



**IN THE LABOUR COURT OF SOUTH AFRICA, GQEBHERHA**

Not Reportable

CASE NO: PR 246/21

In the matter between:

**LANGA GOODMAN DOUSE**

**Applicant**

And

**THE NATIONAL HORSERACING AUTHORITY**

**Respondent**

*In re:*

**THE NATIONAL HORSERACING AUTHORITY**

**Applicant**

And

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondent**

**FEIZAL FATAAR N.O.**

**Second Respondent**

**LANGA GOODMAN DOUSE**

**Third Respondent**

**Heard: 23 February 2023**

**Delivered: 07 June 2023**

**This judgment was handed down electronically by circulation to the Applicant and Respondent's legal representatives by email, publication on the Labour**

**Court website and release to SAFLII. The date and time for handing - down is deemed to be 13h00 on 07 June 2023.**

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## **JUDGMENT**

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**LALLIE, J**

- [1] The respondent launched an application in terms of section 145 (1) of the Labour Relations Act 66 of 1995 as amended (the LRA). It seeking an order reviewing and setting aside an arbitration award in which the applicant's dismissal by the applicant was found substantively unfair, found the third respondent's dismissal by the applicant substantively fair. The application is opposed by the third respondent who filed a cross-review application in which he sought an order substituting part of the relief and the decision on costs. The cross-review is opposed by the respondent. A number of interlocutory applications have been filed.
- [2] The parties agreed that the application brought by the applicant in terms of rule 11 of the Labour Court rules be given priority. In the application the applicant seeks an order dismissing the review application on the grounds that the individual who instituted it lacked the necessary authority. He also seeks an order striking out the papers filed on behalf of the respondent in the cross-review for the same reason. The application is opposed by the respondent.
- [3] The facts relevant to the rule 11 application are that in the founding affidavit of the review application Mr Sibanyoni (Sibanyoni), the respondent's Financial Manager, avers that he is authorized to institute the review application. He repeats the averment in the supplementary affidavit and refers to a resolution confirming the authority. The resolution was, however, not attached. The applicant issued a notice in terms of rule 7 of the Uniform Rules asking the respondent to prove Sibanyoni's authority to bring the review application. Sibanyoni's affidavit was attested to on 10 June 2021. On 18 July 2021, the applicant's CEO, Mr Moodley (Moodley) issued a resolution in terms of which he

authorizes Sibanyoni and Mr Hyde ('Hyde'), the Racing Control Executive to institute and oppose legal proceedings in the Labour Court. He further gives them authority to appoint a firm of attorneys to act in behalf of the respondent.

- [4] In the answering affidavit to this application Sibanyoni denies that he lacks the necessary authority. He relies on his involvement in this dispute from its inception. I must accept the applicant's averments that the allegation Sibanyoni seeks to rely on does not constitute the necessary authority. It therefore cannot assist the respondent. The duration of his involvement does not grant Sibanyoni the necessary authority as it does not prove the manner in which the authority was obtained.
- [5] A further defence Sibanyoni raised in support of his allegation that he has the necessary authority is the special power of attorney he executed in which he appointed the respondent's attorneys of record to act on behalf of the respondent in these proceedings. Sibanyoni derived his authority to execute the power of attorney from the resolution signed by Moodley on 18 July 2021. The defence has been refuted successfully by the applicant who submitted that in terms of chapter 5 of the respondent's constitution, the authority to litigate vests on the respondent's National Board. In the resolution, Moodley does not disclose the source of his authority to issue it. The respondent's constitution regulates activities by and on its behalf. It is a binding document that must be complied with. It states in clear terms that its National Board has the power to litigate on the respondent's behalf. It has not given the CEO any authority to litigate or delegate the power to litigate on its behalf. In the absence of the necessary authority, Moodley's attempt to grant Sibanyoni authority to bring the review application, oppose the cross - review counter application and appoint the firm of attorneys did not succeed.
- [6] The respondent's attack of the applicant's late reliance on Rule 7 of the Uniform Rules is of no moment. An application in terms of Rule 7 can be brought any time before judgment is handed down if it is in the interest of justice to do so. The applicant cannot be faulted for insisting on seeking Sibanyoni to prove his *locus standi* as it is an essential element of the proceedings. It is in the interest of

justice that the respondent is aware of and authorizes the institution of legal proceedings on its behalf.

- [7] It was argued on behalf of the respondent that when there is sufficient evidence to decide that the person litigating on behalf of a company has the necessary authority, the resolution granting the authority becomes unnecessary. The respondent sought to rely on the payment of the funds referred to in the bond of security in the review application. The bond of security makes no submissions in support of the averment that the respondent is aware of or authorized the institution of the review application. It instead states that a firm of attorneys confirms that it is held firmly bound to the applicant to discharge for and on behalf of the respondent a sum not exceeding R 1 500 000.00
- [8] The applicant denied that Sibanyoni and Moodley had the necessary authority to bring and oppose the applications on behalf of the respondent. He relied *inter alia*, on Lancaster 101 (RF)(Pty) Limited v Steinhoff International Holding NV (Markus – Johannes-Jooste and another as third parties) [2021] 4 ALL SA 810 (WCC). In that matter, in deciding whether sufficient evidence had been led to prove that a company had duly resolved to institute the proceedings and that the proceedings were instituted at its instance the court considered the validity of the resolution. The invalidity of the resolution was found to have established the absence of the authority to act and to give instructions for legal representation.
- [9] Even the authorities the respondent sought to rely on did not support its case. The averments made do not support the argument that the respondent granted Sibanyoni authority to litigate on its behalf. The resolution by Moodley is invalid as it was made without the necessary authority. So is the appointment of the attorney who acted on behalf of the respondent.
- [10] It was argued on behalf of the applicant that as the review application was brought without the necessary *locus standi*, all the papers that have been filed on behalf of the respondent's behalf should be struck out and the application decided only on the applicant's papers. The same argument was advanced in respect of the cross-review. The respondent's counter argument that the respondent should not be denied of the right to participate in both applications.

[11] I have considered the arguments on behalf of both parties on the issue. The conduct of Sibanyoni and Moodley in breach of the respondent's constitution does not justify the decision denying the respondent the right to be party to the applications. No fault can be attributed to the respondent for its omission from the proceedings. Any prejudice the applicant may suffer as a result of affording the respondent an opportunity to cure the defect can be suitably addressed by an appropriate costs order. However, the same cannot be said about the decision to non-suit the respondent. This court does not take the decision to deny a party access to justice easily.

Section 162 (1) of the LRA enables this court to make costs orders according to the requirement of the law and fairness. The law entitles the applicant as the successful party to a costs order in his favour. Fairness requires that the respondent should not be mulcted with costs through no fault on its part. This application was necessitated by the conduct of Sibanyoni and Moodley who acted in breach of the respondent's constitution and their persistent refusal to correct their conduct. Fairness further requires that they be afforded an opportunity to give reasons why they should not be ordered to pay the applicant's costs each in his personal capacity. No fault can be attributed to the respondent for its omission from the proceedings. Fairness also requires that the applicant should not be out of pocket for reasonably demanding that a defect in the proceedings be cured.

[12] In the premises, the following order is made:

1. The resolution issued by Vishnunathan Jairaj Moodley, the Chief Executive Officer of the National Horse Racing Authority dated 18 July 2021 is declared invalid.
2. Bongani Sibanyoni lacked the authority to bring or oppose on behalf of the respondent any proceedings under case number PR246/21.
3. The respondent is directed to file the necessary papers in the prosecution of the matter under PR146/21 within 20 days of this judgment.
4. Bongani Sibanyoni and Vishnynathan Jairas Moodley are directed to file submissions giving reasons why a costs order should not be granted

against them in their personal capacities for the applicant's costs of the Rule 11 application.

5. The submissions referred to in paragraph 4 above must be filed within 20 days of this judgment.

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Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Leon Voultsos

Instructed by: Boyens Attorneys Inc

For the Respondent: Chris Ditabe

Instructed by: Ditabe & Wagner Attorneys

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