REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

J 545/13 & J 543 /13

In the matter between:

PETER HUDSON **First Applicant**

DIRK ROBERT BULDER **Second Applicant**

and

SOUTH AFRICAN AIRWAYS SOC LIMITED **Respondent**

Heard: **18 December 2013**

Delivered: 24 April 2014

Summary: Termination of contract of employment – Section 77 of the BCEA; Contract that does not comply with legislative framework ultra vires and void ab initio; Ostensible authority of Kona; non - compliance of statutes and legislation and application of Estoppel

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JUDGMENT

WALELE AJ

[1] The Applicants are Peter Hudson (hereinafter referred to as Applicant 1) and Dirk Robert Bulder (hereinafter referred to as Applicant 2) under case numbers J 545/13 and J 543/13 respectively. Unless there is a

specific need to distinguish any circumstance or submission in relation to any one of Applicants I will for ease of reference refer to the parties as Applicants and Respondent.

[2] The Respondent is a public entity SAA SOC Limited a Company duly registered and incorporated according to the Company laws of the Republic of South Africa.

[3] The Respondent is governed by the South African Airways (SAA Act) Act 5 of 2007, and the Public Finance Management Act (PFMA)1 of 1999

Consolidation Ruling

[4] The legal representatives of the parties sought that the matter be heard at the same time on the basis of the common facts of the case and the common parties that the matter be addressed simultaneously.

[5] I accordingly made the ruling that the matter brought under case number J 545/13 be consolidated with the matter under case number J 543/13.

Preliminary Point

[6] The Respondent submitted that the nature of the relationship between the Applicants and the Respondent is in essence one of an independent contractor and not an employer and employee relationship.

[7] It follows according to the Respondent that any dispute between the parties would not be subject to the jurisdiction of the Labour Court.

[8] The employment agreement referred to by the Applicants is in fact a consultancy agreement disguised as an employment agreement thus making the Applicants independent contractors.

[9] Alternatively, should I find that the relationship between the parties is one of employment then same was terminated lawfully in accordance with the employment contract and on notice in terms of the Basic Conditions of Employment Act 1997.

[10] The Applicants argued that the contracts that they signed were fixed term employment contracts.

[11] They received a salary slip with an Employee number and that UIF was deducted from their remuneration. They had reported daily and had office space at the Respondent

[12] The Applicants showed that they were reporting to the Kona (Kona) and were under his direct control and supervision.

[13] I have perused the contracts referred to as fixed term contracts and have considered the submissions made in the pleadings by both parties and their respective arguments.

[14] There is significant references to the contracts entered into being contracts of employment; reference to the Respondent as the employer hours of work; probationary period; that discipline would be meted out in terms of the Respondent's disciplinary code and procedure; notice period and direct supervision by Kona.

[15] I am satisfied that having regard to the tests applicable in making a determination of an employee status or that of an independent contractor that what is before me is indeed employment contracts entered into by the parties.

Background to the dispute

[16] This matter concerns an application launched in terms of section 77 (3) of the Basic Conditions of Employment Act no 75 of 1997 (as amended) by the Applicants wherein they seek reinstatement arising from the alleged unlawful termination of their contracts of employment by the Respondent.

[17] Applicant 1 signed a fixed term contract of employment on 19 November 2012 for a period of three years to 18 November 2015. He was appointed as the Marketing Manager of AIR CHEFS and would receive an annual

remuneration of R 1 100.000.00 (one million one hundred rands) and other air travel benefits.

[18] Applicant 2 signed a fixed term contract for a period of one year from 13 November 2012 to 12 November 2013. He was appointed as a level 2 manager as financial manager to assist SAAT, AIR CHEFS AND SATC and would receive an annual remuneration of R 1 500.000.00 (one million five hundred rands) and other air travel benefits.

[19] On 17 January 2013, the Applicants were called individually into separate meetings and were informed by Mrs Thuli Mpshe ("Mpshe") the General Manager Human Resources, that the Board had passed a resolution to annul their contracts as the CEO (Kona) did not have a mandate to appoint them and did not follow the procedure that is required to make appointments at the Respondent. There was a moratorium in appointing new employees at the Respondent.

[20] Both Applicants signed the letters titled "Notice of annulment of fixed term contract "as acknowledgement of receipt only.

[21] The annulment had immediate effect subject to the notice period in terms of the BCEA.

[22] The Applicants sought for an order (1) Declaring the termination of their employment contracts to be unlawful; (2) Directing the Respondent to reinstate the Applicants to the positions they occupied prior to the termination upon the same terms and conditions they enjoyed at the time of the termination; (3) costs of the application.

Applicants Submissions

[23] The Applicants through their respective legal representative placed on record that the assertion that the appointments were ultra vires are without merit and that they be reinstated forthwith.

[24] The Applicants claim that they received no response to the aforesaid correspondence despite the undertaking to do so by the Respondent.

[25] The Applicants submitted that the Acting CEO (Kona) was clothed with general authority to sign the contracts on behalf of the Respondent.

[26] The Applicants claimed that they had no knowledge that Kona did not comply with the legislative framework, polices and other statutes applicable when he appointed them.

[27] The Applicants claimed that the Respondent's conduct in addition to it being unlawful, was malicious and amounted a gross violation of corporate governance and the PFMA.

[28] The decision to terminate their contracts were premeditated and implemented despite the advices from the Head of Legal to the contrary.

[29] The Applicants claim that they stand to be prejudiced immensely as they are deprived of income and unable to meet their financial commitments.

[30] In the replying affidavit the submissions are that the Kona ("Kona") did not act irregularly and that his actions did not render the contracts invalid as Kona is clothed with general authority over the Company

[31] They had every reason to believe that in signing the fixed term contract they had every reason that Kona had the necessary authority to sign the contract on behalf of the Respondent.

[32] Applicant 1 submitted that at the time that he was offered employment by the Respondent that the Kona raised the review application in relation to his dismissal from the Respondent and pursuant thereto he agreed not to pursue the pending review application.

[33] Applicant 2 resigned from the employ of the Respondent in 2005. He was employed at a senior level in his capacity as a Chartered Accountant.

Respondent's submissions

[34] The Respondent submitted that the Applicants have not made out a case and that the application should be dismissed.

[35] The Respondent submitted that the appointments of the Applicants were made contrary to the legislative and policy prescripts that governs the Respondent as a public entity.

[36] The Board became aware that certain individuals were appointed to render services to the Respondent and that these appointments were made contrary to the policies and procedures of the Respondent.

[37] The Board conducted an investigation into the matter and it became apparent that the Applicants were appointed by Kona in terms of fixed term service contract.

[38] An ad hoc sub-committee was constituted to consider the matter and report to the Board and later recommended that the contracts be nullified with immediate effect.

[39] The Board resolved under resolution number 2013/B03 to annul the agreements entered into between Kona and the consultants.

[40] The Applicants were informed in writing of the aforesaid by the General Manager Human Resources (Mpshe) of the Respondent

[41] The contracts of the Applicants were regarded as *ultra vires* and void *ab initio* because the appointment and the conclusion of the contracts were in violation of due process and the standing moratorium on appointments within the Respondent's business.

[42] The Respondent has specific recruitment and selection policies that are required to be complied with in the event that appointments are made.

[43] None of these policies were considered in appointing the Applicants; there had been no positions available within the structures of Airchef (a subsidiary business of the Respondent) and no business imperative to appoint the Applicants.

[44] It is the Respondent's contention that the appointments were mooted by a return of a favour to the Applicants by the Kona as Applicant 1 was

dismissed previously by the Respondent on account of his involvement with Kona.

[45] The dismissal of Applicant 1 of the previous employment contract was upheld by the CCMA and he has since reviewed the award.

[46] The Applicant's appointment as Marketing Manager of Airchefs should logically have included the involvement of the Airchefs CEO due to the financial implications of the appointment. This did not occur.

[47] Kona instructed Mpshe to appoint the Applicants. Mpshe refused to appoint the Applicants because there was also no positions to fill, there was a moratorium on appointments and there was no budget available to sustain the non-existent and vague positions that had not been advised as per the policy. Kona advised that he did not care how the appointments are made and they must be effected.

[48] Mpshe asked Kona to put his instructions in writing because any new positions created, needed approval of the Board and the Chairman. Further it had to be signed off by the GM Human Resources and Finance. This did not occur in this instance.

[49] When Mpshe refused Kona instructed her subordinate, the Manager HR Services and Divisional HR Manager (Joubert) to make the appointments.

[50] Joubert was informed by Kona that the Applicants had already been appointed and she was required to prepare the contracts and confirm their salaries. She was made to understand that the appointments of the Applicants were already discussed with Mpshe.

[51] Joubert completed a requisition form in which she indicated that there was no budget allocated for the employment of the Applicants. Kona went ahead and appointed the Applicants. ("Requisition SA 12").

[52] When Joubert started questioning some of the decisions of Kona he instructed Mpshe to transfer Joubert to SAA Technical. Mpshe refused as this was unprocedural.

[53] When Mpshe advised Kona that there was a moratorium on appointments she was advised by Kona that the shareholder and Board had given him carte blanche to do as he wishes. This turn out to be untruthful.

[54] The Board had directed that Kona be put on suspension because of *inter alia* the irregular appointments of the Applicants pending an investigation into the allegations of misconduct against him.

[55] The policy of the Respondent did not allow the employment and appointment of previously dismissed employees and when this was brought to the attention of Kona he replied that *"he was dismissed because of me and now it is payback time".*

[56] The salaries requested by the Applicants namely R 2.4 million and R 2.2 million respectively were questioned by Mpshe and Joubert as the Applicants were paid at a much lower salary when they were previously employed by the Respondent and their salaries were then set at the lower level.

[57] The Applicant 1 in his salary negotiation indicated that he had a matter against the Respondent and that had incurred losses whilst being unemployed and that the remuneration package was intended to compensate for the aforesaid.

[58] The appointment of the Applicant was to a marketing position in Airchefs and yet reported to the Kona of the Respondent. This is an anomaly as there is no marketing function in the CEO's office and Airchefs had its own CEO and a manager involved in its business development.

[59] The contracts of the Applicants stated that their duties and responsibilities would be communicated to them by a Manager but no such Manager was identified.

[60] The Applicants as former senior employees of the Respondent was aware or at the very least should have been aware of the procedures required to be complied with and conspired to circumvent and flout the policies and procedures and have been party to serious breaches of the prescripts that govern the Respondent.

[61] The contracts have little detail on the material issues of the Applicants' duties and responsibilities and the positions appointed to do not exist in the Respondent's organogram or that of its subsidiaries.

[62] The duties undertaken by the Applicants were unknown to the senior management of the Respondent including the CEO of Airchefs and the GM Human Resources.

[63] Kona portrayed to the CEO of Airchefs that the Applicants would be performing consulting services on behalf of Kona and would be paid from the budget of his office.

The Appointment process of the Applicants

[64] The Respondent has shown that the contracts entered into with the Applicants did not materially comply with the legislative and policy prescripts that govern the Respondent and are accordingly irregular appointments.

[65] It appears from the pleadings before me that the contracts were concluded without the consideration to the standing moratorium on appointments applicable at the time in the Respondent or Board approval.

[66] Examples of the aforesaid are: no advertisements both internally or externally for newly created posts as is required by the Human Resources Policy framework were done; the Applicants were not put through a standard recruitment process; no job evaluation or job profiles were developed for the positions before the appointment of the Applicants; there is no Marketing Manager position in the organogram of Airchefs and hence no business imperative to appoint; the Applicants

had to report to Kona of the Respondent when there is no such reporting line in the Respondent's structure; the Management of Airchefs (including its CEO)were not involved in the appointments; there was no budget allocation for the positions; there was no board approval for new appointments.

[67] Mpshe made Kona aware of the fact that Applicant 1 had been dismissed and he replied that she should not be concerned as he was dismissed due to him.

[68] Kona told Joubert that the Applicants had been employed and that she must prepare their contracts and confirm their salaries.

[69] Joubert was led to believe that the aforesaid had been discussed with Mpshe.

[70] Kona was informed by Mpshe that there was no budget but despite this he signed off the requisition form in relation to the salaries.

[71] Kona advised Mpshe untruthfully that the shareholder and Board had given him carte blanch to do as he pleased.

[72] Kona was suspended as a result of the appointments of the Applicants.

[73] The Applicant when discussing his salaries with Joubert advised that he had a dispute with the Respondent arising from his former employment with the Respondent and due to the losses that he suffered from loss of income and that the remuneration requested is to compensate for the aforesaid.

The law

[74] The Respondent is a public entity governed by the South African Airways Act 5 of 2007 read with the provisions of the schedule 2 of the Public Finance Management Act, 1 of 1999 (the PFMA)

[75] The Respondent is governed by a Board of Directors who are in turn accountable to the Minister of Public Enterprises.

[76] The Respondent is accountable to the Parliament of the Republic of South Africa and to the *fiscus* in relation to the manner in which it conducts its business and in particular how it dispenses with its monies being partly funded by public monies.

[77] The Respondent argued that the Applicants were warned that there are fundamental disputes of fact and that the Applicants foresaw or should have foreseen but nevertheless launched motion proceedings.

[78] In the circumstances I will be directed and will consider the facts set out in the pleadings in accordance with the well-known principles as set out in the *Plascon- Evans* decision.

[79] In *New balance Athletic Shoe Inc. v Dajee NO* 2012 ZASCA 3 Nugent J A in a unanimous judgment held at para 16:

"Those *rules manifest the principle that application proceedings are intended for the resolution of legal issues. For that reason final relief will be granted only where the relief is justified by undisputed facts (facts alleged by the Applicant that are not disputed together with facts alleged by the Respondent) though there are exceptions, which applies as much where the Respondent bears the onus of proof" … For example where the allegations or denials of the Respondent are farfetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*

[80] The general rule is a party cannot rely on Estoppel when to do so would result in enforcing an unenforceable contract.

[81] In *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 415-416: "The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other."

[82] Further stated in *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402: "The general rule which has been adopted by the English Courts is stated as follows by Spencer Bower on Estoppel by Representation at p. 182: "just as it is a good affirmative defence to an action on a contract that it cannot be performed without directly contravening the provisions of a statute, and that, by enforcing it or otherwise judicially treating it as valid, any court would be sanctioning and condoning such a contravention, so also, and a *fortiori*, it is a good affirmative answer to a case of estoppel by representation that any closure of the representor's mouth would result in a like judicial recognition of, and connivance at a statutory illegality. The private rights and interests of the individual must yield to the higher rights and interests of the State.""

[83] In *Hely-Hutchinson v Brayhead Ltd and Another* 1968 1 QB 549: "Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their members to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority."

[84] *Botha AR* in *Strydom v Die Land-en Landboubank van Suid Afrika* 1972 (1) SA 801 (A) op 816 A-B sal van toepassing wees: "Waar 'n handeling van 'n statutere liggaam, soos die Landbank, ultra vires is, hetsy omdat hy sy verleende bevoegdhede te buite gegaan het, hetsy omdat hy in gebreke gebly het om voorskrifte na te kom wat die wetgewer vir die regsgeldigheid van daardie handeling voorgeskryf het, het hy in regte nie gehandel nie."

Evaluation

[85] The Board directed that the contracts of the Applicants amongst others be reviewed to ascertain its validity; to determine whether due process

was followed when appointing the Applicants; and if not that the contracts be terminated.

[86] The Board later resolved (resolution number 2013/B03) that the contracts of the Applicants be terminated as it was ultra vires and void ab initio.

[87] The Applicants contend that the reasons furnished by the Respondent for the termination of the contracts do not fall within the ambit of the termination clause of the contract and as such are without foundation and unjustified and accordingly constitutes a breach of contract.

[88] The termination clause in terms of paragraph 3 of the Applicants' contracts of employment make reference to termination for any reason determined by law.

[89] I agree with the Respondent that the Applicants who were formerly employed at a senior level by the Respondent ought to have known that the recruitment process falls within the legislative framework that is applicable in similar circumstances at the public entity.

[90] These legislative prescripts are peremptory and applicable to a public entity.

[91] The Applicants were party to appointments that they were aware or ought to be aware were unlawful, impermissible and void ab initio.

[92] The Applicants submitted that they were appointed by Kona who is clothed with the authority to act on behalf of the Respondent.

[93] Actual authority must be distinguished from ostensible authority and the above shows that there are significant circumstances that indicate that the actual authority was marred and as stated above that the Applicants ought to have been aware of the non- compliance.

[94] The Applicants are precluded from raising Estoppel in similar circumstances as it is trite that the failure by a statutory body to comply with provisions which the legislature has prescribed for its validity cannot

be remedied by Estoppel as that would give validity to something that is unlawful and ultra vires.

[95] It cannot be argued that the fact that the Acting CEO Kona did not follow due process cannot be held against the Applicants is untenable. The CEO's powers are found in the statute and prescripts applicable in the Respondent.

[96] There is no confirmatory affidavit to confirm the aforesaid

[97] Even if I were to accept (which I do not) that the Applicants did not know that the prescripts have been followed that to permit these contracts and its continuation would be contrary to public policy and interest (Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 at 411 H -412 B

[98] The Respondent would compelled to do something contrary to its own prescripts and the legislative framework and would be open to manipulation and abuse and the subjective interests of individuals must be weighed against the objective interests of the society.

Conclusion

[99] The contracts of the Applicants are *ultra vires* and void *ab initio* because the appointment and the conclusion of the contracts were in violation of due process and the standing moratorium on appointments within the Respondent's business.

In the circumstances, I make the following order:

1. The decision of the Respondent to annul the contracts of the Applicants is lawful.

2. The application of the Applicants is dismissed with costs

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WALELE AJ

Acting Judge of the Labour Court of South Africa

Appearances

Applicants:	Carls Attorneys
Respondent:	Advocate Mosam
Instructed by:	Norton Rose South Africa