



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT]**

CASE NO.: EL1481/2023

In the matter between: -

LUBABALO MANJINGOLO

Applicant

and

AMATHOLE DISTRICT MUNICIPALITY

1st Respondent

**THE MUNICIPAL MANAGER: AMATHOLE
DISTRICT MUNICIPALITY**

2nd Respondent

N. ZENGETHWA

3rd Respondent

**MEC FOR COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS, EASTERN CAPE
PROVINCE**

4th Respondent

JUDGMENT

NORMAN J:

[1] The applicant moved court on an urgent basis seeking the following orders:

- “1. Condoning the applicant’s non-compliance with the Uniform Rules of Court relating to forms, timeframes and service;*
- 2. Granting the applicant leave to bring this application by way of urgency in accordance with the provisions of the applicable rules of the Uniform Rules of this Court;*
- 3. Directing that the application be heard as one of urgency in terms of rule 6(12) of the Uniform Rules of Court;*
- 4. Granting the applicant leave to use form 2 of the Uniform Rules of Court;*
- 5. Issuing of rule nisi calling upon the respondents to show cause, if any, on 10 October 2023 at 09:30 or soon thereafter as the matter may be heard why an order in the following terms should not be made final:*
 - 5.1 declaring the first and/or second respondents’ decision to bar the applicant from performing the functions of chief financial officer with effect from 01 September 2023 to be unlawful and in breach of the contractual agreement between the applicant and the first respondent;*
 - 5.2 directing the first and second respondents to forthwith take all necessary steps to ensure that the applicant discharges the duties of the chief financial officer in accordance with contractual agreement between the applicant and the first respondent which was concluded on 19 July 2023 within 24 hours of the order sought being granted;*
 - 5.3 directing the first and/or second respondents to give full effect to the contract concluded between the applicant and the first respondent on 19 July 2023 within 24 hours of the order sought being granted;*
 - 5.4 directing the first and/or second respondents to take all the necessary steps to ensure that the applicant is loaded onto the first respondent’s employment payment system within 24 hours of the order sought being granted;*
 - 5.5 directing the first and/or second respondents to permit the applicant to discharge the functions of chief financial officer with immediate effect within 24 hours of the order sought being granted;*
 - 5.6 interdicting and restraining the first and/or second respondents from –*
 - 5.6.1 appointing the third respondent to the position of chief financial officer;*
 - 5.6.2 concluding any contract of employment with the third respondent for the position of chief financial officer;*
 - 5.6.3 granting the third respondent permission to perform the functions of chief financial officer;*
 - 5.7 that, in the event of the third respondent having been appointed as chief financial officer, the third respondent be interdicted from discharging the functions of chief financial officer within the establishment of the first respondent;*
 - 5.8 directing the first and/or second respondents to pay the costs of this application and the third respondent to pay costs of this application, together with the first respondent, jointly and severally, the one paying the other to be absolved, only in the event of the third respondent opposing this application;*
 - 5.9 as to such further and/or alternative relief as this Court may deem grant;*

6. *directing those paragraphs 5.2 to 5.7 of the rule nisi shall operate as an interim interdict/mandamus pending the finalization of the application;*
7. *directing the second respondent to deliver an affidavit confirming that he and the first respondent have complied with paragraphs 5.2 to 5.7 of the rule nisi within 24 hours of such compliance;*
8. *directing the first respondent to pay the costs of this application and the second and third respondents to pay the costs of this application, together with the first respondent, jointly and severally, the one paying the other to be absolved, only in the event of the second and third respondents opposing this application; and*
9. *as to such and/or further alternative relief as this Court may deem grant."*

[2] Applicant cited as the first respondent the Amathole District Municipality ('the municipality'), the municipal manager as second respondent and Mr N. Zengethwa who was interviewed for the same position of Chief Financial Officer (CFO), as third respondent. After the institution of the application and after a point of non-joinder was taken by the respondents the applicant further applied on an urgent basis to have the MEC for Cooperative Governance and Traditional Affairs, Eastern Cape Province ("the MEC") joined as the fourth respondent. The joinder application was not opposed by the municipality and the municipal manager. On 22 September 2023 the MEC was joined as a party to the proceedings in terms of the order that was issued by Zilwa J. The main application was thereafter opposed by the municipality and the municipal manager ("the respondents"). The MEC simply filed a notice to oppose on 4 October 2023 but did not file any answering affidavit.

Relevant facts

[3] It is common cause that during May 2023 the municipality advertised a vacant position for a CFO. It received applications from various applicants including the applicant herein and Mr Zengethwa. The applicant was interviewed for the position on 20 June 2023. The municipal manager, Dr Mthembu, formed part of

the interviewing panel as a chairperson. It is also common cause that towards the end of the applicant's interview, the municipal manager enquired from the applicant whether he had anything to disclose to the panel. The applicant alleged that he disclosed to the panel that he had a pending criminal court case which emanated from March 2018. This allegation is denied by the respondents. The applicant further alleged that the municipal manager commented that that issue should not affect his employability since it was a pending case. The applicant further stated that the reason he disclosed this information to the interview panel was because he was mindful that as a CFO, issues that pertain to fraud are directly relevant to the functions of a CFO. He contends that after he had made a disclosure it was up to the interview panel to request specific information but it failed to do so. He also stated that at the time he had already left the Mngquma Local Municipality and was a CFO of the Amahlathi Local Municipality.

[4] On 14 July 2023 the municipal council resolved to appoint the applicant as the CFO. On 19 July 2023 the municipal manager informed the applicant of his appointment. He accepted the appointment and indicated that he would commence discharging his duties on 1 September 2023. He contends that upon acceptance of that appointment a binding enforceable contract of employment came into existence between him and the municipality. He stated that on 19 July 2023 he gave notice of his intention to resign from Amahlathi Local Municipality. The last day of employment at Amahlathi Local Municipality was 31 August 2023.

[5] When he attended the offices of the municipal manager on 1 September 2023, he received a letter from the municipal manager informing him that the MEC

requested the municipal council to reconsider and set aside his appointment based on the allegations of misrepresentation of certain facts. Those facts involved allegations that he failed to disclose a pending fraud and corruption case. He further advised him that the municipality was awaiting a legal opinion on the issue and advised the applicant not to commence duty on 1 September 2023.

- [6] The applicant contends that the MEC is not his employer. His attorneys of record wrote to the MEC and to the Mayor with the intention of persuading them to reverse their decision that he should not assume duty. He sent a WhatsApp message to the municipal manager indicating to him that because he was not rendering any services he was at risk of not receiving a salary for the month of September 2023. He indicated to him that should he not receive an undertaking that he would be paid at the end of the month, he would be left with no option but to approach court. There was no response to the message.
- [7] He received a letter from the legal representatives of the municipality to the effect that the applicant had misrepresented facts by not disclosing the pending criminal case and that no undertakings would be made in relation to his salary. He alleged that the municipality had breached the contract that it had with him.
- [8] On 6 September 2023 applicant's attorneys, Bam Attorneys Inc. addressed a letter directly to the Executive Mayor suggesting that his instruction to the municipal manager was irregular and unlawful and fell to be set aside. They demanded that the mayor should retract his unlawful instruction to the municipal manager on or before 8 September 2023 and that their client should be allowed

to assume duty on Monday, 11 September 2023 otherwise they would approach court for appropriate relief.

- [9] On 11 September 2023 another firm of attorneys, Msitshana Attorneys, who are now the applicant's attorneys of record addressed a letter to the municipal manager and Head of Legal Services of the Amathole District Municipality.
- [10] In the letter it is recorded that "no explanation whatsoever was offered as a reason for him not to report for duty. This is a clear violation of the contractual obligation as a binding contract was entered between the municipality and our client." (my underlining)
- [11] They threatened that a review would be brought to court should they not receive an undertaking that their client would receive a salary at the end of September 2023.
- [12] On 12 September 2023 the municipality's attorneys responded and indicated that reasons were advanced in the municipality's letter of 30 August 2023. They informed him that an investigation was underway to investigate the allegations that their client misrepresented material facts in the application form. They indicated that no undertaking would be given until the investigations were concluded. The following day the applicant launched these proceedings on an extremely urgent basis.
- [13] The municipal manager deposed to an answering affidavit on behalf of the municipality. He raised, amongst others, urgency, non-joinder and failure to meet the requirements of an interdict, as preliminary points. As indicated the issue of non-joinder of the MEC has since been cured. He stated that when a letter of appointment was sent to the applicant, it was indicated therein that the effective date would be from 1 August 2023. When the applicant accepted the

offer he elected to commence employment on 1 September 2023. On 6 August 2023, notwithstanding the council's resolution and the above letter of appointment, an internal memorandum was compiled for the attention of the Head of Department, Cooperative Governance and Traditional Affairs advising him about the appointment of the applicant as the CFO.

[14] In an internal memorandum prepared by Mr V Mlokoti, the Deputy Director-General: Developmental Local Government, it was recommended that the MEC should not support the decision of the council in appointing the applicant as CFO because he misrepresented facts in the application form with regard to a pending fraud and corruption case.

[15] It was recommended that the MEC should advise the council to consider the appointment of the second-best recommended candidate. On 31 August 2023 the MEC approved the recommendations which were set out in the internal memorandum. On the same day the MEC wrote to the Executive Mayor of the Council, Mr A. Ntsangani regarding the appointment of the applicant. He advised him that he did not support the decision of the council to appoint the applicant. He reiterated what was contained in the internal memorandum in relation to the alleged misrepresentation of facts.

[16] The municipal manager communicated these developments to the applicant. As a result, he requested the applicant not to commence with employment on 1 September 2023 until correspondence had been addressed to him by his office. On 7 September 2023 there was going to be a special council meeting for the consideration of the instructions issued by the MEC to it. In preparation

for that council meeting the municipal manager prepared a report which contained, *inter alia*:

- “5. The Employment Regulations inter alia prescribe that in an application for the vacant post of a senior manager (the post of CFO being a senior management position) a candidate must disclose his or her academic qualifications, proven experiences and competencies; contactable references and full details of any dismissal for misconduct or any disciplinary action whether pending or finalized instituted against him or her in his or her current or previous employment.*
- 6. Before deciding on an appointment the council must satisfy itself that the candidate meets the relevant competency requirements for the post, that the screening of the candidate has been conducted and that the candidate does not appear on the record of staff members dismissed for misconduct or have a criminal record.*
- 7. Once an appointment has been made the council must submit a written report to the MEC for local government in the province containing, inter alia, a report on the screening process and the outcome thereof and competency assessment results.*
- 8. The minimum competencies set out in annexure “A” to the Employment Regulations include “Moral Competence” which is defined as “the ability to identify moral triggers, apply reasoning that promotes honesty and integrity and consistently display behavior that reflects moral competence. The ‘competent’ achievement level includes the requirement to ‘actively report fraudulent activity and corruption within local government;’ the ‘advanced’ achievement level requires the candidate to take an active stance against corruption and dishonesty when noted and the superior level requires a candidate to ‘set integrity standards and shared accountability measures across the institution.’”*

[17] A special council meeting was held on 7 September 2023. On 8 September 2023 the executive mayor reported to the MEC the outcome of the special council meeting. The council had resolved to give the MEC more information about the declaration of the pending fraud and the corruption case by the applicant; to inform the MEC about the verbal disclosure made by the applicant during the interviews and to seek a legal opinion. The council further resolved to convene another special council meeting within seven days pending the response of the MEC.

[18] In this regard, the municipal manager dealt with the application form completed by the applicant. He stated that under the disciplinary record section the question is: *‘Have you been accused of an alleged misconduct during the past ten(10) years*

and have resigned from your job pending the finalisation of the disciplinary proceedings?

Under the subheading of the criminal record the following is stated: *“Have you been convicted of any criminal offence in a court of law during the past ten (10) years?”* The applicant answered ‘NO’ to both questions.

[19] In section E of the application form an applicant is required to provide work experience. The section provides as follows: *‘If you were previously employed in the local government indicate whether any condition exists that prevents your re-employment. If yes, provide the name of the previous employing municipality’*. The applicant answered ‘NO’ to both questions. As a result, he did not provide the name of the previous municipality that was his employer. The applicant also signed a declaration to the effect that he understood, among others that, *‘any misrepresentation or failure to disclose any information may lead to his disqualification or termination of his employment contract if appointed’*. He also raised the issue that the applicant did not use the prescribed form but used a different form.

[20] In dealing with lack of urgency, he contended that the applicant failed to explain why he cannot be afforded substantial relief at a hearing in due course. He further stated that the applicant does not explain why the normal unfair dismissal route of referring the matter to the bargaining council is not open to him. He submitted that urgency is self-created and the application should fail on this basis.

[21] The municipality contends that nowhere in the affidavit has the applicant dealt with the requirements that must be satisfied when one seeks an interdict. It stated that on this basis alone the application must fail. The municipality admitted that a letter of appointment was given to the applicant but denied that a binding and enforceable contract came into existence. It further contended

that the applicant did not meet the moral and core competencies provided for in the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers¹. He further stated that because the applicant was appointed without meeting the competencies, the provisions of section 56 (1) (b) are triggered and they render the decision to appoint him null and void. It further contends that due to the challenges that the municipality has in relation to service delivery, it is imperative that an honest CFO who is not facing criminal charges involving financial misconduct, fraud and corruption, be appointed.

[22] In reply, the applicant contends that he simply wishes to enforce the terms of the contract. He contends that if the MEC was of the view that the appointment was contrary to the Municipal Systems Act, he should have, in terms of section 56(6) thereof, approached court to seek declaratory relief and challenge the validity of the appointment. He failed to do so and on that basis the applicant contends that he is entitled to enforce compliance with the contract. In reply, the applicant stated for the first time that the MEC was aware of the charges against him. I shall deal with this issue later on.

Legal submissions

[23] Mr Miller appeared for the applicant and Mr Nhlapo for the respondents. Mr Miller submitted that: This court had raised the issue of jurisdiction *mero motu* with reference to the decision in ***Chirwa v Transnet Limited***². He argued that this court must adjudicate this matter in line with the practice of this Division in similar matters. He urged this court to hear the matter. He relied on ***Fredericks***

¹ Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers as published in GN 21 in GG 37245 dated 17 January 2014.

² *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC).

v MEC for Education and Training Eastern Cape and Others³ for the submission that section 157 of the Labour Relations Act 66 of 1995, as amended, has the effect of depriving the High Court of jurisdiction in matters that the Labour Court is required to decide except where the Labour Relations Act 66 of 1995 ('the LRA') provides otherwise.

[24] In *Chirwa*⁴ a distinction is drawn between a scenario where reliance is placed upon a violation of the provisions of the LRA and a scenario such as in *Fredericks* (and in this matter) where a litigant does not place such reliance. The applicant seeks specific performance and expressly places reliance on the enforcement of a contract between the parties. In this regard he relied on ***Fedlife Assurance Ltd v Wolfaardt***⁵ and on ***Makhanya v University of Zululand***⁶.

[25] In dealing with urgency, he argued that the timetable set out by the applicant in the notice of motion was commensurate to the degree of urgency contended for by the applicant. He relied on ***Harvey v Niland and Others***⁷ that the applicant has a right to determine time periods in urgent applications and the respondent must simply do the best he or she can, to comply with them. The applicant and his family will suffer untold harm should he not receive his salary from September 2023. He distinguished the facts of this case from those in ***Matshidiso v Chief Executive Officer- South African Social Security***

³ ***Fredericks v MEC for Education and Training Eastern Cape and Others*** 2002 (2) SA 693 (CC).

⁴ *Chirwa*, supra, paras 59-61.

⁵ ***Fedlife Assurance Ltd v Wolfaardt*** 2002 (1) SA 49 (SCA).

⁶ ***Makhanya v University of Zululand*** 2010 (1) SA 62 (SCA).

⁷ ***Harvey v Niland and Others*** 2016 (2) SA 436 (ECG) at para 19.

Agency and Another⁸ , because the applicant therein had waited for three (3) months before instituting legal proceedings.

- [26] Mr Miller submitted that the matter is urgent based on the fact that barring the applicant to take up employment in the circumstances of this case is unlawful. He submitted that the applicant has made out a case for the relief sought. On the issue of costs, he submitted that the applicant is entitled to the costs of the application and of the hearing of the matter.

Respondents submissions

- [27] Mr Nhlapo submitted that the respondents were served with the application on 13 September 2023 and had to file their opposing affidavits by 15 September 2023. The applicant afforded himself two days to file a reply. He submitted that there are no grounds for urgency. He argued that it has been held by the courts that the fact that one stands not to be paid a salary does not on its own establish urgency. In this regard he relied on ***Tshwaedi v Greater Louis Trichardt Transitional Council***⁹.

- [28] He submitted that there is no case made out for an interdict. On the issue of non-disclosure he submitted that the applicant in submitting his application did not use the prescribed form as set out in annexure C to the Regulations on Appointment and Conditions of Employment of senior managers. He submitted that the form completed by the applicant is silent on the envisaged criminal conviction. According to the respondents this issue is significant because the

⁸ ***Matshidiso v Chief Executive Officer- South African Social Security Agency and Another*** (J1175/2022) [2022] ZALCJHB 365 (29 September 2022).

⁹ ***Tshwaedi v Greater Louis Trichardt Transitional Council*** [2000] 4 BLLR 469 (LC); ***ECCAWUSA v Southern Sun Hotel Interests (Pty) Ltd*** [2000] 4 BLLR 404 (LC) para 16.

applicant is currently facing charges based on financial misconduct, fraud, and corruption. He submitted that even at the interview the applicant did not specify that it was a criminal matter that was pending let alone that it involved financial misconduct, fraud and corruption.

[29] He submitted that the applicant does not deserve any assistance from the court because he misled the court when he created an impression in the founding affidavit that he disclosed to the panel that the pending matter concerned fraud. That is not supported by the transcript.

[30] He relied on ***Eskom Holdings Ltd v Fipaza and Others***¹⁰ for the contention that the applicant did not provide true, complete and accurate information. He relied on, *inter alia*, the following remark:

*“A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him would be mutually recognized by honest men in the circumstances.”*¹¹

[31] He submitted that as the position related to that of a senior manager the applicant was ethically obliged to disclose the criminal charges against him. He further submitted that the applicant lacks competencies prescribed in section 56 of the Municipal Systems Act Amendment Act No.3 of 2022 and thus the decision to appoint him is null and void. He further submitted that the MEC duly exercised her powers. He submitted that the municipality has decided not

¹⁰ ***Eskom v Fipaza and Others*** (JA 56/10) [2012] ZALAC 40; [2013] 4 BLLR 327 (LAC); [2013] 4 BLLR 327; (2013) 34 ILJ 549 (LAC) (3 October 2012); ***Intercap Ferreira Mainliner (Pty) Ltd v Mcwade and Others*** (JR 158/17) [2019] ZALCJHB 274; (2020) 41 ILJ 208 (LC); [2020] 2 BLLR 199 (LC) (18 September 2019).

¹¹ ***Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)*** 1965 (3) SA 410 (W) at 418 E-F.

to give effect to the appointment due to the misrepresentation. He asked for the application to be dismissed with costs.

Discussion

[32] It is worth recording that in the answering affidavit the following was stated:

- “38. *It is trite that in employment related disputes, the fact that you stand not to be paid a salary does not on its own establish urgency. In fact it has been held by the courts that it is well within the contemplation of employment law that such an unfortunate circumstance would be attendant to an employee or former employee hence the dispute resolution procedure.*
- 39. *I further deny that Mr Manjingolo cannot be afforded substantial relief at a hearing in due course. I see this premised upon the fact that he does not explain why the normal unfair dismissal route of referring the matter to the bargaining council is not open to him.*
- 40. *More importantly Mr Manjingolo has preferred an expensive route thus depleting the resources that he claims he does not have. This is rather a self-created inconvenience upon which he seeks to mount urgency.” (my emphasis)*

[33] The applicant did not put up any facts in the founding affidavit to indicate that this court has jurisdiction to hear the matter. It was, among others, the underlined statement, above, that informed this court to raise the issue of jurisdiction. The applicant himself had alluded to the fact that because of the allegations of non – disclosure of certain material facts the respondents should have followed the labour dispute procedures. This court has been persuaded by the applicant’s counsel that it should hear the matter because its jurisdiction is not ousted by the Labour Relations Act 66 of 1995 (“the LRA”).

[34] It was submitted on behalf of the respondents that this court should dismiss the application because the applicant does have the alternative remedy of having the dispute referred to the bargaining council. The difficulty with that argument is that, although the court is entitled to raise the issue of jurisdiction *mero motu*, where the other party has not raised it clearly and unambiguously, the court is constrained to dismiss the application based on that point . The reason for that

is not far to find. A party objecting to jurisdiction must do so right at the outset and raise the objection as a preliminary issue for determination. It must not continue to defend the litigation only to raise its voice on jurisdiction when it is being raised by the court especially where the issue to be decided is not placed in a “strait jacket” by the LRA. This court, having received argument both oral and written on this issue, is satisfied that its jurisdiction is not ousted by the LRA.

Urgency

[35] The applicant contends that the matter is urgent and in this regard he advanced the following reasons:

- 35.1 He was last paid his salary by Amahlathi Local Municipality on 25 August 2023;
- 35.2 He has financial obligations that he has to meet such as a bond, motor vehicles, school fees, groceries for his two children, medical aid, investment policies, fuel, water, electricity, rates and taxes;
- 35.3 The municipal manager refused to give him an undertaking that his salary would be paid for the month of September 2023;
- 35.4 His salary received on August 2023 would only last until September 2023;
- 35.5 He has a binding agreement and a right to demand performance from the other party; and
- 35.6 He has a right to demand his duties as the CFO as a matter of urgency in order to receive his September 2023 salary.

[36] Rule 6(12) (b) of the Uniform Rules of Court provides that in every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which render the matter urgent and the reasons why the applicant claims that he would not be afforded substantial redress at a hearing in due course¹².

[37] The applicant was advised about the MEC's instruction to the Council on 1 September 2023. He called upon the municipality to indicate by 10h00 on 4 September 2023 when he could attend work. He launched the application on the 13 September 2023, some 9 days later. By his conduct he had agreed that another date would be set for him to commence work. Most importantly, in Annexure "LM6", he stated amongst others:

"1. You have indicated in your letter that the Executive Mayor instructed you to write to me to indicate that I must not attend work today.

2. With due regard to the fact that you are my superior I have agreed to not attend work today on the 1st September 2023." (my underlining).

[38] In a letter by his erstwhile attorneys, Bam Incorporated, it was demanded of the municipality to *"allow the applicant to assume duties on Monday, 11 September 2023"*.

[39] It must have dawned on the applicant that whatever steps he took would be opposed by the respondents. He decided to give the respondents less than two days to file their answering affidavits. He gave himself two days to deliver his replying affidavit. The application was set down on 10 October 2023 and yet the whole basis for its urgency was the September salary. The relief sought is based on the events of 1 September 2023. The applicant even stated: *"I am faced with the real threat that I shall not receive my salary for the month of September*

¹² **Mangala v Mangala** 1967 (2) SA 415(E) at paras E-F where the Court found that the applicant must either comply with the Rules in the normal way or make out a case for urgency in accordance with the provision of Rule 6 (12) (b) and dismissed a spoliation application.

2023.” The interdictory relief was sought after that date on 10 October 2023. By that time the matter had served before Zilwa J for determination of the joinder application. It is trite that an interdict is not a remedy for the past invasion of rights¹³. Lack of urgency alone ought to put an end to this matter. However, there are certain matters that should be addressed in this judgment.

Enforcement of the contract relief

[40] Mr Miller equated the relief sought to specific performance. The applicant contends that he is enforcing the contract that he has with the municipality. One needs to have regard to the letter of appointment and assess whether the letter of appointment constitutes a contract of employment that is capable of enforcement by this court. That assessment cannot be done in abstract it must refer to the uncontested facts for context.

[41] The letter of appointment reads:

“

Dear Mr Manjingolo

RE: APPOINTMENT TO THE POSITION OF CHIEF FINANCIAL OFFICER

It is with great pleasure to inform you that you have been appointed to the position of Chief Financial Officer. The appointment will be effective from 1 August 2023. You shall be required to conclude your contract of employment with the municipality before the effective date of your appointment. The remuneration and other conditions of service will be negotiated between you and the municipal manager when concluding the contract of employment. The council wishes to congratulate you on your new position and hoping to have a long and mutually beneficial relationship with you. (my emphasis)

Yours sincerely

BJ Mthembu (Dr) Municipal Manager

19 July 2023.”

[42] In accepting the offer this is what the applicant stated:

¹³ Goldstone JA in *Phillip Morris Inc. and Another v Marlboro Shirt Co SA Ltd and Another* 1991 (2) SA 720 (AD) 735B.

“ACCEPTANCE OF AN OFFER

I, Lubabalo Manjingolo accept the position offered to me and will commence duties on 1 September 2023. I confirm undertaking to read the policies referred to in this letter and irrevocably undertake to abide by the stipulations, terms and conditions contained in such policies.

Signed

19 July 2023.”

- [43] Nowhere in the founding affidavit has the applicant contended that subsequent to him receiving the appointment letter a contract of employment was concluded between the parties as contained in the offer to him. Secondly, nowhere has the applicant stated that the remuneration and other conditions of service were indeed negotiated between him and the municipality or the municipal manager and had thus concluded a contract of employment.
- [44] According to the letter of appointment, a contract of employment had to be concluded before the effective date, namely, 1 August 2023. The applicant does not state that he concluded one before that date. This court does not have a signed agreement or contract before it as envisaged in the letter of appointment. None of the parties have dealt with the material terms of the alleged contract. So, the question is, how does a court enforce a contract of employment that does not exist? That is the first difficulty.
- [45] There is another difficulty. The offer that was made to the applicant gave the applicant an effective date being the 1st of August 2023. The applicant in accepting the offer elected his own date, being, the 1st of September 2023. That, in my view, amounted to a counter - offer to the municipality.
- [46] Professor Christie states that it is usually regarded as equally axiomatic that a counter- offer incorporates a rejection and therefore destroys the original

offer.¹⁴ I have not seen any document that evinces that there was agreement that the applicant was going to commence work on the 1st of September 2023 instead of the 1st August 2023. This issue is dealt with in paragraph 13 of the answering affidavit where the municipal manager stated the following:

“13. On 19 July 2023 the ADM through my office informed Mr Manjingolo per letter dated 18 July 2023 that he has been appointed to the position of CFO. Further that his appointment would be effective from 1 August 2023. When accepting the offer of employment, Mr Manjingolo elected to commence employment on 1 September 2023. See annexure “LLM4” attached to the founding affidavit.” (my emphasis)

[47] The relief sought by the applicant is based on enforcement of contractual agreement between the applicant and the first respondent which was concluded on 19 July 2023. As aforementioned the only thing is the letter of appointment that had a counter- offer to it. One must have regard to the method of interpretation to be adopted when one is confronted with the letter of appointment and the acceptance letter, as informed by the principles adopted in **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹⁵. Wallis JA stated:

“[18] . . . The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective.”

¹⁴ Christie: The Law of Contract, 8th Edition, page 67 para (f): Counter- offer.

¹⁵ **Natal Joint Municipal Pension Fund v Endumeni Municipality** (920/2010) [2012] ZASCA 13 at para 18.

[48] I accordingly find that the letter of appointment given the text thereof and the plain language used therein, was a preliminary document which preceded any contract of employment that was to be concluded between the parties.

[49] My conclusion in this regard is fortified by, amongst others, a letter addressed to the applicant on 30 August 2023, by the municipal manager informing him about the correspondence addressed to the office of the Executive Mayor by the MEC. In that letter there are two issues that are dealt with therein which relate to the finding I made earlier in relation to the letter of appointment. They are: *"In the correspondence you were informed that your appointment shall be effective from the 1st of August 2023. A contract of employment was to be concluded prior to the date of your appointment which contract was to deal with the conditions, remuneration between yourself and the municipality. . . (my emphasis). Based on the aforesaid we request you not to commence your employment on the 1st of September 2023 till a correspondence has been addressed to you by our office. Should you have queries or wish to make further discussion do not hesitate to contact my office."* This, to me, further demonstrates that the respondents were still adhering to the original offer even though there was the counter-offer by the applicant as aforementioned.

[50] The other difficulty relates to the effective date of 1st August 2023. In the offer the applicant was advised: *"You shall be required to conclude your contract of employment with the municipality before the effective date of your appointment. The remuneration and other conditions of service will be negotiated between you and the municipal manager when concluding the contract of employment."* In his acceptance the applicant accepted only the position offered to him. He went further and stated:

"I confirm undertaking to read the policies referred to in this letter and irrevocably undertake to abide by the stipulations, terms and conditions contained in such policies."

- [51] Nowhere in the offer is an undertaking sought from the applicant to read the policies and to abide by the stipulations contained therein. According to the offer, a contract of employment had to be concluded before the effective date of appointment, namely, before 1 August 2023. The terms and conditions, remuneration and other conditions of service were to be negotiated between applicant and the municipal manager when concluding the contract of employment. The founding affidavit is silent on these material conditions of contract. Instead a bald statement is made that there is a valid contract between the applicant and the municipality. The applicant's counsel submitted that this court must focus only on what the applicant seeks, namely, enforcement of the contract.
- [52] Accepting for a moment that the letter of appointment constitutes a full contract between the parties, the inconsistencies between what is contained in the offer and the acceptance letter make it difficult for this court to find that there was a contract capable of enforcement.
- [53] For instance, one of the orders sought is that the first and second respondents must be directed to give full effect to the contract concluded between the applicant and the first respondent. Again, it is not possible for this court to give effect to a contract that it has not been placed in possession of. It is not clear what the remuneration package of the applicant was going to be. It was clearly stipulated in the offer that "*remuneration and other conditions of service*" were to be negotiated. The applicant has not even alluded to the amount of his salary or remuneration. Based on these findings and on the facts, I find that there is no contract capable of enforcement as prayed for by the applicant.

The alleged non-disclosure of material facts

[54] The respondents contend that there was non-disclosure of material facts by the applicant both in his application form and at the interview. Professor Christie in the Law of Contract in South Africa¹⁶ states:

“It remains as true as ever that the object of the courts is to apply and where necessary, to develop the law in order to achieve justice. Justice is, however, a broad concept, and it is helpful to have a more sharply defined goal at which to aim. It will be found that in many (but of course not all), problem areas of the law of contract. The most satisfactory result can be achieved by enforcing contracts that stem from true agreement or cause mutual assent, and by not enforcing contracts that do not conform to that pattern.” (my underlining).

[55] If this court were to enforce the letter of appointment it would be compelling the respondents to , first , conclude an employment contract with the applicant and second, disregard the misrepresentation allegations and any investigations that the respondents are conducting, third, disregard the concerns of the Deputy Director-General who raised concerns about the appointment and fourth, disregard the concerns of the MEC who is exercising a power in terms of section 56 (6) of the Systems Act and fifth, disregard the decision of the council to seek an opinion, amongst others.

[56] The MEC has a supervisory and enforcement role in respect of permanent appointments made in terms of section 56 (1) (a) and is not a passive observer to the appointment process. In ***Notyawa v Makana Municipality and Others***¹⁷ the Constitutional Court held that Parliament entrusted the MEC with the power to monitor compliance with the Systems Act. The power to monitor compliance is a necessary component of the relationship between local government and

¹⁶ 8th Ed at page 2.

¹⁷ ***Notyawa v Makana Municipality and Others*** (CCT115/ 18) [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC) (21 November 2019).

other levels of government who have a duty to intervene when local government functions are in a defective or deficient manner which compromises its autonomy and integrity. I am satisfied that there is no justification in law for such interference as it would cause the separation of powers harm.

[57] The applicant in his founding affidavit stated the following:

“(ii) *INTERVIEW*

24.

25.

26. *At the end of the interview, I was asked by the second respondent, in his capacity as the chairperson on the interview panel, if I had anything to declare.*

27. *I informed the panelists and all present which included observers from EMATU and SAMU that there was pending in a criminal case against me. The criminal case emanated from March 2018. At the time I had already left Mquma Local Municipality and was a CFO at Amahlathi Local Municipality. The second respondent commented that should not affect my employability since it was a pending case.*

28. *The reason I disclose this information to the interview panel is because I am mindful that as a CFO, issues pertaining to fraud are directly relevant to the job function of a CFO.*

29. *It was reasonable to expect me to disclose at the interview, at the minimum, that there was a pending case against me before any appointment was made, beyond this, it is up to the interview panel to request further information, this they did not do, and they had an opportunity to do so and elected not to do so.” (my underlining).*

[58] The municipality attached to the answering affidavit by the municipal manager a transcript of, amongst others, the interview of the applicant. The following is recorded which is relevant to the issue at hand:

“Chairperson: Ok. Alright. Thanks so much. And then any declaration?

Mr Manjingolo: oh declaration, I think it is important to disclose the issue which would likely even be picked up through the vetting process. **I have got a pending matter that is in court.** It has been pending since 2018. I do not know how long it is going to remain pending. I think it is important, even though **I do not think it is a matter that affects my availability,** it is important for disclosure purposes and for transparency that I disclose it.

Chairperson: Ja, no for sure because (indistinct).

Mr Manjingolo: Ja.

Chairperson: Any questions from your side?
Mr Manjingolo: That is all.” (my emphasis)

- [59] That declaration is in stark contrast to the allegations made in the founding affidavit. There is no mention of fraud allegations in the declaration. A pending matter could very well be a civil matter. An impression was created in the founding affidavit that the applicant disclosed the pending fraud case against him. That is not borne out by what is contained in the transcript. The municipality indicated that investigations are underway. It is not the applicant’s case that the allegations relating to fraud and corruption against him have no bearing on the appointment. In fact, the applicant himself stated that fraud and corruption are relevant considerations where one occupies a position of CFO. Notwithstanding that concession the applicant persists that this court must order the respondents to comply with the ‘contractual agreement’.
- [60] Investigating these matters is in the interests of justice. Allegations of misrepresentation of material facts relating to fraud and corruption must be dealt with adequately and speedily, especially where the applicant is to be tasked with the obligation of, amongst others, handling public funds. This court does not know what the investigations would yield. The applicant has not made out a case in the founding affidavit that the balance of convenience favour halting those investigations. Instead, he tried to make a case in reply that the MEC was always aware of the fraud allegations. He referred to correspondence dating back to 10 January 2023 in support of that contention. There is no explanation why that correspondence was not relied upon in the founding affidavit. For instance, the applicant relied on, *inter alia*,

correspondence given to him by the municipal manager. He stated as para 46 of the founding affidavit:

“46. On 1 September 2023 I attended the office of the second respondent where I received a letter from the second respondent stating that the MEC for Cooperative Governance and Traditional Affairs : Eastern Cape (“ the MEC”) had requested the municipal council to reconsider and set aside my appointment as there were facts that I had made a misrepresentation in the application form, more particularly that I had failed to disclose a pending fraud and corruption case...”

[61] The applicant was clearly aware, when he deposed to the founding affidavit that the MEC’s stance against the appointment was based on the alleged non-disclosure of the fraud and corruption charges. He was clearly in possession of the correspondence he relied on in reply.

[62] An applicant must make out his case in the founding affidavit¹⁸ by setting out all the necessary allegations upon which he relies, as he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. Although this is not an absolute rule, this court is not inclined to exercise its discretion in favour of the applicant who has failed to proffer an explanation why this information was not dealt with in the founding affidavit. The MEC who has not filed an answering affidavit may have dealt with the issue if it was raised in the founding affidavit. In any event, the extract and the letter relied upon in this regard makes no mention of pending fraud and corruption charges.

[63] The respondents contend that there are investigations that are underway. Sections 151, 152 and 153 of the Constitution entrench the constitutional sovereignty of the municipality and an interdict against it must be granted under

¹⁸ **Mauerberger v Mauerberger** 1948 (3) SA 731 (C) at 732. Bayat v Hansa 1955 (3) SA 547 (N) at 553 C-G

exceptional circumstances and in the clearest of cases.¹⁹ The applicant has failed to meet the *Plascon Evans* standard²⁰. The respondents' version and the reasons for commissioning the investigations are explained and they are adequate enough to be accepted by the court. If the version of the respondents cannot be rejected then it follows that the applicant cannot succeed. The version of the respondents created serious doubt on the applicant's version and the relief sought should be refused.

[64] The Constitutional Court in ***National Treasury & Others v Opposition to Urban Tolling Alliance & Others (OUTA)***²¹ held:

“The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must alongside other relevant harm, have proper regard to what may be called separation of powers harm. A Court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimants case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.” (my emphasis).

[65] The Court must weigh up the damage and inconvenience which the respondents would suffer if the interim interdict is granted. And, on the other hand, the damage and inconvenience which would be suffered by the applicant if the interim order is refused. The applicant's fears of non – payment of his salary when weighed up against the interests of justice, to have allegations of non-disclosure or misrepresentation of serious allegations of fraud and corruption, investigated disappear into oblivion. It follows therefore that the

¹⁹ ***National Treasury & Others v Opposition to Urban Tolling Alliance & Others (OUTA)***2012 (6) SA 223 CC at para 43

²⁰ ***Plascon - Evans Paints (TVL) Limited v Van Riebeeck Paints (Proprietary) Limited*** (53/84) [1984] ZASCA 51.

²¹ OUTA at para 47.

application must fail. On these grounds, the applicant has not made out a case for the relief that he seeks.

[66] On the issue of costs, I find that there is no reason to depart from the rule that costs should follow the result.

ORDER

[67] I accordingly make the following Order:

The application is dismissed with costs.

T.V NORMAN

JUDGE OF THE HIGH COURT

Matter heard on : **10 October 2023**
Judgment Delivered on : **09 November 2023**

APPEARANCES:

For the APPLICANT : **ADV MILLER**
Instructed by : **MSITSHANA INCORPORATED**
6 ST. PATRICK'S ROAD
BELGRAVIA
EAST LONDON
TEL: 043 722 0603
EMAIL:
msitshanaincorporated@telkomsa.net
admin@msitshanaincorporated.co.za
REF: MR MSITSHANA/zandi

For the 1ST & 2ND RESPONDENTS : **ADV NHLAPO**
Instructed by : **MBALI MAKELENI ATTORNEYS INC.**
191 BEKKER ROAD
MIDRAND
TEL: 011 100 7632
EMAIL: siya@mbalilaw.co.za
mtho@mbalilaw.co.za

REF: ADM/2123
c/o : **MAPHOSA AND ASSOCIATES**
30 CHAMBERLAIN ROAD
BEREA
EAST LONDON
TEL: 043 721 0458