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, KIMBERLEY

Case No: CA&R 27/2024 & 1682/2023
Heard: 20/05/2024
Delivered: 26/07/2024

In the matter between:

SEKHOANE BENJAMIN SEHOLE APPLICANT

and

KGATELOPELE LOCAL MUNICIPALITY 1st RESPONDENT
THE SPEAKER OF COUNCIL 2nd RESPONDENT
THE MAYOR 3rd RESPONDENT
THE MUNICIPAL MANAGER 4th RESPONDENT

Coram: Mamosebo J et Stanton J

JUDGMENT ON REVIEW

MAMOSEBO J

[1] The applicant is Mr Sekhoane Benjamin Sehole. The first respondent is Kgatelopele Local Municipality (the Municipality), established in terms of s 12 r/w s14 of the Local Government: Municipal Structures Act, 117 of 1998 and falls under the ZF

Magcawu District. The second respondent is Mr Mosala Leutlwetse, Speaker of the Council of the first respondent. The third respondent is Ms Irene Williams, the Executive Mayor of the first respondent. The fourth respondent is Mr Willie Blundin, the Municipal Manager employed by the first respondent.

[2] The applicant launched the urgent application in Part A seeking a declarator pending the review in Part B. Part A served before Olivier AJ on 20 September 2023 which dealt with points *in limine* followed by its dismissal with costs. Before us is the review application, Part B in terms of which the applicant is seeking the following relief:

2.1 Declaring that the fourth respondent, the Municipal Manager, lacks authority to terminate his services;

2.2 Declaring that the termination of his services by the Municipal Manager on 31 August 2023 is unconstitutional, invalid and of no force and effect;

2.3 Setting aside the decision by the Municipal Manager [taken] on 31 August 2023 to terminate his services;

2.4 That the first to fourth respondents be ordered to reimburse him the salary deductions made by the first respondent in July and August 2023;

2.5 Interdicting and restraining the first to fourth respondents from appointing other candidates into the position he held, pending the finalisation of the court proceedings;

2.6 Costs of this application on the scale as between attorney and client to be paid by the first and fourth respondents, jointly and severally, the one paying the others to be absolved.

[3] Counsel for the respondents, Adv S Kunene, contended that firstly, the relief sought is not a review but a declarator which must serve before a single Judge and therefore this Court lacks the jurisdiction to hear the matter. Secondly, the respondents only filed their heads on Friday preceding the hearing on Monday and, not only have the heads not reached the Court files but they were also six months out of time without any application for condonation. Thirdly, the applicant had filed a supplementary affidavit which was met with a Rule 30A Notice on 17 May 2024 but has also not made its way to the Court files. They contend therefore, that the supplementary affidavit was not compliant with the rules of Court. The parties were afforded an opportunity to narrow down the issues for the Court to further direct the proceedings.

[4] Upon resumption, the applicants abandoned the supplementary affidavit, which also rendered moot the Rule 30A notice. In as far as the Court lacking jurisdiction to hear the matter on review with two Judges sitting, we made the ruling that the matter is indeed a review and proceeded to hear it.

Failure by the respondents to file Heads of Argument timeously

[5] The parties' attention is drawn to the Northern Cape Rule 3(6) pertaining to the filing of Heads of Argument and Practice Notes. The SCA has also admonished parties in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) paras 36 and 37. Harms JA, then, warning practitioners by saying:

> *"[38] Practitioners should note that a failure to give proper attention to the requirements of the practice note and the heads might result in the disallowance of part of their fees."*

Practitioners are reminded, yet again, that the derelictions are unacceptable and must not be repeated.

[6] It is trite that where a party fails to comply with a rule of Court within the prescribed timeframes, condonation must be sought. Despite the respondents' purported filed Heads not having reached the Court, they were also filed six months out of time. Condonation is not to be had merely for the asking. The applicant has not contended that the failure to purge their default would prejudice him irreparably. The contrary would be true if the hearing was postponed.

The historical background to this review

[7] The Municipality advertised and filled the vacant position of Director: Technical Infrastructure and Community Services. Of the five candidates who were shortlisted and interviewed, the applicant was appointed. The Municipality notified him of his appointment with immediate effect by letter dated 22 December 2022, under the

signature of the Municipal Manager, Mr Willie Blunden. The decision was taken at the Council meeting held on the same day by Council Resolution No SC 70/12/2022. The appointment was a fixed term contract with effect from 03 January 2023 until 31 December 2027. His remuneration was based on Midpoint to a total amount of R905,626.00 per annum.

[8] In a subsequent undated letter (during February 2023) addressed to the applicant by the Acting Municipal Manager, Mr K Scholtz, he was informed that, following a report that Council had received from the MEC querying his appointment at Midpoint salary, the Council resolution taken on 22 December 2022 was rescinded and his salary would now be on a minimum point of R859,002.00. He was directed to repay the five months overpayment by no later than 15 June 2023.

[9] In a letter dated 07 February 2023 by the Head of Department (HOD): Cooperative Governance, Human Settlements and Traditional Affairs (COGHSTA), Northern Cape, to the Municipal Manager (KLM4) which was initially withheld from the applicant, he was informed in relevant part:

> *"12. Since the Municipal Council resolved on the appointment of the candidate without concurrence from the MEC for local government and offered him a Total Remuneration Package outside the ambit of the relevant pay scales are in contravention with the LG: Upper Limits of Total Remuneration Packages payable to Municipal Managers and Managers directly accountable to Municipal Manager Gazette No 47538 dated 18 November 2022. The decision by the Municipal Council is unlawful.*

> *13. It is against this backdrop, that the municipality must re-advertise the post of Director: Technical, Infrastructure and Community Services to avoid any possible litigations."*

[10] After receiving the letter (KLM 4) from the HOD addressed to the Municipal Manager, Council met and resolved the issue by making the following recommendations (KLM 5):

> *"12. That the resolution taken on 22 December 2022 at a Special Council Meeting be rescinded.*
>
> *13. That the Council resolve that the Director: Infrastructure and Community Services be appointed on remunerations package R859,002.00 as from the 1 January 2023.*
>
> *14. That the Director: Infrastructure and Community Services pay back to the Municipality the overpayment [made] due to an error.*
>
> *15. That the Municipal Manager inform the Director: Infrastructure and Community Services of Council's decision and that he be given 5 days to respond and if the Director fails to accept that the Municipal Manager…*(sentence ends abruptly and is incomplete).

[11] The applicant lodged a formal grievance against the Municipal Manager on 16 May 2023. We cannot go into the details of the grievance because they are not before us. The applicant requested that the grievance be dealt with by the Mayor, cited as the third respondent, Ms Irene Williams. To his amazement, his grievance was placed in the hands of the very third parties that his concerns related to. He had also requested but was denied, a copy of the resolution that altered his appointment with a reduced salary. He applied for and was granted leave from work but on his return

an instruction was issued to deduct over 40% of his salary for the months of July and August 2023.

[12] The applicant then referred the matter to the Bargaining Council which conciliated the dispute on 30 August 2023. Mr Willie Blundin, the fourth respondent, represented the Municipality at conciliation stage and sought an indulgence from the Commissioner until 01 September 2023 to file written submissions. Notwithstanding that request, the Municipal Manager abandoned the dispute resolution process and declared the appointment of the applicant unlawful. This decision was followed by a letter under signature of the Municipal Manager, dated 31 August 2023, terminating the applicant's services with effect from 01 September 2023. It reads in relevant part:

*"My office has dictated a letter dated 22 December 2022 in which Council's resolution was given expression. I want to emphasise that your appointment was **subject to concurrence from the MEC,** which was clearly set out in paragraph 1 of the letter.*

Subsequently, thereafter (I attached a copy of letter from Coghsta) my office received a letter from Coghsta dated 7 February 2023 in which the process of your appointment was declared unlawful. Considering the outcomes from Coghsta and furtherance to your dispute referral to the SALGBC, in respect of the reduction of your salary, I must inform you that your appointment, [due] to no fault of yourself, has been declared unlawful and cannot be rectified.

Therefore, your service at the Kgatelopele Local Municipality will come to an end on 01 September 2023. I will give instruction to the CFO and the Senior Human Resource Management, to prepare the leave accumulated."

<u>Jurisdiction of the High Court</u>

[13] It was contended on behalf of the respondents that this Court lacks jurisdiction to hear this matter. The Apex Court has in *Baloyi v Public Protector and Others* 2022 (3) SA 321 (CC) at para 40 made these salutary remarks:

> *"[40] The mere potential for an unfair-dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, and a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right). The following dictum of the Supreme Court of Appeal in Makhanya, which squarely addressed a contractual cause of action in the employment context, is apposite in this regard:*
>
>> *'The LRA creates certain rights for employees that include the right not to be unfairly dismissed and [not to be] subjected to unfair labour practices....Yet employees also have other rights, in common with other people generally, arising from the general law. One is the right that everyone has (a right emanating from the common law) to insist upon performance of a contract....*
>
> *When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'"*

[14] We are mindful that this Court has concurrent jurisdiction with the Labour Court. We have assessed the jurisdiction of this Court on the basis of the pleadings and arrived at the conclusion that this matter does not fall within the exclusive purview of the Labour Court. The applicant's cause of action is founded on an administrative action under PAJA.

[15] The question that falls for determination is whether or not the Municipal Manager had the authority to terminate the services of the applicant, and if so, on what basis. To start with, regard must be had to the fact that the applicant was appointed in terms of s 56 of the Local Government: Municipal Systems Act 32 of 2000 which stipulates:

> "**56 Appointment of managers directly accountable to municipal managers**
>
> *(1)(a) A municipal council, after consultation with the municipal manager, must appoint-*
>
> *(i) a **manager** directly accountable to the municipal manager; or*
>
> *(ii) an **acting manager** directly accountable to the municipal manager under circumstances and for a period as prescribed.*
>
> *(b) A person appointed in terms of paragraph (a) (i) or (ii) must at least have the skills, expertise, competencies and qualifications as prescribed."*

[16] It cannot be gainsaid that the applicant was appointed as a manager and not an acting manager. This distinction is crucial because the legislature has distinguished between appointments

made in terms of s 56(1)(a)(i) and s 56(1)(a)(ii) of the Municipal Systems Act. Section 56(1)(c) which applies to acting managers, stipulates:

> *"(c) A person appointed in terms of paragraph (a) (ii) may not be appointed to act for a period that exceeds three months: Provided that a municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months."*

[17] Section 56(8) provides that a person appointed in a permanent capacity as a manager directly accountable to the Municipal Manager when this section takes effect, must be regarded as having been appointed in accordance with this section. The appointment of the applicant by the Municipal Council had met the requirements of s 56(1)(a)(i) and there was no basis for the Municipality to refer his appointment to the MEC: COGHSTA. It is axiomatic that a HOD cannot usurp the function of the Court and declare an appointment unlawful.

[18] The pronouncements by Skweyiya J in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC)[1] para 29 are insightful:

> *"[29] The rule of law is a founding value of our constitutional democracy. It is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The supremacy of the*

[1] Also reported as (2014) 35 ILJ 613 (CC); (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC) (18 December 2013)

> *Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights."*

[19] Of importance is that, wrongly or rightly, the Municipality operated under a misconception that its Council decision was unlawful. It, however, did not approach this Court to review its decision under the principle of legality. Instead, its election was not only to rescind the resolution by Council, but also to reduce the applicant's salary and terminate his services on the stroke of a pen. This conduct, especially after creating the impression that the Municipality was following a dispute resolution mechanism only to abandon the process overnight, has to be deprecated as acting in bad faith.

[20] An MEC or other State functionaries, for that matter, is entitled to approach the Court for relief in circumstances where they committed an error. The Supreme Court of Appeal (SCA) in *Pepcor Retirement Fund & Another v Financial Services Board and Another* [2003] ZASCA *56;* 2003 (6) SA 38 (SCA) at para 10 emphasised that public functionaries '*may not only be entitled but also bound to raise the matter in a court of law*'. In *Ntshangase v MEC for Finance: KwaZulu-Natal & Another [2009] ZASCA 123; 2010 (3) SA 201 (SCA); (2009) 30 ILJ 2659 (SCA),* the MEC for Finance, KwaZulu-Natal sought to review a decision made by the chairperson of a disciplinary committee in the course of sanctioning an employee for misconduct. The SCA held that the MEC in that matter was bound to raise the irregular decision in court as a public

functionary exercising a power in the interests of the public in terms of legislation.

[21] It is common cause that the applicant had not only accepted the offer of the position, but also accepted the salary. It is presumed that he had adapted his expenses to the salary and position. The Municipality has not implied in its papers that the applicant lacked the skills, expertise, competencies and qualifications required for the said post. The HOD stated in the letter that the post must be re-advertised to avoid litigation. It is incomprehensible how re-advertising an already filled position would avoid litigation or right a wrong. The Municipal Manager repeated the HOD's sentiments.

[22] The salutary remarks by Skweyiya J in *Khumalo*[2] bear repeating:

> *"[56] Considering the courts' power to grant a just and equitable remedy the impact of a finding of invalidity may be ameliorated by fashioning a remedy that is fair to Mr Khumalo. In considering the factors above, particularly the lack of a complaint against Mr Khumalo's performance, a just and equitable remedy would in all likeliness result in him keeping his job, if his promotion were found to be unlawful. Therefore, on this leg of the test, the consequences and potential prejudice do not in this case, and ought not in general, to favour the Court non-suiting an applicant in the face of the delay. The application of this aspect of the test set in Gqwetha must be contextualised in the courts' discretion to grant a just and equitable remedy."*

[23] Regard being had to the aforementioned considerations and authorities, it is clear to me that the fourth respondent, the Municipal Manager, lacked the authority to terminate the

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[2] At para 56

applicant's services. The respondent's counsel conceded that the decision to terminate the applicant's services was unlawful but still persisted and countered that the Labour Court was exclusively clothed with the jurisdiction to hear the matter. This submission is unmeritorious. The Municipal Manager's conduct is telling because when he sought indulgence from the Commissioner at the Bargaining Council he had no intention of returning to that process. The evidence shows that he had already drafted a letter to be served on the applicant on 31 August 2023 terminating his services with effect from 01 September 2023. This is not only malicious and vindictive conduct but also an unlawful exercise of public power.

[24] The Municipality could not offer a benefit to the applicant and withdraw it, for no fault of his, without affording him a proper opportunity to be heard. This is highly irregular. When we heard this matter on review, the post was not yet filled. It is just and equitable under these circumstances for the applicant to be restored to the position in which he was before the resolution of December 2022 was rescinded.

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

1. It is declared that the fourth respondent, Mr Blundin, in his capacity as the Municipal Manager, lacked the authority to terminate the applicant's services.

2. The termination of the applicant's services on 31 August 2023 by the fourth respondent was unconstitutional, invalid and of no force and effect and is reviewed and set aside.

3. The first to fourth respondents are ordered to reimburse the applicant's salary deductions made by the first respondent in July and August 2023.

4. The first respondent is ordered to re-instate the applicant in the previously held position of Director: Technical Infrastructure and Community Services.

5. The first to the fourth respondents are ordered to pay the costs of this application on a scale between attorney and client, jointly and severally, the one paying the other to be absolved.

[redacted]

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur.

[redacted]

pp. **A STANTON**
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

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