



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable

Case No: 1711/2023

In the matter between:

BUTI PIET MOLUPE

APPLICANT

And

NALA LOCAL MUNICIPALITY

FIRST RESPONDENT

MUNICIPAL MANAGER, NALA LOCAL MUNICIPALITY

SECOND RESPONDENT

Neutral citation: *Buti Piet Molupe v Nala local Municipality and Another (1711/2023)*

Coram: **Daniso, J**

Heard: **19 September 2024**

Delivered: **04 February 2025**

ORDER

- (1) The applicant's claim is dismissed with costs on scale B.
- (2) The respondents' counter-application (review application) is dismissed with costs on scale B.

JUDGMENT

Daniso, J

- [1] The first respondent appointed the applicant as its Director: Corporate Services was terminated in terms of a contract of employment concluded between the applicant and the first respondent's erstwhile Municipal Manager (the second respondent) on 30 October 2019 for a salary of R1 102 590.00 per annum payable in 12 monthly instalments. The contract was for a fixed period of five years, ending on 6 October 2024. The applicant's appointment was terminated with effect 28 March 2023 by way of a written notice dated 30 March 2023 (the termination notice).
- [2] In these opposed proceedings the applicant seeks an order declaring that the termination of his appointment constitutes a breach of contract entitling him to damages in the amount of R1 745 767.50 equalling his remuneration for the remainder of the contract period of 19 months.
- [3] In addition to opposing the application, the first respondent raises a counter-application for the review and setting aside of the appointment including the resolution and the appointment letter which preceded the appointment. The premise is that the appointment was irregular as it was made in contravention of

the Local Government: Municipal Systems Act¹ (Systems Act) and the related Regulations on Appointment and Conditions of Employment of senior Managers (the 2014 Regulations) which require an appointee in the applicant's vacancy to possess a Bachelor's degree in Public Administration / Management Sciences / Law or equivalent. At the time that he was appointed, the applicant had Diplomas therefore he did not meet the requirements (the review application).

- [4] On the papers, it is indisputable that barely a month before the appointment contract was concluded Members of the applicant's Executive Council for the Department of Cooperative Governance and Traditional Affairs Messrs ST Ngxangisa (MEC Ngxangisa) and M. Dukwana (MEC Dukwana) indicated their non-concurrence with the applicant's appointment raising the fact that despite numerous requests, they have still not been provided with the documents relating to the applicant's application for the post and his appointment. In his letter to the caucus of the Economic Freedom Fighters (EFF) dated 16 August 2021, MEC Ngxangisa wrote:

"INTENTION TO APPROACH THE HIGH COURT TO SEEK A DECLARATORY ORDER TO SET ASIDE THE APPOINTMENT OF Mr BP MOLUPE AS THE DIRECTOR: CORPORATE SERVICES OF THE NALA MUNICIPALITY AS INVALID

1. *The Municipal Systems Act 32 of 2000 and all its related Regulations, governs the appointment of senior managers. Furthermore, other various pieces of legislation, including sections 154 and 155 of the Constitution of the Republic of South Africa, Section 74 of the Municipal Finance Act 56 of 2003 and sections 19 and 49 of the Municipal Structures 117 of 1998, inter alia, regulate the relationship between municipalities and both the provincial and national governments.*
2. *Nala Local Municipality submitted the appointment report of Mr BP Molupe as the Director: Corporate Services on the 06th August 2019.*

¹ Act 32 of 2000.

3. *After various unsuccessful attempts to be provided with outstanding documents, the MEC wrote to Nala Municipality on the 20th September 2019 indicating his non-concurrence to the appointment of the Mr Molupe. The MEC advised the Mayor to ensure that a Special Council be called where the matter of the Director: Corporate Services will be dealt with. To date, there has been no response from Nala on this matter.*
4. *Kindly be informed that I have instructed the HOD of the Cooperative Governance and Traditional Affairs to urgently approach the High Court for a declaratory order setting aside the appointment of Mr Molupe as invalid.*
5. *You will be informed as soon as the matter is placed before the court roll."*

[5] A year later on 03 August 2022 MEC Dukwana followed it up by invoking the provisions of section 56(5) of the Systems Act and instructed the first respondent to convene a special council to rescind the appointment otherwise a court order will be sought to set aside the appointment. The relevant parts of his letter record the following:

"INTENTION TO APPROACH THE HIGH COURT TO SEEK A DECLARATORY ORDER TO SET ASIDE THE APPOINTMENT OF Mr B.P. MOLUPE AS THE DIRECTOR: CORPORATE SERVICES OF NALA MUNICIPALITY INVALID

1. ...
2. *Nala Municipality submitted the appointment report of Mr. B.P. Molupe as the Director: Corporate Services on the 06th August 2019.*
3. *After various unsuccessful attempts to be provided with outstanding documents, the MEC wrote to Nala Municipality on the 20th September 2019 indicating his non-concurrence to the appointment of the Mr. Molupe. The MEC advised the Mayor to ensure that a Special Council to be called where the matter of the Director: Corporate Services will be dealt with. To date, there has been no response from Nala on this matter.*

4. Therefore, the MEC is empowered to take the appropriate action to set aside the appointment as invalid, as per section 56(5) of the Municipal Systems Act 32 of 2000, which states:

If a person is appointed to a post referred in subsection (1)(a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council.

5. You are therefore requested to ensure that a Special Council is called within seven (07) working days from the date of this letter, where the appointment of Mr. Molupe will be rescinded.
6. Kindly note that failure to do so will result in the MEC approaching the High Court to have the appointment declared invalid and set aside as per the provisions of section 56(5) of the Municipal Systems Act."

- [6] On 12 September 2022 the EFF's party whip also registered their discontentment about the appointment in their letter addressed to the second respondent. stating the following:

"SUBJECT: Question which Notice has been given, Rule 54

...We are opening this line of communication to your good self in line with a correspondence which we are quite aware that your office received from the MEC in the Department of Corporate Governance Traditional affairs and Human Settlement Honourable Mxolisi Dukwane. In his letter dated 03/08/2022 the MEC states his intentions to approach the High court to set aside the appointment of the

Cooperative Service Director of Nala Local Municipality, MR BP Molupe, in this letter the MEC refers to unlawful appointment of the aforesaid director..."

Background

Chapter 7 of South African constitution makes provision for the establishment of municipality as another sphere of government which is closer to the people, section 154 of the same constitution under chapter 7 gives guide in terms of what needs to be done and states that "the national government and provincial government by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions."

In accordance with the above piece of legislation the MEC of the CoGTA and Human Settlement in the Free State wrote a letter to the Municipality of Nala which Cllr Mashiya-Ntema was a speaker to advising the appointment of Mr Molupe was unlawful as he did not meet the prescribed standard requirements as the time of appointment, to this effect the MEC then sent a non-concurrence letter which you ignored. In the letter dated 20 September 2019 the MEC advised that a special council be called or convened to rescind the decision to appoint Mr Molupe, however this directive was ignored.

Questions

1. *Local Municipality, this will result in unauthorised and wasteful Expenditure.*

NB:

The EFF will do joint application with the MEC to set aside the appointment of Mr Molupe, we will also pursue the court that all legal costs be paid personally by all respondents. it is also our view that all monies paid to Mr Molupe after the 20 September 2019 be recovered from all individuals who participated in the crime of theft.

The EFF holds a strong view that the MEC acted in line with section 56(5) of the Systems Act as amended in 2021 and there was no application to wave section 56(1b) as prescribed by this act."

- [7] The council ultimately convened on 17 January 2023 where a resolution was taken to implement the MEC's directives. The second respondent was requested to obtain a legal opinion regarding the legal implications and costs for terminating the applicant's appointment. The applicant acquiesced to be placed on paid leave in the interim. A special council meeting was thereafter held on 28 March 2023 where it was resolved to proceed with the termination of the applicant's appointment.

- [8] Before turning to the determination of the merits of the respective applications, the applicant seeks condonation for the late filing of his opposing papers to the counter-application whereas the first respondent and seeks condonation for the delay in bringing the review application.

- [9] There is no explanation regarding the basis upon which the applicant contends his opposition is late, because the notice of the review application requires the applicant to have delivered his opposing papers on or before 17 July 2023. The applicant's opposing papers were delivered by 11 July 2023 which is within the time periods stated in the notice of the review application. I am of the view that condonation is unnecessary. In any event, the application for condonation is not opposed and no prejudice has been indicated by the respondents in this regard.

- [10] On the other side, the review application was launched on 12 May 2023 over three years and nine months after the impugned decisions were taken. The reasons for the delay are set out in the first respondent's present Municipal Manager's affidavit. He explains that he was appointed on 1 July 2022 well after the impugned decisions were taken. He only became aware of the disputed validity of the

applicant's employment when he received a letter from the Party Whip of the Economic Freedom Fighters (the EFF) on 12 September 2022 enquiring whether steps have been taken to implement the MEC's directives to set aside the applicant's appointment and to recover all monies that have been paid to him in terms of the employment contract. He then set about investigating the circumstances under which the applicant was appointed however, despite a diligent search he could not locate the applicant's application documents for the vacancy including his curriculum vitae and qualifications. His efforts were also thwarted by the fact that in his capacity as Director: Corporate Services, the applicant was the custodian of the required documents. A further delay was occasioned by the unavailability of their counsel Mr Sander, to settle the papers due to being engaged in other matters until 11 May 2023.

- [11] Mr Stander submits that as opposed to a review contemplated in the Promotion of Administrative Justice Act (PAJA)² in terms of which a review must be launched not later than 180 days from the date of the impugned decision,³ a legality review is not time barred in fact, condonation is not even required. He states that in assessing the delay the court takes into account the reasonableness of the delay and even where the court finds that the delay is unreasonable, the court can overlook the first respondent's ineptitude by taking into consideration that the applicant was appointed to a position for which he did not have the required competence and qualifications. If the court does not overlook the undue delay and condone the late review it will be condoning illegality as the employment contract is void *ab initio*. The termination of the contract was done out of an abundance of caution it does not vitiate against the court concluding that the very contract that was so terminated, was unlawful and stands to be set aside.

² Act 3 of 2000.

³ Section 7.

- [12] The applicant disagrees. In sum Mr Feni, counsel for the applicant is of the view that the delay has not been sufficiently explained. He states that the second respondent explains that he only became aware of the matter on 12 September 2022 when it was brought to his attention by the EFF's Whip but there is no explanation about the delay from 2 August 2019 when the impugned resolution was taken up to 1 July 2022 when he was appointed. The delay is also attributed to the search for the applicant's application documents whereas the second respondent could have interviewed the current Mayor and other officials involved in the selection process to determine the reasons for appointing the applicant. Furthermore, in the respondents' affidavit there are no averments pertaining to the prospects of success on the merits of the review application including the importance of the case have been proffered in any event, the employment contract has already been terminated therefore there is nothing to review and set aside, condonation for the late review must accordingly be dismissed.
- [13] The principles governing condonation in legality reviews are now well established: the court is enjoined to condone a late review where the delay is reasonable in the sense that a reasonable and justifiable explanation covering the entirety of the delay has been proffered. The applicant cannot benefit from unlawfulness thus where the court finds that the delay is unexplained therefore unreasonable, the court may apply its discretion and overlook the inordinate delay taking into consideration factors such as the potential prejudice to the affected parties, the consequences of setting aside the impugned decision, the conduct of the applicant including the nature of the impugned decision.⁴
- [14] A delay of three years and nine months in bringing the review is indeed extreme. Much as a legality review is not time barred, the application must be launched

⁴ *Buffalo City Metropolitan First respondent v Asla Construction* **2019 (4) SA 331** (CC) at paras 43, 48, 52 to 63; *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* **[2013] ZACC49; 2014 (3) BCLR 333 (CC); 2014 35 ILJ 613** (CC) at paras 49 to 52

diligently and within a reasonable time from the date that an applicant became aware or reasonably ought to have been aware of the impugned decision.⁵

- [15] Having said that, the explanation provided by the first respondent is in my view unreasonable. The first respondent sat idly at least since 17 January 2023 when a resolution was taken to terminate the applicant's appointment. No attempt has been made by the respondents to explain the reason for preferring Mr Sander thereby delaying the matter further. I am however persuaded that there is reason to overlook the first respondent's ineptitude.
- [16] I take into account that the first respondent's conduct and how it shaped these proceedings does not show any malice but simply an attempt though inert, to uphold its constitutional obligations to self-review in order for the court to inquire on the lawfulness of exercise of public power.
- [17] It is true, as Mr Sander pointed out that the termination of a purported irregular appointment is not an impediment to review proceedings as the appointment is not automatically null and void, it retains its legal effect and consequences as provided for in the Labour Relations Act⁶ until declared unlawful by a court of law.⁷
- [18] It must also be borne in mind that on the papers, the fact that at the time of his appointment the applicant was not in possession of a Bachelor's degree when appointed is not in dispute. The issue of whether the 2014 Regulations which prescribed a Bachelor's degree as a minimum requirement for appointment were extant or not at the time the applicant was appointed is in my view, an issue of

⁵ See also section 237 of the Constitution.

⁶ Act 66 of 1995.

⁷ *Khumalo* above n 4 at paras 70 to 73.

importance which compels me to overlook the delay in order for the legality of the employment contract to be scrutinized. Any prejudice that can befall the applicant can be ameliorated by an equitable and just order as contemplated in section 172(1)(b) of the Constitution.⁸ I therefore hold that this is indeed a matter where a delay should not prevent the court from deciding it. It is in the interest of justice as well as of the applicant that this matter is determined on its merits on that account, the late institution of the review application is condoned.

- [19] Turning to the merits of the application, the notice of termination the applicant complains about reads as follows:

"NOTICE: TERMINATION OF EMPLOYMENT SERVICE // RESCISSION OF APPOINTMENT

1. *The above matter has reference to NALA Council resolution of the special meeting that was held on Tuesday, 28th March 2023.*
2. *This therefore serves to notify you that your employment contract with NALA LM is hereby terminated with effect from the 28th March 2023.*

⁸ In terms of Section 172(1):

"When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

3. *For the record, we hereby wish to convey the following extract of the aforementioned Council resolution for your information: (namely)*

**14.1.4. That any money due to the Chief Finance Officer and Director Corporate Services emanating from the expiry and termination of their employment contracts respectively be paid by the 31st March 2023.*

4. *Please return all NALA LM equipment, material or documents that are in your possession on or before Wednesday, 5th APRIL 2023 to the undersigned.*
5. *You are further requested to observe confidentiality of any privileged information you have obtained during the course of your employment as agreed at the start of your employment.*
6. *You are entitled to a salary for the month of March 2023 which will be paid out on the 31st March 2023. Failure or delay in returning NALA LM property which is in your possession will cause a delay in your final severance package.*

We wish you great success in your future endeavours."

[20] It is the applicant's case that the early termination of his appointment amounts to a repudiation of the contract. Relying on clause 27 of the cancelled contract, the applicant further contends that the first respondent was only entitled to terminate the appointment on account of the applicant's failure to remedy a material breach of the terms of the contract, misconduct or incapacity. In this matter, the reasons for terminating his appointment are not even stated in the termination notice. Based on all these reasons, the applicant is entitled to damages equal to the unexpired portion of the contract being a salary of 19 months in the amount of R1 745 767.50. The respondents must pay the costs on a punitive scale.

[21] The respondents countered that the applicant is not entitled to the damages he seeks. The fact that the termination notice does not state the reason for terminating

his appointment is a non-issue. He was well aware that his appointment was terminated on the grounds of invalidity as the decision to terminate his employment was preceded by resolutions taken on 13 December 2022 and 17 January 2023. By virtue of his position as Director: Corporate Services he was part of the council administration and responsible for the copying of the agenda and taking of the minutes at those meetings. It does not end there, the applicant seeks contractual damages based on an illiquid claim as his remuneration was subject to deductions to wit: Unemployed Insurance Fund (UIF), medical aid, motor vehicle allowance and provident fund contributions which the applicant opted not to deal with at all in his claim. The applicant also received his salary up to March 2023 and there is also no evidence with regard to the prospects of his employment in mitigation of his damages. Mr Sander proceeds to state that motion proceedings are impermissible in cases of illiquid claims, the applicant's damages are incapable of determination he should have proceeded by way of action proceedings. The application must accordingly be dismissed with costs on scale B.

- [22] On the applicant's own version, pursuant to the resolution to terminate his appointment an agreement was reached on 17 January 2023 that he would be placed on special leave pending the assessment of the legal and financial implications of implementing the resolution⁹ therefore, by the time the notice of termination was served on him on 30 March 2023 he was already aware of the reason for the termination of his appointment. That aside, it is clear on the papers that the nature and the amount of the damages sought by the applicant is disputed.
- [23] The onus is on the applicant to adduce evidence and prove the damages which he contends are equal to what he would have earned had the appointment not been prematurely terminated. Clause 9 of the contract provides as follows:

"9 Remuneration

⁹ Paginated page 110, is a copy of the letter of the applicant's attorneys re: VALIDITY OF EMPLOYMENT CONTRACT // MR. BP MOLUPE.

9.1...

9.1.1....

9.1.2. *The Employee shall be paid an inclusive annual remuneration package of R1 102 590. 00 (One Million One Hundred and Two Thousand Five Hundred and Ninety Rand Only) payable on 12 equal monthly instalments.*

9.1.3. *The inclusive annual remuneration package consists of a basic salary and a flexible portion. The basic salary shall be at least 50% of the inclusive remuneration package. The remaining part of the remuneration package is the flexible portion and may be structured by the Employee as set out below.*

9.1.3.1. *R (Retirement Provident Fund)*

9.1.3.2. *R (Contribution to a Medical Aid Scheme)*

9.1.3.3. *R (Motor Vehicle Allowance)*

9.1.3.4. *R (UIF)*

9.1.4. *The above-mentioned inclusive annual remuneration package to be restructured in line with the guidelines provided by the South African Revenue Services (SARS)."*

- [24] Having regard to the provision of the contract dealing with remuneration, there is merit to the respondents' contention that the amount claimed cannot be easily ascertained as to how it is arrived at.
- [25] The law is trite on this aspect: it is impermissible to seek a monetary judgment for unliquidated damages by way of motion proceedings as they are 'not geared to deal with factual disputes – they are principally for the resolution of legal issues – and illiquid claims by their very nature involve the resolution of factual issues.'¹⁰

¹⁰ *William v Tunstall* **1949 (3) SA 835** (TPD) at 839; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* **1949 (3) SA 1155** (T) at 1160-1161; *Cadac (Pty) Ltd v Weber-Stephen Products Company and Others* **[2010] ZASCA 105; 2011 (3) SA 570** (SCA) at para 10.

- [26] The dispute arose long before the application was launched¹¹ and it is also apparent from the papers however, the applicant has insisted that the claim is properly quantified. In the result, I am not satisfied that the applicant has adduced sufficient evidence to prove his claim on a balance of probabilities.
- [27] As far as the review application is concerned, apart from challenging the applicability of the Systems Act and its related 2014 Regulations to his appointment, the applicant has also raised malice on the part of the second respondent alleging that he did not disclose to this court that he was also a contender for this post. He also explains that there is no merit to the respondent's case because he was previously appointed on a similar post with the same qualifications and the first respondent was actually entitled to relax the appointment requirements in these circumstances.
- [28] On the facts of this case, except for the issue relating to the applicability of the Regulations prescribing the appointment for the post, the rest of the defences raised by the applicant are in my view unnecessary for me to traverse here.
- [29] On the available facts, it is indisputable that the provisions of the Systems Act and the 2014 Regulations relied upon by the first respondent to declare the applicant's employment contract void ab initio were declared constitutionally invalid on 9 March 2017.¹² The declaration of invalidity was indeed suspended for a period of 24 months ending at least on 9 March 2019 to allow the Legislature to correct the irregularity. The Legislature only managed to do so in May 2022 therefore, at the time the contract was concluded on 30 October 2019 the suspension period had lapsed and the order of invalidity was operational. This principle is succinctly

¹¹ In the applicant's letter of demand dated 3 April 2023, he sought clarity from the respondents with regard to what they consider to be money due him emanating from the termination of the appointment as at that time, he had only been paid what was equal to one month's salary on 31 March 2023.

¹² *South African Workers' Union v Minister and Others* [2017] (5) BCLR 641 (CC).

enunciated by the Constitutional Court in *Members of the Executive Council for Co-operative Governance and Traditional Affairs, Kwazulu Natal v Nkandla Local Municipality and Others*¹³ referencing SAMWU at para 18, that:

"A declaration of invalidity means that a provision or statute is unenforceable as a result of the declaration of invalidity. An order suspending the order of invalidity keeps the provision or the law alive until the suspension period has lapsed or until Parliament has either rectified the source of its invalidity or amended it. Interested parties may also approach this Court for an order extending the period of suspension. This must be done before the period of suspension has expired. In SAMWU, Parliament did not take advantage of the suspension period to rectify the source of the declaration of invalidity after the decision of this Court. The Minister also did not approach this Court for an order extending the suspension period before its expiry."

And further at para 19:

"...Once the suspension period had expired, the order of invalidity kicked in. After this there could no longer be any reliance by the MEC on the section to seek an order to declare the appointments null and void because it was invalid and therefore unenforceable."

- [30] Having regard to the facts of this matter and the case law to be applied, I am of the view that the issue in this review ought to be determined in favour of the applicant. The above confirms the applicant's contention that at the time the contract was concluded the Systems Act and the related 2014 Regulations were invalid and unenforceable therefore, the first respondent cannot rely on these provisions to seek an order to declare the applicant's appointment void ab initio.

¹³ [2021] ZACC 46.

- [31] I have thus come to a conclusion that the applicant has not made out a case for the relief he seeks, equally no case has been made out for the relief sought by the respondent in the counter-application. In the circumstances, both the application and the counter-application stand to be dismissed.

Costs

- [32] I have found no reason why the costs should not follow the respective results. I am not persuaded that the respondents' conduct is so reprehensible to warrant a punitive cost as suggested by the applicant. In the premises, I make the following order:

Order

- (1) The applicant's claim is dismissed with costs on scale B.
- (2) The respondent's counter-application (review application) is dismissed with costs on scale B.

The Honourable Justice
2025 -02
N.S. Daniso
N S DANISO, J

APPEARANCES

Counsel on behalf of the applicant:

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Instructed by:

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