



- (1) Reportable: NO
 (2) Of interest to other Judges: Yes

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

CASE NO: D85/23

In the matter between:

TEBOGO MANELE

Applicant

And

MEMBER OF THE EXECUTIVE COUNCIL

COOPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS, FREE STATE

PROVINCE

First Respondent

TSHEPISO RAMAKARANE

Second Respondent

Heard: 1-24 October 2024, 10-11 November 2025 and 3 December 2025.

Delivered: This judgment was handed down electronically by circulation to the parties' Legal Representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing - down is deemed to be 15h30 on 28 July 2026.

JUDGMENT

LALLIE J

- [1] The doctrine of separation of powers requires that each arm of government, namely, the legislature, executive and the judiciary exercise only the power vested in it and guard against encroaching on the authority of others. Its main purpose is the promotion of accountability and good governance. In provincial government state power is exercised mainly through heads of provincial government departments and public administration. The doctrine of separation of powers is applicable in all spheres of government. The institution of these proceedings stems from the exercise of power by a Member of Executive Council for Cooperative Governance and Traditional Affairs.
- [2] The plaintiff is Mr Manele (Manele). He is employed as the Office Manager of the Member of the Executive Council (MEC) for the Department of Agriculture in the Free State Province. On 11 February 2020 while the plaintiff was the Office Manager to the MEC for Cooperative Governance and Traditional Affairs (COGTA) in the Free State Province, the Provincial Executive Council of the Free State (the EXCO) passed a resolution to intervene at Metsimaholo Local Municipality (the Municipality) in terms of section 139(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution). On 12 February 2020, Mr Nxangisa (Nxangisa) who was the MEC for COGTA at the

time appointed the plaintiff as an administrator of the Metsimaholo Municipality in terms of section 139(1)(b) of the Constitution. The appointment was at the level of a Chief Director. As the plaintiff was the Office Manager of Nxangisa's office at the time, the latter seconded him in terms section 15 of the Public Service Act of 1994 (the PSA) to serve as the municipality's administrator.

- [3] On 19 June 2020 the EXCO passed a resolution approving the payment of a secondment allowance to fulltime EXCO representatives and assistant EXCO representatives with effect from the date of their secondment. The plaintiff received the allowance in the mount of R50 000,00 per month for a period of 7 months. On 10 February 2021 the intervention at Metsimaholo Municipality in terms of section 139(1)(b) of the Constitution was extended by a period of 8 months and on 29 October 2021 the Head of the Department terminated the plaintiff's appointment as an administrator.
- [4] It is the plaintiff's case that when he took up the position as an administrator at Metsimaholo Municipality he continued being remunerated at the rate of Director level 13 instead of being remunerated at the rate of a Chief Director at level 14 in line with his appointment letter and the remuneration rate of other administrators. The plaintiff alleged that the first defendant acted in breach of the agreement they reached on 12 February 2020. In these proceedings he seeks an order directing the first defendant to pay him an amount of R187 856, 75, the salary difference between level 13 and level 14 remuneration rate for the period 20 February 2020 to 31 October 2021 and his remaining secondment allowance in the amount of R650 000.00.

- [5] The defendants opposed the plaintiff's claim on the grounds that the amounts which form the basis of his claim are not legally due to him. In substantiating his claim that he is entitled to the payment of the amount of R187 856,75 which constitutes the salary difference between salary level 13 and 14 for the period between 20 February 2020 and 31 October 2021 the plaintiff relied on the letter he received from Nxangisa dated 12 February 2020 which, in his view, constituted a contract of employment. The salient parts of the letter read as follows:

“APPOINTMENT AS ADMINISTRATOR: METSIMAHOLO LOCAL MUNICIPALITY

1. This letter serves to confirm your appointment as the Administrator at Metsimaholo Local Municipality. This is in line with the resolution of the Provincial Executive Council of Free State (“Executive Council”) dated 11 February 2020, wherein the Executive Council resolved to intervene at Metsimaholo Local Municipality in terms of section 139(1)(b) of the Constitution. The MEC has elected to appoint you as the Administrator.
2. The date of your appointment is effective from 20 February 2020 for a period of 12 months, subject to further written extensions or termination of the intervention in which case the Department reserves the right to provide you with seven written days' notice.

Location

Bloemfontein/Sasolburg

Rank

Chief Director”

- [6] The defendants denied that the letter is a contract of secondment. They submitted that the letter is an instruction for the plaintiff to exercise the powers and perform the duties listed in it at the rank of Chief Director.

[7] The essential question to be answered in determining whether the plaintiff is entitled to the portion of the salary he should allegedly have earned when appointed as an administrator at Metsimaholo Municipality is whether Nxangisa, in his capacity as the Member of the Executive Council (MEC) for COGTA, had the authority to second the plaintiff and raise his rank and consequently his salary to that of a Chief Director. The plaintiff relied on Nxangisa's letter appointing him as the administrator of Metsimaholo Municipality, documentary evidence and oral evidence of witnesses who supported his version in submitting that he was entitled to be remunerated at the level of Chief Director during his secondment. He drew attention to paragraph 4 of his letter of appointment which reads as follows:

"4. Your appointment is hereby, formalised and confirmed and any other formalities or lack thereof, in respect of contractual obligations, do not affect the validity of this appointment."

[8] The defendants argued that the executive authority's failure to comply with the relevant prescripts in effecting the secondment was fatal to the plaintiff's claim. They relied on regulation 57(1)(d) of the Public Service Regulations of 2016 which provides that an executive authority shall ensure that each person upon appointment is provided with written particulars of employment including the terms and conditions of his or her service. They also relied on regulation 87 and 12A. All the regulations regulate employment of individuals in the civil service. They submitted that in seconding the plaintiff to the Municipality Nxangisa acted in breach of section 15 of the PSA.

[9] The first defendant's evidence was that the letter of appointment did not constitute valid secondment of the plaintiff because it was not a written

contract and failed to comply with the prescripts that regulate secondment of public servants. The first defendant relied on the provisions of section 9 of the PSA which enjoins the executive authority to make appointments in his or her department in accordance with the PSA and in such a manner and on such conditions as may be prescribed.

- [10] Section 15(2) and (4) of the PSA grant the executing authority powers to second employees in the following words:

“15(2) A person in the service of a department under any law other than this Act, or in the service of another government, or of any council, institution or body established by or under any law, or of any other body or person, may be employed by another department or a department, as the case may be, for a particular service or for a stated period and on such terms and conditions, other than conditions laid down by or under any pensions law, as may be agreed upon by the employer of the person concerned and the relevant executing authority and approved by the Treasury.

(4)(a) A person (in this paragraph referred to as the official) in the service of a department under any law other than this Act, or in the service of another government, or of any council, institution or body established by or under any law, or of any other body or person, may be employed by another department or a department, as the case may be, for a stated period and on such terms and conditions, other than conditions laid down by or under any pensions law, as may be agreed upon by the employer of the official and the relevant executing authority and approved by the Treasury and in such a case, on such conditions, in addition to those prescribed by or under any law, as may be determined by the said authority after consultation with the Treasury, an officer or employee may with his or her consent and in terms of such an

agreement be placed at the disposal of the employer of the official for the same period on an exchange basis.”

- [11] The defendants submitted that Nxangisa’s failure to act in consultation with the treasury in effecting the plaintiff’s secondment was in breach of section 15 of the PSA and rendered the secondment invalid. They relied on *Ndaba v Department of Communications* where the following was held¹:

“[19] In *Khanyile v Minister of Education and Culture, Kwazulu-Natal and Another*, the court decided that an appointment into the Public Service was null and void, as it had not been in compliance with the PSA or its regulations and was thus ultra vires the statute. Khanyile’s case was that he had been appointed in the ordinary course to full time employment in the Public Service. The court found that the appointment into the SMS had been flawed in at least three major aspects - first, the post was not advertised; secondly, the proper selection procedures were not followed and thirdly, no contract of service, nor a performance agreement were concluded.”

- [12] I accept the first defendant’s contention that the plaintiff’s letter of secondment to be an administrator at Metsimaholo is not a contract of appointment to the position. Secondment of government employees is governed by section 15 of the PSA. It is further regulated by regulation 62 of the Public Service Regulations. Nxangisa did not disclose the source of his authority to unilaterally second the plaintiff and to do so at the rank of Chief Director when he was employed at the MEC’s office as a Director at level 13 salary. Chief Directors are remunerated at salary level 14.

¹(JS925/2010) [2012] ZALCJHB 41 (11 May 2012) at para [19].

[13] The defendants submitted that the plaintiff's letter of secondment was an instruction for him to exercise the powers and perform the duties listed in the letter at the rank of Chief Director. Nxangisa attempted to cure his omission to follow all the formal requirements in effecting the secondment by stating the following in paragraph 4 in the appointment letter:

“4. Your appointment is hereby, formalised and confirmed and any other formalities or lack thereof, in respect of contractual obligations, do not affect the validity of this appointment.”

[14] The wording of section 15(4) presupposes that the requirement that a contract of secondment must be in writing has been complied with. The contract is an agreement on the duration and terms and conditions of the secondment with the approval of Treasury. The Treasury needs to apply its mind to the relevant information before granting its approval. It can practically perform that responsibility when the agreement is reduced to writing. Section 15(4) further provides that an officer may be seconded after consultation between the executing authority and the Treasury. The role of the Treasury in seconding an employee is material and significant. In the context of retrenchments consultation is defined in section 189(2) of the Labour Relations Act² (the LRA) as an engagement 'in a meaningful joint consensus-seeking process and attempt to reach consensus'. The participation of the Treasury in the secondment of an employee is vital. Nxangisa's decision to second the plaintiff at a higher rank and salary supports the need for the Treasury's participation in the process of secondment as it is directly affected by the increase in the plaintiff's salary.

² Act 66 of 1995, as amended.

- [15] Nxangisa's attempt to usurp the function of the Treasury cannot succeed. A secondment of a government official does not become valid because he stays so. He did not have the authority to declare the required formalities unnecessary or to condone his non-compliance with them. He was required to effect the plaintiff's secondment in terms of the law in exercising his powers. The plaintiff did not prove the validity of his secondment. He conceded that Nxangisa failed to fulfil all the requirements which would have rendered his secondment valid. The plaintiff's entitlement to the remuneration he is claiming in these proceedings depends on the existence of the contract on which his claim is based. He failed to present the contract. I must, in the circumstances accept the defendant's version that there was no contract.
- [16] Based on the decision in *Ndaba (supra)* I find that Nxangisa's failure to obtain the Treasury's consent and to effect the plaintiff's secondment in terms of the PSA and its regulations rendered the secondment invalid. The letter of appointment which placed the plaintiff at the rank of Chief Director is simulated as its purpose was to raise his salary irregularly during the period of his secondment. I have considered the plaintiff's submissions that other administrators at Metsimaholo Municipality were remunerated at the rate of Chief Director and that remunerating him less was unfair and discriminatory. The plaintiff did not disclose the circumstances surrounding the appointment of the other directors. As his case was based on contract he had to discharge the onus of proof that the amount he is claiming was due to him in terms of his contract of secondment. He did not discharge the onus of proof. His claim cannot succeed.

[17] The plaintiff's claim that he is entitled to a secondment allowance in the amount of R650 000.00 is based on a resolution the EXCO passed on 19 June 2020 whose salient provisions are the following:

"1. Determination of Allowance for Administrators and EXCO

Representatives

- 1.1 Approves the payment of secondment allowance for fulltime EXCO Representatives and Assistant EXCO Representatives;
- 1.2 The secondment allowance be determined and paid by COGTA and the amount to vary between R30 000.00 and R50 000.00 per month depending on the size of the municipality and nature and the extent of the assigned responsibilities;
- 1.3 That the allowance be paid to the EXCO Representatives and Assistant EXCO Representatives effective from their date of secondment;
- 1.4 Treasury allocates a budget to COGTA to fund the payment of secondment allowance.'

[18] The plaintiff testified that he received the secondment allowance in the monthly amount of R50 000.00 for a period of 7 months between 20 February 2020 and 31 October 2021. He stated that the first defendant refused to pay him the remaining portion of his secondment allowance in the amount of R650 000.00. It is common cause that payment of the secondment allowance was effected by using allowance code 0204 on the government PERSAL payment system. In October 2020 the Department of Public Service Administration (DPSA) issued a notice of the de-activation of compensation allowance code 0204 with effect from 1 December 2020. The last date of payment of allowances in terms of the code was 31 January 2021. On 1

December 2020 the first defendant's Mr Duma (Duma) addressed a letter to the DPSA requesting approval to create a code for the unique circumstances of interventions in terms of section 139(1)(b) of the Constitution at various municipalities in the Free State Province. In a letter dated 24 April 2021 the Director General (DG) of the DPSA Ms Makhasi (Makhasi) declined the request.

- [19] On 17 June 2021 the EXCO passed a resolution to terminate the intervention in terms of section 139(1)(b) of the Constitution at Metsimaholo Municipality with immediate effect. On 22 June 2021 Nxangisa addressed a letter to the Metsimaholo Municipality advising it of the EXCO resolution of 17 June 2021. He added that notwithstanding the resolution, the first defendant would continue rendering support to the municipality as contemplated in section 154 of the Constitution. In a letter dated 29 October 2021 Duma instructed the plaintiff to return the motor vehicle that had been allocated to him as he was no longer providing the service of assisting the municipality under intervention.
- [20] When the EXCO resolved, on 19 June 2020 to approve payment of the secondment allowance to its fulltime representatives at Metsimaholo Municipality the plaintiff was one of the representatives. He was therefore entitled to the payment of a monthly R50 000.00 secondment allowance with effect from 12 February 2020, the date of his secondment. When the DPSA de-activated code 0240 that was used to pay the secondment allowance with effect from 1 December 2020 and refused the first defendant's request for a payment code in order to continue paying the secondment allowance, the basis for its payment fell away. As an EXCO representative at the municipality

the plaintiff was entitled to the secondment allowance from 12 February 2020 to 31 January 2021.

[21] The plaintiff provided no legal basis for his entitlement to the secondment allowance beyond the de-activation of payment code 0240. He presented no evidence proving that Nxangisa's power to invoke the provisions of section 154 of the Constitution and extend the rendering of support to the Metsimaholo Municipality included authority to order that he be paid the secondment allowance. His evidence that he continued rendering service at the municipality after the termination of the intervention in terms of section 139(1)(b) of the Constitution cannot assist him as it does not prove his entitlement to the secondment allowance. In the absence of the legal basis for his entitlement to the secondment allowance beyond 31 January 2021, the plaintiff did not prove that payment of the secondment allowance beyond 31 January 2021 was due to him. The plaintiff conceded that he received the secondment allowance for a period of 7 months. The secondment allowance he did not receive is, in the circumstances, for 3½ months.

[22] Ms Makhasi the Director General of the Department of Public Service and Administration made it clear to Duma that the reason for the payment of the R50 000,00 monthly allowance the EXCO authorised fell outside its powers. It was therefore unlawful. It is the Minister of Public Service and Administration who has the authority to establish norms and standards relating to conditions of service and other employment practices for government employees. His office, through Makhasi informed Duma that payment of the R50 000, 00 allowance was unlawful as the EXCO exceeded its powers in approving it. The plaintiff led no evidence to prove that the unpaid allowance was legally

due to him. In the absence of such evidence his claim for the unpaid allowance cannot succeed. The failure to communicate Makhasi's response to the plaintiff is of no moment.

[23] Nxangisa was enjoined to effect the plaintiff's secondment in terms of the law including the PSA. He also had to act within his powers. In the letter of appointment, he stated that the location to which the plaintiff was appointed was Bloemfontein/Sasolburg. The plaintiff and Nxangisa testified that the location meant that the former would render service at Metsimaholo Municipality and continue performing his duties at Nxangisa's office and that he indeed worked at both locations. During his secondment the plaintiff received his monthly salary as a manager at Nxangisa's office which included a car allowance of R7652,00 and a role playing allowance in the amount of R6635,00. The plaintiff testified under cross-examination that the role playing allowance was created to cover overtime as the MEC's office called him to perform his duties anytime.

[24] Nxangisa conceded that he addressed a letter to the Minister of Public Service and Administration on 5 March 2021 requesting permission to pay an acting allowance to an official who was going to act in the plaintiff's position. In that letter he confirmed that the plaintiff was seconded in terms of section 15 of the PSA as a result of the EXCO's decision to put the Metsimaholo Municipality under administration in terms of section 139(1)(b) of the Constitution. He added that as a result of the secondment no one was performing his function of Head of the MEC's office. A further material fact Nxangisa stated in the letter was that as a result of the plaintiff's secondment

the COGTA department had decided to appoint an official in the office of the MEC as acting head of office for the duration of the plaintiff's secondment.

[25] It must be noted that the letter of 5 March 2021 was written before 17 June 2021 the date on which the EXCO resolved to terminate the intervention in terms of section 139(1)(b) of the Constitution at Metsimaholo Municipality. It is inconsistent with the plaintiff's evidence which Nxangisa attempted to corroborate that the plaintiff continued to perform his duties as the head of his office while on secondment at Metsimaholo Municipality. The plaintiff also received the allowance that was intended for full time representatives at Metsimaholo Municipality because he was one.

[26] The plaintiff failed to prove the existence of a contract which entitled him to the amounts of money he is claiming in these proceedings. He therefore did not make out a case for the relief he seeks. His claims are therefore dismissed.

[27] The first defendant sought a costs order against the plaintiff. Evidence revealed that Nxangisa who even testified in favour of the plaintiff convinced the plaintiff that he was entitled to the money he is claiming in these proceedings. The plaintiff's evidence that he was never given reasons for the non-payment of the outstanding secondment allowance was unchallenged. Justice requires that the plaintiff, as the unsuccessful party, should not be mulcted with a costs order for being unsuccessful in litigation which was triggered by the first defendant's misinformation and failure to provide him with material information.

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

1. The plaintiff's claims are dismissed.
2. Each party to pay its own costs.

MZN Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr M.J Ponoane of Ponoane Attorneys

For the Respondents: Advocate A.I.B Lechwano

Instructed by the State Attorney