



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not reportable
Case no: J 1276 /17

In the matter between:

BRIAN MOLEFE

Applicant

and

ESKOM HOLDINGS SOC LIMITED

First Respondent

MINISTER OF PUBLIC ENTERPRISES

Second Respondent

THE DEMOCRATIC ALLIANCE

Third Respondent

THE ECONOMIC FREEDOM FIGHTERS

Fourth Respondent

Heard: 27 and 29 June 2017

Delivered: 4 July 2017

Summary: Urgent application to declare the Applicant's dismissal unlawful and void *ab initio*. Applicant seeks enforcement of his contract of employment. Disputed whether Applicant resigned in December 2016 and whether a valid contract of employment existed in June 2017 when he was allegedly dismissed. High Court applications to be decided first. Matter is postponed *sine die*.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant approached this Court on an urgent basis for an order to declare his dismissal unlawful and void *ab initio*.
- [2] The application is opposed.

Brief history

- [3] The undisputed background facts are as follows: The Applicant (Molefe) commenced employment with the First Respondent (Eskom) as acting chief executive from 17 April 2015 to 30 September 2015. On 7 March 2016 Molefe entered into a five year fixed term employment contract with Eskom and in terms of the contract he was appointed as 'group chief executive' (chief executive) of Eskom with effect from 1 October 2015.
- [4] The contract provided *inter alia* that Molefe would become a member of Eskom's Pension and Provident Fund (EPPF), subject to the rules thereof, and that Eskom would pay his monthly contributions to the said fund.
- [5] On 2 November 2016 a report titled 'State of Capture' prepared by the former Public Protector, Advocate Madonsela, was released. In the report it was observed *inter alia* that there was a distinct line of communication between Molefe of Eskom, the Gupta family and directors of their companies and that these links could not be ignored as Molefe did not declare his relationship with the Gupta family. On his own version Molefe was concerned about the negative press that would ensue as a result of the observations made against him in the 'State of Capture' report.
- [6] On 11 November 2016 Molefe issued a statement wherein he made reference to the release of the 'State of Capture' report and stated that he would clear his name in future when a commission of inquiry is appointed to conduct a proper investigation into the Public Protector's observations. Molefe recorded that in the meanwhile harm is done to Eskom's reputation and that he had decided to leave his employ at

Eskom with effect from 1 January 2017 and he did so 'in the interests of good corporate governance.' Molefe reiterated that it was not an admission of wrongdoing, but was the correct thing to do in the interests of Eskom and good corporate governance. The statement concluded by saying 'I go now, because it is in the interests of Eskom and the public it serves, that I do so.'

- [7] On the same day the Eskom Board issued a statement to the effect that Molefe has decided to step down in the interest of good corporate governance. The Minister also issued a media statement on 11 November 2016 regarding Molefe's departure and stated that she was saddened by Molefe's resignation but she respected his decision to do so.
- [8] Also on 11 November 2016 Molefe wrote a letter to Dr Ngubane (Ngubane), the chairman of Eskom's board, wherein he requested approval for early retirement in terms of the rules of the EPPF read with a resolution of the 'People and Governance' subcommittee of the board dated 9 February 2016. Molefe indicated that his last day of service would be 31 December 2016.
- [9] On 24 November 2016 Ngubane responded to Molefe's letter of 11 November 2016 and confirmed that Molefe's last day of service would be 31 December 2016. Ngubane further recorded that Molefe's early retirement in terms of the EPPF rules and Board resolution was approved.
- [10] Molefe's employment at Eskom ended on 31 December 2016.
- [11] Molefe was sworn in as a Member of Parliament on 23 February 2017.
- [12] In April 2017 the Second Respondent (Minister) read in the Sunday newspapers that Molefe had been paid a R 30 million pension payout and she convened an urgent meeting with the Eskom Board on 19 April 2017 to discuss the pension payout she became aware of in the Sunday newspapers. The Minister raised queries about Molefe's pension benefits and she issued a statement on 23 April 2017 to the effect that the

pension benefits Molefe thought he was entitled to lacked a legal rationale and that the Eskom board had to engage with him regarding the pension payment. The Minister made it clear that she declined the proposed R 30 million pension payout.

- [13] The rules of the EPPF clearly do not permit early retirement before the age of 55 and as Molefe has not reached the age of 55, he could not take early retirement.
- [14] Molefe's case is that he and Eskom harboured under the common mistake that he had reached the age (50) at which he could take early retirement and it turned out later that their understanding of the EPPF rules was incorrect. The EPPF rule 24 clearly states that the age for early retirement is 55 and not 50 as Molefe and Eskom understood it to be. Molefe explained that neither himself nor Eskom knew this before they concluded the early retirement agreement in November 2016.
- [15] In the same breath Molefe explained that his understanding of the EPPF rules was informed by the Board resolution of 9 February 2016 and based on this understanding he thought he was entitled to early retirement and the pension benefits arising from such early retirement. Molefe also explained that he did not check the EPPF rules and merely assumed that he would qualify for early retirement and that all was in order with his early retirement and attendant pension benefits.
- [16] Be that as it may, by April 2017 it became evident that Molefe could not and did not qualify for early retirement and that his purported early retirement could not be effected. Molefe submitted that as the early retirement agreement concluded between himself and Eskom was based on a common misunderstanding of the EPPF rules, Eskom obtained legal advice on how to regularise the situation. Based on the legal advice obtained, four options were presented namely a consensual rescission of the early retirement agreement which entailed an agreement to cancel the early retirement agreement and revert to the *status quo ante*, or a non-consensual rescission of the early retirement agreement, or a

rescission of the early retirement agreement with the option for Molefe to resign and lastly payment in settlement of the matter.

- [17] The Eskom Board preferred the first option of consensual rescission of the early retirement agreement and indicated its willingness to accept Molefe back as its group chief executive. The Eskom Board presented the four options to the Minister and indicated its preference of the consensual rescission.
- [18] Eskom passed a resolution on 2 May 2017 to rescind its decision to approve Molefe's request for early retirement.
- [19] Eskom and Molefe understood that the consequence thereof was that the *status quo ante* had to be restored and that he had to resume his duties as group chief executive and the amounts paid out by Eskom on account of Molefe's retirement would have to be repaid to Eskom.
- [20] A letter to this effect was addressed to Molefe on 3 May 2017 and Ngubane informed Molefe that the Board had to review its decision of 21 November 2016 and that the decision to approve Molefe's early retirement was rescinded and Molefe had to resume duty as Eskom's group chief executive. Ngubane made specific reference to the potential impact the decision might have on Molefe's 'current role.' It is undisputed that Molefe was a Member of Parliament at the time the letter was addressed to him. Ngubane concluded by saying they were looking forward to a favourable response from Molefe.
- [21] On 11 May 2017 Ngubane addressed a letter to Molefe wherein Eskom tendered the resumption of Molefe's duties as chief executive by 15 May 2017 on the basis as set out in the reinstatement agreement.
- [22] Molefe signed the reinstatement agreement on 11 May 2017.
- [23] In terms of the reinstatement agreement Molefe's employment agreement signed on 7 March 2013 (the principal agreement) shall continue on its terms, Molefe should resume duties in terms of the principal agreement on 15 May 2017, Eskom should take all necessary

steps to give effect to the reinstatement agreement, Molefe should pay all amounts due to the EPPF which were paid to him pursuant to the retirement agreement by no later than 30 November 2017 and the period between 1 January 2017 and 15 May 2017 would be regarded as unpaid leave.

- [24] On 12 May 2017 the Minister issued a statement indicating that Molefe had agreed with the Board to serve the remainder of his original contract of employment.
- [25] Molefe returned to Eskom as chief executive on 15 May 2017 and resumed his duties in that capacity.
- [26] On 15 May 2017 the Third Respondent (Democratic Alliance referred to as DA) filed an urgent application in the High Court: Gauteng Division, Pretoria under case number 33051/2017 seeking *inter alia* an order to review and set aside the decision to reinstate Molefe as Eskom's chief executive.
- [27] On 19 May 2017 the Fourth Respondent (Economic Freedom Fighters referred to as EFF) filed an urgent application in the High Court: Gauteng Division, Pretoria under case number 34568/2017 seeking *inter alia* an order to set aside the decision to re-appoint Molefe as chief executive.
- [28] The DA and EFF applications (the High Court applications) were set down for hearing in the High Court in Pretoria on 6 and 7 June 2017.
- [29] On 31 May 2017 the Minister issued a directive to the Eskom Board to rescind the decision to reinstate Molefe as chief executive. The Minister was of the view that the appropriate process was not followed.
- [30] On 2 June 2017 the Eskom Board resolved to rescind the reinstatement agreement concluded between Molefe and Eskom on 11 May 2017. On the same date Molefe was informed that the reinstatement agreement was rescinded and that he was no longer the chief executive of Eskom.
- [31] Molefe subsequently filed an urgent application in this Court on 5 June 2017 seeking an order to declare his dismissal unlawful and void *ab*

initio. Molefe sought his urgent application to be heard and his employment status to be restored prior to the High Court applications that were due to be heard on 6 June 2017.

- [32] Rule 8 of the Rules of the Labour Court provides that the Registrar of this Court must fix a date, time and place for the hearing of an urgent application and as soon as the Registrar has allocated same, the application should be served on the respondent party. Molefe did not approach the Registrar to allocate and enrol the urgent application for 5 June 2017 and as there was no compliance with the Rules, Molefe's urgent application was not enrolled for hearing on 5 June 2017.
- [33] On 6 June 2017 and at the High Court in Pretoria the DA, EFF, Eskom and Molefe agreed to an order that Molefe would not attend at Eskom for the purpose of performing his employment duties, that Eskom does not require Molefe to perform any employment duties and that the Labour Court application would be postponed to a date to be arranged with the Registrar of the Labour Court. The High Court applications were postponed *sine die*.
- [34] The DA and EFF subsequently filed applications in this Court seeking leave to intervene and be joined as parties in case number J 1276 /17.
- [35] The intervention application was argued on 27 June 2017 and the DA and EFF were granted leave to intervene and were joined as Respondents.

The High Court applications

- [36] In the main application filed in this Court as well as the intervention applications filed by the DA and EFF reference is made to the High Court applications and the parties provided this Court with the papers in the pending High Court applications.
- [37] The High Court applications are relevant to the extent that they are related to the relief sought in the intervention applications and the relief

this Court is inclined to grant, thus it is necessary to provide a brief summary of the pending High Court applications.

- [38] The High Court applications filed by the DA and EFF seek relief in terms of a part A and a part B. Part A seeks relief pending the determination of the relief sought in part B and the relief so sought is that Molefe be interdicted from performing any duties or functions or from receiving any benefits or entitlement deriving from or associated with the post of Eskom's chief executive and that the Eskom Board be interdicted from taking any steps to reinstate Molefe.
- [39] In part B of the relief the DA seeks an order to review and set aside the Minister's decision to reinstate Molefe as Eskom's chief executive and that any payment or sum of money received by Molefe pursuant to the early retirement be declared invalid and that Molefe be ordered to repay such amount.
- [40] In part B of its application the EFF seeks an order directing the Minister to remove the members of the Eskom Board and for the decision of the Board to reappoint Molefe as chief executive and the Minister's decision to approve such reappointment to be declared irrational, unlawful, unconstitutional and invalid and for that to be set aside. The EFF also seek an order to declare that Molefe is unsuitable to hold the position of chief executive of Eskom.
- [41] The Respondents in the High Court applications are Eskom, the Minister and Molefe and they all filed opposing papers.
- [42] When the matter was enrolled for hearing on 6 and 7 June 2017 it did not proceed as an interim settlement was reached between the parties, as already alluded to *supra*.
- [43] The DA's case before the High Court is that Molefe resigned and his employment thus terminated and the decision to reinstate Molefe amounted to a fresh appointment which is in breach of the requirements of the relevant legal framework and is irrational. The decision to reinstate is unlawful and falls to be reviewed and set aside. The reasons why the

DA avers that Molefe indeed resigned are fully dealt with in the papers before the High Court.

- [44] The EFF's case before the High Court is that Molefe's contract of employment with Eskom came to an end on 1 January 2017 and it could not be revived without a lawful recruitment process. Subsequent to Molefe's departure, Eskom embarked on a recruitment process and advertised the position of chief executive with the closing date for applications on 20 March 2017, bearing credence to the finality of Molefe's departure. The reinstatement of Molefe as chief executive subverted an ongoing recruitment process and is unlawful, procedurally unsound, unconstitutional and irrational and falls to be reviewed and set aside. Molefe's contract of employment could not be revived by simply reinstating him without following a lawful process.
- [45] The EFF's case is further that Molefe could not have retired as he is not of retirement age, nor could he take early retirement and he has in fact resigned from Eskom.
- [46] The Minister filed an explanatory affidavit wherein she explained that she was under the impression that Molefe resigned on 11 November 2016 as chief executive and to her mind his resignation was just that. The Minister further explained that she was unaware of the fact that Molefe applied for early retirement and that Eskom had on 11 November 2016 accepted such an application. The Minister stated that once these facts were explained to her, she could not hold the position that Molefe resigned. The Minister explained the reasons why the early retirement agreement was rescinded and this was based on her understanding that such an agreement was reached with Molefe. However, the Minister was not a party to the early retirement agreement and the agreement was invalid and the *status quo ante* had to be restored.
- [47] Eskom filed an opposing affidavit explaining that Molefe has not resigned but in fact requested early retirement and his request for early retirement was accepted. The early retirement agreement concluded between Eskom and Molefe was given effect to and Eskom made payment of R

30 million to the EPPF. Molefe departed from Eskom on the basis of his early retirement and became a Member of Parliament. In April 2017 the Board concluded that the early retirement agreement had legal impediments to its implementation and had to be rescinded and the *status quo ante* was restored and Molefe had to resume his duties as chief executive.

- [48] Eskom's case is that in consequence of the resolution to rescind the early retirement agreement, Molefe and Eskom concluded a reinstatement agreement which provided for Molefe's employment contract to continue on its terms, for Molefe to resume duty as chief executive and to repay the amounts he received pursuant to the early retirement agreement and for the period between 1 January 2017 until 15 May 2017 to be treated as unpaid leave. Eskom's case is that Molefe has not resigned and when the early retirement agreement was rescinded, the *status quo* as it existed prior to the conclusion of the retirement agreement had been restored.
- [49] In Molefe's opposing affidavit he stated that the High Court applications rest on the incorrect premise that his original contract of employment came to an end when he left on 31 December 2016 and that his return to Eskom required a decision by the Eskom Board or the Minister. Molefe's case is that his contract did not come to an end because the early retirement agreement reached with Eskom was based on a common mistaken understanding that he was eligible for early retirement in terms of the EPPF rules when that was not the case. His purported retirement was not effective as it was influenced by a common error.
- [50] Molefe's case is that his employment never terminated and there was no decision made or required to reinstate him.
- [51] In its replying affidavit the DA addressed the Respondents' version that Molefe did not resign but instead applied for early retirement, which agreement could not be enforced. The DA submitted that Molefe resigned and that his employment with Eskom indeed terminated and

that a decision was taken to reinstate Molefe, which decision is unlawful and subject to review.

- [52] In the EFF's replying affidavit it is disputed in fact and in law that Molefe's employment contract did not terminate at the end of December 2016. The reasons why the EFF avers that Molefe indeed resigned are fully dealt with in the papers before the High Court.

The Labour Court application

- [53] Molefe approached this Court on an urgent basis and explained that it is of considerable importance for him to have his employment status restored, in that absent an order from this Court declaring his dismissal to have been unlawful and void *ab initio*, it will render the High Court applications academic to his ultimate disadvantage.
- [54] Molefe submitted that he needs his employment status to be restored so that he could effectively participate and oppose the High Court applications.
- [55] It is evident from the High Court applications that Molefe was cited as a Respondent in his personal capacity and that he has filed comprehensive opposing papers. I find it difficult to accept that Molefe needs his employment status to be restored so that he could effectively participate and oppose the High Court applications. As it stands Molefe is participating and opposing the High Court applications.
- [56] The High Court applications concern *inter alia* the lawfulness of the decision to reinstate Molefe, which is separate from the subsequent decision to rescind the reinstatement agreement. Molefe is entitled to participate and oppose the High Court applications and he can do so without an order from this Court restoring his employment status.
- [57] The Respondents before this Court, except Eskom, took issue with the urgency of this matter. I have considered the submissions raised in respect of urgency and although those are not without merit and although

urgency may be questionable in a case where the effect of the relief sought is specific performance of a contract, I deem it in the interest of the parties before this Court to deal with the matter and to give direction as to the way forward.

Molefe's case

- [58] In this Court Molefe's case is that the agreement concluded between himself and Eskom relating to his early retirement (the early retirement agreement) was concluded in good faith and his request for early retirement was intricately linked to the pension benefits flowing therefrom. The rules of the EPPF however do not permit early retirement at the age of 50 and the parties' understanding of the EPPF rules was incorrect and as the agreement for early retirement had been entered into on the basis of a common mistake, it was rescinded and the *status quo ante* was restored.
- [59] When the early retirement agreement was rescinded and the *status quo ante* prevailed Molefe had to resume his duties as chief executive as a continuation of his contract of employment. Molefe's case is that he did not resign from Eskom and that his departure at the end of December 2016 was on account of early retirement. The terms of the early retirement agreement could however not be placed into effect as a matter of law and the early retirement agreement is void.
- [60] Molefe submitted that his contract of employment entered into in March 2016 did not come to an end and he remained employed as Eskom's chief executive in terms of the said contract. The restoration of the *status quo ante* means that his employment never terminated but continues. Molefe's purported retirement from Eskom's employ was not effective and was void *ab initio* on the basis of a common mistake.
- [61] In respect of the reinstatement agreement Molefe's case is that the agreement did no more than to regulate the unwinding of the financial consequences arising out of the implementation of his early retirement agreement and the parties' performance in terms of the void early

retirement agreement. Molefe submitted that the reinstatement agreement had no legal consequence beyond this. The early retirement agreement was a nullity from inception and it was not necessary for Eskom to rescind the early retirement agreement wherefore the reinstatement agreement was not required to declare the early retirement agreement a nullity.

- [62] In summary Molefe's case is that his early retirement agreement was a nullity, his contract of employment dated 7 March 2016 did not come to an end on 31 December 2016 or on any other date and his return to Eskom on 15 May 2017 was pursuant to a valid and operative employment contract concluded on 7 March 2016 and was not the result of an appointment by Eskom or the Minister in May 2017.
- [63] The decision the Eskom Board took on 2 June 2017 constituted a summary dismissal and the decision was unlawful for a number of reasons. Firstly, the Board has no power to remove Molefe as chief executive as that power is exclusively entrusted in the Minister and the Board purported to dismiss Molefe in circumstances where it did not have the power to do so.
- [64] Secondly, Eskom's memorandum of incorporation (MOI) requires Molefe's dismissal to be effected in terms of section 186(1)(a) of the Labour Relations Act¹ (the Act) and neither Molefe's contract of employment nor the MOI permit Eskom or the Minister to impose a summary dismissal and such dismissal is in breach of his contract of employment read with clause 14.3.6 of the MOI.
- [65] If it is accepted that Molefe's summary dismissal was effected at the instance of the Minister, the Minister had no authority to do so because her conduct amounted to an unlawful repudiation of his contract as the Minister had no legal grounds premised on either capacity, operational needs or conduct to effect his dismissal. Molefe's case is that his dismissal was motivated by political considerations which are not lawful grounds for dismissal. His case is further that the Minister failed to follow

¹ Act 66 of 1995.

the mandatory requirement that the Act applies to the removal of the chief executive and he should have been given a hearing in compliance with the requirements of procedural fairness.

[66] Thirdly, Eskom was not entitled to rescind the reinstatement agreement as it elected to honour Molefe's contract of employment and in exercising such election, it divested itself of any right it may have to dismiss him. The election was exhaustive and irrevocable.

[67] Finally, the retirement agreement was a nullity *ab initio* and the reinstatement agreement had no legal consequences beyond formalising the recognition of the legal position that Molefe's contract of employment had not been terminated. The rescission of the reinstatement agreement cannot bring about Molefe's dismissal and he is entitled to insist on the enforcement of his contract of employment.

[68] Molefe seeks an order declaring his dismissal unlawful and void *ab initio*.

Eskom's case

[69] Eskom filed an affidavit stating that it abides by the decision of this Court in respect of the merits of the application and only opposed a cost order sought against it.

[70] Eskom made it clear that it did not want to be embroiled in a dispute as to whether the resumption of Molefe as Eskom's chief executive was legally valid and it decided to give effect to the Minister's directive to rescind the decision to reinstate Molefe. It is for the Minister to defend the matter.

The Minister's case

[71] In her opposing affidavit the Minister made it clear that the question whether Molefe has resigned or not formed the basis of a dispute in this application.

[72] The Minister explains that her understanding is that Molefe resigned as chief executive of Eskom on 11 November 2016 and such understanding

is based on a meeting she had with Molefe at her home a few days before Molefe publicly announced his decision to step down. The Minister referred to Molefe's departure as a resignation and he did not correct her or suggested to her that he intended to take early retirement. The Minister met and interacted with Molefe and the Eskom Board after her media statement of 11 November 2016 and neither Molefe nor any member of the Board corrected her description of his departure as one of resignation.

- [73] The Minister submitted that her view that Molefe resigned persisted for five months until 16 April 2017 when she read in the Sunday newspapers about the R 30 million pension payout for Molefe. She was surprised to discover that the Board had concluded an early retirement agreement with Molefe and she convened an urgent meeting with representatives of the Board to discuss the newspaper revelations. The Minister expressed her disagreement with the early retirement agreement and the pension payment and she instructed the Board to get back to her with an appropriate pension proposal.
- [74] On 9 May 2017 the Minister met with the Board to discuss the proposals to address her concerns and she was informed that Eskom obtained an opinion from senior counsel to the effect that Molefe did not qualify for early retirement in terms of the EPPF rules and as the early retirement agreement was concluded on a mutual misunderstanding of the EPPF rules it was invalid. The Board presented the Minister with four proposals and indicated that it preferred the proposal of a consensual rescission of the early retirement agreement and reinstatement of Molefe as chief executive. At the time the Minister accepted the advice the Board had obtained from senior counsel and on 12 May 2017 she issued a statement confirming Molefe's reinstatement as chief executive on the proviso of its legality.
- [75] On 24 May 2017 President Jacob Zuma appointed an inter-ministerial committee (IMC) comprising the Minister and the Ministers of Justice, Finance and Energy to consider the implications of Eskom's decision to reinstate Molefe. A meeting between the IMC and the Eskom Board took

place on 31 May 2017 and it subsequently concluded that it would be in the best interest of Government, Eskom and the country as a whole for the Board to rescind the decision to reinstate Molefe. On the same day the Minister issued a directive to that effect to the Board and on 2 June 2017 the Board complied with the Minister's directive.

[76] The Minister's case is that the early retirement agreement could not be set aside as void *ab initio* with consequent reinstatement of the *status quo ante* for a number of reasons. Firstly, Molefe has resigned and expressed an unequivocal intention to depart on 31 December 2016 before the early retirement agreement was considered by the Board or concluded. Any common mistake had no impact on Molefe's decision to step down. The early retirement agreement was merely a mechanism to achieve a better outcome and there was no scenario under which Molefe would remain an employee. Secondly, before Molefe could have been reinstated he had to undergo the procedure contemplated in the MOI and there was no compliance with any of the procedures set out in clause 14.3 of the MOI. The Minister's approval of the reinstatement agreement was accordingly not effective.

[77] The Minister rejected the notion that Molefe was unaware of the rules of the EPPF and that he did not check the rules and make sure he was entitled to early retirement as inherently improbable.

[78] The Minister further submitted that the reinstatement agreement was invalid and Molefe's reinstatement was premised on an invalid agreement. There was no dismissal as there had not been a valid appointment after Molefe's resignation on 11 November 2016.

The DA's case

[79] The DA's case is that Molefe could only be dismissed if he was validly and lawfully employed to begin with. The DA submitted that on a proper understanding of all the facts, in truth and in law Molefe resigned. His purported early retirement agreement with Eskom was unlawful.

- [80] The DA submitted that the evidence demonstrated a clear intention that Molefe's employment with Eskom was terminated on 31 December 2016. His request for early retirement and Eskom's acceptance thereof was not conditional in any way and the parties clearly contemplated an end to his employment with effect from 31 December 2016. This intention is also evident from the statements made by Molefe, Eskom and the Minister on 11 November 2016 and the appointment of an acting chief executive. Molefe left Eskom's employ on 31 December 2016 and was sworn in as a Member of Parliament on 23 February 2017. Section 47(1)(a) of the Constitution does not permit Molefe to be a member of the National Assembly and the chief executive of Eskom and Molefe's contention that during the period when he left Eskom and went to Parliament as a Member of Parliament, he was still employed and was placed on unpaid leave, is contrived as an afterthought and is manifestly false. Eskom duly advertised the vacant position of chief executive.
- [81] The DA disputed that the decision to reinstate Molefe is merely a continuation of his employment contract as it was a deliberate decision and Molefe's employment did not continue by operation of law when the early retirement agreement was rescinded, nor can it be deemed to never have terminated. The DA's case is that the reinstatement agreement is unlawful and irrational.

The EFF's case

- [82] The EFF submitted that the Minister exercises control and supervision over Eskom and she issued a directive to the Eskom Board to rescind the reinstatement of Molefe as chief executive and demanded that an open and competitive recruitment process be followed in the election of the most suitable candidate. The EFF stated that Molefe has not challenged the directive issued by the Minister which is the underlying *causa* for his dismissal.
- [83] The EFF further submitted that Molefe's employment came to an end in December 2016 and he was reinstated after a pension payout could not lawfully be disbursed to Molefe and after the Minister rejected such

payment. The reinstatement agreement violated the process prescribed for the appointment of a chief executive in Eskom's MOI, the ongoing recruitment process that followed Molefe's departure in December 2016 and section 195 of the Constitution².

- [84] The EFF took issue with Molefe's averment that he has not resigned and his contract did not terminate and submitted that such contention is unsustainable on the facts as Molefe could not have been a Member of Parliament and the chief executive of Eskom simultaneously.

The pertinent events

- [85] In my view there are three pertinent events namely Molefe's departure from Eskom in December 2016 (December departure), Molefe's return to Eskom in May 2017 (May return) and Molefe's departure from Eskom in June 2017 (June departure).
- [86] In respect of the December departure Molefe's case is that he had not resigned, but that he left in terms of an early retirement agreement reached with Eskom which agreement was void as it was influenced by a common error. Molefe's version is that his employment never terminated.
- [87] The version of the Minister, DA and EFF is that Molefe indeed resigned and that his contract terminated on 31 December 2016.
- [88] In respect of his May 2017 return Molefe's version is that as there was no resignation or valid early retirement agreement, the reinstatement agreement was nothing more than a mere continuation of his existing employment agreement that was signed on 7 March 2016 and his return was nothing but a restoration of the *status quo ante*.
- [89] The DA and EFF's version is that Molefe's May 2017 return constituted a new agreement as Molefe's employment terminated on 31 December 2016. Their case is that Molefe was not lawfully employed as he had resigned and was reinstated to the position of chief executive in terms of a reinstatement agreement which they submit was an unlawful and

² The Constitution of the Republic of South Africa, 1996

invalid agreement. The Minister's version is that Molefe has resigned and the reinstatement agreement was invalid and Molefe's reinstatement was premised on an invalid agreement.

[90] In respect of his June 2017 departure Molefe's case is that the decision to rescind the reinstatement agreement constituted a dismissal and the opposing Respondents' case is that as Molefe resigned, there existed no valid employment relationship hence there was no dismissal.

[91] In summary the three pertinent questions to be considered are firstly whether the December 2016 departure was premised on an invalid early retirement agreement or whether it was a resignation, secondly whether the reinstatement agreement entered into between Molefe and Eskom in May 2017 was valid or not and thirdly whether Molefe was dismissed on 2 June 2017 or not.

[92] These questions are interrelated for obvious reasons. A finding that Molefe indeed resigned would mean that the employment relationship terminated in December 2016 and such finding will impact on the question whether the subsequent reinstatement agreement was valid and will ultimately impact on the question whether there was a dismissal or not. Equally so will a finding that Molefe has not resigned impact on the questions relating to the validity of his reinstatement agreement and existence of dismissal.

Forum shopping

[93] In her opposing affidavit the Minister admitted that this Court has jurisdiction to hear this matter, but noted that the High Court also has jurisdiction to determine a dispute that is rooted in contract. The Minister submitted that the institution of the present proceedings in this Court is forum shopping of the most flagrant kind.

[94] The DA submitted that the pending High Court applications deal with overlapping subject matter concerning to a large extent the same set of facts, parties, legal principles and issues and there is a real potential for

conflicting judgments from the High Court and the Labour Court in this matter.

- [95] The DA argued that in bringing this matter before the Labour Court, the same parties must again traverse the same factual background and issues in further affidavits in this Court and it is an unnecessary and costly exercise in that there is an unnecessary duplication of proceedings with the associated escalating costs. This is more concerning in view of the fact that the Minister and Eskom are litigating this matter using public funds.
- [96] This was raised with Molefe's attorneys as far back as 4 June 2017 when the DA's attorneys stated in a letter to Molefe's attorneys that: *"We see no reason why Mr Molefe should not have raised any challenge to the decision of 2 June 2017 in the currently pending High Court proceedings. To challenge that in separate proceedings in the Labour Court is, we believe, an attempt at forum shopping and a process which is unnecessary, time consuming and wasteful of costs as well as the resources of the courts. It will lead to the highly undesirable situation where two different courts are asked to consider the issue of the validity of the 11 May 2017 decision. It has the potential for conflicting judgments on that issue."*
- [97] The DA's concern is that should this Court find in favour of Molefe, it would by implication have found that Molefe's reinstatement was lawful and such finding would result in a situation where the High Court is faced with a judgment from this Court on the same facts concluding that the reinstatement agreement is lawful.
- [98] The DA submitted that the correct forum to ventilate the issues is the High Court and that Molefe is forum shopping. The High Court has concurrent jurisdiction in respect of any matter concerning a contract of employment. The High Court is already seized with the matter and it is not open to Molefe to approach both Courts on the same issues in respect of the same facts to obtain relief which mirrors his opposition to the DA's High Court application.

- [99] The EFF raised the issue of forum shopping and submitted that Molefe is forum shopping, a practice that should not be countenanced as it presents the potential of contradicting judgments and an embarrassment to the judiciary, which should be avoided.
- [100] The factual and legal issues raised in this application are the same or similar to the issues raised in the High Court applications and the High Court is the correct forum to ventilate the issues.
- [101] Molefe disputed that he was forum shopping and Mr Graves on his behalf submitted that this Court has jurisdiction to adjudicate the matter and that Molefe has the right to institute legal proceedings in the Court of his choice.
- [102] This Court's jurisdiction to hear this matter is not disputed and I am alive to Molefe's right to institute legal proceedings in this Court and I do not suggest for one second that Molefe has no right to approach this Court. On the contrary, he has every right to do so and he has done so. My concern however, as I canvassed with Mr Graves during argument, remains whether this Court is in a position to declare a dismissal unlawful and void when there is an undecided dispute about the very existence of a valid employment relationship.

Issues to be decided

- [103] In the papers filed in this Court Molefe made it clear that this Court is only called upon to pronounce on the lawfulness of his dismissal on 2 June 2017. The issue regarding his reinstatement is an issue currently before the High Court and does not require this Court's consideration.
- [104] There are two questions that come to mind. The first is whether this Court can, in view of the dispute pending before the High Court, accept that Molefe was lawfully employed as at 2 June 2017. Whether Molefe was lawfully employed as at 2 June 2017 is an issue that is hotly disputed and properly ventilated in the High Court applications. The second is whether this Court can, in the absence of a finding that Molefe

was indeed lawfully employed as at 2 June 2017, decide on the lawfulness of his alleged dismissal.

[105] Molefe's case is that his early retirement agreement was a nullity, his contract of employment dated 7 March 2016 did not come to an end on 31 December 2016 or on any other date and his return to Eskom on 15 May 2017 was pursuant to a valid and operative employment contract concluded on 7 March 2016, which contract was unlawfully terminated on 2 June 2017.

[106] Molefe's case rests on two pillars namely that he was validly and lawfully employed at Eskom and that he was unlawfully dismissed due to a breach of his contract of employment.

[107] Logic dictates that before there could be a breach of a contract, a contract should exist and the first issue to be considered and decided is whether Molefe was lawfully employed as at 2 June 2017 before there can be a consideration of whether such contract was breached and whether he was unlawfully dismissed.

[108] The first question whether Molefe resigned or not and the validity of the reinstatement agreement and whether he was validly and lawfully employed are raised and fully ventilated in the High Court. There is a pending dispute concerning whether Molefe's employment with Eskom terminated in December 2016 and whether the subsequent reinstatement agreement signed on 11 May 2017 is lawful.

[109] The relief sought by Molefe in this Court necessitates a finding by this Court on the existence and lawfulness of his employment. In my view this Court could only decide the merits of this application after the High Court has decided the part B of the pending applications. To do otherwise would amount to dealing with the matter on a piecemeal basis and would pose the real risk of conflicting judgments.

[110] The approach Molefe wants this Court to take by dealing with the lawfulness of his dismissal before it is decided whether he was lawfully

employed, will amount to stepping into a minefield of undecided but relevant and related issues pending before the High Court.

[111] The question which this Court is called upon to decide namely whether Molefe was unlawfully dismissed, cannot be decided before a determination is made on whether Molefe was lawfully employed.

[112] Molefe disputed these concerns and submitted that a successful outcome for him in this application will have no adverse consequence for the pending High Court applications as it remains open to the DA and EFF to pursue the relief claimed in their High Court applications. This may be so, but this Court is not in a position to declare a dismissal unlawful and void when there is a dispute about the very existence of a valid employment relationship pending in the High Court.

Referral to trial

[113] The merits of the main application were to be argued on 29 June 2017. At the commencement of the proceedings Mr Graves handed up another bundle containing correspondence between the legal representatives of the parties before Court, a document setting out the chronology of events, supplementary heads of argument and a bundle of authorities referred to in the supplementary heads of argument.

[114] It appears from the correspondence placed before this Court that Molefe's attorneys approached the Respondents' attorneys on 28 June 2017 and indicated that there is a potential that this Court may experience difficulty in resolving certain factual matters which have been raised in the papers, which disputes did not exist at the time of launching the urgent application. In view of the affidavit the Minister filed in the Labour Court, in contrast to her affidavit in the High Court, there is a dispute between the Minister and Molefe relating to the status of his employment on 2 June 2017. Molefe's attorneys proposed that the most practical and suitable method to have the dispute determined, is to have the matter referred to arbitration in terms of the arbitration clause in Molefe's contract of employment.

- [115] Molefe indicated no objection to have his dispute with Eskom and the Minister be determined in accordance with the arbitration provisions. The DA and EFF were invited to participate as parties in the arbitration proceedings. The Respondents were requested to confirm their acceptance of the referral to arbitration and a draft order to that effect was sent to the Respondents.
- [116] The DA and the EFF rejected the proposal and recorded that the arbitration clause has from the outset provided a mechanism to Molefe and it is a mechanism that he could have invoked at any time. There is no need for Molefe to apply to the Court or to ask for an order from this Court to refer the dispute to arbitration, as he could have done so himself under clause 26 of his contract of employment.
- [117] The Minister also rejected the proposal to refer the matter to arbitration.
- [118] Mr Graves indicated that he wanted to argue the referral to arbitration, alternatively referral to trial before the merits of the main application are argued, as an application to refer a matter for the hearing of oral evidence or trial must be made *in limine* and not only after it becomes clear during argument that the applicant is failing to convince the Court on the papers³.
- [119] Mr Graves did not persist with the relief sought that this Court should refer the matter to arbitration and only persisted with his argument that the matter should be referred to trial in this Court.
- [120] Although the counsel for the Minister, DA and EFF submitted arguments on why this Court should not issue an order to refer the matter to arbitration, it is not necessary to deal with those arguments in view of the fact that the relief so sought is not persisted with.
- [121] In respect of the application to refer the matter for trial, Mr Hulley for the Minister submitted that Molefe's case is that the dispute of fact arose because of the about turn made by the Minister. Mr Hulley referred to the

³ *Law Society Northern Provinces v Mogami* (2010) (1) SA 186 (SCA) at para 23, *De Reszke v Maras and others* 2006 (1) SA 401 at para 33.

specific paragraphs in the Minister's answering affidavit where a dispute of fact may arise and those issues are defined and limited and relate in main to the issue whether Molefe resigned.

- [122] Mr Hulley submitted that there has to be a material dispute of fact to be referred for evidence or trial and the matter before this Court is a contractual one and the issues in dispute do not relate to the contractual issues before this Court. Mr Hulley argued that the matter should not be referred for trial.
- [123] Mr Kennedy for the DA argued that there are three issues to be decided namely whether Molefe's departure in December 2016 was a resignation or not, whether Molefe's reinstatement in May 2017 was valid or not and whether Molefe's June 2017 departure is a dismissal or not.
- [124] Molefe wants this Court to decide whether his dismissal was lawful or not, but before Molefe could be found to be dismissed, he must have been an employee and before that issue could be decided, there are two antecedent questions to be considered and decided namely whether Molefe resigned or not and whether he was validly reinstated or not. The High Court is seized with the two antecedent issues and those must be decided first. The matters should be dealt with in sequence and the High Court applications are preceding.
- [125] Mr Kennedy submitted that Molefe has the freedom to choose the forum where he wants to challenge his dismissal, but Molefe has to accept that there are antecedent issues pending before the High Court and his refusal to proceed with his dispute in the High Court, has consequences. This Court should not refer the matter to trial as the trial Court cannot deal with the issues before the antecedent issues had not been decided by the High Court and it would be premature to deal with the lawfulness of the dismissal in view of the pending High Court applications.
- [126] Mr Ngcukaitobi for the EFF submitted that the basis for the relief sought by Molefe in the main application is set out in paragraphs 65 – 71 of Molefe's founding affidavit and those are that the Board has no power to

remove Molefe as chief executive, Eskom's MOI requires Molefe's dismissal to be effected in terms of section 186(1)(a) of the Act and neither Molefe's contract of employment nor the MOI permit Eskom or the Minister to impose a summary dismissal and such dismissal is in breach of his contract of employment read with clause 14.3.6 of the MOI. Furthermore, Eskom was not entitled to rescind the reinstatement agreement as it elected to honour Molefe's contract of employment and such election was exhaustive and irrevocable. The rescission of the reinstatement agreement cannot bring about Molefe's dismissal and he is entitled to insist on the enforcement of his contract of employment.

[127] Mr Ngcukaitobi argued that in paragraph 11 of Molefe's supplementary heads of argument the issues in dispute which according to Molefe justify a referral for trial are set out and none of those issues relate to the basis for the relief Molefe seeks in this Court.

[128] In this Court Molefe's claim is a contractual one and there is no material dispute that calls for referral to trial. Mr Ngcukaitobi submitted that the request to refer the matter for trial is nothing but a postponement in disguise and an abuse of process.

[129] In my view no case has been made out for this application to be referred to trial. Firstly, it would be premature to do so as the trial Court would not be able to decide the lawfulness of Molefe's dismissal in isolation and without a finding that he was lawfully employed, which is an issue for the High Court to decide. This again highlights the difficulties and challenges created by litigation in separate Courts. Secondly the issues in dispute, as identified by Molefe, which calls for the hearing of oral evidence, are not relevant to the contractual issue this Court has to decide ultimately and there is no material dispute to be referred to trial.

The intervention applications

[130] DA and EFF filed applications in this Court in terms of the provisions of Rule 22 of the Rules of the Labour Court, seeking leave to intervene and

be joined as parties. On 27 June 2017 they were granted leave to intervene and were joined as Respondents.

[131] On 27 June 2017 I indicated that I would provide reasons for the order in the judgment in the main application. Herewith the reasons for joining the DA and EFF as parties in this application.

[132] Rule 22 of the Rules of this Court provides for joinder as follows:

“(1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.

(2)(a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

(b) When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs”.

[133] Rule 22 provides that in order for a party to be joined there must firstly be proceedings before Court to which parties could be joined, the parties must have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. Only parties that would be directly affected by the court’s order or where the order cannot be sustained or carried into effect without prejudicing such a party are necessary parties to the proceedings.

[134] The Court may join parties where the right to relief depends on the determination of substantially the same question of law or facts.

[135] These are the principles this Court applied in deciding the application for joinder.

[136] The application for joinder is premised on the submission that the DA and EFF have standing and a substantial legal interest in this matter.

They submitted that the matter brought before this Court is intricately linked to the factual and legal issues in the High Court application, where issues similar to the issues before this Court are pending.

[137] It was submitted that the underlying premise of Molefe's application in this Court is that the decision to reinstate him on 11 May 2017 was valid but the validity of that decision is challenged in the High Court and the issues pending before the High Court and the issues raised in this Court are inextricably linked. The two applications deal with overlapping subject matter concerning to a large extent the same set of facts, parties, legal principles and issues. Any finding by this Court in respect of the merits of Molefe's application would include a pre-determination of the lawfulness of the reinstatement agreement and would accordingly impact directly on the relief sought by the DA and the EFF in part B of the relief sought in the High Court.

[138] I was satisfied that a case was made out and that the DA and EFF have a substantial interest in the subject matter of Molefe's application and that they may be directly affected by this Court's order as it may impact on the pending High Court applications.

[139] I have fully dealt with the issues pending before the High Court and the issues to be decided by this Court and those issues further informed my view that there is indeed more than just a remote link between this application and the pending High Court applications.

[140] Mr Graves submitted that the principles applicable to intervention and joinder applications are not in dispute, but emphasized that although political parties have a role to play, there is no automatic right to intervene. *In casu* the primary issue is whether there was a dismissal from Molefe's existing employment relationship and that is a private matter and the DA and EFF have no interest in private employment relationships.

[141] Mr Graves conceded that the application for intervention was not frivolous, but submitted that it was tactical and brought with the aim to

secure a bloodless victory. Mr Graves argued that the application for intervention should be dismissed with costs, including the costs of three counsel.

[142] Mr Kennedy in reply submitted that the antecedent question whether Molefe was employed must be decided before the issue of his dismissal could be decided and notwithstanding the fact that the employment of Molefe is a private matter, the DA and the EFF are challenging that in the High Court and they have the right to be heard in these proceedings.

[143] Mr Kennedy and Mr Ngcukaitobi argued that Molefe should be ordered to pay the costs for opposing the intervention and joinder application as his opposition was frivolous and ill-advised and the application should not have been opposed, in which event no cost order would have been sought against Molefe.

[144] Costs should be considered against the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[145] I could see no reason to deviate from the general rule that the costs should follow the result, more so where Mr Graves also argued for a cost order to be granted in favour of Molefe.

[146] In the premises I make the following order:

Order

1. The application to refer the matter to trial is dismissed with costs;
2. The main application is postponed *sine die*;
3. The Applicant may approach the Registrar of this Court to enrol the main application under case number J 1276 / 2017 for hearing after the High

Court: Gauteng Division, Pretoria, has given judgment in case numbers 33051/17 and 34568/17.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant: Advocate N Graves SC with Advocate C Bester and Advocate I Phalane

Instructed by: Edelstein Farber Grobler Attorneys

For the First Respondent: Advocate A Bam SC with Advocate M Sikhakhane SC and Advocate Z Ngwenya (watching brief only)

Instructed by: Cliffe Dekker Hofmeyer Inc Attorneys

For the Second Respondent: Advocate G Hulley SC with Advocate U Dayanand-Jugroop and Advocate M Sibanda

Instructed by: State Attorney

For the Third Respondent: Advocate P Kennedy SC with Advocate K Harding and Advocate L Zikalala

Instructed by: Minde Schapiro & Smith Inc Attorneys

For the Fourth Respondent: Advocate T Ngcukaitobi with Advocate R Tshetlo

Instructed by: Kwinana and Partners Attorneys