



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1589/2022

In the matter between:

FUNDANI ELCON MOLABA

Applicant

And

MANGAUNG METROPOLITAN MUNICIPALITY

1st Respondent

MATHAPELO OLRINA MASISI

2nd Respondent

HEARD ON: 25 AUGUST 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 11 January 2022.

- [1] The applicant was appointed by the first respondent ("the Municipality") as its general manager: Supply Chain Management ("the SCM post") with effect 1 March 2012. On 17 April 2019, the applicant was transferred to the post of general manager: Institutional Compliance ("the IC post") by the Municipality's

former city manager Advocate Tankiso Mea (“Mea”). The applicant was aggrieved by Mea’s decision to transfer him to the IC post as a result, he did not obey Mea’s instructions to assume the duties of the general manager in the IC post for about two years until he was reinstated back to the SCM post on 18 August 2021.

- [2] It is the applicant’s case that Mea’s decision to transfer him was unlawful and invalid because it was implemented without his consent therefore amounts to a unilateral amendment of the terms of his employment contract, his requests to have audience to discuss the transfer before it was implemented were declined and it also constitutes a constructive dismissal due to the fact that pursuant to the transfer, Mea appointed the second respondent in the applicant’s SCM post.

- [3] Shortly after he resumed his duties in the SCM post in August 2021, the second respondent launched an urgent application in this court seeking to interdict the Municipality and its executives against removing or transferring her from the SCM post pending review proceedings that she intended to institute to declare the applicant’s reinstatement to the SCM post invalid. The application was subsequently removed from the roll on 31 August 2021. The unfair labour practice dispute which the second respondent had referred to the South African Local Government Bargaining Council was also not proceeded with.

- [4] Approximately seven (7) months later in March 2022 the applicant received instructions from the then acting city manager, Mr Mzingisi Nkungwana (“Nkungwana”) to move office and revert back to the IC post. The applicant refused then on 22 March 2022 he was forcefully removed from his office by the Municipality’s security personnel and also threatened with violence if he insisted on refusing to relinquish the SCM post. He has not been able to report for duty since then as he feared for his life.

- [5] The applicant states that there is now an uncertainty with regard to whether his contract of employment with the Municipality in the SCM post remains extant and Mea might return or another manager may also repudiate his employment

contract and transfer him from his SCM post. Accordingly, the applicant seeks the following relief:

- “1. It is declared that, as at the date of his order, the Applicant remains employed by the First Respondent in the position of **General Manager: Supply Chain Management**, and was appointed to that post with effect from **1 March 2012** in terms of a letter of appointment dated **3 February 2013**.
2. It is declared further that the purported transfer of the Applicant to the position of **General Manager: Institutional Compliance** on or about **17 April 2019** by the First Respondent’s erstwhile **City Manager**, namely **Adv. Tankiso Mea**, was unlawful and invalid.
3. It is declared, therefore, that the conduct and actions of the First Respondent’s security personnel on or about **Tuesday 22 March 2022** which prevented the Applicant from gaining access to and/or remaining in the designated workplace and/or office area for the purpose of performing his duties as **General Manager: Supply Chain Management** were unlawful.
4. The First Respondent and its employees and/or agents or service providers acting on its instructions, including the employees of any such agents and/or service providers, are interdicted and restrained from engaging in the above unlawful conduct and actions towards the Applicant, which include the unlawful unilateral variation of his existing employment contract that was concluded with the First Respondent upon his appointment to the position of **General Manager: Supply Chain Management** with effect from **1 March 2012**.
5. In the event of the Court finding that the application cannot properly be decided on affidavit due to (a) material dispute(s) of fact(s) arising on the papers, directing that oral evidence be heard on the specified issues with a view to resolving any such dispute(s) of fact, alternatively referring the matter to trial with appropriate directions as to pleadings or definition of the issues, or otherwise, in accordance with **Rule 6(5)(g)** of the **Uniform Rules of Court**.
6. Directing the respondents who oppose the application to pay the costs thereof, jointly or severally, the one paying the others to be absolved...”

[6] At the hearing, only the relief sought in prayers 1, 2, 4 and 6 was pursued.

- [7] The second respondent opposed the application and also launched a conditional counter-application for a declaratory order that the applicant's reinstatement back to the SCM post is unlawful, invalid, null and void.
- [8] The application is opposed simply on the grounds that this matter no longer presents an existing or live controversy and no case has been made out for the relief sought.
- [9] The second respondent contends that the applicant is back at work and duly performing his duties therefore the relief sought by the applicant is now academic. Furthermore, the applicant seeks to challenge a decision taken over two (2) years ago and by Mea who is no longer in the Municipality's employment. The applicant's delay in approaching the court to affirm his employment contractual rights militates against the court granting the order sought.
- [10] With regard to the merits of the case, the second respondent submits that at all material times hereto Mea was the Municipality's city manager and the accounting officer it follows too that he had the powers to transfer the applicant¹ and except to engage the applicant on the reasons for the transfer, Mea was not obliged to obtain the applicant's consent before taking the decision to transfer him. The applicant was duly engaged. The decision to transfer him was relayed to the applicant at the meeting which took place on 17 April 2019. He was provided with the reasons for the transfer namely, for operational reasons. The reasons were later provided to the applicant in writing as per his request.
- [11] At no stage did the applicant object to the transfer. He merely suggested to be transferred to a post of his preference namely, that of General Manager: Strategic Support in the office of the Chief Executive Officer and when his suggestion was declined, he absconded from his duties for about two (2) years while drawing a full salary at the expense of the Municipality who had to employ

¹ S55(1)(b), (e), (f),(m) (q) of Local Government Municipal Systems Act No, 32 of 2000; S60 and 80(2)(b) of the Local Government Municipal Finance Management Act, 56 of 2003 and the Delegation of Powers Policy of the Municipality, Regulation G-9 (Delegation of Powers Policy).

someone else to act in his position. He did not lodge a grievance with the city manager or an unfair labour dispute with the Bargaining Council, for these reason, the application must be dismissed alternatively, the counter-application be upheld.

- [12] The applicant has delivered an unmeritorious case. Inexplicably, the applicant persists in seeking a declaratory order that he remains employed by the Municipality in the position in the SCM post and that the transfer to the IC post was unlawful and invalid. The applicant also seeks an interdict to restrain the Municipality, its employees, agents or service providers from preventing him from gaining access to his work place and from unilaterally amending his existing employment contract and this is despite the fact that, in his replying affidavit he admits that:

*“5.17. Not long after this application was launched on **6 April 2022**, Nkungwana exited his erstwhile position of Acting City Manager of the First Respondent. He is no longer the First Respondent’s City Manager, acting or otherwise.*

5.18. The newly installed and current executive(s) of the First Respondent have embraced my current claim and accordingly recognize me as the current lawful incumbent in the position of General Manager: Supply Chain Management (GM: SCM).

5.19. I have since returned to work at the municipality in my position of GM: SCM, and continue to occupy that position unhindered to date. I have not, since then, encountered any more unpleasant confrontations with the First Respondent’s security personnel.”

- [13] On the available facts, the applicant’s employment status *quo ante* has been restored and the threat to him or his employment no longer exists. I’m thus in agreement with the second respondent’s contention that this matter no longer presents an existing or live controversy which warrants this court intervention.

[14] In *Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*² the court held that:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.'

[15] The applicant's fear that the decision to transfer him might arise again if there is a shift in management in the future or if Mea and Nkungwana are reinstated does not save this matter from mootness. On his own version the contract is extant in that regard, there are sufficient safeguards against the breach of the terms of his employment contract. The applicant would have both an unfair labour practice claim and a contractual claim in the event that he is again confronted by a decision which constitutes a unilateral amendment of the terms and conditions of his employment.³ Furthermore, in terms of the Municipality's Delegation of Powers Policy⁴ the applicant is entitled to invoke the internal grievance procedure by lodging an appeal with the city manager against the impugned decision.

[16] In conclusion, I hold that Courts do not exist for hypothetical issues.⁵ I am also of the view that court orders are not meant to cure conjectural anxieties.

[17] I am of the view that the remainder of the facts of this matter do not justify a judgment on the merits. The application ought to fail.

² **2000 (2) SA 1 (CC)** at 18.

³ *Mazista Tiles (Pty) Ltd v National Union of Mineworkers & others* **(2004) 25 ILJ 2156** (LAC).

⁴ Clause 6.4 of the Mangaung Delegation of Powers of Policy provides thus:

"A person whose rights are affected by a decision taken by a delegated body may appeal against that decision by giving written notice and reasons for the appeal to the City Manager within 21 days of the date of the notification of the decision. The City Manager must promptly submit the appeal to the appropriate appeal authority who must decide on the appeal in the manner and within the time set out in the Systems Act. The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision..."

⁵ *J T Publishing (Pty) Ltd v Minister of Safety and Security* **1997 (3) SA 514** (CC); **1996 (12) BCLR 1599** (CC) at para 15; **[1996] ZACC 23**

[18] With regard to costs, there is no reason why the costs should not follow the result.

[19] In the premises, I make the following order:

1. The application is dismissed.
2. The applicant shall pay the second respondent's costs.

N.S. DANISO, J

APPEARANCES:

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