IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1340/2021
DATE HEARD: 21/10/2021
DATE DELIVERED: 18/01/2022

In the matter between

CHANOCH GALPERIN **APPLICANT**

and

EAST LONDON HEBREW CONGREGATION AND EAST LONDON CHEVRA KADDISHA **FIRST RESPONDENT**

UNION OF ORTHODOX SYNAGOGUES OF SOUTH AFRICA, FEDERATION COUNCIL **SECOND RESPONDENT**

BETH-DIN OF JOHANNESBURG JEWISH ECCLESIASTICAL COURT **THIRD RESPONDENT**

JUDGMENT

MABENGE AJ:

[1] The applicant was employed by the first respondent as a rabbi in terms of an employment contract dated the 23rd of June 2016. The first respondent terminated this contract on 3 February 2020.

[2] The first respondent is a church under the name East London Hebrew Congregation. The second respondent is the Union of Orthodox Synagogues of South Africa, Federation Council. The second respondent is an association incorporated under section 21 of the Companies Act. The first respondent is a

member of the second respondent. The third respondent is the Jewish Ecclesiastical Court of the Federation council (the Beth-Din). Both the applicant and the first respondent are subject to the authority of the Beth Din.

[3] In this application, the applicant seeks an order reviewing and setting aside the third respondent's decision dated 15 January 2021 not to exercise its jurisdiction to adjudicate the dispute involving the applicant and the first respondent. The applicant further seeks an order that the first respondent must file its statement of defence upon the applicant's attorneys of record and upon the third respondent within ten (10) days of the service of the order upon the first respondent and that the third respondent must hold a hearing to adjudicate the applicant's dispute within one month of the service of the order. The first respondent opposed the application.

[4] In the affidavit the applicant set out a number of instances on which he relied for the relief sought.

[5] The applicant submitted that he has been subjected to unfair administrative action and the conduct of the third respondent constituted an unreasonable exercise of its powers as per section 6 of the Promotion of Administrative Justice Act[1]. The administrative action by the third respondent failed to comply with the Articles of Association, the Torah and the Jewish Law.

[6] The applicant further submitted that the third respondent failed to apply their minds to those clauses in the Articles of association as read with the Torah and Jewish Law which gives the Beth-Din exclusive jurisdiction over the referred dispute. Clause 10 of the Articles of Association of the Federation Council provides that: "disputes between any constituents shall be submitted for

[1] No3 of 2000 (PAJA)

arbitration to the management committee, with the right of appeal to the Johannesburg Beth-Din. Disputes between any constituents and officials in their employ shall be submitted to the Beth-Din, whose decision shall be final and binding". The applicant submitted that the decision by the Beth-Din not to exercise its jurisdiction to adjudicate the dispute between the applicant and the first respondent falls to be reviewed and set aside.

[7] The respondent's answering affidavit in the present application stated that since the applicant premised his review on PAJA, the provisions of PAJA are not applicable as the decision of the Beth-Din does not constitute an administrative action and is not one of an administrative nature.

[8] The respondent stated that clause 13 of the annexed contract of employment clearly provided that termination of the employment contract due to misconduct, incapacity and operational requirements shall be effected through the procedures prescribed in the Labour Relations Act. The first respondent elected not to have the labour dispute relating to a dismissal to be adjudicated upon by the Beth-Din as the employment contract expressly provided that labour disputes were to be determined by the labour courts and not by the Beth-Din. As such the first respondent communicated to the Beth-Din that they will not attend the proceedings by the Beth-Din.

Discussion

[9] The applicant's main application is for an order reviewing and setting aside the decision by the third respondent being the Beth-Din taken on 15 January 2021. In this decision the third respondent elected not to exercise its jurisdiction to adjudicate the dispute between the applicant and the first respondent. The

applicant seeks this order against the third respondent only, the applicant does not seek any order against the first respondent directing it to comply with any obligation to have the labour dispute adjudicated upon by the third respondent except for the ancillary relief to direct the first respondent to file its statement of defence within ten days of the service of the order on the first respondent.

[10] It is important to note that the applicant referred to the Beth-Din a dispute relating to the applicant's wrongful and unlawful dismissal[2]. It is common cause that the first respondent refused to submit themselves to the Beth-Din's jurisdiction notwithstanding all the efforts made by the Beth-Din that the first respondent agree that the dispute be adjudicated upon by the Beth-Din. Hence the decision of the Beth-Din[3] that Jewish law does not permit the Beth-Din to make rulings without both parties to the dispute agreeing to be subject to such rulings and appearing before the Beth-Din. Due to the exceptional circumstances, the Beth-Din granted the applicant permission to pursue his claim against the first respondent in the secular courts.

[11] It is important to note that parties have to voluntarily agree to submit the matters of controversy between them to the Beth-Din as the decision of the Beth-Din will be final and binding on the parties. It is further important to note that the Beth-Din has confirmed that it has the necessary jurisdiction over the applicant's dispute, however in circumstances where one of the parties to the dispute is not present the Beth-Din is not permitted in Jewish law to adjudicate the dispute[4]. The case referred to by the first respondent is relevant in these circumstances those who join associations are to conform with its principles and rules[5]. Considering that the Beth-Din issued a directive and or a decision that

[2] BB7 para 31
[3] BB8
[4] BB15
[5] Taylor v Kurtstag NO and others [2004] 4 All SA 317

according to Jewish law it could not adjudicate the labour dispute as referred by the applicant where one party was not willing to have the dispute adjudicated upon by the Beth-Din, the applicant as it had already referred the dispute to the Beth-Din and the decision by the Beth-Din was that it is not permitted to force a party to its jurisdiction, then the applicant in accordance with Jewish law is bound to accept the decision of the Beth-Din.

[12] The decision by the Beth-Din which the applicant seeks to review and set aside is in accordance with the Jewish law that has been initially followed by the applicant, the applicant therefore should accept the decision by the Beth-Din where the Beth Din is guided by a voluntary and willingness basis for parties and there is no reason for this court to interfere with this decision to the extent that it is reviewed and set aside as the Beth-Din has made it clear to the applicant that it is not permitted in Jewish law to hold a hearing or adjudicate a dispute where one of the parties to the dispute is not present.

[13] The dispute by the applicant as referred to in its papers[6] relates to the applicant's wrongful and unlawful dismissal. The Labour Relations Act[7] (LRA) is well placed to deal with the applicant's dispute as per sections 185, 186,191,192 and 193 of the LRA. Section 210 of the LRA further provides that if any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution, the provisions of this Act will prevail. This shows that the LRA is well placed to deal with the applicant's dispute, this seeing that the Beth-Din has granted the applicant special permission to approach secular courts as the matter cannot be dealt with following Jewish law. This will mean that the applicant has not committed any

[6] BB7 para 31
[7] Act 66 of 1995 as amended

sin or acted contrary to his religious beliefs as he has the blessing of the Beth-Din to approach secular courts.

[14] It is clear that the applicant as correctly pointed out by the first respondent that the applicant relies on the provisions of PAJA to have the decision of the third respondent (Beth-Din) reviewed and set aside. The first respondent further correctly pointed out that the decision which is sought to be reviewed and set aside is not one that was taken when exercising a public power or performing a public function. The first respondent referred this court to the case of Hare v President of National Court of Appeal No 140 and another[8] the court stated that the fact that the second respondent is the sole controlling body for motorsport in South Africa, does not render the decisions of its tribunal an exercise of public power or the performance of a public function. It is the same for the third respondent, the Beth-Din its decisions do not qualify as administrative action as defined in PAJA and are therefore not subject to judicial review. The Beth-Din does not perform a public power or public function in terms of an empowering provision and as such the decision does not qualify as administrative action, it is therefore not reviewable in terms of the provisions of section 6 (1) of PAJA.

[15] In the circumstances the application is dismissed with costs.

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[8] [2009] ZAGPJHC 60

N MABENGE
ACTING JUDGE OF THE HIGH COURT

Appearances

Applicant: Adv IJ Smuts SC, instructed by Wheeldon, Rushmere & Cole Inc, Makhanda.

Respondent: Adv P Blieden SC, instructed by Stirk Yazbek Attorneys.