



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No. J599/22

In the matter between:

MOROASHIKE DAVID MOKOENA

Applicant

and

WEST RAND DISTRICT MUNICIPALITY

First Respondent

LIZEL VENTER (Ms)

Second Respondent

THABE DS (CLLR)

Third Respondent

Heard: 10 June 2025

Supplementary Heads: 18 & 24 June 2025

Delivered: 8 July 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand down is deemed to be 8 July 2025.

JUDGMENT

MAKHURA, JIntroduction

[1] The applicant brought these proceedings in terms of section 158 of the Labour Relations Act¹ (LRA) and section 77 of the Basic Conditions of Employment Act² (BCEA).

[2] The review application seeks to review and set aside the final investigation report dated 14 January 2020 and the West Rand District Municipality (WRDM or the first respondent) Council Resolution dated 16 January 2020. The investigation report sought to be reviewed was prepared by Lizel Venter Attorneys, the respondents' attorneys of record, subsequent to an investigation into the allegations of misconduct against the applicant. Lizel Venter Attorneys' director is cited as the second respondent in these proceedings. The respondents, including the second respondent, are represented by Lizel Venter Attorneys in these proceedings. This relief was, however, abandoned by Mr Kufa, appearing for the applicant, during the hearing. The applicant persists with the review against the Council Resolution. In this regard, the applicant also seeks an order that the delay in instituting the review application be overlooked.

[3] The application in terms of section 77 of the BCEA is for various declaratory orders - that the termination of employment was in breach of his contract of employment; that his dismissal on 17 January 2020 is unlawful, invalid and liable to be set aside; that his termination of employment on the basis of his appointment having lapsed is void *ab initio*; and that his contract of employment remains extant.

¹ Act 66 of 1996, as amended.

² Act 75 of 1997.

[4] In the alternative, the applicant seeks an order for payment of R3 281 377.26, being the total amount he would have earned from the date of his dismissal to the date when his fixed-term contract would have lapsed.

Material facts

[5] The applicant was employed by the first respondent as a Municipal Manager on a fixed-term contract of employment from 14 August 2011 to 14 August 2016.

[6] Prior to the expiry of the above fixed contract on 14 August 2016, the applicant and the first respondent entered into a performance agreement. This performance agreement was signed by the parties on 27 June 2016 and was, despite the applicant's contract coming to an end in a month and a half, for the financial year 1 July 2016 to 30 June 2017. Clause 3.3 of this performance agreement provides that the performance agreement will terminate at the termination of the contract of employment.

[7] At the end of the fixed-term contract on 14 August 2016, the applicant was appointed in an acting capacity for three months, pending the recruitment and appointment process of the new incumbent. The applicant applied for the position. On 11 November 2016, the first respondent's Council resolved to offer the applicant the position of Municipal Manager and to appoint its Chief Financial Officer from 14 November to 30 November 2016 as an Acting Municipal Manager.

[8] On 30 November and 7 December 2016, the applicant and the first respondent concluded a fixed-term contract of employment. This fixed-term contract was for the period 1 December 2016 to 30 November 2021. The contract of employment provides that it was:

'subject to terms and conditions contained in this contract and subject to the Local Government: Municipal Systems Act, 2000 and the Municipal Finance Management Act, 2003.'

[9] Further, the contract was subject to:

'The signing of a Performance Agreement within sixty (60) days after assumption of duty and annually within one (1) month after the commencement of the new financial year as based on the Performance Management Plan in Annexure A, provided for in Appendix A.'

[10] The termination of contract clause provides that the employment contract may be terminated by the applicant by giving *"the employer two (2) months' notice of termination in writing"* or by the employer on one calendar month's notice in writing. In addition, the termination clause provides that the contract *"will"* terminate if *"a performance agreement is not concluded within sixty (60) days after the employee's appointment"*.

[11] The applicant and first respondent entered into a performance agreement on 27 February 2017. Both parties concluded performance agreements in the subsequent years. The applicant continued to render services until 31 October 2019, when the first respondent resolved to suspend him based on an allegation of misconduct. The relevant part of the resolution reads that:

'Council resolved to place the MM on precautionary suspension pending investigation on how he managed the entire process of the appointment, including having put the institutions name in disrepute. The investigation be conducted within the Framework of the law governing Municipal Managers.

Council resolved to appoint an Acting MM in the name of Mr E Kolozi with immediate effect.'

[12] The applicant was notified of the decision to suspend him on 1 November 2019. Although the respondents pleaded that the applicant was given 7 days to make representations why he should not be suspended, it is common cause that the applicant was informed to vacate the premises with immediate effect on 1 November 2019, rendering the alleged 7-day opportunity academic as the suspension took effect immediately.

[13] On 4 November 2019, the applicant's attorneys addressed a letter challenging the decision to suspend him and demanding the immediate upliftment of his suspension. On 7 November 2019, the first respondent considered the applicant's attorneys' letter and reaffirmed its position and its 31 October 2019 resolution to place the applicant on suspension based on how he managed the appointment process of the CFO. The suspension was for a period of three months.

[14] Lizel Venter Attorneys were appointed on 22 November 2019 to conduct the investigation into the above allegation of misconduct. Lizel Venter Attorneys prepared and presented a preliminary report on or about 4 December 2019. In this preliminary report, the following was recorded:

'Due to the failure by the Municipal Manager to conclude the Performance Agreement within the prescribed timeframes of section 57(2)(a)(i) of the Systems Act the Municipal Manager's appointment lapsed.

... it was established that at no time did the Municipal Manager show "good cause" as to why his appointment should not lapse, and at no point did the municipal council... express their "satisfaction" that such "good cause" was indeed shown by the Municipal Manager...

Based on the above... facts it is clear that the appointment of the Municipal Manager lapsed. As such the Municipal Manager is not an "employee" of the WRDM and no employment relationship exist between the two parties.'

[15] On 5 December 2019, the first respondent addressed a letter to the applicant in terms of which he was invited to make representations regarding his compliance with section 57(2)(a) of the Local Government: Municipal Systems Act³ (Systems Act). Section 57(1) and (2) of the Systems Act provides that:

'(1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only -

³ Act 32 of 2000.

(a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance concluded agreement concluded annually as provided for in subsection (2).

(2) The performance agreement referred to in subsection (1) (b) must –

(a) (i) be concluded within 60 days after commencement of service, failing which the appointment lapses: Provided that, upon good cause shown by such person to the satisfaction of the municipal council, the appointment shall not lapse; and

(ii) be concluded annually, thereafter, within one month after the beginning of each financial year of the municipality;’ [Own emphasis]

[16] In the letter dated 5 December 2019, the first respondent referred to the signed contract of employment and section 57(2)(a)(i) of the Systems Act. The first respondent alleged that the applicant was appointed on *10 November 2016* and therefore the 60 days in section 57(2)(a)(i) of the Systems Act lapsed on *9 January 2020*. The applicant was informed that he was required in terms of section 57(2)(a)(i) of the Systems Act to approach the first respondent to show “*good cause*” why his appointment should not lapse “*by reason of the fact that the parties are not able to conclude the Performance Agreement within the prescribed period of 60 days*” and that he failed to make a request to this effect. The applicant was informed that his appointment had lapsed as a result of the non-compliance with section 57(2)(a)(i) and that the consequence of this was that there was no valid and binding employment between him and the first respondent.

[17] The applicant was then afforded an opportunity to make representations to provide any proof of compliance with section 57(2)(a), or alternatively, the reasons or explanation for his non-compliance and why his appointment has not lapsed.

[18] In his representations made through his attorneys, the applicant raised a point that the first respondent did not require him to sign the performance agreement within 60 days. He submitted that he subsequently signed performance agreements, which

served to ratify any previous defect and that the first respondent's failure to raise this alleged non-compliance previously constitutes a waiver. The applicant proceeded to give the reason why the performance agreement was signed on 27 February 2017. He stated that at the time of appointment in December 2016, the first respondent's Council had developed the terms of office and planned 14 outcomes that had to be implemented for the forthcoming five years. He continued:

'This impacted and caused the delay in signing of a new Performance Agreement. There was a strategic session for a new implementation plan for the new political term...

It was only after the strategic planning session held on the 21st to the 23rd of February 2017 that [the applicant] was then asked by the Municipality to sign a new performance agreement that incorporated the new implementation plan plus the service delivery budget adjustment for the month of January 2017...'

[19] The applicant provided proof that the first respondent's strategic planning session was held on 21 to 23 February 2017, and the 14 outcomes which were developed for the five-year plan. He also provided a copy of the email dated 24 February 2017 from the head of the performance section to him, in terms of which the performance agreement was attached, and he was requested to provide comments or inputs before the signing of the agreement. Accordingly, the applicant submitted that to the extent that there was any non-compliance, he is not at fault, but the first respondent was. In conclusion, the applicant recorded that the first respondent *"is set on terminating his employment contract and seeks to rely on baseless grounds for doing so"* and that, should it persist with the allegation that his employment had lapsed, he would approach the High Court for the necessary declaratory relief.

[20] On 20 December 2019, Lizel Venter Attorneys finalised the report. The final investigation report made findings of alleged misconduct insofar as the CFO's appointment process is concerned. The report recommended that:

'In view of the contents of this Investigation Report and the Preliminary Report presented to the Municipal Council on 4 December 2019, it is hereby recommended that:

9.1 In the event that the Municipal Council finds that the Municipal Manager's appointment has not lapsed due to non-compliance with the provisions of the erstwhile 57(2)(a)(i) of the Systems Act, as comprehensively dealt with in the Preliminary Report which was presented to the Municipal Council on 4 December 2019, then and in that event the Municipal Council of the WRDM should proceed to institute disciplinary steps against the Municipal Manager based on the above referred to findings;

9.2 Any disciplinary action instituted against the Municipal Manager must be done in compliance with the provisions of the Financial Misconduct Regulations, read with the provisions of DRSM.'

[21] On 17 January 2020, the first respondent issued a letter to the applicant, with the subject "*lapsing of appointment as Municipal Manager in terms of section 57(2)(a)(i) of the [Systems Act]*". The letter reiterated the first respondent's earlier stance that he should have signed the performance agreement by 9 January 2020. The applicant was informed that his contract of employment lapsed as a result of the non-compliance with section 57(2)(a)(i) of the Systems Act. The consequence of the non-compliance, so the letter continued, is that "*there is no valid and binding contract of employment*" and that the first respondent has no discretion but to effect the peremptory statutory provisions.

[22] On 28 January 2020, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). On 19 February 2020, the CCMA issued a certificate of outcome and which certified the dispute as unresolved. On the same day, the applicant requested arbitration.

[23] On 3 June 2022, the applicant launched the current proceedings in this Court.

Evaluation

[24] This is a hybrid application – to review and set aside the Council Resolution and to declare the termination of employment invalid. The first respondent's case is that the contract of employment terminated *ex lege* due to the applicant's failure to sign a performance agreement within 60 days and the failure to show good cause to the Council's satisfaction within the 60-day period that his appointment did not lapse. I deal first with the alleged unlawful or invalid dismissal. The review of the Council Resolution would be dependent on the decision on the lawfulness or otherwise of the dismissal. If the dismissal was carried out lawfully, that would mean that the resolution was lawful. If the dismissal was unlawful, that would render any decision on the rationality of the resolution moot and superficial.

[25] Since the contract of employment came to an end by operation of law, as alleged by the first respondent, the question this Court has to answer is whether the jurisdictional requirements for the lapsing of the appointment or contract of employment have been met. If they are met, then the contract of employment would have lapsed and the applicant's appointment would have terminated *ex lege*. If not, the contract of employment remained extant for its duration and the applicant remained in the first respondent's employ until the expiry of the contract.

[26] The matter turns on the interpretation of section 57(2)(a)(i) of the Systems Act, which reads as follows:

- '(2) The performance agreement referred to in subsection (1) (b) must –
- (a) (i) be concluded within 60 days after commencement of service, failing which the appointment lapses: Provided that, upon good cause shown by such person to the satisfaction of the municipal council, the appointment shall not lapse;'

[27] I raised with the parties the Constitutional Court judgment of *Mamasedi v Chief of the SA National Defence Force & others*⁴ (*Mamasedi*), asked the parties to address the

⁴ [2024] ZACC 17; (2024) 45 ILJ 2475 (CC).

Court on the interpretation of the above provision, including the meaning of days referred to in the Systems Act. The Systems Act does not provide a definition of a “day” or “days”. The first respondent submitted that in the absence of the definition of days in the Systems Act, this Court must adopt the definition in section 4 of the Interpretation Act⁵, in terms of which Saturdays, Sundays and public holidays are included except where the last day falls on a Sunday or a public holiday. The applicant, on the other hand, urged the Court during the hearing to apply the definition of a day in line with *Mamasedi*.

[28] In *Mamasedi*, the Constitutional Court was confronted with an interpretation of section 59(3) of the Defence Act⁶, which provides that:

‘A member of the Regular Force who absents himself or herself from official duty without the permission of his or her commanding officer for a period exceeding 30 days must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank, on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of duty or the last day of his or her official leave, but the Chief of the Defence Force may on good cause shown, authorise the reinstatement of such a member on such conditions as he or she may determine.’⁷

[29] Rejecting the adoption or application of section 4 of the Interpretation Act to the Defence Act, Zondo CJ, in a unanimous judgment, held that:

[42] In *Mogapi* the judgment of the High Court does not reveal whether Mr Mogapi did disclose the basis for his submission that Saturdays, Sundays and public holidays were excluded from the period of 30 days in s 59(3). So, we do not know whether it was that on those days Mr Mogapi was not obliged to work, as is the case in the present case. To the extent that Mr Mogapi may not have disclosed the basis for his submission that Saturdays, Sundays and public holidays were to be excluded from the 30 days in s 59(3), the High Court was

⁵ Act 33 of 1957.

⁶ Act 42 of 2002.

⁷ See also *Mamasedi* at para 33.

correct to rely on s 4 of the Interpretation Act to conclude that Saturdays, Sundays and public holidays were included. In the present case the High Court relied on *Mogapi* to support its decision that the period of 30 days in s 59(3) includes both the days on which the employee was obliged to work and those on which he is not obliged to work.

[43] I, therefore, conclude that the reference to 30 days in s 59(3) is a reference only to the days on which the member is obliged to be on official duty. Weekends and public holidays cannot be included in calculating the 30 days if such days are not days on which the member is obliged to be on official duty. Of course, if weekends and public holidays are days on which the member is obliged to be on official duty, then those days would be counted in determining whether a member was absent from official duty without his or her commanding officer's permission for a period exceeding 30 days.

[44] The interpretation of 30 days advanced by the respondents would, if accepted, result in members of the Regular Force being dismissed for not being on duty on a day they were not obliged to be on duty. This would happen, for example, if a member was away from work without permission for 28 days if you do not count three other days on which he or she was not at work but was not obliged to be at work. He or she would have exceeded the 30 days on that approach by one because two of the days which would be counted would be days on which he or she was not obliged to work. That is the interpretation that says the reference to 30 days in s 59(3) is a reference to calendar days irrespective of whether or not the member was obliged to work on those days or on some of those days. This interpretation does not promote the spirit, purport and objects of the Bill of Rights. The interpretation I have adopted in this judgment promotes the spirit, purport and objects of the Bill of Rights.'

[30] Seven calendar days after the *Mamasedi* judgment, the Labour Appeal Court (LAC) issued a judgment in *Member of the Executive Council: Department of Education*,

*KZN and another v Cumaio*⁸ (*Cumaio*). There, the LAC was confronted with the interpretation of section 14(1) of the Employment of Educators Act⁹ (Educators Act). Section 14(1) provides that:

‘(1) An educator appointed in a permanent capacity who –
 (a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
 ...
 shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where –
 (i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work...’

[31] The LAC held that the 14 consecutive days refer to days on which the employee was required to be at work. It held as follows:

‘In the present instance, the calculation of the 14-day period referred to in section 14(1)(a) was thus to be done by accounting not for calendar days, but only for those days on which the employee was obliged to be at work. It follows that the 14-day period on which the Department relied to invoke section 14(1)(a) had not yet expired on 29 November 2017, calculated as it was as calendar days. In short, the Department’s calculation of the *dies* was incorrect. 14 consecutive days from 15 November 2017, correctly calculated, had not expired by 29 November 2017 and the Department’s reliance on section 14(1)(a) was thus premature.’¹⁰

[32] In terms of his contract of employment, the applicant was required to work: ‘such hours and days in accordance with the operational needs and requirements of the Employer, which will not be less than forty (40) hours per week from Monday to Friday.’

⁸ [2024] 12 BLLR 1249 (LAC); (2025) 46 ILJ 99 (LAC).

⁹ Act 76 of 1998.

¹⁰ Ibid at para 15.

[33] From the above, it is clear that the applicant was contracted to work Mondays to Fridays. In terms of section 18 of the BCEA:

‘An employer may not require an employee to work on a public holiday except in accordance with an agreement.’

[34] Therefore, where any of the days (from Monday to Friday) is a public holiday, the first respondent had to have agreed with the applicant that his working days would include public holidays. No such provision exists in the contract of employment.

[35] The contract of employment required the applicant to work Mondays to Fridays, and the BCEA prohibits employers from requiring employees to work on public holidays except whether the parties have agreed. The contract of employment does not make any provision for such an agreement. In my view, the interpretation in *Mamasedi*, although decided on a wording slightly different to the wording in *casu*, must be adopted. In *Cumaio*, despite the section referring to “consecutive” days, the LAC adopted the *Mamasedi* interpretation and held that these are consecutive days that the employee is required to be at work.

[36] The Systems Act made reference to days, not *calendar* days, not weeks and not months. If these days were to be inclusive of days other than the days that the applicant was required to be at work, the Systems Act would have expressly stated so or would have qualified this by stating that “calendar days” instead of “days” or referred to the period in weeks or months. I see no reason why this Court should deviate from the interpretation adopted in the above judgments. Therefore, the 60 days must be counted to exclude Saturdays, Sundays and public holidays, which are days that the applicant was not contracted or required to be at work.

[37] Counting 60 working days from 1 December 2016, the last day of signing the performance agreement was 28 February 2017. The performance agreement was signed on 27 February 2017, which was within the period. Based on the above, the jurisdictional requirements for the appointment or employment contract to lapse have

not been met and the first respondent's reliance on section 57(2)(a)(i) was premature. The letter informing the applicant that his contract had lapsed was based on an incorrect interpretation of the law and facts. The applicant's contract of employment did not lapse as alleged. His contract of employment was therefore terminated by the first respondent, and that act of termination was invalid. Accordingly, the applicant's contract of employment remained extant, and he is therefore entitled to his declaratory relief.

[38] If I am wrong in my interpretation of days, section 57(2)(a)(i) makes a proviso that, "*upon good cause shown by such person to the satisfaction of the municipal council, the appointment shall not lapse*". In other words, the proviso is that if "*such person*", in this case the applicant, shows good cause to the satisfaction of the council, "*the appointment shall not lapse*".

[39] The law relating to the interpretation of documents was summarised by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹¹ as follows:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable,

¹¹[2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[40] Mr Laubscher submitted that once the appointment lapses, it cannot be revived because the good cause referred to in this provision must be shown during the 60-day period, not after the expiry of the period. For this submission, he relied on the judgment of *Mere v Chairperson of the North West Provincial Executive Council and Others*¹² (*Mere*). In *Mere*, the applicant (*Mere*) was employed as a Municipal Manager for the sixth respondent, Tswaing Local Municipality (Tswaing). He sought a declaratory order that he remained the employee and municipal manager or that his appointment as the municipal manager had not lapsed. This followed a letter from Tswaing informing *Mere* that his appointment had lapsed as a result of the non-compliance with section 57(2)(a)(i) of the Systems Act. The matter turned on the interpretation of section 57(2)(a)(i).

[41] *Mere* was appointed with effect from 1 April 2012. The performance agreement between him and Tswaing was concluded on 18 July 2012. The learned Judge Gura concluded that the consequences of the non-compliance with section 57(2)(a)(i) is that the appointment lapses. Prior to reaching this conclusion, Gura J made the following observations and findings:

'[23] ... In my view, but for the redeeming provision, the appointment would have lapsed automatically after sixty days.'

¹² Unreported and Unpublished Judgment, North West High Court Case No. M454/2015, dated 30 June 2016. The judgment was attached to the respondents' heads of argument.

[24] The redeeming provision in section 57(2)(i) states: “provided that upon good cause shown by such person to the satisfaction of the Municipality, the appointment shall lapse...”

[25] In my view, before the expiry of sixty days, the onus is on the applicant, but not on the Municipality or its Council to show good cause to the employer ... why the appointment shall not lapse. This is a positive but not a passive act on the part of the applicant. If he fails to take a positive step to show good cause to the employer, his employment will automatically lapse at the end of sixty days. In determining whether good cause has been shown, the conduct of the sixth respondent is irrelevant. The purported renewal of the appointment of the applicant beyond the sixty days period is illegal and a nullity because it flies into the face of section 57(2)(a)(i).

[26] Above that, it is common cause between the parties that the applicant did nothing to discharge the onus which rests upon him in terms of section 57(2)(a)(i). He never submitted any representation to the sixth respondent before the expiry of sixty days.’ [Own emphasis]

[42] On whether Mere’s continued employment and subsequent conclusion of the performance agreements meant that the non-compliance was condoned, Gura J, referring to the opening sentence of the section, which reads that “[t]he performance agreement referred to in subsection (1) (b) must”, held that the word “must” is an unambiguous indication that the Municipality has no discretion or power to condone a nullity.

[43] The *Mere* judgment is not binding but is of persuasive authority. *Mere* was handed down before *Mamasedi* and *Cumaio* and the Court did not engage in the interpretation of “days”. To the extent that the Court adopted the definition in the Interpretation Act, the present matter, as I have demonstrated above in terms of the applicant’s contract of employment and the *Mamasedi* and *Cumaio* judgments, I am unable to agree with the interpretation.

[44] Mr Lauscher submitted that good cause must be shown before the expiry of 60 days. If adopted, this interpretation and submission based on *Mere* would in my view have unimaginable and unintended consequences. A municipal manager, who is given a performance agreement on the 59th day, and becomes incapacitated for reasons outside his control for two days from the 59th day before signing the performance agreement and recovers on the 61st day, his appointment, taking Mr Laubscher's argument to its logical conclusion, would have lapsed and he will not be entitled to an opportunity to show good cause why he did not sign the performance agreement by the 60th day. This would be untenable.

[45] Secondly, it must be borne in mind that the appointed municipal manager is not responsible for the preparation of the performance agreement. Mr Laubscher's interpretation would mean that if a Municipality delays in preparing the performance agreement and the municipal manager is only provided with a copy of the performance agreement on the 61st day, his appointment lapses and he is effectively barred from showing good cause.

[46] In my view, the proviso enjoins the municipal council, before making a pronouncement that the appointment had lapsed, to afford the municipal manager an opportunity to show cause why the appointment should not lapse. This is in keeping with the *audi alterum partem* principle, the right of the employees to fair labour practices guaranteed in the Constitution¹³ and to prevent arbitrary decisions by public sector employers. For these reasons, I hold a different view from that expressed by Mr Laubscher supported by *Mere* that good cause must be shown during the 60-day period. Further, I do not agree that the conduct of the Municipality in determining good cause is irrelevant. My view is that in showing good cause, the role, if any, played by the Municipality cannot be ignored. It would be remiss to disregard the delays caused by the Municipality in formulating the performance agreement when the applicant is not a party who decides his own performance targets and indicators.

¹³ Section 23 of the Constitution of the Republic of South Africa, 1996.

[47] Accordingly, in the event that the applicant's appointment lapsed, the first respondent was duty-bound in terms of the proviso to afford the applicant an opportunity to show good cause. It failed to do so. Its decision was therefore taken in breach of section 57(2)(a)(i) and is a nullity, with the result that the termination of the contract of employment was not *ex lege* as alleged but was carried out by the first respondent's act. That act of terminating the contract of employment by the first respondent is therefore invalid. The applicant is entitled to his declaratory relief.

[48] Based on the findings above, the review application has become moot. In any event, the review application is limited to the Council Resolution. Therefore, whether or not the review application succeeded is of no consequence because reviewing and setting aside the Council Resolution does not automatically invalidate the dismissal or letter dated 17 January 2020.

Remedy

[49] In *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)*¹⁴, the Constitutional Court held that:

'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 employee has never been dismissed, that means that the employee remains in his or her position in the employ of the employer...'¹⁵

[50] The fixed term contract was for the period 1 December 2016 to 30 November 2021. The applicant cannot be ordered to resume his duties and the first respondent cannot be ordered to permit the applicant to resume his duties because the fixed period had expired. The appropriate relief, which was strangely sought in the alternative, is the payment of the applicant's remuneration for the remainder of his contract, that is,

¹⁴ 2016 (3) SA 251 (CC); (2016) 37 ILJ 564 (CC).

¹⁵ Ibid at para 189.

payment from 17 January 2020 to 30 November 2021. This payment amounts to R3 281 377.26.

Costs

[51] Both parties sought costs against each other. The applicant sought costs on an attorney and client scale. The conduct of the first respondent was opportunistic and disingenuous. It sought to investigate the applicant on an allegation of misconduct. When its appointed investigator, the second respondent, presented its preliminary report, which suggested that the applicant's appointment may have lapsed, it jumped at the opportunity because it was set on finding any reason to dislocate the applicant from his employment. All the respondents, including the second respondent who was only appointed by the first respondent through her firm of attorneys to conduct an investigation into an allegation of misconduct, elected to participate in the proceedings and opposed the application.

[52] The first respondent blindly followed the report and informed the applicant that his appointment had lapsed. The applicant had to assert his right by approaching this Court. He should not be saddled with all the costs of this application, and for their conduct in dismissing and contributing to the decision to unlawfully terminate the applicant's contract of employment, the respondents must be liable to pay the costs of the application.

[53] Whilst the applicant is in my view entitled to costs, I am not persuaded that a case has been made out for a punitive scale. In addition, I am not persuaded that the applicant is entitled to 100% of the costs. In my view, the applicant should be entitled to recover 50% of the costs of the application and should not be entitled to costs relating to the drafting of the supplementary heads of argument.

[54] The reasons are that the applicant had abandoned part of his relief at the hearing of the matter. I have also considered the fact that the Court upheld the claim primarily

based on the *Mamasedi* and *Cumaio* judgments, which the applicant did not address in his supplementary heads of argument. His supplementary heads of argument were of no assistance to the Court, and for that reason, he should not be entitled to the costs of drafting the supplementary heads of argument.

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

Order

1. The termination of the applicant's fixed-term contract of employment on 17 January 2020 is hereby declared invalid and/or void *ab initio*.
2. It is declared that the fixed-term contract of employment between the applicant and the first respondent remained extant and the applicant remained the first respondent's employee and municipal manager until 30 November 2021.
3. The first respondent is ordered, within 15 court days of this judgment and order, to pay the applicant R3 281 377.26, which is an equivalent of his unpaid remuneration for the period 17 January 2020 to 30 November 2021.
4. The respondents are ordered to pay the applicant's costs, excluding the costs of drafting the supplementary heads of arguments, jointly and severally, the one paying the other to be absolved, limited to 50% and the costs of one counsel, on a party and party scale.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr M Kufa
Instructed by:	Abner Mabaso Inc.
For the Respondents:	Mr NC Laubscher
Instructed by:	Lizel Venter Attorneys