

SOUTH AFRICA / JUDGMENT

Moeketsi v Gauteng Tourism Authority and Another (34046/2021) [2021] ZAGPPHC 743 (28 October 2021) [2021] ZAGPPHC 743

COURT

North Gauteng High Court, Pretoria

BEFORE

DT Skosana

CASE / FILE NUMBER

34046/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

CASE NO: 34046/2021

In the matter between:-

MONTSHENG SARAH MOEKETSI

Applicant

and

GAUTENG TOURISM AUTHORITY

First Respondent

MEC FOR ECONOMIC DEVELOPMENT,
AGRICULTURE, ENVIRONMENT AND RURAL
DEVELOPMENT-GAUTENG

Second Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 28 O 2021.

JUDGMENT

SKOSANA AJ

[1] This is an application for a mandamus wherein the applicant seeks an order compelling the first respondent, Gauteng Tourism Authority ("GTA") to comply with the decision of the second respondent ("MEC"), dated 01 December 2020 and to amend its disciplinary policy. On 03 December 2020, the second respondent issued a letter in which she, among others directed that the GTA must reinstate the applicant with retrospective effect from 01 November 2020 to her original position of Executive: Corporate Management. She also ordered the GTA to amend its disciplinary policy.

[2] The relevant factual background is the following:

2.1 The applicant was appointed as the Human Resources Manager of the first respondent in 2006 and as its Executive Manager: Corporate Management in 2011. In these capacities, the applicant was the principal author and custodian of the GTA's Human Resources policies including the disciplinary policy.

2.2 The applicant was charged with acts of misconduct on 01 November 2018 and an external chairperson in the name of Adv Mosam SC was appointed to chair such process. The applicant was found guilty and eventually dismissed on 02 July 2020. She was nonetheless advised of her rights to appeal the chairperson's finding within 5 days of receipt thereof in terms of the disciplinary policy of the GTA.

2.3 On 07 July 2020, the applicant submitted a purported appeal to the MEC in which, in addition to numerous grounds of appeal, stated that she is lodging the appeal directly to the MEC. Her reasoning was that since she had been charged by the CEO and the board, the GTA structures do not provide for the next level of authority and therefore in her view such authority should be the Executive Authority of the department, being its MEC who is also the shareholder of the GTA.

2.4 The efforts of the GTA to persuade her that her appeal is misdirected as the MEC has no power to decide the appeal and that an independent and objective chairperson would be secured through the office of the state attorney, were unsuccessful.

2.5 Notwithstanding her insistence to have the appeal heard and determined by the MEC, the appellant referred an unfair labour dispute to the CCMA on 11 November 2020 claiming that the disciplinary hearing was procedurally unfair in that the chairperson of the disciplinary hearing had failed to consider the evidence placed before him and that the outcome was also substantively unfair in that the chairperson was biased and also that she had not been afforded an appeal.

2.6 As the applicant had not lodged an appeal within the confines of the GTA disciplinary policy, the GTA had decided to terminate her employment with effect from 30 October 2020.

2.7 On 01 December 2020, the chairperson of the board of the GTA presented, through an email, a comprehensive submission to the MEC's chief of staff essentially to the effect that the applicant has failed to lodge an appeal within the confines of the disciplinary policy and that she had maintained that the appeal should be heard by the MEC notwithstanding advice that the MEC lacks authority in that regard.

2.8 Notwithstanding the above, on 03 December 2020, the MEC issued the letter referred to above reinstating the applicant to her position, among other things. The GTA then indicated to the applicant that the MEC's letter was ultra vires and constituted unlawful administrative action.

2.9 In the meantime, the CCMA arbitration process continued until 07 June 2021 when the applicant took the view that the dispute fell outside the jurisdiction of the CCMA. From that day on, the applicant insisted that the GTA should comply with the MEC's directive. This was followed by the present application which began as an urgent application.

[3] Counsel for the applicant argued before me that the decision of the MEC constitutes administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 "(PAJA") and that it was valid until set aside by a court of law. Although he could not provide me with the statutory source of the MEC's power to make such decision or to adjudicate upon such an appeal, he persisted that such issue was irrelevant in that the validity of the MEC's

decision could only be tested by a review court. He also added that the applicant had been ill advised in approaching the CCMA in that the CCMA could only have granted a remedy of reinstatement which the applicant already had obtained through the MEC. I disagree with the approach taken by the applicant.

[4] First, the MEC is an organ of State. He can only act if and as empowered by an appropriate legal instrument. No such source of power was pointed out to me nor does it exist. The finding of the disciplinary chairperson constitutes a culmination of a quasi-judicial process regulated by the disciplinary policy of GTA. The internal appeal process also derives its existence from the disciplinary policy of the GTA. Otherwise, no such appeal process can exist.

[5] Second, the GTA is a juristic person established by the Gauteng Tourism Authority Act 10 of 2001 as well as a schedule 3 provincial public entity in terms of the Public Finance Management Act 1 of 1999 (PFMA). The MEC's role and responsibility in relation to the GTA is expressly circumscribed by the GTA Act. Such role does not include the hearing of an appeal from the disciplinary hearing. On the other hand, the GTA disciplinary policy, in paragraph 12 thereof,

states that the appeal hearing shall be conducted as provided for in the disciplinary policy and the CEO or her designate shall nominate the chairperson of such appeal hearing which may include utilizing the services of an external party. The utilization of an external person clearly contemplates a situation where no internal person could be perceived to be sufficiently objective or adequately qualified.

- [6] In addition, paragraph 6.2.6 of the disciplinary policy grants an employee the right to appeal the outcome of a hearing “to a higher authority/level of management in accordance with the appeals procedure set out below (referring to paragraph 12 of the policy)”. Moreover, the objectives of the disciplinary policy, as contained in paragraph 2 of such policy, make it clear that the policy applies to all GTA employees and it is aimed at achieving consistency, fairness and smooth running of the organization.
- [7] The applicant relied on the MEC’s decision as an administrative action in terms of the PAJA. I have misgivings as to whether the PAJA should apply in the present matter which concerns a relationship between employer and employee. In this regard, I find the decision of Gcaba v Minister for Safety and Security and Others[1] apposite wherein Justice Van der Westhuizen held that employment and labour relationship issues do not amount to administrative action within the meaning of PAJA and that section 33 of the Constitution does not regulate the relationship between the State as employer and its workers. In my view, the present case is a classical instance of a matter concerning employment relations and has no direct implications for other citizens other than the applicant. However, since the issue of jurisdiction was not pertinently raised by the respondent and no meaningful argument was advanced in that regard even after I had probed for it, I will not base my adjudication of this case thereon.
- [8] Crucially, the MEC was not authorized to issue a directive to the GTA as he did. Such directive had the effect of setting aside the decision of the chairperson of the disciplinary hearing which could only occur through a legitimate appeal process. There being no empowering provision for the MEC’s action, his decision violated the constitutional principle of legality and was consequently unlawful. A decision that is invalid because of its inconsistency with the Constitution can never have legal force and effect[2].
- [9] I am in agreement with the first respondent’s counsel, Mr Ram that the illegality of the MEC’s decision has been properly raised as a collateral defence or challenge. The first respondent did not have to raise it in a form of a counter application nor is a separate review application necessary. The basis for the invalidity of such decision, including the facts and the law relating thereto, has already been placed before me and I cannot turn a blind eye to such flagrant violation of the law and the Constitution, lest I condone an illegality.
- [10] In the case of Tasima (supra)[3] the Constitutional Court affirmed the applicability of a collateral challenge to prevent an illegal compulsion to do something. I am therefore inclined to accept the collateral challenge mounted by the first respondent in relation to the validity of the MEC’s

decision. Such challenge has not been sufficiently combated by the applicant. Actually, the applicant's counsel conceded that there is no empowering provision for the MEC's conduct.

- [11] As to prayer 3 of the notice of motion which seeks an order compelling the respondent to amend its disciplinary policy, such order is untenable. To mention but a few reasons in this regard, the remedy sought is vague as it seeks an amendment "in line with best practice in order to avoid arbitrary arbitration and decisions". It is not clear what this prayer is intended to mean or achieve nor does it specify the exact portions of the current policy that should be amended. A review of such a policy requires much more than that.
- [12] Further, it has not been denied that the applicant was the principal author and custodian of such policy but only seeks to complain about it when it is to be applied in her case. I also find it unreasonable for the applicant to have rejected the offer to appoint an external senior counsel to chair the appeal. There is no plausible reason why such a person should not be regarded as objective and independent. It is also incorrect to state that the decision of the disciplinary hearing was taken by the CEO and the board when an external senior counsel was also employed for that purpose.
- [13] The applicant could even have raised the inadequacy of the appeal procedure at the CCMA as part of procedural unfairness, though in my view, that could perhaps only help her to explain why she would not have utilized the internal appeal process before approaching the CCMA. She also rejected and abandoned the CCMA arbitration process upon receipt of the MEC's decision notwithstanding that the GTA had advised that such decision was unlawful before and after it had been made.
- [14] In the circumstances, it is my view that the applicant has failed to make out a case for the relief that she has sought. There is no reason why the costs should not follow the result.

[15] In the premises, I make the following order:

The application is dismissed with costs.

DT SKOSANA

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of hearing:

25 October 2021

Date of judgment:

28 October 2021

Appearances:

For the Applicant:

Adv A.S.L. Van Wyk

Instructed by Phosa Loots Inc.

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First Floor

Faerie Glen

Pretoria

For the First Respondent:

Adv R. Ram SC

Instructed by Office of the State Attorney

95 Albertina Sisulu and Corner Kruis Streets

Johannesburg

For the Second Respondent: No appearance

[1] 2010 (1) SA 238 (CC) para 64.

[2] Department of Transport & Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) paras 79 & 81.

[3] Para 86.

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