IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Nos:- JR 1607/2001
JR 1608/2001
JR 1609/2001

In the matters between:-

DIHLABENG LOCAL MUNICIPALITY Applicant

and

COMMISSIONER MARTHINUS VAN AARDE First Respondent

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION Second Respondent

T L SCHOLTZ Third Respondent in 1607/01

T W MONTSITSI Third Respondent in 1608/01

T P MOTSIMA Third Respondent in 1609/01

JUDGMENT

Vahed AJ:

[1] Three separate review applications were instituted under the above cited case numbers. Save for the identity of the third respondent, each involved the same parties. The question to be determined in each was identical. For convenience they were heard together. In this judgment I shall refer to the third respondent in each by name or collectively as “the third respondents”.

[2] The facts which underpin these reviews may be briefly stated as follows. The third respondents were each serving councillors of the applicant, having been duly elected as such. During 1997 they each resigned as councillors and were subsequently employed by the applicant in divers capacities. In the case of each the date of employment was within a six month period calculated from when they each last held office as a councillor. During 2000, and after the local government elections had been completed, the appointment of the third respondents was challenged on the basis that it was contrary to the provisions of section 67 of the Local Government Ordinance, 1962. That section provided:

"67. Appointment of employees
(1) A council shall, subject to the provisions of the Remuneration of Town Clerks Act, 1984, and the Profession of Town Clerks Act, 1988, appoint a town clerk and such other employees as it may consider necessary for the proper performance of its functions, at such remuneration as it may determine.
(2) ...
(3) No person shall be appointed in terms of subsection (1) if he is or at any time during the six months immediately preceding the appointment, was a member of council."

[3] Under case number 2000/1858 one Marais, then a councillor of the applicant, applied to the Orange Free State Provincial Division of the High Court of South Africa for an order declaring the appointments of Scholtz and Montsitsi as being void, being in contravention of section 67 of the Ordinance. In bringing that application Marais purported to act on behalf of the applicant.

[4] The applicant resolved to oppose Marais' application and also resolved to challenge the constitutionality of section 67 of the Ordinance. This they subsequently did in the same court under case number 2000/2520. In this latter aspect they were supported in their efforts by Scholtz and Montsitsi.

[5] On 26 January 2001, apparently on the advice of counsel, the applicant resolved to no longer pursue the constitutional challenge and it, together with Scholtz and Montsitsi, withdrew the application under case number 2000/2520. On the same day the applicant resolved to

terminate the services of the third respondents with immediate effect. The applicant also withdrew its opposition to the relief sought in case number 2000/1858.

[6] During or about February 2001 the third respondents referred disputes to the second respondent, *inter alia*, challenging the fairness of their alleged dismissals.

[7] On 14 June 2001 the High Court (per Van Coller J in case number 2000/1858) declared the appointments of Scholtz and Montsitsi to be void.

[8] The arbitration before the first respondent under the auspices of the second respondent was held on 25 June 2001 and the award was delivered on 26 June 2001.

[9] The applicant raised a point *in limine* at the arbitration to the effect that the third respondents were not employees as defined for the purposed of the Labour Relations Act, 1995, and that consequently, the first and second respondents had no jurisdiction to entertain the matter. That point *in limine* was contended for on the basis that as the appointments of the third respondents were in contravention of section 67 of the Ordinance they were void *ab initio* with the result that the third respondents never became employees of the applicant in the first place.

[10] In his award the first respondent correctly summarised the issues to be determined by him as follows:-

"(a) did the ... Council have the authority to appoint the [third respondents]?;
(b) if not, [were] the appointment[s] void *ab initio* in terms of section 67(3) of [the Ordinance] and thus without any legal effect?;
(c) if not, is the Council *estopped* from denying its authority and, therefore, bound by the appointment made by them?; and
(d) [are the third respondents] entitled to any relief by the CCMA following [their] dismissal/termination ...?"

[11] The first respondent ultimately found in the third respondents' favour and awarded them relief in the form of compensation limited to the period 26 January 2001 (ie. the date of termination) to 13 June 2001 (ie. the date of Van Coller J's declaration that the appointments were void).

[12] The first question: Did the applicant have authority to appoint?

The first respondent did not expressly answer this question. To be fair to him, however, he did appear to align himself with a submission made by the applicant's representative at the arbitration to the effect:

"...that ... administrative action not authorised by law or in conflict with an Act is invalid and it would not be legally correct to hold the administration responsible for *ultra vires* actions performed by it."

In the context of the appointments I am concerned with here that statement is undoubtably correct. In my view section 67(3) of the Ordinance contains an absolute prohibition and there cannot be any doubt that the appointments were void.

However, the first respondent went on immediately to say:

"I also want to point out that in [*Pottie v Kotze* 1954 (3) SA 719 (A)] the court held that such actions would *prima facie* (and not *per se*) be regarded as void."

No doubt the first respondent, in making that statement, had the following extract from *Pottie's* case (at 724H - 725D) in mind:

"The Ordinance does not expressly say that non-compliance with the requirements of sub-secs. (1) and (3) invalidates the transaction. We are asked to infer invalidity from words which make such compliance imperative and impose a penalty for entering into the transaction without prior compliance. The inference is said to be called for by the well-known maxim of construction which is formulated as follows in Halsbury's *Laws of England* (Hailsham ed.), vol 31, par. 748, pp. 555, 556:

'Every transaction forbidden by a statute and carried out in violation of it is *prima facie* illegal and therefore void. An act for the doing of which a penalty is imposed is a thing forbidden.'

In this formulation the words '*prima facie*' qualify the application of the rule, and the very next paragraph in *Halsbury* says:

'The Court has always drawn a distinction between statutes denying a legal effect to instruments by declaring them to be void to all intents and purposes and statutes which merely require formalities to be observed, and the Court will not readily construe contracts so as to bring them within the prohibition of a statute'

(para. 749, p. 557)."

In my view *Pottie's* case was relied upon incorrectly as support for the contention that such acts are *"prima facie*...void". Unlike the Ordinance being considered in *Pottie's* case, here we have a prohibition in clear terms, not just something visited with a penalty for a contravention.

In my view there can be no question that appointments made in contravention of section 67(3) of the Ordinance were void in the sense that they were "*per se* void" and to the extent that the first respondent may have found otherwise, he was incorrect.

[13] The second question: Is the appointment void *ab initio*?

The first respondent appears to have construed Van Coller J's order as being a declaration that the appointments were void from the date of the order to that effect being made. That, in my view, was wrong. The act was either void or it was not. Baxter, *Administrative Law*, 1994, pp. 357 - 358, explains the position thus:-

"When the courts refer, as they do in the vast majority of cases, to the fact that unlawful administrative acts are 'void', 'nullities', 'of no force and effect', 'invalid', and so on, they are referring to the formal status of those acts when adjudged according to the criterion of legality. This they must do, for otherwise they would have no warrant to interfere. But when they sometimes refer to unlawful acts as 'voidable', this must be viewed within the context of their own role as the authoritative oracles of validity and legality. They do not thereby imply that the act was valid until set aside, nor do they mean to suggest that refusal to declare the act in question void thereby validates it, even though the *effect* of their refusal is that it continues to be treated as if it *were* valid."

I respectfully adopt those views.

[14] The third question: Can estoppel operate against the applicant?

I must confess that I do not understand the first respondent's treatment of this question in his award. To my mind the state of our law is clear. I agree with Mr Gauntlett, who appeared for the applicant, when he submitted, relying upon the authority of *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 79H, that the applicant:

"...cannot be estopped from denying that it has entered into a contract which it was *ultra vires* for it to make, and it cannot be bound by estoppel to do anything beyond its legal capacity..."

Thus, the applicant cannot be clothed with authority it did not have in the first place to make the appointments concerned.

[15] Having reached those conclusions, there is no need, in my view, to visit the fourth question.

[16] There are two reviews before me with regard to each of the third respondents. In each case the applicant contends that the first respondent acted outside his powers in accepting that he had jurisdiction to accord relief to the third respondents and that the award falls to be reviewed and set aside. In each also each of the third respondents cross-apply for the award to be reviewed and set-aside and replaced with an enhanced award.

[17] As far as the cross-applications are concerned they were brought out of time and there are also before me applications for this to be condoned. The applications for condonation were not opposed by the applicant, which abides my decision in this regard. In my view the

explanation for the delay is an acceptable one and I accordingly grant the condonation sought.

[18] In my view first respondent's treatment of the matter was not justifiable. The actions of the applicant in making the appointments were clearly void and no legal consequences attaches thereto. It therefore must follow that the third respondents were not employees. On the authorities of both *Carephone (Pty) Ltd v Marcus N.O. & Ors* (1998) 19 ILJ 1425 (LAC) and *Shoprite Checkers (Pty) Ltd v Ramdaw N.O. & Ors* (2001) 22 ILJ 1603 (LAC) the award falls to be set aside and that the cross-review must be dismissed.

[19] Finally I must acknowledge that there has been a long delay in delivering this judgment. For that I apologise to the parties.

[20] I therefore make the following order in each of case numbers JR1607/2001, JR1608/2001 and JR1609/2001:

1. The award of the first respondent under the auspices of the second respondent is reviewed and set aside in terms of section 145 of the Labour Relations Act, 1995.

2. The cross-review is dismissed.

3. The third respondent is ordered to pay the applicant's costs.

Date of Judgment:

11 March 2004