

SOUTH AFRICA / JUDGMENT

Tshelane v Khoathane and Others (J353/2015) [2015]

ZALCJHB 108 (25 February 2015)

[2015] ZALCJHB 108

COURT

Labour Court Johannesburg

BEFORE

Steenkamp

CASE / FILE NUMBER

J353/2015

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J353/2015

DATE: 25 FEBRUARY 2015

In the matter between

GOODLUCK PHUMZILE TSHELANE.....Applicant

And

MMEG KHOATHANE.....First respondent

N SHAIK-PEREMANOV.....Second respondent

N J MXAKATO-DISEKO / J KELLERMAN.....Third respondent

M M MOKUENA.....Fourth respondent

J KESHAW / Z ZIBI.....Fifth respondent

SOUTH AFRICAN NUCLEAR ENERGY

CORPORATION (SOC) LTD.....Sixth respondent

EX TEMPORE JUDGMENT

STEENKAMP, J:

The applicant, Mr Goodluck Phumzile Tshelane, is the CEO of the sixth respondent, the South African Nuclear Energy Corporation State-owned Company Limited, known by the acronym of NECSA, inappropriately, since the actual acronym would be SANEC. Be that as it may, the applicant brought an application to this court on an urgent basis on less than 24 hours' notice to the respondents. The first to fourth respondents are non-executive directors and members of the Board of the sixth respondent, to which I shall refer as NECSA or "the Company".

The CEO was suspended by the Board pending a disciplinary inquiry setting out a number of serious allegations of misconduct. The allegations include, inter alia, the misuse of a luxury company car, a Lexus, and using the money of the company to fund a gala dinner for the ANC in Mpumalanga. The relief sought by the applicant was wide-ranging, and although the notice of motion does not reflect it in terms, it really, as Mr Laka highlighted, goes to the suspension of the applicant and an attempt to have that suspension lifted.

The relief he seeks, or rather sought, was to declare the meeting of the Board held on 27 January 2015 invalid; reviewing and setting aside the decisions taken jointly by the Social and Ethics Committee and/or the Finance and Investment Committee; and declaring that the Board of NECSA "and/or together with its sub-committees" no longer legally exists for failure to comply with constitutive legal instruments.

The notice of motion purports to give the respondents until 16:00 on 23 February 2015 to file an answering affidavit; however, as I have noted, the application was only served on the respondents after that date, that is at about 12:41 yesterday, 24 February. That gave the respondents extremely little time to file any answering affidavit, but they did so this morning. Counsel informed me in chambers this morning that those papers would be handed up and in those circumstances, the matter stood down until 11:30.

To the surprise of the Court, when the matter was called at 11:30, Mr Laka informed me that the application is withdrawn. That left only the question of costs to be considered.

Mr Avvakoumides, for the respondents, drew the attention of the Court to an e-mail dated 23 February from his instructing attorneys to the applicant's attorneys, setting out that they were instructed to act on behalf of at least the fourth respondent, Ms Midi M Mokoena. The e-mail further said, and I quote:

"Further be advised that we are not in a position to deliver the answering affidavit within the unreasonable timeframe stipulated in the notice of motion and that we shall deliver it to you by hand when we hand it up to court on the morning of Wednesday, 25 February 2015."

i.e. this morning. This morning, the respondents' attorneys and counsel did indeed hand up a notice of opposition but on behalf of all the respondents, including the company, accompanied by an answering affidavit. The answering affidavit is deposed to by one Aukney Clifford Mabunda, who is the Group Company Secretary and Head of Legal Services. He says in his affidavit:

“I am duly authorised by all the respondents to depose to this affidavit on their behalf. In respect of the sixth respondent [that is NECSA] I annex, as annexure ACM1, e-mail communications amongst the first to sixth respondents evidencing their consent and my authority to depose to this affidavit on behalf of them and the sixth respondent.”

He also included confirmatory affidavits of the first and fourth respondents. Mr Laka, for the applicant, objected that there was no Board resolution attached to the answering affidavit empowering Mr Mabunda to act on its behalf. However, the e-mail correspondence attached to the answering affidavit sets out that the respondents did indeed, in the extremely limited time available to them and through what Mr Laka referred to as a round robin process, exchange e-mails and did give the Company Secretary the authority to oppose the application and to depose to the answering affidavit on its behalf.

Mr Avvakoumides correctly referred to section 74 of the Companies Act that does make provision for a process such as this one; and in the circumstances of this case, and given the extremely unreasonable time periods imposed by the applicant on the respondents, one can hardly blame the respondents for being remiss in not having been able to convene a properly constituted Board meeting and passing a Board resolution, but rather by resorting to the e-mail correspondence referred to.

Quite obviously, the applicant, who is the CEO and who is supported by the Chairman, Mr Seekoe -- who refers to himself as Ambassador Seekoe -- were not part of that meeting, as the applicant, the CEO, is supported by the Chairman in this application. Be that as it may, the respondents, constituting a majority of the Board members, did properly authorise the Company Secretary to act on their behalf and on behalf of NECSA.

Given that the respondents have been brought to court on extremely short notice in what turned out to be a baseless application that has been withdrawn at the last minute, I have no hesitation, in law and fairness, ordering the applicant to pay the respondents' costs.

ORDER

Therefore, I simply record that the application is withdrawn and I order the applicant to pay the respondents' costs, including the costs of two counsel.

STEENKAMP J

APPEARANCES

APPLICANT: A P Laka SC

Instructed by: Ramphele Attorneys.

RESPONDENTS: G T Avvakoumides (with him Ms N R Choeu)

Instructed by: Selebogo Inc.

Date of Hearing: 25 FEBRUARY 2015

Date of Judgment: 25 FEBRUARY 2015

CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, in as far as it is audible, the foregoing is a VERBATIM transcription of the proceedings as was ordered to be transcribed by iAfrica Transcriptions and which had been recorded by Digital Court Recording Services by means of a digital recorder.

In the matter between :

GOODLUCK PHUMZILE TSHELANE Applicant

NECSA BOARD OF DIRECTORS Respondents

CASE NO: J353/2015

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Court Nr: Stenographer:

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