IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 26921/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED. ✓

7/5/18

7/5/18

DATE

SIGNATURE

In the matter between:

SIYADUMA BINIZA	1ST APPLICANT
LULAMA ZITHA	2ND APPLICANT
ZAKHELE ALEX TUMMY ZITHA	3RD APPLICANT
NHLANHLA NGUBANE	4TH APPLICANT
ALAN BALOYI	5TH APPLICANT

And

MINISTER OF PUBLIC WORKS	1ST RESPONDENT
TRUSTEES FOR THE TIME BEING OF THE INDEPENDENT DEVELOPMENT TRUST	2ND RESPONDENT
TLHOTSE MOTSWALEDI	3RD RESPONDENT
MANDISA FATYELA-LINDIE	4TH RESPONDENT

OCTAVIA MATSHIDISO MATLOA	5TH RESPONDENT
MORRIS MTHOMBENI	6TH RESPONDENT
NOMVULA RAKOLOTE	7TH RESPONDENT
YVONNE MBANE	8TH RESPONDENT
HANNELIE KRUGER	9TH RESPONDENT
THULASI NXESI	10TH RESPONDENT
MASTER OF THE HIGH COURT, PRETORIA	11TH RESPONDENT
PHELISA NKOMO	12TH RESPONDENT
RASHID AMOD SADECK PATEL	13TH RESPONDENT
GCWALISILE CYNTHIA KABANYANE	14TH RESPONDENT

JUDGMENT

Fabricius J,

1.

The Applicants set down this urgent application for Tuesday 24 April, which for Urgent Court purposes was only a three-day week.

2.

It could not be accommodated, but I made myself available for 3 May, although I had been allocated other duties.

3.

The Notice of Motion is dated Monday 16 April 2018. Notice of Intention to Defend was required by 10h00 on Tuesday, and the Answering Affidavit by 15h00 on 18 April.

4.

The Notice of Motion, apart from the prayer relating to urgency, contains seven prayers seeking final relief, including a cost order against the Minister personally, and one seeking interim relief (prayer 6), pending a review application.

5.

The application was only opposed by the First Respondent, the Minister of Public Works.

6.

The Independent Development Trust is a major public entity as contemplated in Schedule 2 of the ***Public Finance Management Act 1 of 1999***. Its primary goal is to use its resources for the benefit of poor communities in South Africa.

7.

Apart from the applicability of the ***Public Finance Management Act***, it operates within the parameters of a Trust Deed. The "Executive Authority" is the Minister, both in terms of the Trust Deed, and by way of "ownership control" in terms of s. 1, and 3 (3) of the ***Act***. Section 63 (2) is also of relevance.

8.

A Board of Trustees is appointed in terms of clause 8 of the Deed. Two appointed by the Minister in terms of clause 8.2.1, and 10 appointed in accordance with the procedure set out in clause 8.3 ("The Selection Committee Members").

9.

The Fourth and Fifth Applicants, due to an "administrative oversight" as the Founding Affidavit puts it, were never authorized by the Master to act as trustees. On 31 March 2018, the Minister removed them as Executive Authority Trustees. The interdict referred to in par. 6 relates to them. Section 6 (1) of the ***Trust Property Control Act*** states that Trustees may only act once authorized by the Master.

See: ***Simplex (Pty) Ltd v Van der Merwe & Others 1996 (1) SA 111 W at 113 E.***

This is a peremptory prohibition. Any act contrary thereto is null and void.

10.

The selection committee appointed First, Second and Third Applicants, the Third Respondent, the Fifth Respondent and the Twelfth, Thirteenth and Fourteenth Respondents. As I have said, those Respondents abide by my decision and have filed no affidavits.

11.

After his appointment, the Minister required six of the remaining eight trustees to provide reasons why he should not act in terms of s. 20 of the ***Trust Property Control Act No. 57 of 1988*** to remove them as trustees. Representations were indeed made, as well as by the Fourth and Fifth Respondents. These were considered but, on 31 March the Minister decided to remove all six of the affected trustees. On the same day, as I have said, the Fourth and Fifth Applicants were also removed. No procedural irregularities were relied on by Applicants though they do rely on ***PAJA*** in these proceedings. (The ***Administrative Justice Act 3 of 2000***).

12.

It is Applicants' case that the removal of the "Selection Committee Trustees" is unlawful as the Trust Deed makes no provision therefor by the Minister (clause 15). This is a peremptory prohibition. Any act contrary thereto is null and void.

13.

On 4 April 2018, Applicants' Attorney sent a letter to the Minister. It was said that the removal of the Selection Committee Trustees was unlawful and that the decisions were subject to review in terms of ***PAJA***, as the removal was not authorized by any empowering provision.

14.

The removal of the Executive Authority Trustees was said to be unlawful because of its irrationality. This conduct was also reviewable in terms of ***PAJA***, it was said.

15.

The Minister was told that an urgent application would be brought within 14 days if certain undertakings were not provided by 9 April 2018. He said that he had the power in terms of s. 20 of the ***Trust Property Act*** to approach the Master or the Court for removal of trustees. This s. 20 process has not been finalized. Adequate reasons for removal existed.

17.

On 11 April 2018, Applicants' Attorney noted the Minister's reply, and requested that they be notified of any process to remove the trustees.

18.

Details were also requested as to why the Executive Authority Members were removed and on which basis the Minister intended to appoint an "Interim Board".

19.

The Minister's Attorneys replied on 11 April that they would take instructions and revert. This letter was not annexed to the Founding Affidavit.

20.

Before the Minister's Attorneys could do this, the urgent application was emailed to the Attorneys on 16 April 2018. Service followed a day later.

21.

As far as urgency is concerned, the following is relevant:

21.1 The time lines stipulated in the Notice of Motion, which are wholly unreasonable. Furthermore, and contrary to all requirements of the Rules relating to urgency, the Practice Manual and the decisions of this Court, the Founding Affidavit does not even attempt to justify these severely curtailed times, as it should have. The decision of ***Luna Meubels v Makin 1977 (4) SA 135 W***, was simply ignored.

21.2 The Applicants do not act in their official capacity herein but make vague allegations about the "harm" they are suffering because they have been prevented to act as trustees. No details are provided of such likely harm to them.

21.3 It is not alleged that the "Interim Board" is in the process of making decisions that would undermine the purpose of its existence; and that urgent relief is therefore a necessity.

21.4 It is said that the Minister has effectively brought the operations of the Independent Development Trust to a stand-still. Again, there is nothing to support this allegation.

21.5 It is further said, that the public monies have been "unlawfully captured" by the Minister and again no evidence of this serious allegation is contained in the in the affidavits.

21.6 The Applicants also purport to protect "innocent" third parties who may conclude invalid contracts, but they do not purport to act in the public

interest herein, but merely in their own interest, and as the Minister put it, they recently applied for an increase of 25% in their fees.

21.7 The Applicants in the Replying Affidavit attach a letter of 16 April 2018, which they wrote to the Board. This was not annexed to the Founding Affidavit. They suggest that the application be enrolled for 2 May instead of 24 April, if certain undertakings are given.

21.8 It is clear that the Applicants do not require any relief from this Court to have decisions of a Minister reviewed. They have that right in any event.

See: ***National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC).***

21.9 The Minister is acting as an executive authority and did not make administrative decisions in the present context. A degree of deference must be allowed.

See: ***Minister of Defence & Military Veterans v Motau 2014 (5) SA 69 (CC).***

Such decisions are not subject to review under ***PAJA***.

21.10 The Minister said that he acted because of advice given by his senior directors that maladministration had occurred, details of which were annexed. These documents do not reflect arbitraries, irrationality or bad faith. The Applicants have studiously avoided this topic, though it was argued that the irregularities occurred before their appointment.

21.11 The Minister said that the application was premature as the s. 20 process in relation to the Selection Committee Trustees has not been completed. There is therefore no dispute before me and those Applicants can exercise all their rights in due course.

See: ***Ferreira v Levin 1996 (1) SA 984 CC at par. 199***, regarding the concept of "ripeness".

21.12 As far as prayer 6 was concerned, these trustees have been appointed, and interdicts are meant for prospective matters, and are not preventative.

See: ***S v Baloyi 2000 (2) SA 425 (CC) at par. 17.***

22.

Having regard to my decision in ***Afrisake v City of Tshwane of 14 March 2014***, Mr Gauntlett SC QC, on behalf of the Minister, submitted that a Court had to be consistent in its application of ***Rules*** relating to urgency. I agree. The question really is: have Applicants made out a case why they need this urgent relief now, failing which, their rights cannot be adequately protected in the future? The answer is a clear "no". The application is premature.

23.

Before me is also an application to strike out certain parts of the Applicants' Founding Affidavit and Replying Affidavit because, they are scandalous, vexatious, defamatory and prejudicial to the First and Tenth Respondents. These relate to allegations that the Minister is deceitful and dishonest, amongst others. The facts put before me do not support such gratuitous insults which were made even before the Minister filed his Answering Affidavit. I take a serious view of this. Attorneys and Advocates should be careful before such allegations are made, and satisfy

themselves that facts support such. The culture of insults and defamation that has crept into our society should not be allowed to take its place in Court proceedings, merely because one party is dissatisfied with the conduct of its adversary or even Court decisions. I agree that these abusive allegations can severely prejudice the Minister in the absence of any facts that would support assertions of dishonesty.

24.

The application to strike out the parts referred to in the Notice in terms of ***Rule 6 (15)*** is therefore granted with costs on the Attorney and client scale, including costs of two Counsel.

Notice of such intention to apply for a punitive order was given, but the allegations were unjustifiably persisted in. A punitive cost order is therefore justified.

See: ***Helen Suzman Foundation v President of the Republic of South Africa 2015 (2) SA 1 (CC) at par. 36 to 38.***

25.

The main application is struck off the Roll. The Applicants acted in their own interest. The application was premature and abusive. Relevant letters were not disclosed. There is no reason why a cost order should not be made against them. The Applicants are therefore ordered to pay the costs of the application, including the costs of two Counsel.

26.

All cost orders are to be paid jointly and severally, the one paying, the others to be absolved.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

7 May 2018