

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 1001/2008
Case Heard: 01/08/2008
Date: 15/08/2008

In the matter between:

N P Ditshetelo

APPLICANT

and

Moshaweng Local Municipality

1st RESPONDENT

Pabalelo Jacqueline Simpson

2nd RESPONDENT

Member of the Executive Council:

Local Government & Housing: NC

3rd RESPONDENT

Speaker of Moshaweng Local Municipality 4th RESPONDENT

JUDGMENT

Olivier J:

1. The applicant, Mrs Nomonde Patience Ditshetelo, lodged an application in which she cited the Moshaweng Local Municipality as the first respondent, Mrs Pabalelo Jacqueline Simpson as the second respondent, the Member of the Executive Council: Local Government & Housing: Northern Cape Province as the third respondent and the Speaker of the Moshaweng Local Municipality as the fourth respondent.

2. The application is in essence aimed at the review and setting aside of resolutions adopted at a meeting of the council of the first respondent on 30 June 2008 (part B of the notice of motion). The applicant has, however, also applied for interim relief to the effect that the operation of the particular resolutions be suspended pending finalisation of the review (part A of the notice of motion).

3. The application for the interim relief was heard on 1 August 2008. Mr Danzfuss SC appeared on behalf of the applicant and Mr Daffue on behalf of the first respondent, being the only respondent that actually opposed the application.

4. Mr Daffue at that stage applied for leave to file a rejoining affidavit, which application I dismissed with costs. At the conclusion of the hearing I granted an order

*"2.1 That pending the finalisation of the application for review by the applicant in Part B hereof, the resolutions passed by the Council of the first respondent on **30 June 2008** referred to in items **5.1.3**, **5.1.4** and **5.1.5** of the Minutes of the said meeting appended to the founding affidavit as annexure 'X' with the following effect:*

 - 2.1.1 that the applicant's employment agreement be terminated;*
 - 2.1.2 that the second respondent be appointed as Acting Municipal Manager of first respondent;*
 - 2.1.3 that the process of advertising the post of Municipal Manager be proceeded with;*

be suspended"

and ordered the first respondent to pay the costs of the application.

5. Although provision was originally made in the notice of motion for the issue of a rule nisi, both mr Danzfuss and mr Daffue were agreed that, in view of the fact that the application had been fully argued on 1 August 2008, a rule nisi would serve no purpose.

BACKGROUND

6. The applicant and the first respondent had concluded a contract in terms of which the applicant would be the first respondent's municipal manager for a fixed period ending on 30 October 2007.
7. On 15 September 2007 the council of the first respondent resolved to extend the applicant's appointment from 31 October 2007 *"on month to month contract"* and to advertise the post of municipal manager. The applicant was informed that the month to month contract would continue *"until Council decides otherwise"*.
8. When the post was advertised the applicant also applied for the position. She, the second respondent and a third candidate were shortlisted and invited to interviews. The third candidate withdrew and the second respondent was apparently after the interviews found to be the strongest candidate.
9. At a meeting on 6 June 2008 the council of the first respondent resolved to appoint the second respondent as the new municipal

manager and to terminate the applicant's month to month contract with immediate effect.

10. The applicant then applied for the review and setting aside of the decisions taken on 6 June 2008, **inter alia** on the ground that members of the council had been influenced and even threatened to vote in favour of the termination of her contract and the appointment of the second respondent as municipal manager.
11. That application was settled on 24 June 2008, when it was by agreement ordered that those resolutions be set aside. On the very same day the applicant was, however, informed (by the first respondent's attorneys, acting upon instructions issued by the mayor of the first respondent) that council would meet on 27 June 2008 to discuss "*the termination of ... (her) ...month to month employment agreement*" and was invited to make written representations in this regard.
12. It appears that the applicant then enquired about the reason/s why the termination of her contract was going to be considered. No reason was given. At the hearing it was on this basis argued that she had in fact been denied a fair hearing, as it was only in the opposing papers that the mayor alleged that the strained working relationship between himself and the applicant had necessitated considering the termination of the applicant's contract.
13. The applicant was then informed by the mayor (on 27 June 2008) that the meeting would only take place on 30 June 2008. According to the applicant she was present and available when

the meeting took place on 30 June 2008, but was not allowed to attend the meeting.

14. It is of interest to note that the speaker (fourth respondent) of the first respondent's council, Mrs Matshidiso Irene Mothibakeledi, would in any event not have attended any meeting on 27 June 2008. She had addressed a letter to the mayor on that day, informing him that she would not report for work "*due to ill health*" and stating that she "*assume (d) that there will be no abnormal matters dealt with during my absence other than day to day activities (i.e. routine)*".
15. The applicant's case is that the fourth respondent deliberately avoided having to convene or attend a meeting on 27 June 2008 concerning these matters, because she was not in favour of the mayor's initiative to have the applicant's contract terminated.
16. The minutes of the meeting of 30 June 2008 reflect the following relevant resolutions:

"That Mrs. N.P. Ditshetelo (sic) month to month contract be terminated with effect from 31 July 2008.

That Mrs. N.P. Ditshetelo be given a month's salary in lieu of notice and that she vacates her place of employment forthwith."

"Council resolved to appoint Mrs P.J. Sampson as Acting Municipal Manager when Mrs. N.P. Ditshetelo vacates her office on the 31st July 2008."
17. In a letter from the office of the mayor (dated 3 July 2008) the applicant was informed that her contract would expire on 31 July 2008.

18. The application for interim relief was brought on an urgent basis on 23 July 2008. By agreement between the parties the matter was then postponed to 1 August 2008 on the basis that answering papers would be filed by 24 July 2008 and replying papers by 29 July 2008.

LOCUS STANDI

19. In a confirmatory affidavit dated 24 July 2008 (and attached to an answering affidavit deposed to by the first respondent's mayor, mr T L Seikaneng, on the same date) the second respondent stated that she, in her capacity as acting municipal manager of the first respondent, had the delegated power to authorise the opposition of the application on behalf of the first respondent.
20. In reply the applicant took the point that the second respondent could, on the papers as at the stage when she deposed to that affidavit, not have been validly appointed as acting municipal manager and that the opposition of the application by the first respondent had accordingly not been authorised.
21. Mr Daffue conceded that the minutes of the meeting of 30 June 2008 reflect completely contradictory decisions in this regard
22. On the one hand the minutes reflect resolutions to the effect that the applicant's contract would be terminated "*with effect from 31st July 2008*" and that the second respondent's appointment would only then become effective. The subsequent letter (dated 3 July 2008) by the first respondent's mayor

informed the applicant that it had been resolved that her contract would “*expire on the 31 July 2008*”.

23. In the same letter the mayor excused the first applicant from work for the month of July, which would not have been necessary if the intention had been to terminate her contract with immediate effect.
24. On the other hand the minutes do reflect another resolution which would suggest that this had indeed been the intention, **viz** “*That Mrs N P Ditshetelo be given a month’s salary in lieu of notice and that she vacates her place of employment forthwith*” (and therefore not only on 31 July 2008, as implied in a further resolution).
25. On the papers as at 1 August 2008 the second respondent had therefore not made out a case that she was the validly appointed acting municipal manager at the stage when she deposed to her answering affidavit and when she purported to authorise the opposition of the application on behalf of the first respondent. There is no suggestion that the mayor would have been competent on any basis to authorise the opposition of the application. Insofar as the first respondent had chosen to rely on the second respondent’s affidavit as proof of authorisation, it had therefore (on the papers as at 1 August 2008) failed to make out a case that it had the required **locus standi**.

APPLICATION FOR LEAVE TO FILE REJOINING AFFIDAVIT

26. It is against this background that leave was sought, on the day of the hearing, to introduce a further affidavit by the second

respondent. The affidavit was deposed to by the second respondent on the day of the hearing. Appended thereto were minutes of a further council meeting (of 30 July 2008), reflecting a resolution:

“That the decision of special council meeting of 30th June 2008 herewith be varied to read that:

- That Mrs Ditshetelo’s appointment as municipal manager be terminated with effect 30th June 2008.*
- That Mrs Ditshetelo be given one month’s salary for july (**sic**) 2008 in lieu of notice.*
- That Mrs Sampson be appointed as acting municipal manager immediately after Mrs Ditshetelo vacates her office, the effective date of her appointment being 01st July 2008.*
- That all the actions of the mayor and/or acting municipal manager in opposing applications under high (**sic**) court case no’s 861/2008 and 1001/2008 be ratified.”*

27. The “*variations*” pertaining to the termination of the applicant’s contract and the appointment of the second respondent would amount to a decision completely different from that reflected in the minutes of 30 June 2008 and on the basis on which the applicant had lodged her application. Mr Danzfuss pointed out that the introduction of such new and completely different facts on the day of the hearing would in all probability have necessitated a postponement to enable the applicant to deal with the new allegations. This would have frustrated the whole purpose of the interim relieve she seeks.

28. It is noteworthy that the resolution taken on 30 July 2008 was not aimed at the variation of the **minutes** of 30 June 2008. The resolution was quite clearly to vary the "*decision*" of 30 June 2008. This would amount to a resolution, taken on 30 July 2008, to terminate the applicant's contract with retrospective effect from 30 June 2008 and to appoint the second respondent retrospectively from 1 July 2008. Needless to say the applicant would have been entitled to an opportunity to address this.
29. Mr Daffue argued that the second respondent had not been in the position to depose to the further affidavit at an earlier stage, because in terms of the resolutions adopted on 30 June 2008 her appointment only became effective on 1 August 2008. In her affidavit of 1 August 2008 the second respondent indeed also stated that she "*could not depose to this affidavit at an earlier stage*".
30. Apart from the fact that this argument was obviously based on only certain of the resolutions adopted at the meeting of 30 June 2008, this statement would have been irreconcilable with the minutes of the meeting which was held from 14:00 to 15:00 on 30 July 2008, according to which the second respondent would in any event have been entitled to depose to an affidavit in her capacity as acting municipal manager from 1 July 2008. On her own version nothing would therefore have prevented the second respondent from deposing to the further affidavit immediately after the meeting of 30 July 2008.
31. It cannot be argued on behalf of the first respondent that it was only when the replying papers were filed that it became aware of the fact that the second respondent had possibly not been

properly appointed as acting municipal manager when she deposed to her initial affidavit. In his answering affidavit of 24 July 2008 the mayor already made the allegation that the minutes of 30 June 2008 were "*not correct in so far as second respondent has been appointed as acting Municipal Manager with immediate effect*". No reason was advanced for the fact that the next meeting only took place on 30 July 2008.

32. As far as the council's own ratifying resolution is concerned, and even if it is for the moment to be assumed that the council could not have convened earlier than 30 July 2008, nothing prevented the first respondent from bringing it to the applicant's attention at an earlier stage.
33. In my view the introduction of the further affidavit by the second respondent at that stage would therefore have unjustifiably prejudiced the applicant. It went much further than merely an attempt to rectify a procedural defect. It sought to introduce a completely different case as regards when the applicant's contract was terminated.
34. This would not, of course, affect any rights that the first respondent may have to apply for leave to file a further affidavit for the purposes of the review application.
35. Although I therefore concluded that the first respondent lacked the **locus standi** to oppose the application, I will nevertheless, and insofar as this conclusion might not have been correct, deal with the contents of the opposing affidavits.

URGENCY

36. It is quite clear that the applicant had been fully entitled to approach the Court on an urgent basis for the interim relief. The applicant had been informed (on 3 July 2008) that her appointment would terminate on 31 July 2008 and that she would only receive her salary until then.
37. Although the issue of urgency was attacked in the opposing papers, Mr Daffue wisely decided not to take this any further in argument. It in any event for all purposes became a moot point when the parties on 23 July 2008 agreed on the postponement and on dates for the filing of papers.

JURISDICTION

38. Mr Daffue argued that the issues essentially emanated from a relationship between employer and employee and that the Labour Court therefore had exclusive jurisdiction in terms of section 157(1) of the Labour Relations Act, 66 of 1995.
39. The mere fact of such a relationship would not result in any imaginable dispute between the parties being reserved for the exclusive jurisdiction of the Labour Court. What had to be decided was whether the nature of the disputes was such that they all fell "*to be determined by the Labour Court*" (see **Chirwa v Transnet Limited and Others** 2008 (3) BCLR 251 (CC) para [60]).
40. The grounds relied upon by the applicant for the purposes of the review of the decisions taken at the meeting of the first

respondent's council on 30 June 2008 can be roughly divided into two categories:

- 40.1. The applicant's case is that the meeting was irregularly convened and held and that accordingly the resolutions adopted at the meeting are of no force or effect.
 - 40.2. The applicant furthermore contends that events before the meeting and the procedure followed at that meeting infringed upon her right to just administrative action and fall to be reviewed in terms of the Promotion of Administrative Justice Act, 3 of 2000. More specifically the applicant's case is that she was effectively denied the right to be heard and that the members of the council had failed to properly exercise and apply their minds in taking the decisions.
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41. In my view the question whether a meeting of the council of a municipality has been irregularly convened or conducted is not one intended by the legislature to "*be determined by the Labour Court*" and therefore reserved for the exclusive jurisdiction of the Labour Court.
 42. In view of the conclusion to which I had come as regards the validity or regularity of the meeting, I deem it unnecessary at this stage to deal with the question whether the taking of the decisions at the meeting and the termination of the contract and the appointment of the second respondent amounted to administrative action and to the exercise of a public power and,

if so, whether the applicant should have approached the Labour Court insofar as she wished to rely on those grounds.

43. Suffice it to remark that there can apparently be an overlapping of jurisdiction in respect of administrative issues and that, although it has been found that this can lead to “*forum shopping*”, there is apparently at this stage nothing that prevents an employee from approaching a High Court on this basis (see **Chirwa v Transnet Limited and Others, supra**, para [71] and compare **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others** 2008 m(2) SA 24 (CC) para [97]).

THE MEETING OF 30 JUNE 2008

44. In terms of section 29(1) of the Local Government: Municipal Structures Act, 117 of 1998, meetings of a municipal council can only be called by the speaker.
45. The applicant’s case is that the meeting of 30 June 2008 was called and conducted irregularly. In this regard she appended (as annexure ‘U’) a “*NOTICE OF SPECIAL COUNCIL MEETING*” to her founding affidavit, which purports to be signed by the fourth respondent and to be a notice of a meeting on 27 June 2008. The applicant stated as a fact that this notice could not have been signed by the fourth respondent before 30 June 2008, because the fourth respondent had been absent from work on Friday 27 June 2008. The mayor has in fact admitted that this notice was not signed by the fourth respondent on or before 27 June 2008. According to him the fourth respondent did however

sign it on 30 June 2008. I will revert to this aspect in due course.

46. According to a letter addressed by the fourth respondent to the mayor, and which is dated 28 June 2008, the fourth respondent did call a meeting for 30 June 2008, but specifically stated that matters concerning the applicant's contract and the appointment of the second respondent could not be deliberated, due to the unavailability of a "*judgment document*" (in the previous case between the applicant and the first respondent) and correspondence subsequent to that judgment. This letter was copied to members of the executive committee of the first respondent, the chief whip and to the municipal manager.
47. On the assumption that the fourth respondent did indeed sign the letter dated 28 June 2008, the question may be raised whether the fourth respondent had been entitled to prescribe or limit the issues to be deliberated at a meeting of the council. Furthermore no "*judgment document*" would in any event have become available, because that matter had been settled.
48. The fact would remain, however, that a number of the members of the council had been informed that these issues would not be discussed. According to the minutes the meeting of 30 June 2008 was attended by only twelve of the twenty members of the council, which raises the question whether one or more of those absent had possibly decided not to attend because of the fact that the fourth respondent had indicated that these issues would not be discussed.

49. In his affidavit the mayor stated that the applicant's contract and the second respondent's appointment were eventually indeed deliberated after it had at that meeting been *"agreed between myself and the fourth respondent that all items referred to in the agenda may form part of the discussions and may be resolved upon"*.
50. This was clearly not true, because the fourth respondent had not attended the meeting of 30 June 2008. This appears clearly from the minutes of the meeting. Not only is her name not included among the names of those who attended the meeting, but the minutes reflect that the meeting was in fact chaired by an acting speaker in her stead.
51. The applicant interpreted the fact that the fourth respondent did not attend the meetings of 27 and 30 June 2008 as an indication that the fourth respondent thereby disassociated herself from the mayor's drive to get rid of the applicant. In answer to this the mayor stated (in his affidavit) that *"Applicant tries to create the impression that fourth respondent did not want to become a party to irregularities"*. The mayor then strangely went on to deny this (which would mean that according to him the fourth respondent did indeed want to become a party to irregularities).
52. The mayor appended to his affidavit what purports to be a confirmatory affidavit by the fourth respondent and he specifically referred to the confirmatory affidavit in support of his contention that the fourth respondent had at the meeting of 30 June 2008 agreed upon the deliberation of all issues on the agenda. As already pointed out this cannot be true.

53. This places a huge question mark over the confirmatory affidavit. Why would the fourth respondent have confirmed this allegation if she had indeed not even attended the meeting and why is there no explanation at all for her sudden change of heart?
54. In this regard it is of interest to note that two members of the council have deposed to affidavits in which they state, **inter alia**, that the fourth respondent walked out of an earlier caucus meeting in protest against the mayor's attitude regarding the applicant's contract.
55. It was not disputed that the person who chaired the meeting of 30 June 2008 as acting speaker had not been validly appointed.
56. It was also not disputed that at least one of the members who had not attended the meeting of 30 June 2008, mr E O Leshope, had been instructed at an earlier ANC caucus meeting not to attend, and that he was so instructed because of the fact that he had previously deposed to an affidavit to the effect that members had been influenced and threatened prior to the meeting of 6 June 2008 to vote against the applicant.
57. There was also a question mark over whether all councillors had received notice of the meeting of 30 June 2008. According to the mayor they had all been given notice telephonically by the administrator in the office of the fourth respondent, mr M A Segame, and a confirming affidavit was annexed. In reply the applicant however appended the affidavits of two councillors, mr O Leshope and mr M G Choche, who denied having received any notice of the meeting.

58. The same two gentlemen also emphatically denied having signed the document (annexure 'TLS 7' to the answering affidavit of the mayor) which purports to be a list of the names of councillors who had in writing requested the fourth respondent to convene a meeting on 30 June 2008 and who, according to the mayor, had "*felt very strongly that the issues to be discussed at that meeting* (the meeting that had been planned for 27 June 2008 and at which the mayor had intended the termination of the applicant's contract to be deliberated upon) *should proceed*". Messrs Leshope and Chocke stated that their signatures had been forged on annexure 'TLS 7'.
59. There is absolutely no merit in mr Daffue's argument that, even if two of the fifteen signatures on annexure 'TLS 7' had been forged, the applicant still did not prove that a majority of members (**ie** more than ten members) did not sign the document. The fact that two of the signature had been forged would cast more than sufficient suspicion on annexure 'TLS 7' to justify its subjection to intense scrutiny on review.
60. As regards the letter (annexure 'TLS 6') under cover of which the list had allegedly been forwarded to the fourth respondent, it is a mystery how the mayor could, when allegedly signing it on 27 June 2008, have mistakenly dated it the 30th of June 2008. In this regard it is also of interest to note that in this letter, which purports to be a notification by the fourth respondent of a meeting on 30 June 2008, reference was made to the mayor's letter of 27 June 2008 (and not 30 June 2008).

61. The question is also why it would have been deemed necessary to have the fourth respondent sign a notice (of a meeting – annexure 'U') on Monday 30 June 2008, if all the members had in any event already been notified telephonically.
62. As far as the appointment of the second respondent is concerned, it is clear that insofar as it was on 30 June 2008 resolved to "*appoint mrs RS Sampson as Municipal Manager*" with immediate effect, this would have been clearly irreconcilable with a resolution that the applicant's contract would only terminate on 31 July 2008. On this basis alone the resolutions of 30 June 2008 would fall to be reviewed.
63. The mayor's somewhat incoherent explanation for this was that "*the minutes are not correct in so far as second respondent has been appointed as acting Municipal Manager with immediate effect*". He failed to explain what had in fact been resolved in this regard.
64. That the intention had in fact been to re-appoint the second respondent with immediate effect on 30 June 2008 is borne out by the fact that she had continued to work as the acting municipal manager as if the resolution of 6 June 2008 had not been set aside.
65. When this fact was noted in a letter dated 25 June 2008 by the applicant's attorneys, the first respondent's attorneys replied (on 26 June 2008) that "*Mrs Sampson is currently ... not in the employ of our client*". In his answering affidavit the mayor conceded that this was not correct and stated that he had

"reason to believe that Mr Anderson (first respondent's attorney) and I misunderstood each other".

INTERIM RELIEF

66. The requirements for the granting of interim relief are (i) a clear or **prima facie** right; (ii) a well-grounded apprehension of irreparable harm if the relief is not granted; (iii) a balance of convenience in favour of granting the relief; and (iv) the absence of any other satisfactory remedy (see **Aranda Textile Mills (Pty) Ltd v Hurn and another** [2000] 2 All SA 530 (E)).
67. In view of what has already been referred to above I came to the conclusion that the applicant had, at the very least, made out a case that she had a **prima facie** right. In fact, the immediate appointment of the second respondent would clearly have been irregular. Insofar as contradictory decisions had been taken at the meeting of 30 June 2008 they would also on this ground fall to be set aside.
68. There is no doubt that the implementation of the resolutions of 30 June 2008 would have caused the applicant irreparable harm had the interim relief not been granted. The consequences of the termination of her contract would not have been confined to financial losses.

"The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the

*community round one to be so barred, are not so immediately realised by the outside observer and appear, with respect, perhaps to have been underestimated in the **Swart** and **Jacobs** cases. There are indeed substantial social and personal implications inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do in other countries."*

See: **Muller v Chairman, Ministers' Council, House of Representatives, and Others** 1992 (2) SA 508 (C) at 523C-B.

69. Mr Daffue argued that section 64(4) of the Labour Relations Act provided a satisfactory alternative remedy. Apart from the fact that the termination of a month to month contract could hardly be viewed as "*a unilateral change to terms and conditions of employment*", a dispute concerning the legality of a meeting of a party to such a contract and the validity of resolutions adopted at such meeting cannot by any stretch of the imagination be seen as a "*labour dispute*" (see **section 28(c)** of the **Labour Relations Act**).
70. I am in any event of the view that, even if the applicant would technically speaking have been entitled to approach a body like the bargaining council, it would have made much more sense from a practical point of view to approach the Court which had already made an order in respect of a large part of the evidence that could once again be relevant.
71. There can be no question that the balance of convenience favoured the applicant. She stood to lose her income and other benefits with effect from the end of July 2008 and was

effectively barred from attending her office and doing the work she had been doing for more than two years.

72. There was no suggestion that the applicant was not competent or able to do the work.
73. They mayor made the rather vague allegation that the return of the applicant would “*lead to severe friction between her and other employees and in particular with reference to the strained relationship between her and councillors, including me*”. There is no evidence of a strained relationship between the applicant and any of the other employees and councillors (apart from the mayor of course).
74. Mr Daffue argued, with reference to the case of **Metlika Trading Ltd and Other v Commissioner, South African Revenue Service** 2005 (3) SA 1 (SCA), that the relief sought in part A of the notice of motion would in fact be final in effect and that the application for that relief should therefore be dealt with in accordance with the principles and requirements applicable to applications for final relief.
75. I disagree. The facts of the present matter, and the effect of the relief sought in part A of the notice of motion, are entirely distinguishable from those in the **Metlika** case. An order suspending the execution of a resolution temporarily cannot be said to be similar in effect to an order compelling the return of an aircraft to South Africa.
76. The grounds of review raised in this part of the application, and the issues pertaining thereto, will clearly again have to be raised

and considered in the review proceedings and will only then be finally disposed of. The grounds upon which the return of the aircraft had been ordered in the **Metlika** case were completely different from those in the pending action.

COSTS

77. I could see no reason why costs should not follow the result and none was suggested to me. This applies to both the application for leave to file a rejoining affidavit and the application for interim relief.
78. These are the reasons for the orders made on 1 August 2008.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	Adv F W A Danzfuss, SC
Instructed by:	Job Attorneys, KIMBERLEY
For the Respondent:	Adv J Daffue
Instructed by:	Mjila & Partners, KIMBERLEY