



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2023 - 023483

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

8/3/2024

DATE

SIGNATURE

In the application by

**MANUFACTURING ENGINEERING & RELATED
SERVICES SECTOR EDUCATION & TRAINING
AUTHORITY**

Applicant

And

SOCIAL ENTERPRISE TRUST

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Skills Development Act 97 of 1998 - section 31(1) – exclusive jurisdiction of Labour Court in matters arising out of the Act

Section 31(3) – proceedings referred to Labour Court

Order

[1] In this matter I make the following order:

- 1. The proceedings are referred to the Labour Court in terms of section 31 (3) of the Skills Development Act 97 of 1998;*
- 2. The costs of the application to date of this judgment shall be paid by the applicant on the scale as between attorney and client.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant seeks an order setting aside its own previous decision on review and thus setting aside an agreement entered into between the parties in March 2021 and June 2021 comprising an initial agreement and an addendum. When the agreement was entered into the applicant was presented by one Ms Nomvete who was an employee now facing disciplinary action arising from the conclusion of the agreement. The applicant states that Ms Nomvete did not have the authority to enter into the agreement and she failed to follow the internal processes of the applicant, and that the respondent colluded with her.

[4] It is therefore the case for the applicant that the decision to enter into the

agreement was unlawful *ab initio* and the agreement is dented as a result. The application is opposed by the respondent.

[5] In terms of the agreement the respondent was to render services to the applicant for a period of four years and the agreement was intended to terminate on 30 December 2025. The agreement was implemented until it was suspended by the applicant in October 2022. Services rendered during the period that the agreement was implemented have been paid for.

[6] The applicant says that the agreement is unenforceable for want of compliance with section 217 (1) of the Constitution of 1996 and the merSETA policies, regulations and discretionary grant criteria and guidelines of 2020 and 2021. The authority to sign such an agreement lies with the chief executive officer unless delegated to another person and any application for funding ought to be verified to ensure that all applicants are compliant with the requirements. It is alleged that the respondent did not qualify and failed to provide the requisite documentation for a discretionary grant.

[7] The applicant then makes the averment that the agreement “*falls to be cancelled and the decision to enter into an MOA¹ and contract with respondent is reviewed and set aside. Otherwise the courts will be sanctioning illegality.*” An illegal agreement is void and liable to be set aside on review.² Such an agreement does not create any enforceable rights or obligations.

[8] I must point out that the applicant does not merely rely on irregularities but states that the that the respondent was complicit in these irregularities and acted in collusion with the signatory to the agreement. For the reasons set out below I do not have to decide this factual question nor whether the applicant acted *ultra vires* as the applicant suggests or whether the agreement is vitiated by irregularities arising out of fraudulent collusion between individuals on both sides of the fence.

[9] The respondent brought a conditional counter application seeking an order declaring that the purported termination of the award of the tender and the agreement is invalid and that it be set aside.

¹ Memorandum of agreement.

² See *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) paras 14 and 15.

[10] The respondent relies on a number of defences in addition to a defence on the merits, namely an averment that the court does not have jurisdiction to entertain the application and the perceived non-joinder of parties with an interest in the application.

Jurisdiction

[11] The agreement is regulated by the Skills Development Act 97 of 1998. The purpose of the application as set out in the founding affidavit is to review and set aside the decision that led to the conclusion of the agreement for want of compliance with the applicant's policies and the regulations promulgated in terms of the Skills Development Act, and the discretionary grant criteria. Discretionary grants are allocated in terms of the Skills Development Act.

[12] Section 31 of the Skills Development Act reads as follows:

“31 Jurisdiction of Labour Court

- (1) Subject to the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters arising from this Act.*
- (2) The Labour Court may review any act or omission of any person in connection with this Act on any grounds permissible in law.*
- (3) If proceedings concerning any matter contemplated in subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer the matter to the Labour Court.”*

[13] The words ‘*arising out of*’ denote a causal connection between the Act and the harm complained of.³

[14] This Court does not have jurisdiction to entertain the application but it does enjoy jurisdiction to grant a cost order in addition to an order in terms of section 31 (3) of the

³ See albeit in a different context, *National Housing and Planning Commission v Van Nieuwenhuizen* 1952 (4) SA 532 (T) and *Jacobs v Auto Protection Insurance Co Ltd* 1964 (1) SA 690 (W).

Skills Development Act. It is appropriate that these costs should be borne by the applicant on a punitive scale. The applicant was forewarned on 14 April 2023 in a letter that the High Court does not enjoy jurisdiction to entertain the matter and invited to consider its position. It failed to do so and the question of jurisdiction was again raised in the answering affidavit.

[15] In the replying affidavit the applicant states that the High Court has concurrent jurisdiction with the Labour Court. No factual basis is made for concurrent jurisdiction and the statement merely echoes an equally bald statement in the founding affidavit that the High Court does have jurisdiction.

[16] Section 31 of the Skills Development Act is not rendered inoperative because the applicant also relies on constitutional principles encapsulated in section 217 of the Constitution of 1996 or indeed on any other legislation. On a plain reading of the founding affidavit as a stand-alone document the relief sought by the applicant relates to matters arising from the Act.⁴ This fact is not disputed in reply nor can be disputed.

[17] Cameron J⁵ in the Constitutional Court said in *My Vote Counts v Speaker of the National Assembly*:⁶

“[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.”

[18] The primary legislation relied upon by the applicant is the Skills Development Act.

⁴ I refer specifically to paragraphs 5 and 12.6 of the founding affidavit (read with the whole affidavit) and also to the agreement annexed to the founding affidavit.

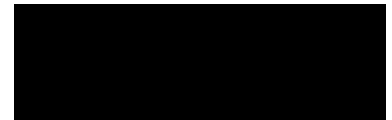
⁵ Cameron J (Moseneke DCJ, Froneman J and Jappie AJ concurring).

⁶ *My Vote Counts v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 53, and *Airports Company SA SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) with reference to section 217 of the Constitution.

It follows that the matter must be referred to the Labour Court in terms of section 31 (3) of the Act and that a case has been made out for a punitive cost order. Because of the referral I believe it would not be appropriate to deal with the merits and the non-joinder point in this judgement as these are issues to be pronounced upon by the Labour Court.

Conclusion

[19] For all the reasons as set out above I make the order in paragraph 1.



**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **8 MARCH 2024**

COUNSEL FOR THE APPLICANT:	N RALIKHUVHAHA
INSTRUCTED BY:	T J MAODI INC
COUNSEL FOR THE RESPONDENT:	A C BOTHA SC
INSTRUCTED BY:	SIM ATTORNEYS INC
DATE OF ARGUMENT:	23 FEBRUARY 2024
DATE OF JUDGMENT:	8 MARCH 2024