



Not Reportable

Case NO: J 2106/2013

In the matter between:

THABA CHWEU LOCAL MUNICIPALITY

Applicant

and

KOMA, BURTON SHOLE

First Respondent

SAMWU

Second Respondent

MEMBERS OF SAMWU LISTED WHO'S

NAMES ARE LISTED IN ANNEXURE 'A'

Third To Further Respondents

Heard: 11 May 2017

Delivered: 13 March 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] During 2012, internal discussions were held at the level of Local Labour Forum (comprising Management, SAMWU and IMATU) regarding the placement of employees within the applicant's restructured establishment. On 5 December 2012, the applicant, represented by the first respondent and its then Acting Municipal Manager (Koma), entered into a settlement agreement with SAMWU representing the third to further respondents. The agreement provides as follows;

‘SETTLEMENT AGREEMENT

In the matter between South African Municipal Workers Union

And

Thaba Chweu Municipality

Establishment of the settlement agreement

- *Council Resolution A66/2012*
- *Local Labour Forum LLF (Minutes of the Meeting)*
- *Categorisation and Job Evaluation Wage Curve Collective Agreement*

NOW THEREFORE THE PARTIES AGREE ON THE FOLLOWING;

1. *To finalize the placement of staff before the end of January 2013. The commencement date for this agreement is 01 December 2012*
2. *The employer party will provide cost implications of the staff movement as a result of placement process.*
3. *The employer party will in an absence of Job Evaluation of posts benchmark against a municipality of a similar size*
4. *The party is committed to ensure that all factors around the placement process are handled with objectivity and in good faith*
5. *The parties agree that all negative and positive factors, comparison with other municipalities as best practice will be taken into consideration*
6. *Should the Employer party fail to honour this agreement the employee party will exercise its rights*
7. *All placement letters will be issued on 3 January 2013’*

[2] It was common cause that placement letters were issued by Koma to SAMWU members in terms of this agreement. On 25 March 2015, the applicant approached the Court in terms of the provisions of section 158 (1) (h) of the Labour Relations Act to seek an order in the following terms;

“ ...

1. Reviewing and setting aside the decision by the First Respondent to conclude, on behalf of the Applicant, the settlement agreement,
2. Reviewing and setting aside the decision of the First Respondent to issue placement letters to the Third to further Respondents pursuant the settlement agreement
3. Declaring the settlement agreement unlawful, null and void,
4. Condoning the late filing of this application”

[3] The late filing of the review application, together with that of the answering and replying affidavits was condoned in terms of an order issued by Van Niekerk J on 30 August 2016. The review application according to the applicant was preceded by the following events;

- 3.1 The discussions between the parties had commenced sometime in 2012. A Placement Committee (a sub-committee of the Local Labour Forum) comprising of all stakeholders was formed and tasked with the facilitation of discussions surrounding the placement of employees, and to compile a report to be presented to the Municipality Council.
- 3.2 The Placement Committee was unable to reach any agreement and the parties had reached deadlock. The matter never even reached the Municipality Council for its consideration.
- 3.3 On 5 December 2012, SAMWU members embarked on an unprotected strike, demanding that they be placed in accordance with their proposals as placed before the Placement Committee. During the strike, electricity and water supply services to communities was switched off, resulting with members of the communities confronting the Municipality to demand restoration of the services, failing which legal action would be taken.
- 3.4 With a view of ending the strike, Koma held meetings with SAMWU and its members. The latter had insisted that the strike would only be

ended and services to communities restored when the Municipality acceded to their demands. They had further demanded that they be issued with placement letters before the end of January 2013.

- 3.5 The applicant alleges that Koma was in the light of the circumstances, pressured into entering into the impugned settlement agreement. He subsequently issued placement letters as per SAMWU's demands.
- 3.6 Koma could however not implement the agreement as it was not sanctioned by the Municipality Council. The Council accordingly refused to honour it, as it viewed it and the subsequent issuing of the placement letters as being unlawful.
- 3.7 A further unprotected strike took place on 3 April 2013 to force the applicant to honour the agreement and appointments made in terms of the placement letters. When ultimatums were issued by Koma, SAMWU subsequently referred a matter of mutual interest dispute to the SALGBC under case number MPD041303. A settlement agreement was reached at the SALGBC in terms of which SAMWU withdrew the referral unconditionally.
- 3.8 Koma was subsequently placed on special leave in April 2013 as a result of signing the settlement agreement and issuing of placement letters. It is further alleged that he was placed on special leave as a consequence of his failure to properly run the affairs of the applicant. It was common cause that he had resigned in May 2013. When the new Acting Municipal Manager took over, all the vacant posts within the applicant's establishment were advertised. This sparked an urgent application by SAMWU on 3 October 2013.
- 3.9 On 8 October 2013, Van Niekerk J confronted with the unopposed urgent application under the present case number, granted a final order compelling the applicant to comply with the terms of the settlement agreement and the placement letters, and effecting back-pay to employees.

- 3.10 At the time that the final order was obtained, the applicant was essentially in a dysfunctional state, with personnel having come and went in the position of Municipal Manager. It is further alleged that the applicant's legal department also failed to defend matters brought to courts due to a variety of reasons. On 6 December 2013, SAMWU obtained a further order from this Court calling upon Koma to appear before the Court to show cause why he should not be found to be in contempt of Van Niekerk J's order of 8 October 2013.
- 3.11 On 10 February 2014, the applicant filed an application for rescission. The matter came before Snyman AJ on 15 October 2014, who had issued an order *inter alia* dismissing SAMWU's contempt application and rescinding Van Niekerk J's order of 8 October 2013. The Municipality was further directed to file this application within six weeks. SAMWU's application for leave to appeal was dismissed, and a subsequent petition to the Labour Appeal Court was refused on 18 August 2015.

The review grounds:

- [4] The applicant seeks to have the settlement agreement declared null and void on *inter alia*, grounds of legality, which it was contended was a principle applicable to all exercise of public power, requiring that all public functionaries exercise their powers in a lawful and rational manner. It further relies on the fulfilment of its constitutional and statutory obligations to ensure lawfulness, accountability and transparency in its administration.
- [5] The applicant further relies on the provisions of section 195 of the Constitution of the Republic¹, in terms of which, where it is made aware of a potential

¹ **Basic values and principles governing public administration**

195. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.

irregularity, there is a duty upon it to investigate and where necessary, to correct any unlawfulness through appropriate avenues.

[6] In line with the above provisions, it was contended that the appointments and placement of employees subsequent to the settlement agreement;

- did not comply with applicable legislation and or policies of the applicant, and in particular sections 55 and 56 of the Systems Act;
- that those appointments/placements were arbitrary as some employees were appointed to non-existing positions as per the applicant's organogram, whilst others were promoted about three levels above their current positions;
- that Koma had no authority to bind the applicant to the agreement, and further that the agreement was not authorised and/or condoned by the applicant's council;
- the executive authority to appoint staff vests in the municipal council, and to the extent that the settlement agreement in this case divested the municipal council of its executive powers, it was unlawful;
- the agreement, to the extent that it obliged the applicant to employ some employees permanently, also contravened section 66 (3) of the

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- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
 - (2) The above principles apply to—
 - (a) administration in every sphere of government;
 - (b) organs of state; and
 - (c) public enterprises.
 - (3) National legislation must ensure the promotion of the values and principles listed in subsection (1).
 - (4) The appointment in public administration of a number of persons on policy considerations is precluded, but national legislation must regulate these appointments in the public service.
 - (5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
 - (6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

Local Government: Municipal Systems Act² (The Systems Act) and was also unlawful.

[7] SAMWU opposed the application on the following grounds;

- 7.1 The Council resolved in 2012 to review and change its organisational structure. A placement committee comprising of all stakeholders was established with the purpose of reviewing the organisational structure, and to place employees into newly created organisational structures;
- 7.2 The Placement Committee in discharging its duties was bound by the South African Local Government Association Council Placement Policy which was a collective agreement that was binding on the parties. On 1 October 2012, the Placement Committee resolved that the placement of employees would be considered by the Local Labour Forum or a subcommittee of the Forum, provided that the committee was composed of no more than eight persons;
- 7.3 The committee was to compile a report on how employees should be placed in new structures, and once the committee had submitted its report to the Local Labour Forum, it was to be submitted to the Municipal Manager for implementation;
- 7.4 To the extent that the placement plan formulated by the committee was approved by the Local Labour Forum, it was then implemented by Koma as agreed to in accordance with the recommendations made on 20 November 2012³;
- 7.5 The settlement agreement was therefore a valid agreement stemming from the decision of the Committee and the Local Labour Forum, and the Council was not, in accordance with the recommendations made by the Local Labour Forum, required to approve the placement plan. The responsibility of approving the

² Act 32 of 2000, as amended

³ Annexure 'SM2' to the Answering Affidavit

placement plan accordingly rested on the committee and the Local Labour Forum and was therefore to be implemented by Koma;

- 7.6 It was denied that the committee was required to table the placement plan/report to the Council, or that it had not reached consensus on placements. It was further denied that Koma was induced to sign the settlement agreement by means of illegal strikes, and/or that he required the Council's approval to conclude that agreement. It was contended that Koma had the necessary authority to bind the applicant in his capacity as the head of administration and also in terms of the powers delegated to him by the Council;
- 7.7 The provisions of sections 55 (1) (e) and 59 of the Systems Act did not place an obligation on the Council to approve or authorise the agreement relating to placement of employees, as the power to appoint staff was conferred to Koma by virtue of his delegated authority.

The legal framework and evaluation:

- [8] The Labour Court may in terms of section 158(1)(h) of the LRA, "*review any decision taken or any act performed by the state in the capacity as employer on such grounds that are permissible in law*". In *Hendricks v Overstrand Municipality*⁴, it was held that a decision taken by the state in its capacity as employer could be reviewed on any grounds permissible in law, if no other remedy is available. The grounds permissible in law were identified as (i) those listed in PAJA, provided the decision constituted an administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) on the basis of the constitutional principle of legality.
- [9] To the extent that this matter is all about the placement and/or appointment of employees in the Municipality's establishment in terms of the impugned settlement agreement, it is apparent that the applicant is entitled to approach

⁴ [2014] 12 BLLR 1170 (LAC) at para 29

this Court on the grounds of legality if it was of the view that Koma did not have the requisite authority to enter into it. It is further accepted that the applicant has no other available remedy. The principles stated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁵ remains apposite to the extent that SAMWU insists that the settlement agreement remains enforceable.

- [10] As also correctly pointed out on behalf of the applicant, the starting point in the determination of this application is section 195 of the Constitution, in terms of which accountability, transparency, and high standard of professional ethics are required of the Municipality and its functionaries in the management of its activities as an organ of state. Other pertinent provisions of the Systems Act are;

Section 55 “Municipal managers

- (1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for-

...

- (e) the appointment of staff other than those referred to in section 56 (a), subject to the Employment Equity Act, 1998 (Act 55 of 1998);”

Section 66 ‘Staff establishments

⁵ 2004 (6) SA 222 (SCA) at para 26, where it was held that;

‘.... But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.’

- (1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must-
 - (a) approve a staff establishment for the municipality;
 - (b) provide a job description for each post on the staff establishment;
 - (c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and
 - (d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.
- (2) Subsection (1) (c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57."

Section 67 **'Human resource development**

- (1) A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including-
 - (a) the recruitment, selection and appointment of persons as staff members;
 - (b) service conditions of staff;
 - (c) the supervision and management of staff
 - (d) the monitoring, measuring and evaluating of performance of staff

- (e) the promotion and demotion of staff;
- (f) the transfer of staff;
- (g) grievance procedures;
- (h) disciplinary procedures
- (i) the investigation of allegations of misconduct and complaints against staff
- (j) the dismissal and retrenchment of staff, and
- (k) any other matter prescribed by regulation in terms of section 72.

[Sub-s. (1) amended by s. 38 of Act 51 of 2002.]

- (2) Systems and procedures adopted in terms of subsection (1), to the extent that they deal with matters falling under applicable labour legislation and affecting the rights and interests of staff members, must be consistent with such legislation.
- (3) Systems and procedures adopted in terms of subsection (1), apply to a person referred to in section 57 except to the extent that they are inconsistent with that person's employment contract.
- (4) The municipal manager must-
 - (a) ensure that every staff member and every relevant representative trade union has easy access to a copy of these staff systems and procedures, including any amendments;
 - (b) on written request by a staff member, make a copy of or extract from these staff systems and procedures, including any amendments, available to that staff member; and

- (c) ensure that the purpose, contents and consequences of these staff systems and procedures are explained to staff members who cannot read.”

[11] The conclusions drawn from the provisions of section 66 in *Dihlabeng Local Municipality v Nthute and Others*⁶ are that;

“Section 66 clearly envisages that the municipal manager will draw up a document reflecting all the posts within the establishment as well as a job description for each post, so that there can be no doubt as to the staff compliment of the municipality.... The logical conclusion of this is that the municipality cannot appoint people to posts that do not appear in the document evidencing the staff structure. Such a document would be important in another respect. It is meant to ensure that there would be no unauthorised appointments. In other words, appointments made outside the established and approved structure will be unauthorised”⁷.

[12] SAMWU relies on the Placement Committee’s resolution that the placement of employees shall be considered by the Local Labour Forum or its sub-committee, which had in turn compiled a report on how the placements in the new structure were to take place. It was argued that since the report was placed before the Local Labour Forum, which was in turn submitted to the Koma for implementation, that should have been the end of the matter, to the extent that Koma had turned the report into a settlement agreement, and that there was no obligation on him to seek the approval of the Municipality Council.

[13] SAMWU’s arguments have to be considered within the context of the role and powers of the Local Labour Forums as established in terms of the SALGBC Main Collective Agreement. In terms of clause 2.8.11 of the Agreement, every employer must establish a Local Labour Forum with equal representation from the trade unions and the employer. The trade unions’ representation shall be divided in proportion to their respective membership in that Council/employer. Employer representatives on the other hand shall consist of Councillors and of

⁶ [2009] JOL 23108 (O)

⁷ At para 6

Management (as set out in clause 2.4.2.1 – which specifies the Municipal Manager and persons appointed as managers directly accountable to Municipal managers in terms of section 57 of the Systems Act).

[14] The powers and functions of a Local Labour Forum are set out in clause 2.8.2 of the Main Agreement. In essence, the Local Labour Forum have the powers and functions;

- To negotiate and/or consult on the following matters;
 - Matters of mutual concern pertaining to the municipality and which do not form the subject matter of negotiations at the SALGBC;
 - Matters referred to it by the SALGBC;
 - Minimum Service Level Agreements;

[15] As I understand the position, the powers and scope of Local Labour Forums are only limited to matters relating to the work places and which are not the subject of bargaining at either national and or provincial level, and in terms of clause 2.8.2.2, disputes over what is negotiable and what are the matters for consultation and over whether a specific process constitutes sufficient consultation are to be resolved through the dispute resolution mechanism of the SALGBC.

[16] Insofar as the issue of placements is concerned, such placement in accordance with clause 3.2 of the SALGBC Placement Policy (An agreement entered into between South African Local Government Association and the Unions) shall be considered by the Local Labour Forum or Sub-Committee of that Forum. This clause further provides for the establishment of the Placement Committee, with its main terms of reference being to *'consider and reach consensus regarding the placement of existing employees into posts in the new structures*. It is further tasked with striving to reach consensus on the staff placement. Where however consensus cannot be reached, the Council's proposal will prevail and be published.

- [17] In this case, it can be accepted from annexures 'TCLM1' and 'TCLM2' to the founding affidavit that to some extent, the Placement sub-committee discussed and considered the placement of employees on 1 October 2012 and 12 November 2012. The only issue is whether consensus was reached, resulting in the settlement agreement which is the subject of the dispute, and whether even if that was the case, there was no further obligation on Koma to get the approval of the Council prior to implementation of any recommendations.
- [18] The applicant's contention is that Koma was not authorised to enter into the agreement and accordingly, it was not only unlawful for him to do so, but that the agreement is unenforceable on account of it being null and void.
- [19] Koma in his confirmatory affidavit to the answering affidavit, which was filed after the applicant had filed its replying affidavit, averred that the applicant's Council had resolved to establish the Local Labour Forum and a Placement Committee. The Committee made recommendations on the placement of staff into the new organisational structure of the applicant and based on those recommendations approved by the Local Labour Forum, he had entered into the agreement and issued placement letters.
- [20] Koma denied that he had signed the agreement under pressure and averred that he had acted based on the recommendations of the committee. He further averred that the applicant had approved a budget to finance the placement of the employees and it was untrue that the placements were unbudgeted for or that they would cause financial problems for the applicant. He further averred that the Council was represented in the Local Labour Forum and the Placement Committee; that the Councillors were part of the process of placing the employees in the new organisational structure, and further that the Systems Act and Delegations of Authority by the applicant's Council conferred powers upon him as Municipal Manager to appoint staff. He contended that he did not need the approval of the Council to appoint staff prior to implementing the placement plans as agreed to by the Committee.

- [21] Having objected to the belated filing of the confirmatory affidavit, the applicant (through a replying affidavit of its acting Municipal manager, Mokoena) nonetheless in its reply contended that Koma left the applicant's employ under acrimonious circumstances. He had been placed on special leave as a result of the unauthorised settlement agreement. When the Council was about to place him on special leave, and realising the possibility of disciplinary action, Koma chose to resign.
- [22] Mokoena denied that the placement committee ever reached consensus on the placement of employees as the parties had reached deadlock on these issues as evident from the meetings of 1 October and 12 November 2012, and further denied that the placement committee had ever made recommendations which were approved by the Local Labour Forum. It was also denied that the applicant ever had a new structure or that the Council had ever approved any organogram into which the employees were to be placed.
- [23] Mokoena further denied that the applicant had approved a budget to finance the placement of the employees as the Council never approved any such budget. It was pointed out that at the time, the applicant was under financial distress and undergoing a turnaround plan under the assistance of the provincial Department of COGTA, Treasury and the Enhlanzeni District Municipality due to lack of funds. Mokoena further averred that the manner in which Koma issued the placement letters was unlawful as he did not have the authority to do so. He contended that it was unlawful for a municipal manager to make appointments without advertising the posts.
- [24] The role and powers of the Local Labour Forum (or Sub-committees), and its terms of reference in accordance with clause 3.2 of the SALGBC Placement Policy, is to *'consider and reach consensus regarding the placement of existing employees into posts in the new structures'*. This implies firstly that the Forum must reach consensus, and further that there must be a new structure. Consensus can only imply that all the parties in the sub-committee, viz, Management, SAMWU and IMATU must have been able to reach an agreement on the placement of employees. Curious with the settlement

agreement is that it was only entered into between SAMWU and the applicant as represented by Koma, and it is not apparent from the papers why IMATU was excluded, if the Forum/Placement Committee had indeed reached consensus.

- [25] SAMWU nonetheless relies on the minutes of 1 October 2012 and 12 November 2012, in contending that consensus was reached. In regard to the minutes of 1 October 2012, it contended that this indicated that there was consensus to grant the Placement Committee a mandate to place employees into newly approved organisational structure, to compile a report on how employees were to be placed, and to submit it to the Forum. The minutes of 12 November 2012 merely indicated that the meeting was postponed to 15 November 2012, and that a management meeting was to be held on 14 November 2012 to make submissions that were to be placed before the Placement Committee. There is no evidence that a meeting took place on 14 November 2012 as scheduled.
- [26] SAMWU further relies on Annexure 'SM2' to the answering affidavit, which it contended that the Committee had finalised its mandate and sent its recommendations to the Forum which had approved them and forwarded them to Koma. This annexure is purportedly a notice issued by Koma that a special meeting was to be held on 20 November 2012 to consider *inter alia*, the issue of placements and the recommendations purportedly made by the Placement Committee. The notice further contains plans which specifies in detail, which employees are to be placed into which positions
- [27] The veracity of the document relied upon is disputed by the applicant. The applicant views the document as fabrication as it never came to its attention before, including in countless prior litigation between the parties before this Court, nor does it bear any Council's signature. It was contended that it was produced for the first time for the purposes of this application.
- [28] Arising from the above, the issue that remains in contention is the veracity of the purported recommendations of the Committee as implemented by Koma. No attempt was made to explain its origins, and even if it had existed prior to

the signing of the conclusion of the settlement agreement, it is not clear from that document which clearly contains recommendations, as to when those were approved and by whom. The document on the face of it appears to be a mere notice, and not minutes. It lists items on the agenda, including the issue of placements. As to whether that meeting took place on 20 November 2012 and who had attended it is unclear. Significantly worrying however is that if the Forum held that meeting, it is not clear how was consensus reached, and why is it that only SAMWU and Koma signed that agreement.

- [29] With the above doubts having been expressed, SAMWU relies on the delegation of powers document as approved by the applicant, for the contention that he did not need its approval to implement the Placement plans as recommended by the Placement Committee. The difficulty with this contention as correctly pointed out on behalf of the applicant is that this argument cannot be sustainable in view of the conclusions of Snyman AJ in the contempt application heard on 15 October 2014 and the judgment delivered on 11 February 2015⁸.

⁸ “[74] In addition to the above, there is clearly a dispute between the parties as to the application of the policy provisions of the first respondent’s council in this case. It was undisputed that the powers of Koma were always subject to the policy regulations by the first respondent’s council and to this effect both parties relied on the same delegation of powers document as approved by the first respondent’s council in support of their respective cases. I have considered this document and cannot find any provision specifically empowering Koma as municipal manager to make a placement of all the individual applicants, *en masse*, to new and higher post levels with added remuneration as a result. The applicants have submitted that the delegated power provisions in this document in terms of which the municipal manager had the power to (1) determine the remuneration, benefits or other conditions of service of employees appointed on a contract basis; (2) sign any contract or documents on behalf of the council; (3) second personnel from one post to another; and (4) confirm staff appointments, would empower Koma to have concluded the agreement *in casu*. The first respondent argued that none of these listed delegated powers referred to by the applicants found application in this case and that an approval by the first respondent’s council was always required for such an agreement to be concluded, which approval never happened. In *Manana v King Sabata Dalindyebo Municipality*, the Court said (referring to the Systems Act):

‘In my view 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.’

Again, I do not have to finally decide this issue as to whether council approval was still required or there was proper complete delegation to Koma, which was actually not fully dealt with in evidence on the papers. Suffice it to say, if the first respondent’s contentions are true

[30] In this case, SAMWU persisted with the argument that by virtue of the provisions of section 55 of the Systems Act, Koma was in any event empowered or had the necessary delegated authority to bind the applicant to the settlement agreement, and that with further consideration to the provisions of section 59 of the Systems Act, there was no requirement for the Council to authorise the agreement relating to the placement of the employees.

[31] The interpretation of section 55 (1) of the Systems Act received attention in *Manana v King Sabata Dalindyebo Municipality*⁹ as correctly pointed out by Snyman AJ in the contempt application. This judgment is instructive in the light of SAMWU's persistent approach, and it would be useful to liberally quote from its paragraphs 15 - 17, where Nugent JA held as follows;

“The first submission that was made on behalf of the municipality was that the resolution to which I have referred is not relevant because the power to appoint employees vests in the municipal manager and not in the municipal council. For that submission counsel relied on s 55(1)(a)- (e) of the Act – in particular subsection (e). Confining myself to the relevant part of that subsection it reads as follows:

‘As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for – (e) the appointment of staff ...’ “

And,

“A municipal council is not capable in practice of exercising its executive authority by running the day-to-day affairs of the municipality and it employs staff to do that on its behalf. In the past it was common for municipal councils to confer the appropriate authority upon their staff by delegation of all or some of its executive powers. Such a delegation of power does not ordinarily divest the delegator of the power to

and correct, it would have a proper case to challenge the conclusion of the agreement by Koma when asking the Court to set it aside.”

⁹ (2011) 32 ILJ 581 (SCA)

perform the particular function itself. As the authors of De Smith's Judicial Review express it:

'[I]t has sometimes been stated that delegation implies a denudation of authority.... This cannot be accepted as an accurate general proposition. On the contrary, the general rule is that an authority which delegates its powers does not divest itself of them'"

And,

"In my view 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" (Citations omitted)

[32] Flowing from the interpretation of section 55 (1) (e) of the Systems Act as above, and taking into account the interpretation of section 66 of the same act in *Dihlabeng Local Municipality v Nthute and Others*¹⁰ as referred to elsewhere in this judgment, the following conclusions in regard to this matter can be drawn;

35.1 The role and powers of the Local Labour Forum, as a body established in terms of clause 3.2 of the SALGBC Placement Policy (A collective agreement), is confined to *considering and reaching consensus regarding the placement of existing employees into posts in the new structures*. Its recommendations are merely that, and in the event that it cannot reach consensus on the staff placement, the Council's proposal would prevail and be published. This can only

¹⁰ *Supra*

imply that consensus must be reached with all the stakeholders in the Forum, including IMATU, and where there is no consensus, the Council will have a final say in the matter. In this case, how it can be said consensus was reached when the agreement was only entered into with SAMWU remains unexplained. Furthermore, the mere fact that some Councillors were part of the discussions in the Placement Committee does not imply the Council's executive authority over the matter was divested.

- 35.2 It is not for a Municipal Manager, notwithstanding his delegated authority, to willy-nilly implement recommendations of that Forum without the say-so of the Council. Delegated authority cannot be equated with an abdication of the Council's executive powers, authority and final say on the matter.
- 35.3 There is no evidence in this case to suggest that the recommendations of the Local Labour Forum or the Placement Committee were placed before the Council for its consideration, and in fact on SAMWU's version, there was no need to do so. SAMWU's contention is nonetheless unsustainable in view of the legal principles referred to above.
- 35.4 At the time that the settlement agreement was entered into, it does not appear to be disputed that the Municipality was in a parlous and dysfunctional state, requiring the intervention of the Provincial COGTA MEC, Treasury and other municipalities. The Municipality's finances were in a state of a mess. The appointment and placement of 100 or so employees in a restructured establishment at great financial burden to the Municipality and the long-suffering rate and tax payers compounded that parlous state.
- 35.5 It is either Kobe deliberately acted unlawfully, or he was clearly out of his depth. He completely misconstrued his delegated powers and authority. His insistence that he did not need the Council's approval to bind it to the settlement agreement, issue placement letters and

effectively implement the Placement Committee's recommendations is a clear failure on his part to appreciate his limited powers or the concept of delegated authority. He failed to appreciate the need for accountability, transparency and the promotion of efficient, economic and effective use of resources as required of him in terms of the provisions section 195 of the Constitution when implementing the placement plan. He clearly forgot that notwithstanding his delegated powers and authority, he was still in terms of section 55 of the Systems Act, subject to the policy directions of the municipal council, and that in terms of 66, he still needed to make decisions within a policy framework determined by the municipal council, and to make decisions subject to all applicable legislation. In a nutshell, by failing to get the Council's approval; by issuing letters of placement and haphazardly employing, placing and in some instances unreasonably promoting employees to even higher levels, Koma confused the municipality with his imaginary little fiefdom, where he could do as he pleased.

35.6 It is not even necessary to dwell into the arguments surrounding whether Koma was cajoled into signing the settlement agreement or not, or whether consensus was reached by the Committee. What is sufficient for the purpose of this application is that in implementing the recommendations of the Placement Committee without the need for approval as he had insisted, he had acted unlawfully, and in flagrant disregard of his constitutional obligations as outlined in section 195 of the Constitution, and the prescripts in sections 55 and 66 of the Systems Act, thus making the settlement agreement not only unlawful but invalid.

35.7 To the extent that in implementing the recommendations he had little or no regard to the financial implications for the Municipality, especially at a time when it was not only dysfunctional but also in a parlous financial position, Koma equally acted irrationally.

[33] In the light of the above conclusions, it follows that the applicant should be entitled to the relief it seeks. What remains is the issue of costs. The applicant sought a cost order, particularly since it held the view that SAMWU approached the Court with a view of deceiving it in the light of its reliance on the disputed Notice purportedly issued by Koma, which formed the basis of the claim that the Local Labour Forum had reached consensus. To the extent that I have not pronounced on the validity of that document, and further to the extent that my conclusions were reached based mainly on points of law rather than facts, I am not satisfied that this should be the only basis of making a costs order. Be that as it may and having had regard to the circumstances of this case and the nature of the opposition to the review application, I am of the view that the requirements of law and fairness dictate that SAMWU should be burdened with the costs of this application.

Order:

[34] Accordingly, the following order is made;

1. The decision by the First Respondent to conclude on behalf of the Applicant, the settlement agreement dated 5 December 2012 is reviewed and set aside.
2. The decision by the First Respondent to issue placement letters to the Third to further Respondents pursuant to the settlement agreement dated 5 December 2012 is reviewed and set aside.
3. The settlement agreement dated 5 December 2012 is declared to be unlawful, null and void.
4. The placement letters issued by the First Respondent are declared unlawful, null and void
5. The Second Respondent is ordered to pay the costs of this application.

E. Tlhotlhamaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant:

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Instructed by:

Phungo Incorporated

For the Second, and Third to further Respondents:

Adv. F, Baloyi

Instructed by:

Maenetja Attorneys

LABOUR COURT