baldy say, as he did in his letter of 14 December 2019 that the further contravention will result in a total collapse of the CETA.

[11] This statement is not substantiated and/or predicated on anything substantial. As pointed out earlier, the alleged consultation was damaging to the Minister's case, the consultation contemplated in the section is not one that is elaborate nor extensive. In a consultation process, there is no need to achieve an agreement. That being the case, as at 14 December 2019, the circumstances that would have ignited the need to statutorily consult had already manifested themselves. The question is why did the Minister not simply consult the CETA and the NSA at that time? The Minister was capable of doing so, hence the misguided consultation process allegedly undertaken by the Minister. The Minister was in a position to wait for a period of a month and couple of weeks before taking the impugned decision. This Court is not told whether during that waiting period the injury would have or had happened and if it did not what prevented it to happen.

[12] There is no *iota* of explanation why counsel of NSA was not sought in December 2014. The Minister cannot rush to the draconian powers – to avoid consultation – when an opportunity to consult had presented itself but spurned. Clearly, given the draconian effect of the powers in section 15 (4) of the SDA, the legislature must have intended sparing usage. It does not make sense for a Minister to announce a month and couple of weeks that he shall be using what I choose to term exigency powers. In that period, certainly, a statutory consultation could have happened with ease. It is a trite principle of administrative law that where consultation is statutorily required, it must be done at a formative stage. In *R v North*

and East Devon Health Authority; Ex Parte Coughlan[3], the following was said:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposal to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken"

[13] In further support of the alleged imminent danger that would have manifested had the consultation happened as statutorily required, this Court was referred to further evidence tendered by the Minister in part B of the answering affidavit. Under the heading "*Delay*" the Minister told this Court the following:

> "Once it is established that there is financial mismanagement, the principles outlined in section 195 of the Constitution are being undermined: CETA is not efficiently, economically and effectively using its resources; there is lapse of accountability and in the present circumstances, a serious failure of human resources practices. I was therefore, compelled by section 237 of the Constitution to act in terms of section 15 (4) of the SDA without further delay"

[14] What the Minister is effectively telling this Court is that due to a serious failure of human resources practices, he was exalted by section 237 to avoid the consultation requirement. I may point out upfront that reference to section 195 is wholly misguided. The Constitutional Court has already decreed that the section only assists in interpretation and its provisions

[3] [2001] QB 213.

must be understood from the context of section 23 (1) of the Constitution[4].

[15] Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. The provisions of this section does not apply. On pure application of the principle of subsidiarity, the legal duty implicated in this matter arises from a statute and not from the Constitution. Far from it, it is not a constitutional obligation. A constitutional obligation is one that stems from the provisions of the Constitution. The duty to consult does not stem from the Constitution but from the provisions of section 15 of the SDA. Aptly named, it is a statutory power, popularly known as an exercise of public power.

[16] In my view, the Minister dismally failed to demonstrate that the CETA would have been lacking in capacity to perform its statutory functions, had consultation, as statutorily commanded, preceded the decision. Therefore, the jurisdictional fact to exercise the statutory power is lacking.

[17] The law requires functionaries to exercise powers that they have. If a functionary exercises the powers that it does not in law have, a Court is empowered to set aside such a purported exercise of statutory power on application of the principle of legality. The other element of legality is rationality. It simply denotes that the power must be exercised for the purpose that the power was given. It is clear that the sole purpose to appoint an Admistrator is for him or her to ensure a functional SETA. The evidence reflects that the Minister exercised the powers for a wrong purpose – to conduct an independent investigation in order to decide on the appropriate intervention necessary to restore good corporate governance and stability at the CETA. This appears to be a noble purpose, however, it cannot be achieved by invoking the statutory

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[4] See: *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC).

powers reserved in section 15 (4) of the SDA. Thus, it must also follow that the decision was irrational and susceptible to be set aside on application of the principle of legality. I tend to agree with Mr Cassim SC for the applicants that the Minister seems to have put the cart before the horse – i.e. acted prematurely.

Costs

[18] I now turn to the issue of costs. This application is opposed only by the Minister. The applicants contend that the Minister should be ordered to pay the costs in his personal capacity. The reason for that being that this Court and the Labour Appeal Court had already given an interpretation of section 15 of the SDA and as a result, the Minister should not have committed the same error in applying the provisions of the section. In order for the Court to uphold the applicants' contention, this Court must be satisfied that the Minister acted in bad faith and/or with gross negligence[5]. On the facts of this case, I do not believe that the actions of the Minister were *mala fide* and/or grossly negligent. It is common cause in this matter that the one and, in my view, the most important jurisdictional requirement to exercise the statutory power was present – mismanagement of the finances of the CETA. However, all the Minister did wrong was to miss the step of consultation. In missing the step, he genuinely believed that the law supports him to act without following the important step of consultation.

[19] Clearly, the Minister in this regard may have not been appropriately advised, as he should have been, that in order to bypass the important step of consultation, he needed to demonstrate that the CETA would be in a state of paralysis, as it were, if he delays acting at the altar of a statutory consultation process. It must have been concerning to the Minister that factually there was financial mismanagement at the CETA, irrespective of who might have caused the mismanagement.

[5] See: *Black Sash Trust v Minister of Social Development and others* 2017 (9) BCLR 1089 (CC).

[20] Under those circumstances, a reasonable, *albeit* unlawful, thing to have been done by the Minister was to have rushed to the powers in section 15 (4) of the SDA. For all the above reasons, the Minister cannot be held personally liable for the litigation costs.

[21] Having said that, that is not the end of the enquiry. When it comes to costs in the Labour Court, the guiding principle remains that of the law and fairness. In assessing fairness, this Court would have regard to the conduct of the Minister as an opposing party to the litigation. In this regard, the conduct of his representatives come into play too. This Court must look at the conduct in defending the matter and one during the proceedings. In other words, was opposition of this matter reasonable, regard being had to all the circumstances?

[22] In my view, this is not a matter which the Minister should have opposed, more particularly in the manner in which it was done during the proceedings. This application, turned on a very narrow legal point. However, it took this Court the entire day to deal with the matter, owing to spurious interlocutory applications launched on the instructions of the Minister. With that in mind, it would be unfair to mulct the applicants with the costs of this litigation. Fairness warrants an exercise of discretion in favour of making an order as to costs. I do not agree with a submission that the Minister being a responsible person to establish the CETA should not by that fact, be ordered to pay the costs. SETAs are funded on a different basis and as such distinct bodies from the establishing Minister. The fact that other members of the Accounting Authority are singing praises of the Minister’s action is a red herring.

[23] For all the above reasons, I am minded to make an order of costs against the Minister. There was no opposition from any of the cited respondents. In terms of prayer 5 of the amended notice of motion, the applicants sought costs only in the event of opposition.

[24] In the results the following order is made:

Order

1. The decision taken by the Minister on 29 January 2020 to place the CETA under administration within the contemplation of section 15 (4) of the SDA is hereby reviewed and set aside.
2. The decision to direct the Director General to issue and the issuance of GN 86 in Gazette No: 42991 published on 3 February 2020 is declared invalid and ineffective in law.
3. The appointment of the administrator (Mr S Wasa) is set aside.
4. It is declared that the suspension of the members of the Accounting Authority is lifted and they may resume performance of their statutory duties and functions as members of the Accounting Authority of the CETA.
5. The instruction issued by the Minister on 23 January 2020 prohibiting the Accounting Authority to make any decision with financial implications is hereby revoked and set aside.
6. The Minister, as a party to these proceedings is to pay the costs of this application.

GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate N Cassim SC and Advocate M Morgan

Instructed by: Werkmans Attorneys, Sandton

For the First Respondent: Advocate T Motau SC and Advocate R Tshetlo

Instructed by: Norton Rose Fulbright South Africa Inc, Sandton