REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2582/07

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL

FREE STATE PROVINCIAL GOVERNMENT:

TOURISM, ECONOMIC AND ENVIRONMENTAL

AFFAIRS **Applicant**

and

CHAKA JOHANNES MOEKO **First Respondent**

COMMISSIONER BOHELO PAULUS MOTAKE **Second Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION, BLOEMFONTEIN **Third Respondent**

Heard: **16 November 2012**

Delivered: **08 February 2013**

JUDGMENT

BOQWANA AJ

Introduction

[1] This is a review application for the review and setting aside of the jurisdictional ruling made by the first respondent ('the commissioner') on 19 September 2007 under case number FS2729/06.

Facts

[2] The third respondent was dismissed by the applicant on 26 April 2006.

[3] He referred an unfair dismissal dispute to both the third respondent ('the CCMA') and to the General Public Service Sectoral Bargaining Council ('the bargaining council') on advice of his attorneys.

[4] In the referral form to the CCMA, the third respondent cites the employer as the Department of Tourism, Environmental and Economic Affairs ('the Department'). He, however, does state under paragraph 6 and part B of the referral form that he was employed by the Free State Gambling and Racing Board ('the Board') but was charged by the applicant whom he submitted did not have authority.

[5] On 02 June 2006, the CCMA wrote a letter to the parties advising them that the CCMA had no jurisdiction to conciliate the dispute. The reason being that the bargaining council had jurisdiction to handle the matter and that the case had been referred to the bargaining council. It is not clear when this was done.

[6] On 23 June 2006, the bargaining council issued a notice of set down for conciliation to be held on 17 July 2006.

[7] The conciliator, at the bargaining council, Jerome Mthembu ('Mthembu') advised the parties that the bargaining council had no jurisdiction to hear the matter.

[8] No written ruling has been supplied by the parties to that effect. However, a letter dated 18 July 2006 from the State Attorney addressed to the applicant's

attorney confirmed such a ruling. This letter records, *inter alia*, that although the third respondent was an employee of the applicant in terms of section 10(1) (a) of the Free State Gambling Act,[1] he was not a public servant. It further recorded that 'the conciliator advised that the Bargaining Council would be requested to transfer the matter to the CCMA. The letter also suggested some pre-arbitration arrangements be made between the parties, such as exchange of documents and pre-arbitration meeting.

[9] On 07 December 2006, the third respondent's attorney wrote to the CCMA asking for the matter to be set down.

[10] The matter was set down for hearing on 25 January 2007. The applicant did not attend that inquiry and a default award was issued. The applicant applied for rescission of this award which was granted in its favour.

[11] The matter was set down for arbitration hearing *de novo* on 06 September 2009. It is a jurisdictional ruling issued at that hearing that is the subject of this review.

[12] At that arbitration hearing, the applicant raised a point *in limine* that the CCMA had no jurisdiction to hear the matter because, whilst the third respondent was the Chief Executive Officer ('the CEO') of the Free State Gambling and Racing Board ('the Board') and did not work for the Department he had been appointed by the MEC, he was a public servant and thus his dispute ought to have been resolved by the bargaining council.

[13] The third respondent disputed this arguing that he was a CEO of the Board and, therefore, the CCMA and not the bargaining council had the necessary jurisdiction.

Jurisdictional ruling

[14] The commissioner found that from the information provided by both parties, it was clear that the third respondent did not work for the department but for the Board. The Board, although it fell under the Department, was an autonomous

[1] Free State Gambling and Racing Act, No.6 of 1996

entity, and not a government entity. Therefore, the applicant was not a civil servant. Accordingly, the CCMA had jurisdiction.

[15] The commissioner held that even if the CCMA did not have jurisdiction, it would be entitled in terms of section 147 of the Labour Relations Act[2] ('the LRA') to assume jurisdiction for the purposes of speedy but fair resolution of the dispute taking into account that the dispute is relatively old. He, however, stressed that he did not base his ruling on that provision.

[16] The commissioner went further by substituting the Board as the correct employer in the stead of the Department by stating the following:

> '6. SUBSTITUTION:
>
> 6.1 In line with my finding above in respect of jurisdiction that is based on the fact that the Applicant was an employee of the Board and not the Department, it follows that the Board must be substituted as the employer and, therefore, the correct Respondent. I hereby therefore substitute the Board as the correct employer and Respondent.' (own underline).

[17] The commissioner then found that the CCMA and not the bargaining council had jurisdiction to hear the matter.

Grounds for review

[18] Although the applicant raises the following issues as its grounds for review:

18.1 The ruling made by the commissioner was materially influenced by an error of law as it was contrary to the Free State Gambling and Racing Board Act. The third respondent could only be disciplined and dismissed by the applicant who had authority to appoint and who appointed him in terms of section 10(1)(a) of that Act. The applicant contends that the Board is only empowered to appoint the staff excluding the CEO. The Board is a creature of statute and cannot go beyond the powers granted by statute.

[2] Act No. 66 of 1995

18.2 The commissioner committed an error of law by substituting the employer with the Board. The applicant submits that the Rules of the CCMA make provision for substitution and joinder of the parties. Rule 26(1) to (5) deals with joinder whilst Rule 26(6) to (8) deals with substitution. Of importance for the purposes of argument by the applicant is that substitution necessitates an application (notice of motion accompanied by an affidavit), which must be brought on notice to all the parties who have an interest in the matter. In other words, the commissioner could not, out of his own volition, simply substitute without the substituted party being given an opportunity to comment on whether or not they should be party to the proceedings, before a decision to substitute is made.

18.3 The third issue raised although not strongly argued by the applicant was that the CCMA had already found that it did not have jurisdiction as per the letter dated 2 June 2006, that I have already referred to above, it was thereafter *functus officio* and could not again decide on the matter of jurisdiction.

18.4 Further there is no reference that the matter was ever conciliated by the CCMA.

Third Respondent's case

[19] The respondent's case is that the first respondent was employed by the Board and not the applicant; therefore, the applicant had no power or authority to suspend him.

[20] After his appointment, he concluded and signed a memorandum of agreement in terms of which his contract of employment was governed. This memorandum records that the CEO and the Board decided to give content to the appointment (by the applicant) by concluding an employment contract.

[21] This memorandum recorded terms and conditions that governed the relationship between the Board and the third respondent. It detailed duties,

responsibilities and functions of the CEO as well as remuneration, conditions of service and including termination of the agreement.

[22] According to the first respondent, the Free State Gambling and Racing Board Act is silent on the issue of termination of employment. That lacuna is therefore filled by the memorandum of agreement between the Board and the first respondent.

[23] He also refers to Chapter 6 of the Public Finance Management Act[3] ('the PFMA') and specifically section 51(e) which states that the accounting authority (the Board, according to the first respondent) must take effective and appropriate disciplinary steps against any employee of the public entity who, *inter alia*, contravenes the provisions of that Act.

[24] He further submits that he was subjected to the code of conduct and disciplinary jurisdiction of the Board. Also, the policy of the applicant subjects the contract of employment to the applicable disciplinary code and procedure.

[25] The first respondent further alleges that section 3(3) of the PMFA provides that in the event of inconsistency between the PFMA and any other legislation the PMFA superseded that Act.

Analysis

[26] In dealing with this matter, I propose to start with the issue of whether the CCMA could after having issued a letter that it had no jurisdiction to consider the matter, proceed with the arbitration. Secondly, I will deal with the issue of the employment relationship and finally the issue of substitution and then consider which forum is appropriate for the hearing of this matter.

CCMA Jurisdiction

The legal effect of the CCMA letter on jurisdiction

[27] According to Hoexter, the *functus officio* doctrine applies only to final decisions. A decision is, therefore, revocable before it becomes final. Finality

[3] Act No.1 of 1999.

is considered to be arrived at when the decision is published, announced or otherwise conveyed to those affected by it.[4]

[28] In this case, a letter was written by the CCMA case management, no submissions were made and there is no evidence that the referral form was considered by a commissioner. In my view, the letter by the CCMA case management cannot be viewed as a final decision of a commissioner.

[29] It has been recently held by the Labour Appeal Court in the judgment of *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*[5] that it is only after an administrative agency has finally performed all its statutory duties or functions in relation to a particular matter which is subject to its jurisdiction that it can be said that its powers or functions were spent by its first exercise.[6]

[30] The LAC went further to conclude that:

> '...Cellier did not finally perform his statutory function or duty in relation to the merits of the rescission application on 12 August 2004. It cannot therefore be said that he exhausted his powers and discharged his mandate in relation to the rescission application. The Court *a quo* erred in coming to the conclusion that the ruling of 12 August 2004 rendered Cellier *functus officio* and that he could therefore not entertain the subsequent applications for condonation and rescission on 26 February 2007. There were proper applications before him. He applied his mind and granted the applications. It is not suggested that his ruling should be reviewed and set aside on any other ground other than him being *functus officio*. The Court ***a quo's*** order relating to the ruling of 26 February 2007 ought to be set aside.'[7]

[31] The *functus officio* argument must therefore fail.

Employment relationship

[32] Section 10(1)(a) and(b) of the Free State Gambling and Racing Board Act provides as follows:

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[4] See Cora Hoexter, Administrative Law in South Africa, 2007 at 247.
[5] (Case number JA7/11) [2012] ZALAC 34 (27 November 2012).
[6] Id at para 30.
[7] Id at para 38.

'10. (1) The Board shall, in the exercise of its powers and the performance of its functions under this Act, be assisted by –

Subject to sections 5(1) (a) (i), (iii) and 5 (1) (b), a suitably qualified and experienced person as chief executive officer, appointed by the responsible Member after consultation with the board, or seconded in terms of subsection (3) for the purpose of assisting the board in the performance of all financial, administrative and clerical responsibilities pertaining to the functions of the board, and shall in respect thereof be accountable to the board and;

(b) such staff, appointed by the board or seconded in terms of subsection (3), as may be necessary to enable the board to exercise and perform its powers and functions under this Act effectively: Provided that a person shall not be appointed by the board in terms of this paragraph or remain a member of the staff of the board if he or she is subject to any disqualification as referred to in sections 5(1)(a)(i),(iii) and 5(1)(b).'

[33] Responsible member is defined as: 'The member of the Executive Council responsible for Economic Affairs and Tourism', which is the applicant in this case.

[34] The Board was created by statute and the statute clearly provides how the appointments of the CEO and other members of staff are done. It empowers the MEC to appoint the CEO in consultation with the Board and the Board is empowered with the appointment of other staff members but excludes the CEO's appointment.

[35] In the judgment *of Masetlha v President of the Republic of South Africa and Another*,[8] Moseneke DCJ, held as follows:

'The power to dismiss is necessary in order to exercise the power to appoint. The High Court is right that the power to dismiss a head of the Agency is a necessary power without which the pursuit of national security through intelligence services would fail. Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the

[8] 2008 (1) SA 566 (CC) at para 68.

> constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into section 209(2) of the Constitution. There is no doubt that the power to appoint under section 209(2) of the Constitution and the power under ISA implies a power to dismiss.'

[36] I align myself with this reasoning. It follows therefore that the power to dismiss is located in section10 (1) (a) of the Free State Gambling and Racing Board Act. The applicant had the power to dismiss the CEO. The CEO becomes a board member, ex officio. Further members of the Board are appointed by the applicant in consultation with the Executive Council. Other staff members are appointed by the Board. This distinction is quite important as it shows the intention of the statute.

[37] It is also clear from the legislation that the CEO is appointed for the purposes of assisting the Board in the performance of its functions.

[38] To the extent that the memorandum of agreement entered into between the third respondent and the Board is seen to delegate the powers of the employer to the Board, that view would be misplaced in that those parties had no such authority in terms of the statute. In any event, the applicant did not delegate his duties as an employer to the Board. Even if he did, he would have to have been authorised by the relevant statute to do that.

[39] It is clear to me that the commissioner erred in finding that the applicant was not the employer of the applicant.

Substitution

[40] Turning to the issue of substitution, it is common cause that the Department was cited as the employer in the referral form. The applicant did not take issue with this citation. The applicant attended the CCMA proceedings as the employer to defend the matter. The point *in limine* they raised pertained to the CCMA not being a correct forum to arbitrate due to the third respondent being employed by the applicant. The commissioner however found that the Board

was the employer and substituted the Board as the employer in place of the applicant as already stated.

[41] Rule 26(6) of the CCMA rules stipulates that:

> 'If in any proceedings it becomes necessary to substitute a person for an existing party, any party to the proceedings may apply to the Commission for an order substituting that party for an existing party, and a commissioner may make such order or give appropriate directions as to the further procedure in the proceedings.'

[42] From the above, the commissioner may make an order or give direction for further procedure when it becomes necessary to substitute a person for an existing party. That order or directive is however preceded by an application.

[43] I agree with the applicant's propositions that a formal application ought to have been served and filed. The commissioner ought to have postponed the matter and allowed for service of the notice of substitution to the affected party, the Board. It was improper to make an order against a non-party, in my view. Accordingly, the commissioner committed gross irregularity by substituting a party without notice.

[44] In view of my finding on the employment relationship, the substitution issue becomes academic.

[45] The issue that remains is whether the CCMA or the bargaining council has jurisdiction. My approach is that this matter has been going on for a long time and does need to be brought to finality.

[46] The applicant has been blowing hot and cold I must say. On the one hand, it seemed to have accepted in the letter written by the state attorney to the third respondent's attorney that the matter will be at the CCMA as per the bargaining council's conciliator's advice. It even went further in their letter suggesting that they would request that a senior commissioner be appointed. From the transcribed record, it appears that the applicant's representative conceded that the CCMA had concurrent jurisdiction with the bargaining

council and also submitted that they will abide by the ruling of the commissioner.

[47] The applicant also submitted, in argument, that if the commissioner's ruling had stopped on the issue of which forum was appropriate, then there would have been no need for the review.

[48] My view is that the matter should remitted back for the arbitration hearing to continue before another commissioner at the CCMA. This is done for the purposes of ensuring that this matter is finally brought to finality. I agree with the commissioner that section 147 of the LRA does allow the CCMA to still hear the matter even if it is found that the parties belong to the bargaining council.

[49] I have also noted that the Department of Tourism and Environmental Affairs, which in itself is not a legal persona has been cited as a party in the referral form. I will give no view on this as the applicant has not taken issue with it.

[50] I also note that these proceedings were brought by the applicant although the party who was substituted was the Board. I am, however, satisfied that the applicant has interest in the matter and was entitled to bring this application. In any event, that was also not raised as an issue by the third respondent.

Conclusion

[51] In conclusion, I find that the applicant was the employer of the third respondent by virtue of section 10(1) (a) of the Free State Gambling and Racing Board. He had the authority to appoint and, accordingly, to terminate the third respondent's appointment. That authority was not delegated to the Board.

[52] Secondly, the commissioner committed a gross irregularity by substituting the Board as the employer, without having given them notice.

[53] Thirdly, the letter from the CCMA was not a final decision making the CCMA *functus officio.*

[54] Fourthly, for the sake of expediency the matter must be remitted back to the CCMA for the hearing of the arbitration before another commissioner.

[55] I make no cost order against the first respondent.

[56] I, therefore, make the following order:

1. The ruling made by the first respondent on 19 September 2007 under case number FS2729/06 is reviewed and set aside.

2. The ruling is substituted with the following:

   The applicant is the employer of the third respondent.

3. The matter is remitted back to the third respondent for an arbitration hearing to continue before another commissioner other than the first respondent.

4. The second respondent is directed to set this matter down for arbitration hearing as a matter of urgency.

5. There is no order as to costs.

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Boqwana AJ

Acting Judge of the Labour Court

APPEARANCES:

For the applicants:	Advocate J.Y. Classen SC
Instructed by:	B M Maranyane, Bloemfontein
For the first respondent:	Mr M Khang of Mphafi Khang Inc., Bloemfontein