



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: 2025-013682

In the matter between:

OLAOTSE THEOPHILUS BOJOSINYANE

Applicant

and

DITSOBOTLA LOCAL MUNICIPALITY

First Respondent

COUNCILOR MAZWI MORURI N.O.

Second Respondent

RASUPANG CLARIUS MOOKETSI N.O.

Third Respondent

MEC: COOPERATIVE GOVERNANCE, HUMAN

SETTLEMENT AND TRADITIONAL AFFAIRS, NORTH WEST

Fourth Respondent

Heard: 14 February 2025

Delivered: 28 February 2025

JUDGMENT

MAKHURA, J

Introduction

[1] The applicant was until 30 January 2025 employed in the capacity of the Municipal Manager of the Ditsobotla Local Municipality (Municipality), the first respondent in these proceedings. He has approached this Court on an urgent basis to declare the municipal council's decision to terminate his contract of employment summarily to be in breach of his contract unlawful and invalid or void *ab initio*, inconsistent with the principle of legality and unconstitutional. In addition, the applicant seeks specific performance in the form of reinstatement.

[2] The first to third respondents opposed the application and filed their answering affidavit. The fourth respondent appeared on the date of the hearing without filing any opposing papers and indicated that it intended to raise a point of law of jurisdiction and to argue that the matter was not urgent. These two points were also raised by the first to third respondents.

Material facts

[3] On 4 July 2024, at the Municipality's Special Council meeting, the municipal council resolved to appoint the applicant on a three year fixed term contract, effective 8 July 2024. The Municipality and the applicant subsequently concluded a contract of employment and signed it on 7 and 8 July 2024. Clause 1.1 of the contract of employment stipulates that:

'The Employer hereby employs the Employee on a performance based fixed term contract, and the Employee hereby accepts employment as MUNICIPAL

MANAGER, subject to the terms and conditions contained in this contract and subject to the Local Government Municipal Systems Act, 32 of 2000 as amended ("Systems Act"). The Employee's attention is specifically directed to sections 56, 56A and 57 of the Systems Act, the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers and the duties of top management as contained in section 77 and 78 in the Local Government: Municipal Finance Management Act, 56 of 2003, as amended, both in which the Employer will further refine during the signing of an annual performance agreement.' [Emphasis added]

[4] On 12 July 2024, the third respondent applied on an urgent basis to the North West Division of the High Court, Mahikeng, to declare the applicant's appointment unlawful and to set it aside. That application was opposed by the applicant and the Court struck the matter from the roll with costs.

[5] On 4 October 2024, the fourth respondent launched review proceedings before the High Court, Mahikeng. The fourth respondent sought an order declaring the appointment of the applicant to be in contravention of section 54A(3)(b) of the Systems Act¹ and/or to review and set aside the appointment and/or the contract of employment between the applicant and the Municipality.

[6] The applicant filed a notice to oppose the review application. On 22 October 2024, the municipal council resolved to oppose the "*frivolous and baseless*" review application. On 29 October 2024, the Municipality delivered a notice of intention to oppose the review application. No further steps were taken subsequently to prosecute the application.

¹ Local Government: Municipal Systems Act 32 Of 2000 (Systems Act).

[7] On 20 October 2024, at the second ordinary council sitting, a report was tabled which made serious allegations of misconduct committed by the third respondent during his tenure as the acting municipal manager. The report reads, *inter alia* that:

'There is a generally corrupt relationship between Mr Rasupang Mooketsi and the law firm known as MPM Molefe and Associates Attorneys.

That instead of defending these frivolous claims against Ditsobotla Local Municipality, he signed a deed of settlement with this law firm in an amount of R2 390 512.39. In signing the said deed of settlement, Mr Mooketsi committed the Municipality to the amount of R2 390 512.39 payable within 1 month, while the Municipality is not in a financial position to commit to such payments.'

[8] The report made further allegations of breach of procurement processes on the part of the third respondent, including the extension of contracts without following due procedures and appointment of service providers in contravention of the supply chain management processes. Following this report, the third respondent was suspended with effect from 8 November 2024.

[9] On 20 January 2025, the applicant was issued with a notice informing him of the special council meeting that took place on 17 January 2025. In terms of this notice, the special council had resolved to place the applicant on special leave with immediate effect. This notice of special leave reads that:

'You are hereby informed that Council resolved to place yourself on special leave with immediate effect from 17 January 2025 following the consideration of the report by the Member of the Executive Council for Cooperative Governance in respect of your appointment as a Municipal Manager.

Your special leave shall remain in force pending the review application before the High Court of South Africa, North West Division - Mahikeng filed by the Member of the Executive Council for Cooperative Governance.

In furtherance, you are advised not to report for duty and not to communicate with any of municipal employees, councillors and any of municipal stakeholders.

Failure to comply with paragraph 4 above may constitute an act of misconduct.’
[Emphasis added]

[10] In addition to the decision to place the applicant on special leave, the special council resolved to rescind the resolution of 8 November 2024 in terms of which it suspended the third respondent, uplifted his suspension and appointed him with immediate effect as the acting municipal manager.

[11] The applicant rejected the council’s decision to place him on special leave. As a consequence, he filed an urgent application in this Court for an order *inter alia* declaring that the decision to place him on special leave was unlawful and setting aside the special leave. This urgent application was enrolled for hearing on 31 January 2025. The Municipality did not oppose the application.

[12] On 28 January 2025, the third respondent’s attorneys in the High Court application that was struck from the roll on 12 July 2024, MPM Molefe & Associates, filed an application or a request for a date of hearing on the opposed motion roll in the High Court, Mahikeng. In other words, the third respondent had now decided to re-enroll the matter, after six months of inaction. MPM Molefe & Associates is the same firm of attorneys that sued the Municipality for over R2 million, which the third respondent in his capacity as the acting municipal manager at that time failed to defend the claim but instead entered into a settlement agreement of R2 390 512.39. It is the same firm of attorneys which in a report dated 20 October 2024 is alleged to have a “*generally corrupt relationship*” with the third respondent.

[13] At 19h26 on 30 January 2025, MPM Molefe & Associates, the attorneys who represent the third respondent in his personal capacity in the application to challenge the applicant’s appointment, addressed a letter to the applicant’s attorneys, this time acting on behalf of the Municipality. This letter is attached to the council’s resolution passed at a Virtual Special Council Meeting on 30 January 2025. The resolution reads, *inter alia*:

‘That Council uplifts the special leave of Mr Olaotse Bojosinyane and terminates his contract of employment with Council effective immediately.

That Council should not oppose the application filed by the MEC of COGTA but rather file a plea to be absolved from any costs associated with this litigation...’

[14] The second respondent, the mayor, communicated the decision of the council in a letter to the applicant as follows:

‘You are herewith informed that Council resolved to uplift your special leave effective immediately during its special sitting held [on] the 30th day of January 2025.

We regret to inform [you] that Council resolved to terminate your contract of employment... effective from 30th January 2025 following the assessment outcome on the compliance evaluation on the appointment of Municipal Manager conduct.

Your appointment was found to be in contravention of Local: Regulations on appointment and conditions of employment of senior managers and consequently in contravention [of] Local Government: Municipal Systems Act No 32 of 2000.’

[15] The upliftment of the special leave and the termination of the contract of employment with immediate effect in terms of the above resolution rendered the urgent application set down for 31 January 2025 moot. The Municipality advanced this argument and the Court agreed. The Municipality was however ordered to pay the costs of the urgent application on attorney and client costs.

[16] The applicant then launched these proceedings. He contends that the termination of his contract of employment is in breach of the contract and that it was not for any reason recognized in the Regulations on Appointment and Conditions of

Employment of Senior Managers². He also contends that the termination is unlawful and invalid because it offends the principle of legality, that the Municipality was required to approach the high court to seek an order to set aside his appointment and that it cannot resort to self-help.

Evaluation

Preliminary points: Jurisdiction and urgency

[17] The Municipality raised a jurisdictional point and also argued that the matter is not urgent. With regard to jurisdiction, the Municipality contends that regardless of the applicant's pleaded case, the "*dispute is about the termination of the applicant's contract of employment and must be referred to the CCMA*", which is the available alternative remedy for the applicant. The Municipality further argues that the applicant is trying to review the termination of his employment on the principle of legality and therefore this Court lacks jurisdiction.

[18] This Court has jurisdiction in terms of section 158(1)(h) of the Labour Relations Act³ (LRA) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.

[19] The termination of the contract of employment is not based on capacity or conduct or any reasons envisaged in the LRA. The second respondent has made it clear that the reason for the termination of the contract is that the appointment contravened the Systems Act.

[20] The respondents' submission that this Court lacks jurisdiction after they terminated the employment contract on the basis that the appointment contravened the law is absurd. The South African Local Government Bargaining Council's (SALGBC)

² GN 21 of 17 January 2014: Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers.

³ Act 66 of 1995, as amended.

mandate is to determine the fairness of the dismissal. However, it has no jurisdiction to entertain legality or invalid claims.

[21] The jurisdiction of the Court is determined based on the pleadings.⁴ In *Baloyi v Public Protector and others*⁵, the Constitutional Court held that:

‘It is trite that the same set of facts may give rise to several different causes of action. In some instances, the forum in which a particular cause of action may be pursued is prescribed in terms of legislation. In the labour context, where more than one potential cause of action arises as a result of a dismissal dispute, a litigant must choose the cause of action she wishes to pursue and prepare her pleadings accordingly. Had Ms Baloyi sought to pursue a claim of unfair dismissal, she would have been required, in terms of s 157(1) of the LRA, to approach the Labour Court. This is because unfair dismissal claims fall within the exclusive jurisdiction of the Labour Court.

Crucially, however, where a litigant is required to bring a certain cause of action before a specifically competent forum, it does not follow that they are bound to pursue a claim under that cause of action simply because it is possible to do so. Put differently, the fact that a cause of action is limited to certain fora must not be interpreted as obliging an applicant only to pursue that particular cause of action. The respondents cite the dictum of the Labour Appeal Court that ‘[i]f a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established under the LRA for their resolution’. In this case, they submit that, because Ms Baloyi has a claim meeting the definitional requirements of an unfair labour practice or unfair dismissal claim, she is obliged to pursue that claim in the Labour Court. In this regard, the respondents also place reliance on this court’s statement in *Steenkamp* that ‘[a]

⁴ *Gcaba v Minister for Safety and Security and others* (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at para 75; *Makhanya v University of Zululand* (2009) 30 ILJ 1539 (SCA); 2010 (1) SA 62 (SCA) at paras 23, 52 – 54 and 71; *SA Municipal Workers Union on behalf of Morwe v Tswaing Local Municipality and others* (2022) 43 ILJ 2754 (LAC); [2023] 2 BLLR 131 (LAC) at para 5.

⁵ (2021) 42 ILJ 961 (CC); [2021] 4 BLLR 325 (CC).

cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute-resolution mechanism of the LRA to obtain a remedy provided for in the LRA’.

The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist. In other words, the termination of a contract of employment has the potential to found a claim for relief for infringement of the LRA, *and* a claim for enforcement of a right that does not emanate from the LRA (for example, a contractual right)...⁶

[22] The applicant’s challenge to the Municipality’s decision to terminate his employment with immediate effect is not grounded on the LRA and/or fairness. That he could have opted to challenge the termination in terms of the LRA by referring an unfair dismissal dispute to the SALGBC does not preclude him from pursuing other remedies. The applicant has grounded his claim on the breach of contract and the principle of legality or lawfulness. He contended that the termination breached his contract of employment and offended the principle of legality. Accordingly, this Court has the necessary jurisdiction to entertain the matter and the power to issue an appropriate order.

[23] The Municipality’s argument that the matter is not urgent was influenced heavily by the argument that the applicant must declare and refer an unfair dismissal dispute in the normal cause and that this Court has no jurisdiction to entertain this application. This matter involves alleged abuse of public power by a public functionary. It involves a summary termination of a contract of employment without any hearing whatsoever. It involves the important but trite issue of whether a public functionary can resort to self-help to correct a wrongful or unlawful decision. The applicant is on a 3-year fixed term contract which is to expire in approximately 26 months. If the matter is referred in the ordinary course, or the LRA dispute resolution mechanisms are followed, which the

⁶ Ibid at paras 38 – 40.

applicant elected not to follow. For these reasons, I have decided to entertain the application on an urgent basis.

The merits

[24] Although the resolution did not set out the reason for the termination of the contract of employment, the second respondent's letter made it clear that the contract was terminated because it was in contravention of the Systems Act. The alleged contravened law is section 54A(3) of the Systems Act, which provides:

'A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if –

- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
- (b) the appointment was otherwise made in contravention of this Act.'

[25] The issue in this matter is not novel. It is whether the Municipality, having entered into a contract of employment on 7 and 8 July 2024, and now having decided that the contract was unlawful and a nullity, can disregard that contract of employment and its legal consequences. This question was answered by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*⁷ (*Oudekraal*). The SCA held that:

'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. 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

⁷ 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA).

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.’⁸

[26] The majority judgment of the Constitutional Court in *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*⁹ referred with approval the principle enunciated in *Oudekraal* above. The majority held that:

‘... The underlying principle, that public officials may not take the law into their own hands when seeking to override conduct with which they disagree, has also been given effect in three cases involving schools’ policies on admission of learners.

The fundamental notion - that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside - springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom* -

‘(t)he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.’

For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental

⁸ Ibid at para 26.

⁹ 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.’¹⁰

[27] The Labour Appeal Court (LAC) judgment in *Mbashe Municipality v Dumezweni and Others*¹¹ is apposite in this matter. There, the LAC had to determine whether the contract of employment or appointment of the municipal manager complied with the Systems Act. The LAC first noted that section 54A(1) of the Systems Act requires a municipal council to appoint a municipal manager as head of the administration of the Municipal Council (or an acting municipal manager) and that the appointed candidate must at least have the skills, expertise, competencies and qualifications as prescribed. Section 54A(3) must not be construed to confer the power to the council to disregard the appointment and its consequences, without first seeking the Court’s determination. The LAC concluded:

‘I do not understand subsection (3) to mean that the appointment of a Municipal Manager may be treated conclusively by a municipality, or anybody else, as null and void without the intervention of a court. The principle of legality does not permit this. Contracts are binding but may be void or voidable.’¹²

[28] The Municipality decided that it could correct this decision by passing a resolution. It passed a resolution to place the applicant on special leave pending the determination of the review application filed by the fourth respondent. The applicant sought urgently to challenge this decision. Confronted by this urgent application, the Municipality elected to constitute an urgent special meeting on 30 January 2025. This special meeting passed a resolution to (1) not oppose the application, (2) uplift the special leave and (3) terminate the applicant’s employment contract with immediate effect. The Courts have pronounced that this conduct is not allowed. The decision to set aside the appointment can only be taken by the High Court or this Court on review

¹⁰ Ibid at paras 102 – 103.

¹¹ [2015] ZALAC 18.

¹² Ibid at para 23.

because only a Court of law is the final *arbiter* on legality issues. The Municipality was therefore obliged to follow the correct legal process of applying to review and set aside the appointment. It cannot resort to self-help. Its decision to correct the wrong is therefore unlawful and void.

Remedy

[29] The applicant seeks specific performance in the form of reinstatement. In *South African Broadcasting Corporation SOC Ltd v Phasha*¹³ (*Phasha*), the LAC considered the appropriate remedy to be awarded where the court found that the employer subverted the agreement or as in this case, the legal prescripts. The LAC found that a party to a contract that has been wrongfully rescinded by the other party could elect to hold the other party to the contract.¹⁴ Referring to *Santos Professional Football Club (Pty) Ltd v Igesund and another*¹⁵, the LAC held that the Court has the discretion to refuse or grant specific performance. The order for specific performance may be refused if it would operate “*unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under the circumstances*”¹⁶. The LAC continued:

‘The argument on behalf of the appellant was that if there was a case of wrongful dismissal, it had to be grounded in the concept of fairness. But under the reasoning employed in this judgment, the ultimate finding is that by attempting to circumvent the process in terms of s 188A of the LRA, the appellant acted unlawfully. The distinction between fairness and unlawfulness was emphasised by the Constitutional Court in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* 2016 (3) SA 251 (CC); (2016) 37 ILJ 564 (CC) paras 189 and 192 where the court said that:

‘[189] An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that

¹³ [2020] ZALAC 50; (2021) 42 ILJ 816 (LAC).

¹⁴ *Ibid* at para 32.

¹⁵ (2002) 23 ILJ 2001 (C).

¹⁶ *Phasha* at para 33.

employee has never been dismissed, that means that the employee remains in his or her position in the employ of the employer...

[192] It is an employee whose dismissal is unfair that requires an order of reinstatement. An employee whose dismissal is invalid does not need an order of reinstatement. If an employee whose dismissal has been declared invalid is prevented by the employer from entering the workplace to perform his or her duties, in an appropriate case a court may interdict the employer from preventing the employee from reporting for duty or from performing his or her duties. The court may also make an order that the employer must allow the employee into the workplace for purpose of performing his or her duties. However it cannot order the reinstatement of the employee.'

That must be the position in this case given the finding to which this court has arrived; that unlawfulness renders the initial decision void. And that means that the respondent is entitled to be put back into a position from which she was unlawfully removed...'¹⁷

[30] The principle enunciated above that an employee whose contract was invalidly terminated does not need reinstatement applies equally in this matter. Accordingly, the appropriate remedy is to order the applicant, who has been unlawfully removed from work, to resume his duties as the municipal manager and for the first to third respondents to allow him to do so.

Costs

[31] The application is opposed by the Municipality and the second and third respondents. The applicants argued for a punitive costs order against the respondents.

[32] It is evident from the papers that the respondents understand this legal principle against self-help. They are well aware that in order to declare the appointment unlawful

¹⁷ Ibid at paras 34 – 35.

and have it revoked, they must go to the High Court or this Court. They are aware that they cannot help themselves by merely rescinding their decision to employ the applicant and ending the employment contract because they believe it to be unlawful or void. The third respondent has applied to set aside the appointment and so did the fourth respondent. Therefore, the second and third respondents are aware or should reasonably be aware that the decision to terminate the contract is unlawful. Yet, they decided to oppose the application.

[33] For the above reasons, the applicant argued that the Municipality constituted the special meeting of 30 January 2025 to circumvent the urgent application, and I must add, to circumvent the judicial processes that are pending before the High Court, Mahikeng. The Municipality rejected the applicant's argument and contended that:

'[T]he special meeting was prompted by the need to address MEC of Cogta's report on the appointment of the applicant in a proper and speedy manner.

[T]he issue relating to the special leave of the applicant was also on the agenda, including the report about his unlawful appointment as Municipal Manager in July 2024.

The other issue on the agenda was the first respondent's withdrawal of its notice to oppose the MEC of Gogta's review application...' [Emphasis added]

[34] The need to address the fourth respondent's or MEC's report properly and speedily cannot be done at the expense of the rule of law. The fourth respondent has followed a judicial review process. This particular council considered itself immune from the law. It undermined the pending legal processes. The council wanted the applicant out of its employment by hook or by crook.

[35] On 17 January 2025, the Municipality decided to place the applicant on special leave. When the applicant challenged the decision, the council, on the eve of the hearing of the application to overturn the decision to place the applicant on special leave, and in a legally 'skillful' and contrived move, uplifted the special leave with immediate effect and terminated the applicant's employment with immediate effect. This

was the council's show of power to the applicant. It acted rogue, in bad faith and abused its power. The second and third respondents elected to oppose the application together with the Municipality.

[36] Taxpayers' monies should not be funding what appears to be personal and emotional battles and self-created litigation. For these reasons, I have decided to order that the second and third respondents each file an original affidavit with the Registrar as to why they should not be ordered to pay the applicant's costs, on a client and attorney scale.

[37] In the premises, the following order is made:

Order:

1. The first respondent's decision to terminate the applicant's contract of employment with effect from 30 January 2025 is hereby declared unlawful and void *ab initio*.
2. It is declared that the contract of employment dated 7 and 8 July 2024 between the applicant and the first respondent remains in force and effect and the applicant remains the first respondent's municipal manager.
3. The applicant must report for duty on the next working day and the first to third respondents are ordered to allow the applicant to report for duty and resume his duties as the first respondent's municipal manager.
4. The second and third respondents are each directed to file the affidavit with the Office of the Registrar of this Court within 5 Court days of this judgment, to show cause why they should not be ordered to pay the costs of the application on attorney and client scale, jointly or jointly and severally in their respective personal capacities.
5. The costs of the application are reserved pending the filing of the affidavits in terms of paragraph 4 above

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr WP Scholtz

Instructed by:

Scholtz Attorneys

For the 1st – 3rd Respondents:

Mr K Phuroe

Instructed by:

MPM Molefe & Associates

For the Fourth Respondent:

Ms WN Sidzumo

Instructed by:

The State Attorney, Mahikeng