**IN THE KWAZULU-NATAL HIGH COURT, DURBAN**
**REPUBLIC OF SOUTH AFRICA**

**CASE NO. 11700/2011**

In the matter between:

**THABO PUTINI** APPLICANT

and

**EDUMBE MUNICIPALITY** RESPONDENT

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**JUDGMENT** Delivered on 15 May 2012

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**SWAIN J**

[1] In issue is the enforceability of a settlement agreement, which it is common cause, was concluded between the applicant and a representative of the respondent, which is a local municipality duly constituted in terms of the Municipal Structures Act No. 117 of 1998.

[2] The applicant seeks an order compelling the respondent to perform its obligations in terms of the agreement by payment of an amount of R3,5M less any amount due to SARS , to be determined by way of a further order directing the respondent to obtain a tax directive from SARS in this regard.

[3] The respondent by way of a counter-application seeks an order declaring the settlement agreement to be unlawful and in consequence to be set aside.

[4] In order to place the conclusion of the settlement agreement in context, it is necessary to briefly set out the background facts to its conclusion.

[4.1] The applicant was employed by the respondent in the capacity of Municipal Manager. His period of employment was due to terminate on 31 December 2011.

[4.2] The applicant was suspended on 01 December 2010. The respondent alleges that this followed a forensic audit conducted by KPMG which raised *prima facie* irregularities with regard to procurement, revenue management, financial management irregularities, irregular appointments and promotions, salary increases and consistent absence by the applicant from Council meetings. The applicant however alleges that his suspension arose from untrue and defamatory allegations made against him by certain individuals within "the employ and/or Council" of the respondent.

[4.3] The applicant challenged his suspension in the South African Local Government Bargaining Council, which was set down for hearing on 04 June 2011.

[4.4] The local Government elections took place on 18 May 2011 as a result of which a new Council was elected and sworn in.

There was a change of power in the Municipality as the majority was now held by a newly established political party.

[4.5] At the first meeting of the newly elected Council, held on 30 May 2011, the Council had to consider the position of the applicant and the proceedings initiated by him. The respondent alleges that the proceedings before the Bargaining Council related only to the applicant's suspension and not to the substance of the allegations against him. From the request by the applicant to the South African Local Government Bargaining Council for arbitration, the issues that the applicant defined as being in dispute, were whether his suspension was fair and whether the person who suspended him had the authority to do so. The relief he sought was that the suspension be uplifted immediately and that the maximum compensation be paid to him. The applicant alleges that he also asked his attorneys to institute action against the respondent and its employees and/or Councillors for defamation.

[4.6] The respondent alleges that when the newly elected Council considered the suspension of the applicant, there was concern that the applicant's suspension may be unlawful, as the applicant had by that time already been suspended for more than sixty days. Clause 14 of the applicant's employment contract provided that the applicant could be suspended, if it was alleged that he had committed a serious offence, but the respondent was obliged to hold a disciplinary hearing within sixty days of the suspension, unless that period was extended by the chairperson. No decision was taken by the Council and it was resolved that the matter be referred to the Council's Executive Committee for

consideration. The Executive Committee met and resolved to uplift the applicant's suspension. It also resolved that he should return to work with immediate effect and that a settlement agreement be signed with him in that regard. According to the respondent it was never resolved or discussed, that the applicant would receive any financial settlement and no amount was discussed. The intention was that the applicant return to work and a settlement agreement be signed to that effect.

[4.7] The Executive Committee reported to the full Council the next day and a resolution in terms of the Executive Committee resolution was adopted by the full Council on 31 May 2011, the relevant portion of which reads as follows:

"1. To uplift the suspension of the Municipal Manager and return to work with immediate effect.

2. Settlement Agreement be signed with Municipal Manager with immediate effect.

3. Municipal Manager should return to work immediately after conclusion of Settlement Agreement."

[4.8] Mdlazi, the acting Municipal Manager, was given a letter signed by the Mayor, authorising her to sign a settlement agreement with the applicant, which is annexed to the applicant's affidavit as annexure "C". The letter also authorised her to delegate an official to attend to the matter if she was unable to do so. Because she was unable to do so, the personal assistant of the Mayor drafted the letter which was annexure "D" to the applicant's papers, authorising one Nathi Makhoba, to sign the settlement agreement.

[4.9] As a consequence Makhoba met with the applicant's attorney on 01 June 2011 who according to the applicant, asked for confirmation of the authority of Makhoba to act on behalf of the respondent. The applicant's attorney accordingly received annexures "C" and "D" as well as a further letter, being annexure "E" to the applicant's papers. Annexure "E" is a letter written by Mdlazi to the applicant informing him that the Council of the respondent, had resolved that a settlement agreement be concluded with him with immediate effect and that he should return to work immediately after "conclusion of settlement". It also stated that Makhoba had been instructed to sign the settlement agreement with "your attorneys on 01 June 2011".

[4.10] The respondent points out that none of these letters make mention of any financial consideration to be paid to the applicant, as part of any settlement agreement. The respondent alleges that neither the Executive Committee, nor the Council of the respondent, approved the payment of any financial settlement to the applicant, and that the intention was that the settlement was to deal only with the issue of the applicant's re-instatement.

[5] It is common cause that the settlement agreement, being annexure "A" to the applicant's papers, was subsequently concluded between the applicant, represented by his attorney and the respondent, represented by Makhoba, in terms of which the respondent agreed to pay to the applicant an amount of R3.5M, on or before 15 June 2011.

[6] It is therefore clear that the respondent denied that Makhoba

was authorised to agree to pay the sum of R3.5M, or any other amount, to the applicant, as part of the settlement agreement. The respondent accordingly placed in issue that Makhoba possessed actual authority, to conclude such a settlement agreement.

[7] The case advanced by the applicant in his founding affidavit, was that Makhoba possessed actual authority to agree to a settlement figure of R3.5M, by virtue of the contents of annexures "C", "D" and "E" to his affidavit. The applicant states that "my attorney was confident that Makhoba …….. was duly authorised to conclude the agreement". The applicant in his replying affidavit re-iterated this assertion, stating the following

"The settlement agreement was duly authorised and was properly concluded for and on behalf of the respondent" and that "The resolution certainly authorised Makhoba to conclude the settlement agreement".

[8] It is therefore clear that no case was advanced by the applicant, that Makhoba possessed apparent authority to conclude such an agreement on behalf of the respondent, and that the respondent was consequently *estopped* from denying his authority to do so. In argument Mr. Pillay, who appeared on behalf of the applicant, submitted that this issue was raised by the applicant in reply, where he states the following

"16.3 We have every reason to believe that he was so authorised. My attorney will confirm this much".

[9] This statement must however be read in context, forming part

of the applicant's reply to the following allegation made by the respondent:

"Similarly the applicant's attorney could not have believed that the resolution or annexures "C", "D" or "E" were ever authority for the settlement agreement".

This allegation by the respondent followed an allegation by the respondent that the applicant was the Municipal Manager for three years and was well conversant with the affairs of Council and the rôles and responsibilities given to local government employees by the applicable local government legislation. It was further alleged by the respondent that the applicant could not have construed annexures "C", "D" and "E" to have authorised the settlement agreement and that the applicant abused the lack of knowledge of Makhoba, whom he was aware was a housing clerk.

[10] The passage relied upon by Mr. Pillay, in reply to these allegations by the respondent, was made in the context of the following averments:

"16.1 The resolution certainly authorised Makhoba to conclude the agreement.

16.2 Makhoba made various telephone calls to high ranking officials within the employ of the respondent in the course of these negotiations.

16.3 We have every reason to believe that he was so authorised. My attorney will confirm this much".

[11] It is therefore quite clear that the respondent's reply re-iterates

his assertion that Makhoba possessed actual authority. The only reason why reference is made to any belief by the applicant, or the applicant's attorney, in this regard, is to deny the respondent's assertion that the applicant's attorney could not have believed that annexures "C", "D" or "E" could have authorised Makhoba to pay an amount of R3.5M to the applicant.

[12] The passage accordingly offers no support for Mr. Pillay's submission, that the applicant sought to rely not only upon the actual authority of Makhoba, but also his apparent authority, to agree to pay the applicant R3.5M.

[13] It is quite clear that there is a dispute of fact on the papers, as to whether Makhoba was authorised to conclude such an agreement. Such a dispute of fact was raised by the respondent as a point *in limine* in its answering affidavit, on the basis that in a letter written by the respondent's attorneys, in response to a letter of demand from the applicant's attorneys (annexure "H" to the applicant's founding affidavit) the authority of Makhoba to conclude the settlement agreement was raised. However, it is apparent on reading annexure "H" that the authority of Makhoba was denied simply on the basis that he was not the Legal Officer of the respondent, but only a clerk. The issue of the agreement to pay R3.5M, was disputed on the basis that the respondent never intended to pay this amount to the applicant and consequently there could be "no meeting of the minds" and hence no agreement. The authority of Makhoba was not however challenged on the basis set

out in the respondent's answering affidavit.

[14] Be that as it may, I am nevertheless faced with a dispute of fact, in this regard on the papers. In the absence of a referral of this issue for the hearing of oral evidence, it must be dealt with on the basis of the respondent's averments.

***Plascon-Evan Paints Ltd. v van Riebeeck Paints (Pty) Ltd. 1984 (3) SA 620 (AD) at 634 E – 635 C***

[15] The fact that no financial compensation was discussed by the Executive Committee or Council of the respondent, supports the respondent's contention that there was never an intention to pay compensation to the applicant, which is supported by the terms of the resolution adopted by the Council. It is clear that the object was to ensure that the applicant returned to work immediately. I find it grossly improbable that if the Council of the respondent, intended to financially compensate the applicant, it would not have placed a limit upon any amount to be paid, or at the very least, stipulated that any amount agreed upon, would be subject to the approval of the Council. The applicant would have it that the authority of Makhoba, a housing officer in the Infrastructure and Technical Services Department, to agree to pay compensation to the applicant, was unlimited. When I put it to Mr. Pillay, during argument, that on the applicant's case, whatever Makhoba agreed to pay to the applicant as compensation, even if it was R100M, the respondent would be bound to honour, he quite fairly found difficulty in denying. That the

authority to conclude the settlement agreement was delegated to an officer in the housing department of the respondent, also supports the respondent's contention that the object was simply to get the applicant to return to work immediately, without the payment of compensation. How would Makhoba be qualified to quantify the applicant's alleged claims for unlawful suspension and defamation, when the applicant was represented by an attorney? Although the applicant in reply alleges that Makhoba made "various telephone calls to high ranking officials within the employ of the respondent in the course of these negotiations", no details are furnished as to how the applicant was aware who Makhoba was phoning. No details are furnished as to who these officials were. On the basis of the respondent's averments, it is clear that Makhoba was never authorised to agree to pay any financial compensation to the applicant.

[16] Mr. Pillay however submitted that if I found that there was an irresoluble dispute of fact on the papers, then I should refer the issue of Makhoba's authority for the hearing of oral evidence. Mr. Dickson S C, who appeared for the respondent, submitted however that the applicant was not permitted, as it were, in the alternative, to apply for the referral of this issue for the hearing of oral evidence, and was bound to elect at the outset of argument, to refer the issue for the hearing of oral evidence.

[17] As stated by Harms D P in the case of

***Law Society, Northern Provinces v Mogami***

***2010 (1) SA 186 (SCA) at 195 C – D***

"An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail *(De Reszke v Maras and Others* 2006 (1) SA 401 (C) ([2005] All SA 440) at paras 32 – 33".

In De Reszke's case, Comrie J had the following to say at page 413 F – H

"It is my impression in this division, however, that the pendulum has swung too far the other way. Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions".

[18] In the present case, it was quite clear from the respondent's answering affidavit, that the actual authority of Makhoba to conclude the agreement to pay the applicant R3.5M, was disputed. It should have been apparent to the applicant and the applicant's legal representatives, that this dispute could not be resolved on the papers, particularly as this issue was pertinently raised by the respondent as a point *in limine.* There are accordingly no exceptional circumstances present, which would justify a departure from the general rule, that the applicant was bound to elect to refer

this issue to oral evidence, prior to argument on the merits. I accordingly decline to refer this factual dispute for the hearing of oral evidence.

[19] I accordingly find that the said Makhoba was not authorised to conclude a settlement agreement, in terms of which the respondent was obliged to pay the sum of R3.5M to the applicant. As regards the counter-application to declare the settlement agreement unlawful and to be set aside, Mr. Dickson submitted that if I resolved the dispute of fact, as to the authority of Makhoba, by considering the averments of the respondent, in accordance with the "Plascon Evans" test, I should make no order on the counter-application. He submitted that in any event, the grant of an order in terms of the counter-application was unnecessary, if the application was dismissed. I understood the basis of his argument to be that in so far as the counter-application was concerned, the respondent would bear the *onus* of establishing the lack of authority on the part of Makhoba, and in such a case the application of the Plascon Evans test would result only in a consideration of the applicant's averments. If I have understood the basis of his argument correctly, I disagree with it. Having found on the application that Makhoba did not possess the necessary authority from the respondent, to conclude the agreement, this conclusion must apply with equal vigour to the counter-application, otherwise inconsistent conclusions may be reached on the same facts. In addition, it is in the interest of all concerned that the validity of the settlement agreement be determined in these proceedings.

[20] The respondent submits that the applicant should be ordered

to pay the costs of the application on the attorney and client scale, because the applicant as the previous head of the respondent's administration, would have been aware that specific authority was required and it was never intended that he should be paid R3.5M. In addition, it is alleged that neither he nor his attorney, could have construed annexures "C", "D" and "E" as authority for the settlement agreement which was concluded. Although there may be some validity in this criticism of the applicant's behaviour, it is clear that the respondent's conduct is not above reproach. If the respondent had taken the trouble to clearly define the ambit of any settlement agreement to be concluded, the present dispute would never have arisen. In addition, the conduct of the respondent in delegating authority to an individual not qualified to conclude such an agreement, is deserving of censure. Taking all of this into consideration, I am not satisfied that the applicant should be ordered to pay the respondent's costs on an attorney and client scale.

The order I make is the following:

a) The application is dismissed.

b) The settlement agreement attached to the applicant's founding affidavit as annexure "A", is declared invalid and unenforceable.

c) The applicant is ordered to pay the respondent's costs of the application and the counter-

application.

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**K. SWAIN J**

***Appearances: /***

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| **For the Applicant** | **:** | Mr. I. Pillay |
| **Instructed by** | **:** | Garlicke & Bousefield Inc.<br>Durban |
| **For Respondent** | **:** | Mr. A.J. Dickson S C |
| **Instructed by** | **:** | PKX<br>C/o Luthuli Sithole Attorneys<br>Durban |
| **Date of Hearing** | **:** | 07 May 2012 |
| **Date of Filing of Judgment** | **:** | 15 May 2012 |