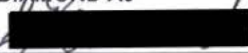


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: 6307/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED: YES/NO</u>
DIAMOND AJ	
	29/08/2025
SIGNATURE	DATE

In the matter between:

DEPARTMENT OF TRANSPORT
AND COMMUNITY SAFETY.

APPLICANT

and

BENNY DRIVER TRAINING C.C.

1st RESPONDENT

DUMEZULU DRIVING SCHOOL C.C

2nd RESPONDENT

LOTSHA DRIVING SCHOOL (PTY)LTD

3rd RESPONDENT

ADV. N.S. RAMAKGHOAKGOA

4th RESPONDENT

JUDGMENT

DIAMOND A J:

- [1] The sequence of events leading up to this application as well as this application itself serves as a clear indication why section 2(1) of the State Liability Act, 1957 (Act No. 20 of 1957) should be adhered to meticulously: Section 2 (1) reads as follows:

"2. Proceedings to be taken against executive authority of department concerned. —

(1) In any action or other proceedings instituted against a department, the executive authority of the department concerned must be cited as nominal defendant or respondent.

(2) The plaintiff or Applicant, as the case may be, or his or her legal representative must— .."¹

- [2] The Respondents alleged they entered into an agreement with the Applicant to render certain services, including driving lessons to the youth in Limpopo Province.
- [3] This agreement is contained in what is called, a Service Level Agreement.
- [4] The Applicant contends that this Service Level Agreement was void *ab initio*.

¹ Emphasis added.

- [5] The three Respondents decided to institute legal action against the Applicant for what they believe was breach of contract by the Applicant.
- [6] Since the Service Level Agreement contained an Arbitration Agreement, the three Respondents commenced arbitration proceedings against the Applicant.
- [7] The parties held a pre-arbitration meeting during which it was agreed that the arbitration proceedings would be done in accordance with the Uniform Rules of Court.
- [8] The Respondents filed a Statement of Claim, and the Applicant filed a counterclaim as well as a Statement of Defense. The Respondents filed a defense to the counterclaim, and the Applicant thereafter filed a Replication to the defense on the Counterclaim. In this replication. The Applicant raises non-joinder, as a defence stating that the proceedings cannot proceed since the Respondents failed to join the Member of the Executive Council for the Department of Transport for the Limpopo Province.
- [9] The Respondents thereafter filed a notice to remove an irregular proceeding. The irregular proceeding being the fact that the Applicant raised the non-joinder in its replication and argued that it should have been raised in defense to the claim.

- [10] The Respondents also brought an application for the joinder of the MEC.
- [11] There were several attempts to set the argument of the irregular proceedings as well as the application for joinder down to be argued. The papers reveal that there were quite a lot of back and forth between the Applicants, the Respondents, and the Arbitrator. I do not deem it necessary to go into the details of these communications.
- [12] Eventually, the Arbitrator delivered a judgment and while referring to Section 2 (1) of the State Liability Act, the Arbitrator also ruled that the MEC was a necessary party that it has a substantial interest in the proceedings and should therefore be joined. The following order was made: "*The second respondent is joined in the action between Applicants and First Respondent.*" The Second Respondent being referred to is the Second Respondent identified as such in the application for the joinder of the MEC.
- [13] In my view, there are two issues that need to be considered at this stage.
- [14] Firstly, the question can be asked whether valid proceedings were at all instituted by these attempted arbitration proceedings in the first instance.

[15] The initial arbitration proceedings were instituted against the "Department" of Transport. This is in clear contravention of Section 2(1) of the State Liability Act, which stipulates that when proceedings are instituted against the State, it shall be done against the Executive Authority, and in particular, the Minister or the Member of the Executive Council of the Department which are involved.

[16] Section 2(1) states explicitly "*in any action or other proceedings*". In my view, "*other proceedings*" are deliberately framed widely, and it therefore includes arbitration proceedings.

[17] In my view, there is a second reason why it cannot be said that valid arbitration proceedings were instituted in the above proceedings.

[18] In *Die Spoorbond and Another v South African Railways*², The court is stated as follows:

" *'The Governor-General-in-Council (whom I shall call the Crown and who is also sometimes referred to as the Government of the Union) is regarded in law as a legal persona, with a perennial existence, and as such, a legal persona distinct from the individual human beings or group of persons who from time to time hold office as Governor-General and as members of the Executive Council, just as the King or the Crown in England is regarded as a corporation sole with a perpetual existence, and, as such, distinct from His Majesty the King.'*

² 1946 AD 999 at P. 1005.

- [19] The legal position that the executive authority (the government) of the state is indeed a legal person that can sue and be sued in its own name, as confirmed in *Die Regering van die Republiek Van Suid-Afrika v Santam Versekeringsmaatskappy Bpk* 1964 (1) SA 546 (W).
- [20] Section 125 of the Constitution of the Republic of South Africa, 1996, states that the executive authority of a Province is vested in the Premier of that Province, and that Members of the Executive council of a Province are responsible for the functions of the executive assigned to them by the premier.
- [21] A government department is therefore not part of the executive, but it is part of the state administration. A Department is consequently not a legal person and cannot sue and be sued in its own name.
- [22] In my view, therefore, both the Applicant, the Arbitrator, and the Respondents were misplaced in the above proceedings with their assumption that legal arbitration proceedings were indeed instituted against the Department. The Department is not a legal person and cannot be sued.
- [23] This conclusion brings up a second dilemma for the deponent, which describes itself to be authorised by the Department to bring this application.

[24] PARAGRAPH 5 of the Founding Affidavit states explicitly that :

"The Applicant is the Department of Transport and Community Safety ("the Applicant"), the Department responsible for the implementation of Provincial Transport matters, with its offices at Phamoko Towers, Colner, Bodenstein and Church Street, Polokwane, Limpopo Province."

[25] In my view, based on the above description, the Department is certainly not part of the executive authority and is therefore not a legal person capable of suing and being sued. The appropriate Applicant would have been the Member of the Executive Council who should have approached this court with an application for appropriate relief, possibly a declaratory order, declaring that the arbitration proceedings were null and void *ab initio*.

[26] In any event, any attempt to enforce an abortive award which may follow out of the above proceedings will most certainly not be enforceable since it is inconceivable that such an award will ever be made an order of court in terms of section 31 of the Arbitration Act for the reasons set out above.

[27] The question that now arises is whether the deponent to the founding affidavit should be ordered to pay the costs of the Respondents in this application, since the deponent initiated abortive proceedings before this Court.

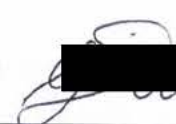
[28] I do not think that it would be fair to burden the Deponent with a cost order.

[29] All parties to these proceedings were, in my view, misguided. Apart from that, when reading through the substance of the application, one must concede that the deponent points to several procedural missteps which could have been a basis to set the interim award aside.

[30] In my view, the appropriate order with regard to costs will be that there shall be no order as to costs.

I consequently make the following order:

- a. The application is struck from the roll.
- b. There is no order as to costs.


[REDACTED]
DIAMOND AJ
ACTING JUDGE OF
THE HIGH COURT
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

HEARD ON

: 24 March 2025

JUDGMENT DELIVERED ON

:29 August 2025. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 29 AUGUST 2025.

FOR THE APPLICANT

INSTRUCTED BY

: Adv EK Tsatsi SC

: The State Attorney
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