

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA46/22

In the matter between:

MONARENG JEFFERY MOHLOWAADIBONA

Appellant

and

DR JS MOROKA LOCAL MUNICIPALITY

Respondent

Heard: 27 March 2024

Delivered: 03 July 2024

Coram: Savage ADJP, Van Niekerk JA et Nkutha-Nkontwana JA

Summary: Practice – Rule 6(2) of the Labour Appeal Court Rules – failure to file a resolution and power of attorney to oppose the appeal is fatal – matter proceeded unopposed. Further evidence on appeal – evidence is weighty and material to determine the issues in appeal – evidence accepted in the interest of justice. Principle of legality – exercise of public power must conform to all applicable law – to exercise more power than what has been conferred in terms of the law would be *ultra vires* and have no legal force.

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

[1] A resignation, once communicated by an employee to the employer, is final and cannot be withdrawn unless the employer agrees.¹ That is so because the autonomous and deliberate conduct of an employee brings about the termination of the contract of employment.² These canons are trite.

[2] Even so, disputes about withdrawal of resignation by employees and refusal to consent thereto by employers are not infrequent. This appeal is a typical illustration.

[3] On 1 April 2021, the appellant (Mr Monareng) summarily resigned from his employment with the respondent (the Municipality) allegedly due to ill health.

[4] On 15 April 2021, he tendered a withdrawal of his resignation and proposed to commence his duties on 19 April 2021. Indeed, on 19 April 2021, he commenced with his duties. On 23 April 2021, Mr BM Mhlanga, who was at the time appointed as an Administrator for the Municipality, served Mr. Monareng with a letter dated 15 April 2021 informing him that the withdrawal of his resignation was not accepted and that his employment accordingly remained terminated. Even so, Mr Monareng was paid his salary for April 2021.

[5] The Municipality was placed under administration in terms of section 139(1)(b) of the Constitution³ per the resolution of the Mpumalanga Provincial Executive Council of 17 January 2021. The administration commenced on 3 February 2021. Mr Mhlanga, an employee in one of the provincial departments, was seconded to the Municipality as an Administrator for six months, commencing on 3 February 2021. According to his secondment letter, he was supposed to remain an employee of the provincial department and be remunerated by his department.

[6] Mr Mhlanga's authority to reject Mr Monareng's withdrawal of his resignation is seriously contested and so is the period of his secondment. I deal with these later

¹ See: *Sihlali v SA Broadcasting Corporation Ltd* [2010] ZALC 1; (2010) 31 ILJ 1477 (LC) at para 15; *Mnguti v Commission for Conciliation, Mediation & Arbitration & others* [2015] ZALCJHB 277; (2015) 36 ILJ 3111 (LC) at paras 22 - 23.

² Id.

³ The Constitution of the Republic of South Africa, 1996.

in this judgment. Nonetheless, it is common cause that Mr Mhlanga was no longer an Administrator as of 1 May 2021. Equally, there was no Acting Municipal Manager appointed following the dismissal of the Municipal Manager on 8 March 2020.

[7] On, 6 May 2021, the Executive Mayor appointed Mr MF Monkoe as an Acting Municipal Manager. On 10 May 2021, Monkoe advised Monareng that the withdrawal of the resignation was accepted. On 11 May 2021, the Municipal Council ratified the appointment of Mr Monkoe as an Acting Municipal Manager from 6 to 11 May 2021 and appointed Mr Mhlanga as an Acting Municipal Manager effective from 12 May 2021.

[8] Mr Monareng reported for duty consequent to the acceptance of the withdrawal of his resignation by Mr Monkoe. However, Mhlanga stopped the processing of Mr Monareng's salary for May 2021 on the basis that he was no longer an employee of the Municipality.

[9] Displeased with the turn of events, Mr Monareng approached the court *a quo* by way of urgency. On 2 July 2021, the court *a quo* issued a *rule nisi* returnable on 2 December 2021, granting an interim order in the following terms:

- 9.1 Declaring that Mr Monareng was still an employee of the Municipality;
- 9.2 Declaring the termination of Mr Monareng's salary invalid and set aside; and
- 9.3 Reinstating his full salary effective from 24 May 2021.

[10] On the return day, Tulk AJ extended the *rule nisi* to 16 March 2022. The Municipality failed to comply with the interim order and as a result, Mr Monareng launched contempt proceedings. On the other hand, the Municipality launched several urgent applications, *inter alia*, to stay the effect of the interim order pending a rescission application and to review the decision by Mr Monkoe to consent to the withdrawal of Mr Monareng's resignation. These applications were struck off the roll for lack of authority to institute those proceedings and subsequently abandoned, it would seem.

[11] On 16 March 2022, being the return date, this matter served before the court *a quo* once more. Mr Monareng, in *limine*, took issue with the authority of Mr Mhlanga to represent the Municipality. A document containing various delegations of authority was handed up in court and accepted by the court *a quo*. That resulted in the demise of that assail. In the same way, the court *a quo* dismissed Mr Monareng's assail of Mr Mhlanga's authority to exercise the functions of the Municipal Manager since he was appointed as an Administrator.

[12] That being the case, the court *a quo* proceeded to the merits of the case and found that Mr Mhlanga's decision not to accept Mr Monareng's withdrawal of his resignation stood and as a result, Mr Monareng ceased to be an employee of the Municipality as of 1 April 2021. The *rule nisi* was accordingly discharged.

[13] This appeal, which is with the leave of the court *a quo*, is therefore against the judgment and order of the court *a quo*. In this Court, the core contentions for Mr Monareng are that the court *a quo* erred in finding that:

13.1 Mr Mhlanga had the necessary authority to oppose the application on behalf of the Municipality;

13.2 Mr Mhlanga had the necessary authority to accept Mr Monareng's resignation and decline to consent to the withdrawal thereof; and

13.3 Mr Monareng had resigned and the retraction of his resignation was not consented to.

[14] Mr Monareng contends further that this appeal raises, *inter alia*, a constitutional issue relating to the correct interpretation of section 139(1)(b) of the Constitution, read with the provisions of the Local Government: Municipal Systems Act⁴ (Systems Act). He has also applied to lead further evidence on appeal in terms of section 19(b) of the Superior Courts Act.⁵ Similarly, section 174(a) of the Labour Relations Act⁶ (LRA) empowers this Court to receive further evidence.

⁴ Act 32 of 2000, as amended.

⁵ Act 10 of 2013.

⁶ Section 174(a) provides:

'The Labour Appeal Court has the power –

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for

Authority of attorneys and Ms Mathebela to represent the Municipality

[15] Mr Monareng assails the authority of the Municipal Manager (Ms Mathebela) to oppose the appeal and the section 174(a) application on behalf of the Municipality. While there is reference to Ms Mathebela's letter of appointment and delegation of authority in the answering affidavit opposing the application in terms of section 174(a) of the LRA, these documents were not attached thereto. Mr Monareng, through his attorneys of record, requested the proof of authority referred to in the Municipality's answering affidavit but to no avail. No explanation is proffered for this remiss.

[16] In addition, the Municipality's attorneys of record (SSM Attorneys) failed to file a power of attorney to oppose the appeal together with their heads of argument as required in terms of Rule 6(2)⁷ of the Rules of this Court. Once again, this point is taken ardently in Mr Monareng's replying affidavit in section 174(a) application and the written submissions on his behalf. Yet, SSM Attorneys failed to file the power of attorney together with the resolution of the Municipal Council authorising them to oppose the appeal.

[17] Counsel for the Municipality, Ms Makhajane, shirked from addressing these assails in her written submissions and during her oral submissions when the matter was heard on 27 March 2024, understandably so because she is a subject of instructions. SSM Attorneys disregarded Mr Monareng's demand that they file the requisite proof of authority.

[18] Notwithstanding, we were not inclined to non-suit the Municipality based on these irregularities. SSM Attorneys was directed to file the power of attorney and the

further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary...

⁷ Rule 6 of the Rules Regulating the Conduct of Proceedings in the labour Appeal Court GN 1666 of 1996 provides:

- '(1) A power of attorney authorising a representative to prosecute the appeal or the cross-appeal must be delivered within 10 days of the delivery of any notice of appeal or cross-appeal.
- (2) If there is no cross-appeal, a power of attorney to oppose an appeal must be filed with the registrar by the respondent's representative when copies of the respondent's main heads of argument are filed under rule 9...

missing annexures which allegedly constitute proof of Ms Mathebela's authority to act on behalf of the Municipality. Mr Monareng was allowed to file answering papers if he so wished.

[19] On 10 May 2024, the Municipality filed an application for condonation for the late filing of the power of attorney and the delegation of authority. Mr Sibusiso Masondo (Mr Masondo), the director of SSM Attorneys, deposed to the supporting affidavit. He asserts that the omission to file the power of attorney and delegation of authority was due to oversight and regrets the turn of events.

[20] Mr Monareng filed his opposing affidavit on 15 May 2024, seriously opposing the grant of condonation on various grounds. I propose to deal with the three main attacks. Firstly, Mr Monareng takes issue with the fact that Mr Masondo failed to explain his authority to depose to the affidavit in support of the application for condonation. Secondly, Annexure "AA1" to the supporting affidavit, Ms Mathebela's appointment letter as the Municipal Manager, does not prove that she has the authority to oppose the appeal proceedings and the application for admission of further evidence on behalf of the Municipality. Thirdly, Annexure "AA2" to the supporting affidavit, an extract from the Municipality's Delegation of Authorities, does not prove that Ms Mathebela has delegated authority to oppose the appeal on behalf of the Municipality and, accordingly Annexure "AA3", the special power of attorney signed by Ms Mathebela, is irregular and stands to be rejected.

[21] I deal first with Ms Mathebela's authority to oppose the appeal and the section 174(a) application. Mr Masondo avers that the Municipal Council's resolution appointing Ms Mathebela as the Municipal Manager and the Delegation of Authorities adorned her with authority, in her capacity as the Municipal Manager, to defend the Municipality in all legal proceedings. The challenge with the averments made by Mr Masondo is that they are not supported by a confirmatory affidavit by any person within the Municipal Council or any official in the Municipality.

[22] Contrary to Mr Masondo's assertion, it is not apparent *ex-facie* the Delegation of Authorities filed as to how Ms Mathebela derived the authority to act on behalf of the Municipality in these proceedings. Having perused the document, it would seem

that delegations 20 and 45 could be relevant. Delegation 20 purports to delegate to the Municipal Manager the authority to instruct the Council's attorney to act on behalf of the Council, including the appointment of an advocate to act on behalf of counsel or to obtain a legal opinion. While Delegation number 43 purports to delegate to the Municipal Manager the authority to act on behalf of the Municipality, as an applicant, to sign all documents necessary and make affidavits as may be necessary and to authorise lawyers and advocates to bring applications on behalf of the Municipality on an urgent basis in a competent court for consideration and decision.

[23] There is nothing in the Delegation of Authorities that authorises the Municipal Manager to oppose appeals and, pertinently, Mr Monareng's appeal before this Court. As correctly contended on behalf of Mr Monareng, absent a delegated authority that expressly deals with the litigation before this Court, it was incumbent upon the Municipal Council to pass a relevant resolution authorising the opposition of the appeal and the section 174(a) application.

[24] Even if one were to take a benign view of the Delegation of Authorities, the Municipality has another insurmountable difficulty. The Municipal Council is enjoined by section 59(2)(f) of the Systems Act, to review the delegation of authorities when a new council is elected. In this instance, the local government elections took place on 1 November 2021. The only resolution on the record is the one that was taken in the special meeting of the Municipal Council on 3 December 2021 where it resolved that the review of the Delegation of Authorities "*be deferred back for due diligence*". There is no evidence on record to show that the Municipal Council did, ultimately, review and/or approve the Delegation of Authorities. The transcript of the proceedings before AJ Talk attached to Mr Masondo's affidavit clearly shows that the Municipality had always been alive to this challenge. Yet, it failed to secure a resolution approving the Delegation of Authorities.

[25] Turning to the power of attorney, Ms Mathebela signed it in her capacity as the Municipal Manager and Head of Administration of the Municipality and purports to appoint SSM Attorneys "*[t]o appear and defend the Municipality and the Office of the Municipal Manager in the legal proceedings and all judicial processes or proceedings before the Labour Court, the Labour Appeal Court as well as in all other*

relevant legal forum and/or tribunals and in all matters relating to a dispute between the Municipality and Mr. J:M Monareng...” Where a Municipal Manager purports to exercise her powers as the Head of Administration⁸, the following observations by the Supreme Court Appeal (SCA) in *Manana v King Sabata Dalindyebo Municipality*,⁹ per Nugent JA are pertinent:

‘... s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority – which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result.’

[26] It follows that the appointment of Ms Mathebela as a Municipal Manager and Head of Administration did not divest the Municipal Council of its executive powers, including the power to oppose Mr Monareng’s appeal. Absent a resolution by the Municipal Council, the powers to oppose Mr Monareng’s appeal and to appoint the attorneys reside with the Municipal Council.¹⁰ In *Papane v van Aarde NO and others*¹¹ (*Papane*), confronted with a similar challenge, this Court clarified what is expected to satisfy the requirements of Rule 6(2):

‘Proof that the SABC has authorised the opposition of the appellant’s appeal and that Maserumule Inc have been authorised to represent the SABC would normally be provided by way of an affidavit deposed to by a person who attended the meeting of the Board of Directors which issued a resolution to the effect that the SABC opposes the appeal and authorising Maserumule Inc to represent the SABC in that regard. The resolution would then be annexed

⁸ Section 55 (1)(p) of the Systems Act provides that the municipal manager as head of administration of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for the implementation of national and provincial legislation applicable to the municipality.

⁹ [2010] ZASCA 144; (2011) 32 ILJ 581 (SCA) at para 17.

¹⁰ See: *Matjhabeng Local Municipality v MC Security & Investigations and Others* (3945/2023) [2024] ZAFSHC 44 at para 19.

¹¹ [2007] ZALAC 27; (2007) 28 ILJ 2561 (LAC).

to that affidavit. If the Board has delegated that authority to some official, proof of that fact would have to be provided.’¹²

[27] Since what had been filed by the respondent’s attorneys in *Papane* was found to be woefully short of what was expected to prove authority to oppose the appeal, this Court resolutely found that the respondent was not properly before it and dealt with the appeal on an unopposed basis.¹³ Likewise, for the reasons alluded to above, the same fate must befall the Municipality in this matter. Regrettably, this problem is rampant; especially from practitioners who litigate in this Court who ought to be familiar with its Rules yet still disregard Rule 6(2). More disconcerting is the level of impertinence displayed in this instance in that there was no effort made by the Municipality’s attorneys of record to comply despite being granted indulgence.

[28] Absent a resolution by the Municipality Council authorising the opposition of Mr Monareng’s appeal and section 174(a) application and appointing SSM Attorneys to represent it, there is no proper opposition and representation. On this account, the appeal must be dealt with on an unopposed basis. Still, to succeed, Mr Monareng has to satisfy us on the merits that the court *a quo* erred and that there is a case to admit new evidence in terms of section 174(a). Given the turn of events, we proceed to deal with the merits, having accordingly rid ourselves of the contents of the written submission filed by SSM Attorneys and the oral submissions made by Ms Makhajane.¹⁴

Section 174(a) application

[29] The section 174(a) application pertains to the period of the section 139(1)(b) intervention which commenced on 3 February 2021 and ought to have terminated in August 2021. Mr Monageng seeks admission of evidence that shows that the initial intervention was extended on 30 September 2020 and terminated on 31 March 2021. He contends that this evidence came to his attention on 14 August 2023, through an anonymous source, hence it was not before the court *a quo*.

¹² Id at para 18.

¹³ Id at paras 22 - 23.

¹⁴ Id at para 23.

[30] Pertinently, one of the documents Mr Monareng seeks leave to introduce is communication to the National Council of Provinces (NCOP) consequent to the question by North West: FF-Plus to the Minister of Cooperative Governance and Traditional Affairs which states that the section 139(1)(b) intervention at the Municipality terminated on 31 March 2021.

[31] Mr Monareng further contends that the section 139(1)(b) intervention may only be brought to an end by the provincial executive on notice to the Municipality. To fortify this point, reference is made to section 148(3) of the Local Government: Municipal Finance Management Act¹⁵ (MFMA) which provides that, when a provincial intervention ends, the MEC for Local Government or the MEC for Finance in the province must notify, *inter alia*, the Municipality, the cabinet member responsible for local government, and the provincial legislature.¹⁶

[32] In addition, section 139(2)(b)(ii) of the Constitution provides that, if a provincial executive intervenes in a municipality in terms of section 139(1)(b), the intervention must end if “...the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention”.

[33] In the light of the above, the Municipality was aware or ought to have been aware of the exact date when the section 139(1)(b) intervention terminated. Yet it failed to place this evidence before the court *a quo* in violation of a constitutional imperative in terms of section 165(4) of the Constitution.¹⁷ Thus, as correctly

¹⁵ Act 56 of 2003, as amended.

¹⁶ Section 148(3) provides:

‘When a provincial intervention ends, the MEC for local government or the MEC for finance in the province must notify –

- (a) the municipality;
- (b) the Minister, in the case of a mandatory intervention;
- (c) the Cabinet member responsible for local government;
- (d) any creditors having pending litigation against the municipality;
- (e) the provincial, legislature; and
- (f) organised local government in the province.’

¹⁷ Section 165(4) provides:

“Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.”

contended by Mr Monareng, I accept that the further evidence is weighty, material and presumably to be believed.¹⁸

[34] Moreover, I accept that the further evidence will be practically conclusive and final in its effect on the issue to which it is directed, which is Mr Mhlanga's authority in relation to his decision of 23 April 2021 not to consent to the withdrawal of the Mr Monareng's resignation.¹⁹ There is traction in Mr Monareng's submission that there is a *prima facie* likelihood of the truth in the further evidence and that it was materially relevant to the outcome of the proceedings before the court *a quo*.²⁰ Mr Mhlanga himself contended in the court *a quo* that his stint as an Administrator commenced on 3 February 2021 and was for six months. Yet, he failed to proffer an explanation and proof of his authority post-July 2021, when his six-month stint ended.

[35] It is well accepted that, in terms of the constitutional standard of interests of justice, the prime consideration is the facilitation of the ventilation of issues and the dispense of justice.²¹ Moreover, the further evidence at stake is not disputed. I am satisfied that it is weighty and material to a determination of the pertinent issue in this appeal. Accordingly, admission of further evidence in relation to the period of the section 139(1)(b) intervention should be allowed.

Authority to decline to consent to the withdrawal of the resignation

[36] While this matter is about the decision not to consent to the withdrawal of a resignation and its consequences, analogous thereto is the source of the power exercised. In terms of the Constitution, local government is an independent sphere of government entitled and empowered to govern its own affairs, subject to relevant prescripts.²² Yet it must be exercised within the confines of cooperative governance

¹⁸ See: *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67; 2011 (1) SA 16 (SCA) at para 11; *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality and another* [2017] ZASCA 23; 2017 (6) SA 360 (SCA) at para 23.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *City of Tshwane Metropolitan Municipality v Afriforum and another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC) at paras 40 – 41.

²² In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC) at paras 42 - 43, Jafta J observed that:

and constitutionally permitted supervision and intervention by the national and provincial governments.²³ This is the context that informs the provincial governments' intervention in the affairs of local governments.²⁴

[37] Section 139(1) of the Constitution provides that, where a municipality cannot or does not fulfil its executive obligations, either in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking appropriate steps to ensure the fulfilment of that obligation, including –

‘ ...

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to –

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity...’

[38] The crux of Mr Monareng's contention is that Mr Mhlanga had no authority to refuse to accept the withdrawal of his resignation on 23 April 2021 because the section 139(1)(b) intervention terminated on 31 March 2021. In essence, the issue at stake is whether the exercise of public power meets the constitutional muster of

[43] Section 40 of the Constitution defines the model of government contemplated in the Constitution. In terms of this section the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and "not assume any power or function except those conferred on [it] in terms of the Constitution".

[44] The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by ss 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed. [Own emphasis]

²³ Id.

²⁴ Id.

legality which “...draws its life-blood from multiple texts of the Constitution and lies at the structural heart of our constitutional democracy”.²⁵

[39] Section 2 of the Constitution lays the foundation for the control of public power and provides: “*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*”. The exercise of all public power must accordingly comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.²⁶

[40] The Municipality, despite being a public institution, failed to be transparent and discover this pertinent evidence to support its allegation that it was still subjected to constitutional oversight in terms of section 139(1)(b) when Mr Monareng withdrew his resignation, a decision that was not consented to by Mr Mhlanga.

[41] Mr Monareng has presented uncontested evidence that shows that the period of the intervention ended on 31 March 2021 and thus the validity of the decisions taken by Mr Mhlanga during April 2021 is now in doubt. As observed by this Court in *Ekurhuleni Metropolitan Municipality v Mabusela N.O. and Others*²⁷, “...a trite principle in our law that if a power that was given to be exercised by a particular official was exercised by another official, who was not authorised by law to do so, such exercise would be illegal or unlawful”. This principle was recently sanctioned by the Constitutional Court in *National Education Health & Allied Workers Union & Others v Minister of Public Service & Administration & others*²⁸ where it was aptly stated:

²⁵ *Minister of Health and another No v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and Another as amici curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC) at para 612. See also *Premier, Gauteng and others v Democratic Alliance and others* [2021] ZACC 34; 2022 (1) SA 16 (CC) at para 1.

²⁶ See: *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC) at paras 612 - 616.

²⁷ [2022] ZALAC 112; (2023) 44 ILJ 137 (LAC) (*Ekurhuleni*) at para 37.

²⁸ *National Education Health & Allied Workers Union v Minister of Public Service & Administration & others; SA Democratic Teachers Union & others v Minister of Public Service & Administration & others; Public Servants Association & others v Minister of Public Service & Administration & others; National Union of Public Service & Allied Workers & others v Minister of Public Service & Administration & others* [2022] ZACC 6; (2022) 43 ILJ 1032 (CC) at paras 73; 89 and 108.

[73] It is also a fundamental principle of our law that an actor must be legally empowered to perform any act in question and that public power may only be exercised by a lawfully constituted authority.

...

[89] The end result is that the State's failure, in its capacity as the employer, to comply with the requirements of regulations 78 and 79 renders the resultant collective agreement entered into between the parties under the LRA invalid and unlawful. To hold otherwise would amount to validating the mischief the relevant constitutional provisions and regulations seek to prevent.

...

[108] Furthermore, the applicants contend that specific performance is a just and equitable remedy on the basis that there had been substantial performance under the collective agreement. However, because the agreement was void ab initio (has no legal force) this question does not arise, and this court need not address it. Thus, the contention is without merit. The general rule is that if an invalid agreement is void, it gives rise to no legal obligations, which means the State cannot be ordered to comply nor can it be expected to perform, as there is nothing in the eyes of the law to be complied with nor enforced... [own emphasis]

[42] In the same way, in this matter, Mr Mhlanga patently misconceived the nature and source of his powers as an Administrator which was based on the section 139(1)(b) intervention. Consequent to the termination of the intervention on 31 March 2021, Mr Mhlanga was accordingly divested of his authority as an Administrator. The decision not to accept Mr Monageng's withdrawal of his resignation lacked legal force. Put otherwise, Mr Mhlanga's illegal action was effectively a nullity and did not give rise to any legal rights.²⁹ That being the case, the decision by Mr Monkoe stands, and consequently, Mr Monareng's withdrawal of his resignation was consented to on 10 May 2021.

[43] This appeal, as clearly shown above, turned on the limited issue that implicates the principle of legality based on the evidence that was not before the court *a quo*. In view of the fact that the finding on the illegality of Mr Mhlanga's

²⁹ *Ekurhuleni supra* at para 41.

conduct is dispositive of the matter, I deem it superfluous to deal with the other issues that have been raised.

Conclusion

[44] In all the circumstances, the section 174(a) application is granted and the further evidence is accordingly admitted in the interest of justice. Mr Mhlanga's decision not to accept Mr Monareng's resignation was *ultra vires* and lacked legal force. Resultantly, the decision to consent to the withdrawal of Mr Monareng's resignation by Mr Monkoe was not disturbed. Accordingly, the decision of the court *a quo* cannot stand.

Costs

[45] The appellant seeks costs on a punitive scale. In my view and in light of the fact that the appeal has been treated as unopposed, no order as to costs should be made. Conversely, the requirements of the law and fairness dictate that the Municipality should pay Mr Monareng's costs in the court *a quo*. It is disconcerting that Mr Mhlanga, despite being aware that his authority was impugned, failed to deal frankly with the issue. Regrettably, Mr Monareng had to endure a litany of unmeritorious lawsuits by the Municipality.

[46] In the result, the following order is made:

Order

1. The application to lead further evidence on appeal is granted.
2. The appeal is upheld with no order as to costs.
3. The order of the court *a quo* is set aside and replaced with the following:
 - "1. The decision by Mr Mhlanga not to consent to the withdrawal of Mr Monareng's resignation was illegal.
 2. The decision by Mr Monkoe to consent to the withdrawal of Mr Monareng's resignation stands.

3. Mr Monareng is still an employee of the Municipality.
4. Mr Monareng's salary is reinstated effective from 24 May 2021.
5. The Municipality shall pay Mr Monareng's costs."

Nkutha-Nkontwana JA

Savage ADJP and van Niekerk JA concur.

Appearances:

For the applicant: Adv Maluleka
Instructed by MM Baloyi Attorneys

For the respondent: Adv C Makhajane
Instructed by SMM Attorneys