

SOUTH AFRICA / JUDGMENT

Litha v Madonsela and Others

(12369/05) [2005] ZAGPHC 106; (2006) 27 ILJ 780 (W) (6 October 2005)

[2005] ZAGPHC 106

COURT
High Courts - Gauteng

BEFORE
Tsoka

CASE / FILE NUMBER
12369/05

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IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION) CASE NO: 05/12369 In the matter between: LITHA, MPHO Applicant and MADONSELA, SIPHONO First Respondent THE BOARD OF THE RAILWAY SAFETY REGULATOR Second Respondent BARLOW, GRAHAM NO Third Respondent THE MINISTER OF TRANSPORT Fourth Respondent J U D G M E N T TSOKA, J: [1] On 25 June 2004 Ms Mpho Litha ("Ms Litha") was appointed the Chief Executive Officer of the Railway Safety Regulator ("RSR"). The appointment was approved by the Cabinet and made by the Minister of Transport. The appointment was made in terms of section 9(1) of the National Railway Safety Regulator Act 16 of 2002 ("the Act"). The appointment was for a period of 5 years. [2] The conditions of service of Ms Litha were to be given to her by the Board of the RSR ("the Board"). These conditions were first to be approved by the Minister. [3] On 1 July 2004 Ms Litha assumed her duties as the Chief Executive Officer ("the CEO") of the RSR. In terms of her letter of appointment Ms Litha was to work closely with the Board and the Ministry. She would report to the Board with regard to the management of RSR. [4] During August 2004 Ms Litha signed a contract of employment which she sent to the Minister of Transport for signature. She did not keep a copy and to date she has not received a signed copy from the Minister. [5] On 25 November 2004 Ms Litha addressed a letter to the Minister stating her dissatisfaction with the conduct of the Chairman of the Board and the Board itself. [6] On 11 January 2005 Ms Litha was requested by the Chairman of the Board to convene a meeting of the Board for 21 January 2005 at which meeting the Board would consider instituting disciplinary proceedings against her. On 21 January 2005 Ms Litha was informed that the Board intends to suspend her but that she must first furnish reasons why the Board should not suspend her. She was informed of the charges the Board intended to level against her. On 23 February 2005 she made representations as requested. On 24 February 2005 she was suspended with full pay. On 15 March 2005 a disciplinary hearing chaired by Adv Graham Barlow was convened. Ms Litha was charged in terms of section 9(4)(a) and (c) of the Act for gross misconduct and repeated failure to perform her functions as the CEO of RSR. She was further charged with breach of procurement policies, fruitless and wasteful

expenditure in contravention of the Public Finance Management Act, 1 of 1999 gross insubordination alternatively refusal or failure to comply with lawful and reasonable instructions. Attempts were made to settle the dispute between the parties but in vain. The disciplinary proceedings resumed on 7 June 2005.[7] On 10 June 2005 Ms Litha, on urgent basis, instituted the present proceedings.[8] The applicant seeks declaratory relief and interdicts. The declaratory orders sought are –8.1that the first and second respondents have acted unlawfully and beyond their authority in seeking to bring disciplinary proceedings against the applicant;8.2that the Government of the Republic of South Africa as represented by the fourth respondent are applicant's employer not the first and second respondents;8.3that the fourth respondent has the exclusive authority to discipline and dismiss the applicant on the grounds of alleged misconduct;8.4that the certain information disclosed to the Minister in her letter of complaint of 25 November 2004 constitute protected disclosure as contemplated in the Protected Disclosures Act 26 of 2000. The interdicts sought by the applicant are –8.5interdicting and restraining the first, second and third respondents or any other person acting under their instructions from proceeding with the present disciplinary hearing against the applicant;8.6interdicting and restraining the first, second and third respondents or any person acting under their instructions from pursuing charges which the applicant believes constitute protected disclosure as contemplated in the Protected Disclosures Act 26 of 2000.[9] The first and second respondents oppose the relief sought by the applicant. The basis of the opposition is that the applicant is employed by the second respondent and that the second respondent has a right to institute disciplinary proceedings against the applicant.[10] The questions to be decided by this court is (a) whether the second respondent is the employer of the applicant and if so (b) whether the second respondent is empowered in terms of the Act to institute disciplinary proceedings against the applicant and if indeed so (c) whether the disclosure made by the applicant in her letter of complaint to the fourth respondent constitute protected disclosures in terms of the Protected Disclosures Act 26 of 2000.[11] It is common cause that the Board has not furnished the applicant with the terms and conditions as provided for in terms of section 9(3)(c) of the Act. It is further common cause that since 1 July 2004 until 11 January 2005 the applicant discharged her duties as provided for in section 9(5) of the Act.[12] On reading the Act, it seems to me that the following are indicative as to who the applicant's employer is –12.1the applicant's application for employment was approved by the Cabinet. The fourth respondent after having consulted with the second respondent appointed the applicant as Chief Executive Officer of the second respondent;12.2the second respondent were to furnish the applicant with the terms and conditions of service;12.3the applicant would report the proper functioning of the RSR to the Board;12.4for each financial year and in accordance with the Public Finance Management Act, Act 1 of 1999 the applicant would complete a report on the activities of RSR. The applicant is to submit the report to the Board for approval;12.5each financial year, the applicant would publish and distribute a plan of action for the activities of RSR. The publication and distribution of this report would only be made after the applicant had consulted with the second respondent and the fourth respondent had approved the publication and distribution;12.6the first and second respondents are appointed by the fourth respondent. The second respondent is answerable to the fourth respondent;12.7the applicant is an ex officio member of the second respondent;12.8the

applicant may be discharged from office by the fourth respondent for repeatedly failing to perform her office duties efficiently; if due to any physical or mental illness or disability is incapable of performing her office functions or performs her office functions inefficiently or for misconduct.[13] The employment contract signed by the applicant is between the applicant and the Government of the Republic of South Africa represented by the fourth respondent. Clause 3.6 of the employment contract signed by the applicant provides as follows: "In the case of inefficiency and misconduct, the employer may deal with her, in accordance with the relevant labour legislation and any directive issued by the Minister." [14] It seems to me therefore that the relationship between the applicant, the second and the fourth respondents is as follows: 14.1 the applicant is employed by the Government of the Republic of South Africa represented by the fourth respondent; 14.2 the applicant's terms and conditions are approved by the fourth respondent and given to the applicant by the second respondent; 14.3 the applicant is employed as the Chief Executive Officer of the Regulator; 14.4 the applicant is an ex officio member of the second respondent. She performs her duties as specified in the Act. She reports to the second respondent who in turn reports to the fourth respondent; 14.5 in case of disability to perform her duties or performing her duties inefficiently or misconduct, only the fourth respondent after having followed the provisions of the Labour Relations Legislations, may discharge the applicant. The fourth respondent may also give directives as to how the applicant is to be dealt with in case of inefficiencies or misconduct; 14.6 the second respondent acts only in a supervisory capacity over the applicant. The second respondent in its supervisory capacity reports repeated failure to discharge duties, incapacity to perform duties due to physical or mental illness; inefficient performance of duties or misconduct to the fourth respondent. Following this report the fourth respondent may institute disciplinary proceedings against the applicant and thereafter may discharge the applicant. [15] It appears therefore that the Government of the Republic of South Africa, the State, is the employer of the applicant. The definition of the State in its wider context includes the second respondent who is a State organ. See *Saapawu v Premier (Eastern Cape) & Others* [1997] 9 BLLR 1226 (LC). [16] In the circumstances I find that the Government of the Republic of South Africa, the State is the employer of the applicant. The applicant is employed by the State as the CEO of the second respondent. It follows therefore that the second respondent has no authority to institute disciplinary proceedings against the applicant. This is not authorized by the Act. The fourth respondent may discharge the applicant only in the circumstances set out in section 9(4) of the Act. To argue as Counsel for the first and second respondents does, that the first and second respondents are entitled to institute disciplinary proceedings with the power to impose any penalty less than the discharge and only to recommend the discharge to the fourth respondent is artificial. The power to discharge is that of the fourth respondent. Only the fourth respondent may discharge the applicant after having considered the charges, and having instituted disciplinary proceedings against the applicant. The fourth respondent must still consider the findings of the disciplinary enquiry before deciding to discharge the applicant or not. The first and second respondents cannot usurp this power and the discretion of the fourth respondent. In *Citimakers (Pty) Ltd v Sandton Town Council* 1977 (4) SA 959 (W) at page 961A-C Mostert J said the following – "In my view, the formation of an opinion on the value of the property in question is a matter which, in the absence of other legislative provisions, is entrusted

solely to the council; it is in the nature of a judicial discretion with far-reaching consequences for both the township owners and the municipality. Where the exercise of a discretionary power is entrusted to a named body, another body cannot exercise that power in the absence of express statutory provision (see De Smith, *Judicial Review of Administrative Action*, 4th ed., pp. 269-270). I agree that the formation of an opinion to discharge the applicant is entrusted solely to the fourth respondent. In the absence of express statutory provisions the first and second respondents cannot exercise this power. [17] Counsel for the first and second respondents submits that the applicant, as an accounting authority in terms of the Public Finance Management Act 1 of 1999, the first and second respondents have powers to discharge the applicant. I do not agree with this submission. I find no authority in section 51(1)(e) of the Public Finance Management Act that the first and second respondents may institute disciplinary proceedings against the applicant. In terms of section 10 of the National Railway Safety Regulator Act 16 of 2002 the applicant, with written authority of the second respondent may appoint staff members for the RSR. Section 51(1)(e) of the Public Finance Management Act authorizes the applicant, as the accounting authority, to take effective and appropriate disciplinary steps against the employees of RSR as referred to in section 10 of Act 16 of 2002. [18] In view of the findings I made I find it unnecessary to decide whether the disclosures the applicant made to the fourth respondent fall within the provisions of the Protected Disclosures Act, Act 26 of 2000. [19] In the result I make the following order –

19.1 The first and second respondents are declared to have acted unlawfully and beyond their authority in seeking to bring disciplinary proceedings against the applicant.

19.2 The Government of the Republic of South Africa as represented by the fourth respondent is declared to be the employer of the applicant and not the first and second respondents.

19.3 The fourth respondent is declared to have the exclusive authority to discipline and dismiss the applicant on the grounds of alleged misconduct.

19.4 The first, second and third respondents or any other person acting under their instructions are interdicted from proceeding with the present disciplinary hearing against the applicant.

19.5 The first and second respondents are ordered jointly and severally to pay the applicant's costs.

____ M P TSOKA JUDGE OF THE HIGH COURT COUNSEL FOR APPLICANT

ADV P KENNEDY SC INSTRUCTED BY

BOWMAN GILFILLAN COUNSEL FOR FIRST AND SECOND RESPONDENTS

ADV N H MAENETJE INSTRUCTED BY

MASERUMULE INC DATE OF JUDGMENT

6 OCTOBER 2005

IN THE HIGH COURT OF

SOUTH AFRICA

(

WITWATERSRAND

LOCAL DIVISION)

CASE NO: 05/12369

In the matter between: LITHA, M PHO Applicant and MADONSELA, SIPHONO First Respondent
THE BOARD OF THE RAILWAY SAFETY REGULATOR Second Respondent
BARLOW, GRAHAM NO Third Respondent
THE MINISTER OF TRANSPORT Fourth Respondent

LITHA, M

PHO

MADONSELA

, SIPHO

NO

THE BOARD OF THE RAILWAY SAFETY

REGULATOR

BARLOW

, GRAHAM

THE MINISTER OF TRANSPORT

J U D G M E N T

TSOKA, J:[1] On 25 June 2004 Ms Mpho Litha (“Ms Litha”) was appointed the Chief Executive Officer of the Railway Safety Regulator (“RSR”). The appointment was approved by the Cabinet and made by the Minister of Transport. The appointment was made in terms of section 9(1) of the National Railway Safety Regulator Act 16 of 2002 (“the Act”). The appointment was for a period of 5 years.[2] The conditions of service of Ms Litha were to be given to her by the Board of the RSR (“the Board”). These conditions were first to be approved by the Minister.[3] On 1 July 2004 Ms Litha assumed her duties as the Chief Executive Officer (“the CEO”) of the RSR. In terms of her letter of appointment Ms Litha was to work closely with the Board and the Ministry. She would report to the Board with regard to the management of RSR.[4] During August 2004 Ms Litha signed a contract of employment which she sent to the Minister of Transport for signature. She did not keep a copy and to date she has not received a signed copy from the Minister.[5] On 25 November 2004 Ms Litha addressed a letter to the Minister stating her dissatisfaction with the conduct of the Chairman of the Board and the Board itself.[6] On 11 January 2005 Ms Litha was requested by the Chairman of the Board to convene a meeting of the Board for 21 January 2005 at which meeting the Board would consider instituting disciplinary proceedings against her. On 21 January 2005 Ms Litha was informed that the Board intends to suspend her but that she must first furnish reasons why the Board should not suspend her. She was informed of the charges the Board intended to level against her. On 23 February 2005 she made representations as requested. On 24 February 2005 she was suspended with full pay. On 15 March 2005 a disciplinary hearing

chaired by Adv Graham Barlow was convened. Ms Litha was charged in terms of section 9(4)(a) and (c) of the Act for gross misconduct and repeated failure to perform her functions as the CEO of RSR. She was further charged with breach of procurement policies, fruitless and wasteful expenditure in contravention of the Public Finance Management Act, 1 of 1999 gross insubordination alternatively refusal or failure to comply with lawful and reasonable instructions. Attempts were made to settle the dispute between the parties but in vain. The disciplinary proceedings resumed on 7 June 2005.[7] On 10 June 2005 Ms Litha, on urgent basis, instituted the present proceedings.[8] The applicant seeks declaratory relief and interdicts. The declaratory orders sought are – 8.1

TSOKA, J

:

Ms Litha

RSR

the Act

the Board

the CEO

Public Finance Management Act, 1 of 1999

8.1

that the first and second respondents have acted unlawfully and beyond their authority in seeking to bring disciplinary proceedings against the applicant;

8.2

that the Government of the Republic of South Africa as represented by the fourth respondent are applicant's employer not the first and second respondents;

8.3

that the fourth respondent has the exclusive authority to discipline and dismiss the applicant on the grounds of alleged misconduct;

8.4

that the certain information disclosed to the Minister in her letter of complaint of 25 November 2004 constitute protected disclosure as contemplated in the Protected Disclosures Act 26 of 2000.

Protected Disclosures Act 26 of 2000

The interdicts sought by the applicant are –

8.5

interdicting and restraining the first, second and third respondents or any other person acting under their instructions from proceeding with the present disciplinary hearing against the applicant;

8.6

interdicting and restraining the first, second and third respondents or any person acting under their instructions from pursuing charges which the applicant believes constitute protected disclosure as contemplated in the Protected Disclosures Act 26 of 2000.

[9] The first and second respondents oppose the relief sought by the applicant. The basis of the opposition is that the applicant is employed by the second respondent and that the second respondent has a right to institute disciplinary proceedings against the applicant.

[10] The questions to be decided by this court is (a) whether the second respondent is the employer of the applicant and if so (b) whether the second respondent is empowered in terms of the Act to institute disciplinary proceedings against the applicant and if indeed so (c) whether the disclosure made by the applicant in her letter of complaint to the fourth respondent constitute protected disclosures in terms of the Protected Disclosures Act 26 of 2000.

[11] It is common cause that the Board has not furnished the applicant with the terms and conditions as provided for in terms of section 9(3)(c) of the Act. It is further common cause that since 1 July 2004 until 11 January 2005 the applicant discharged her duties as provided for in section 9(5) of the Act.[12] On reading the Act, it seems to me that the following are indicative as to who the applicant's employer is –12.1

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the applicant's application for employment was approved by the Cabinet. The fourth respondent after having consulted with the second respondent appointed the applicant as Chief Executive Officer of the second respondent;12.2

12.2

the second respondent were to furnish the applicant with the terms and conditions of service;

12.3

the applicant would report the proper functioning of the RSR to the Board;

12.4

for each financial year and in accordance with the Public Finance Management Act, Act 1 of 1999 the applicant would complete a report on the activities of RSR. The applicant is to submit the report to the Board for approval;

Public Finance Management Act, Act

12.5

each financial year, the applicant would publish and distribute a plan of action for the activities of RSR. The publication and distribution of this report would only be made after the applicant had consulted with the second respondent and the fourth respondent had approved the publication and distribution;

12.6

the first and second respondents are appointed by the fourth respondent. The second respondent is answerable to the fourth respondent;

12.7

the applicant is an ex officio member of the second respondent;

ex officio

12.8

the applicant may be discharged from office by the fourth respondent for repeatedly failing to perform her office duties efficiently; if due to any physical or mental illness or disability is incapable of performing her office functions or performs her office functions inefficiently or for misconduct.

[13] The employment contract signed by the applicant is between the applicant and the Government of the Republic of South Africa represented by the fourth respondent. Clause 3.6 of the employment contract signed by the applicant provides as follows:

“In the case of inefficiency and misconduct, the employer may deal with her, in accordance with the relevant labour legislation and any directive issued by the Minister.”

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and misconduct, the employer may deal with her, in accordance with the relevant labour legislation and any directive issued by the Minister.

[14] It seems to me therefore that the relationship between the applicant, the second and the fourth respondents is as follows:

14.1 the applicant is employed by the Government of the Republic of South Africa represented by the fourth respondent;

14.2 the applicant's terms and conditions are approved by the fourth respondent and given to the applicant by the second respondent;

14.3 the applicant is employed as the Chief Executive Officer of the Regulator;

14.4 the applicant is an ex officio member of the second respondent. She performs her duties as specified in the Act. She reports to the second respondent who in turn reports to the fourth respondent;

14.5 in case of disability to perform her duties or performing her duties inefficiently or misconduct, only the fourth respondent after having followed the provisions of the Labour Relations Legislations, may discharge the applicant. The fourth respondent may also give directives as to how the applicant is to be dealt with in case of inefficiencies or misconduct;

14.6 the second respondent acts only in a supervisory capacity over the applicant. The second respondent in its supervisory capacity reports repeated failure to discharge duties, incapacity to perform duties due to physical or mental illness; inefficient performance of duties or misconduct to the fourth respondent. Following this report the fourth respondent may institute disciplinary proceedings against the applicant and thereafter may discharge the applicant.

[15] It appears therefore that the Government of the Republic of South Africa, the State, is the employer of the applicant. The definition of the State in its wider context includes the second respondent who is a State organ. See *Saapawu v Premier (Eastern Cape) & Others* [1997] 9 BLLR 1226 (LC). [16] In the circumstances I find that the Government of the Republic of South Africa, the State is the employer of the applicant. The applicant is employed by the State as the CEO of the second respondent. It follows therefore that the second respondent has no authority to institute disciplinary proceedings against the applicant. This is not authorized by the Act. The fourth respondent may discharge the applicant only in the circumstances set out in section 9(4) of the Act. To argue as Counsel for the first and second respondents does, that the first and second respondents are entitled to institute disciplinary proceedings with the power to impose any penalty less than the discharge and only to recommend the discharge to the fourth respondent is artificial. The power to discharge is that of the fourth respondent. Only the fourth respondent may discharge the applicant after having considered the charges, and having instituted disciplinary proceedings against the applicant. The fourth respondent must still consider the findings of the disciplinary enquiry before deciding to discharge the applicant or not. The first and second respondents cannot usurp this power and the discretion of the fourth respondent. In *Citimakers (Pty) Ltd v Sandton Town Council* 1977 (4) SA 959 (W) at page 961A-C Mostert J said the following –

Saapawu v Premier (

Eastern Cape

) & Others

[1997] 9 BLLR 1226

Citimakers (Pty) Ltd v Sandton Town Council

1977 (4) SA 959

“In my view, the formation of an opinion on the value of the property in question is a matter which, in the absence of other legislative provisions, is entrusted solely to the council; it is in the nature of a judicial discretion with far-reaching consequences for both the township owners and the municipality.

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Where the exercise of a discretionary power is entrusted to a named body, another body cannot exercise that power in the absence of express statutory provision (see De Smith, *Judicial Review of Administrative Action*, 4th ed., pp. 269-270).”

Where the exercise of a discretionary power is entrusted to a named body, another body cannot exercise that power in the absence of express statutory provision (see De Smith, *Judicial Review of Administrative Action*, 4th ed., pp. 269-270).

I agree that the formation of an opinion to discharge the applicant is entrusted solely to the fourth respondent. In the absence of express statutory provisions the first and second respondents cannot exercise this power.

[17] Counsel for the first and second respondents submits that the applicant, as an accounting authority in terms of the Public Finance Management Act 1 of 1999, the first and second respondents have powers to discharge the applicant. I do not agree with this submission. I find no authority in section 51(1)(e) of the Public Finance Management Act that the first and second respondents may institute disciplinary proceedings against the applicant. In terms of section 10 of the National Railway Safety Regulator Act 16 of 2002 the applicant, with written authority of the second respondent may appoint staff members for the RSR. Section 51(1)(e) of the Public Finance Management Act authorizes the applicant, as the accounting authority, to take effective and appropriate disciplinary steps against the employees of RSR as referred to in section 10 of Act 16 of 2002. [18] In view of the findings I made I find it unnecessary to decide whether the disclosures the applicant made to the fourth respondent fall within the provisions of the Protected Disclosures Act, Act 26 of 2000. [19] In the result I make the following order –

Public Finance Management Act 1 of 1999

section 51(1)(e)

Public Finance Management Act that

section 10

National Railway Safety Regulator Act 16 of 2002

Section 51(1)(e)

Public Finance Management Act authorizes

Protected Disclosures Act, Act

19.1 The first and second respondents are declared to have acted unlawfully and beyond their authority in seeking to bring disciplinary proceedings against the applicant.

19.2 The Government of the Republic of South Africa as represented by the fourth respondent is declared to be the employer of the applicant and not the first and second respondents.

19.3 The fourth respondent is declared to have the exclusive authority to discipline and dismiss the applicant on the grounds of alleged misconduct.

19.4 The first, second and third respondents or any other person acting under their instructions are interdicted from proceeding with the present disciplinary hearing against the applicant.

19.5 The first and second respondents are ordered jointly and severally the one paying the other to be absolved, to pay applicant's costs.

M P TSOKAJUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

ADV P KENNEDY SCINSTRUCTED BY

BOWMAN GILFILLANCOUNSEL FOR FIRST ANDSECOND RESPONDENTS

ADV N H MAENETJEINSTRUCTED BY

MASERUMULE INCDATE OF JUDGMENT

6 OCTOBER 2005

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