



CASE NO. LCA 80/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

COUNCIL OF THE MUNICIPALITY OF KEETMANSHOOP

APPELLANT

vs

JOSEF ROOI

1ST RESPONDENT

NIMROD SWARTZ

2ND RESPONDENT

MOSES IINANE N.O.

3RD RESPONDENT

CORAM: MILLER, AJ

Heard on: 11 June 2012

Delivered on: 18 July 2012

LABOUR APPEAL JUDGMENT:

MILLER, AJ: [1] This matter comes before me as an appeal against an award made by an arbitrator, who is cited herein as the third respondent. The award followed arbitration proceedings instituted by the first and second respondent in

terms of the Labour Act 2007. The appellant was cited in those proceedings as the respondent.

[2] The matter arose in the following way: The appellant is the Council of the Keetmanshoop Municipality, which in turn is a Local Authority in terms of the Local Authorities Act, Act 23 of 1992. As such it functions in accordance with and subject to the provisions of that Act.

[3] During the year 2010 two new posts were created in the staff establishment of the appellant. These were senior posts at the level of that of a Strategic Executive.

[4] The first as second respondents, were at that stage already in the employ of the appellant.

[5] They, amongst others applies to the appointed to these posts, each one of them applying to be appointed to one of the two posts.

[6] On 17 August 2010, the appellant, as the Council appointed the first and second respondents each to one of the two strategic Executive posts. They remained in these posts until January 2011, when the appellant decided to deprive them of their recently acquired positions and resolved to place the first and second respondents in the posts they had occupied prior to their appointment as Strategic Executives.

[7] The reason for the turnabout, was that the appellant upon reflection was of the view that they did not have the power, in terms of the Local Authorities Act, to make these appointments, by virtue of the provisions of Section 27 of the Local Authorities Act.

[28] Section 27 reads as follows:

“(1) Subject to the provisions of this section-

- (a) A municipal council and town council shall appoint, on the recommendation of its management committee and after consultation with the Minister, a person as the town clerk of such municipal council or town council, as the case may be, and a village council shall so appoint a person as the village secretary of such village council, who shall in each case be the chief executive officer of the local authority council in question and who shall, subject to the control and directions of the local authority council, be responsible for the carrying out of the decisions of the local authority council and for the administration of the affairs of the local authority council;
- (b) The management committee of a local authority council or such officer or employee of the local authority council as may be designated by the management committee for such purpose, may appoint such other officers and employees of the local authority council in such posts as may be provided for on the fixed establishment of the local authority council approved by the local authority council and as the management committee or such officer or employee so designated may deem necessary for purposes of the performance of the work incidental to the exercise of the powers and the performance of the duties and functions of the local authority council.

[8] Mr. Khama who appeared before me on behalf of the first and second respondent submitted that Section 27 (1)(b) of the Local Authorities Act confers only a discretionary power upon the Management Committee, with the consequence that there remains an implied power vested for the appellant to exercise those powers. I do not agree. Despite the use of the word “may” in the subsection, it is clear that the power to appoint persons to the establishment of the Local Authority vests solely in the management committee.

[9] The word “may” implies only that the management committee may appoint these persons to the establishment as it “... may deem necessary for the purposes of the performance of the work incidental to the exercise of the powers and the performance of the duties are functions of the Local Authority Council”. I am fortified in this view by the fact that Section 27 (1)(a) in specific terms provides for the appointment of a town clerk, to be appointed by the council. Read in context

what the legislature had in mind was that the council shall appoint the town clerk, whereas other officers and employees are to be appointed by the management committee.

[10] I must add that during the course of the proceedings before the third respondent it was accepted by the first and second respondents, who were represented by a legal practitioner that their appointments were in contravention of Section 27 of the Local Authority Act and in that sense unlawful. The third respondent in fact found that to be so. There is before me no appeal by the first and second respondents against that finding. In the absence of an appeal against the third respondent's finding that the appointments of the first and second respondents were unlawful, it is not open to the first and second respondents to challenge that finding before me as Mr. Khama tried to do.

[11] His argument in this regard centered mainly on a submission that the act of appointing the first and second respondents remained valid until it was set aside by a court of law.

[12] The short answer to that seems to be that the appointments were nullities from the outset and for that reason of no force and effect.

[13] However, since there is no appeal on this issue, as I have indicated, I need not dwell on the point.

[14] That brings me to the crux of the appeal. The third respondent, having found that the appointments were unlawful, concluded that the appellant was estopped from asserting that fact. This was also the basis upon which the first and second respondents advanced their case before the third respondent.

[15] The third respondent rejected the argument advanced by the appellant to the doctrine of stopped finds no application in circumstances where the effect would be that there is a contravention of a statutory provision.

[16] The third respondent reasoned as follows:

“[139] Therefore, my understanding of the above is that at common law courts have been loathe at permitting the plea of estoppels where to do so would result in the violation of a statutory provision. However, with the coming into operation of the Constitution such as ours that contains a Bill of Rights, one need not look at the plea of estoppels in its rigid form, the doctrine must be developed in accordance with the spirit, purport and object of the Bill of Rights (see *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 (4) SA 470 (D) 478*).

[140] The proposition of the respondent’s representative is that estoppels be applied strictly in its rigid form as provided for under common law. In my view, as I have stated above, this will not work as it will in turn result in the condonation of the respondent’s previous illegal acts which in itself is also a furtherance of the violations of the enabling statute. The solution to the problem, in my view, is to balance the scales by restoring the two applicants into their illegally acquired positions, and ensure that in future there shall be no further violations of the relevant statute through tight compliance procedures.”

[17] These conclusions fly in the face of the judgment in *Fatcrown Ltd v Namibia Broadcasting Corporation (Pty) (High Court Case I 394/2009 Not reported)*. In that case Hoff J quoted with approval the following passage from *City of Tswane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA (SCA)*:

“The failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore *ultra vires*.”

[18] As Mr. Maasdorp, who appeared for the appellant, correctly pointed out the *Eastern Metropolitan* case upon which the third respondent relied, was overruled by the decision in the *Tswane* case, I referred to earlier.

[19] I conclude therefore that the third respondent erred. That finding in my view disposes of the matter.

[20] In the result the appeal succeeds and the award made by the third respondent is set aside.

[21] The decision by the appellant to relieve the first and second respondents from the posts as Strategic Executives is re-instated.

[22] There shall be no order as to costs.

MILLER AJ

ON BEHALF OF THE APPELLANT:

Mr. Maasdorp

INSTRUCTED BY:

Engling, Stritter & Partners

ON BEHALF OF THE 1ST & 2ND RESPONDENTS:

Mr. Khama

INSTRUCTED BY :

Clement Daniels Labour Consultants