IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 1175/2021

In the matter between:

OWEN NGUBENDE HLAZO **Applicant**

And

OR TAMBO DISTRICT MUNICIPALITY **1st Respondent**

MUNICIPAL COUNCIL, OR TAMBO DISTRICT MUNICIPALITY **2nd Respondent**

EXECUTIVE MAYOR OF OR TAMBO DISTRICT MUNICIPALITY **3rd Respondent**

DEPUTY EXECUTIVE MAYOR, OR TAMBO DISTRICT MUNICIPALITY **4th Respondent**

JUDGMENT

JOLWANA J

Introduction

[1] The applicant approached this court by way of urgency seeking a declaratory relief pertaining to the termination of his employment contract as well as his reinstatement to the position of the first respondent's municipal manager which he occupied prior to the termination of his employment contract. The applicant also seeks other ancillary relief predicated upon the declaratory relief.

Background

[2] On 02 May 2018 the applicant and the first respondent which was therein represented by its erstwhile Executive Mayor entered into an employment contract. There does not appear to have been any difficulties in this employer/employee relationship until about the 30 June 2020 when the applicant was ultimately placed on precautionary suspension. The reason for the applicant's suspension was because of allegations of gross malfeasance involving an amount in excess of R168 million. The applicant unsuccessfully sought to challenge his suspension at the Labour Court. The Labour Court did not deal with the merits of his suspension on the basis that it did not have jurisdiction to entertain the matter and consequently dismissed the application with costs.

[3] However, while the matter was still pending before the Labour Court and before those proceedings were concluded the first respondent apparently received legal advice to the effect that the applicant's contract of employment had expired on the 30 April 2020 by effluxion of time. Based on that legal advice the council of the first respondent took a resolution on the 21 October 2020 to terminate the applicant's employment contract. On 30 November 2020 the Deputy Executive Mayor, acting during the temporary absence of the Executive Mayor and also having been duly

authorised in the appropriate fashion to deal with all matters involving the applicant's employment, penned a letter dated 30 November 2020 to the applicant terminating the applicant's employment contract (the termination letter).

[4] In the termination letter the applicant was informed, *inter alia,* that the second respondent had obtained a legal opinion that his contract of employment was for a two-year period ending on the 30 April 2020. He was also told that to the extent that the contract of employment reflected the termination date as being the 30 April 2023, it was erroneous. This was the case, so it was said in the letter, because section 57(6)(a) limits the contract of a municipal manager to a period not exceeding one year after the next municipal elections and the term of office of the succeeding council. He was further informed that the effective date of termination was the 31 December 2020 by which date he was required to return all municipal property or assets in his possession. This is a very truncated background to this application. I will elaborate a little bit more hereunder on some of the relevant factual material and allegations as I deal with the respective pertinent contentions of the parties.

[5] In this application which was launched on an urgent basis on the 12 March 2021 the applicant seeks the following orders:

"1. Directing that the matter be heard as one of urgency in terms of Rule 6(12) of the Uniform Rules thereby dispensing with the necessary requirements and form for services and the *dies* as contemplated in the Uniform Rules.

2. Declaring that the resolution taken by the second respondent purportedly on 19 February 2021 but which was only communicated to the applicant on 9 March 2021 to be unconstitutional invalid and unlawful and it offends the doctrine of legality.

3. In the alternative to prayer 2 above, declaring that the purported termination of the employment agreement which was concluded between the applicant and the first

respondent (represented by the third respondent's predecessor) on 02 May 2018 to be unlawful.

4. Declaring that the applicant's employment agreement which was concluded between the applicant and first respondent (represented by the third respondent's predecessor) on 2 May 2018 still subsists and the applicant is still the municipal manager of the first respondent until 30 April 2023.

5. In furtherance to prayer 3 and 4 above, granting the applicant an order of specific performance to be reinstated as the municipal manager of the first respondent in terms of the employment agreement that was concluded on 2 May 2018 with full benefits and responsibilities as the municipal manager.

6. Ordering the respondents to pay the applicant's salary for the month of February 2021 and his subsequent monthly salaries for the months of March 2021 until and for as long as the employment agreement is still in place.

7. Ordering any officials of the first and second respondents (including the third and fourth respondents) who oppose this application to be ordered to pay the costs of this application in their personal capacities on a scale of attorney and own client, such costs to include costs occasioned by the employment of two counsel.

8. Further, and/or alternative relief."

The issues

[6] The respondents' central contentions in opposition to the granting of the above relief are that the application is not urgent and that in any event the applicant's employment contract was validly terminated as it was a two year contract. While the papers are voluminous the issues can be crystalized into only two main issues. The first one is whether the applicant was entitled to approach this Court on an urgent basis. The second and main issue is whether the employment contract between the applicant and the first respondent was for a two-year term ending on the 30 April 2020 or for a five-year term ending on 30 April 2023.

Urgency

[7] The termination of the applicant's employment contract was effected and communicated to him through a letter dated 30 November 2020, the termination letter which the applicant received on 01 December 2020 following a council resolution taken on the 21 October 2020. It is unclear why the resolution to terminate the employment contract having been taken on 21 October 2020, the termination letter was only written more than a month later. However, nothing turns on that. In the termination letter the applicant was told of the reasons for the termination of his employment contract. He was told that the council of the first respondent had taken a resolution on 21 October 2020 to terminate his employment contract on the basis that it had terminated on the 30 April 2020 by effluxion of time as provided for in clause 5.1 thereof. He was further told that reference to the termination date as being April 2023 in his employment contract was in contravention of section 57(6) of the Municipal Systems Act 1[1].

[8] Section 82 of the Municipal Structures Act[2] gives the tasks of appointing a municipal manager to a municipal council. It follows, as a matter of logic, that it is a municipal council that can terminate a municipal manager's contract. The letter of termination was written by no less a senior person than the Deputy Executive Mayor of the first respondent. In the absence of the Mayor the Deputy Mayor is the most senior official in a municipality which, like the first respondent, has a Deputy Mayor.

[1] Local Government: Municipal Systems Act 32 of 2000.
[2] Local Government: Municipal Structures Act 117 of 1998:

[9] The position of a Deputy Mayor like that of a Mayor is created by means of a statute. In terms of section 49(2) of the Municipal Structures Act[3] the Deputy Mayor exercises all the powers and performs all the duties of the Mayor in the absence of the Mayor. The Mayor may also delegate to the Deputy Mayor some of her or his powers even when she or he is not absent.

[10] I must point out immediately that there was a delay in approaching this Court on an urgent basis. Because of the prevalence and often times the abuse of the urgency rules in this division I consider it necessary to spend some time on this issue. The delay in launching these proceedings is difficult to understand for many reasons including the fact that the applicant's urgent application in the Labour Court in which he had challenged his suspension was initially struck off the roll with costs on the 30 July 2020[4] for lack of urgency only three months before the termination letter was received. The Labour Court per, Lallie J described the basis on which that urgent application was moved as self-created urgency. At paragraph 14 of her judgment the learned Judge of the Labour Court concluded thus:

> "[14] … The applicant has failed to prove urgency. He acted unreasonably in bringing this urgent application based on self-created urgency. The urgent roll was created specifically for matters of litigants who seek urgent relief. The applicant's conduct constitutes unreasonableness as envisaged in section 162 of the Labour Relations Act and justifies a costs order against him."

[11] After reading the judgment in his suspension challenge at the Labour Court it defies logic for the applicant and/or his legal representatives to have ignored the termination letter and instead write endless letters requesting the underlying council resolution. The termination letter gave the applicant the same cause of action as the

[3] Section 49(2) provides: The deputy manager exercises the powers and performs the duties of the mayor if the mayor is absent or not available or if the office of the mayor is vacant. The mayor may delegate duties to the deputy mayor.

[4] *Hlazo v OR Tambo District Municipality and Others* case No: P58/20 (30 July 2020)

resolution of the 21 October 2020 which he was informed in the termination letter that it had been taken. In all the paragraphs in which urgency is dealt with in the applicant's founding affidavit the applicant unfathomably completely ignores the termination letter with no explanation or even an attempt to explain why he did not act on it. Any reasonable person would have sprung into action on receipt of a letter terminating his employment unless he decided to acquiesce to such termination. This is because the very reasons that are cited for urgency would have become relevant and equally ominous as soon as he received the termination letter.

[12] A litigant is not, in my view, entitled to ignore a termination letter and wait for the council resolution which may be made available long after the termination letter is received if he chooses to approach court on an urgent basis. The resolution of the 21 October 2020 does not appear to have changed the applicant's cause of action from what it was when the termination letter was received. This begs the question, why was it necessary to wait for the council resolution from the 01 December 2020 to the 09 March 2021. On 9 March 2021 when the applicant received the resolution dated 19 February 2021 it was not the resolution referred to in the termination letter.

[13] Even reliance on the resolution of the 19 February 2021 is equally unfathomable. More worrying is the attitude that the termination letter meant nothing until the underlying resolution was received. This is without any logical or legal basis in my view. This was extremely risky on the part of the applicant or his legal representatives by any standard when it comes to the issue of urgency.

[14] In the founding affidavit the applicant makes an indirect reference to the termination letter and he says:

"72. On 19 February 2021 a certain Mr Basil Mase (Mr Mase) (who purportedly signed a letter on behalf of the municipality as its acting municipal manager) responded and he recorded that (sic) that the employment agreement had terminated on 30 November 2020 and he attached annexure "FA8" …"

[15] Annexure FA8 is the termination letter dated 30 November 2020 which the applicant had already received as far back as the 01 December 2020. On 01 March 2021 the applicant's attorneys wrote a letter to the respondents, addressed to the council care of the third respondent. In that letter the applicant's attorneys confirmed receiving the email of the 19 February 2021 to which the termination letter was attached. They make certain arguments about the non-payment of the applicant's salary for February 2021 and other issues were also raised. They went further to give the respondents a period of 30 days within which to remedy the alleged breaches of contract in not paying the applicant's salary and of unilaterally amending the fixed term of employment to terminate before April 2023.

[16] Even on the basis of the applicant's attorneys' letter dated 01 March 2021 the matter was never regarded as urgent by the applicant or his legal representatives hence the 30 day period afforded to the respondents to remedy the alleged breach of contract. It must have come as a pleasant surprise when the applicant received the letter dated 08 March 2021 annexed as FA1 to the founding affidavit written by the Executive Mayor in which the following is said:

> "This communique serves to kindly inform you that on Friday the 19 February 2021, the O.R. Tambo District Municipality convened its council meeting virtually and it resolved to terminate your contract with the municipality. The resolution extract is attached for ease of reference."

[17] For any person who knew about the resolution of 21 October 2020 this letter is puzzling if not misleading to say the least. The resolution extract attached to the Mayor's letter and annexed as FA2 to the founding affidavit reads:

"RESOLUTION EXTRACT OF A VIRTUAL SPECIAL COUNCIL MEETING HELD ON FRIDAY, 19 FEBRUARY 2021 AT 09:00

AGENDA ITEM: 7.1

REPORT TITLE: JUDGMENT: O.N. HLAZO V O.R. TAMBO DISTRICT MUNICIPALITY & OTHERS CASE NO. P58/20

The council resolved :-

1. **To note the judgment of the Labour Court Case matter OWEN NGUBENDE HLAZO v O.R. TAMBO DISTRICT MUNICIPALITY; DEPUTY EXECUTIVE MAYOR; SPEAKER CASE NO. P58/20.**
2. That Mr O.N. Hlazo should be removed from the system as he is no longer an employee of O.R Tambo District Municipality.
3. That the Executive Mayor is mandated to formally write to Mr O.N. Hlazo affirming the termination of his employment contract."

[18] The resolution extract is under the hand of the acting council secretary and the acting council speaker. Two things become very apparent even from a cursory reading of the resolution extract. First, contrary to the covering letter penned by the Executive Mayor the resolution extract does not even pretend to be a resolution to terminate the employment contract. Second, it notes the Labour Court judgment in the suspension case. Third, it contains a resolution to remove the applicant from the system on the basis that he was no longer an employee of the first respondent. This must surely be a reference to the system through which employee salaries are paid. Fourth, the extract gives a mandate to the third respondent to formally write to the applicant affirming the termination of his employment contract. It is very strange that instead of writing a letter to the applicant as indicated in the extract, the Mayor wrote a letter referred to above in which she incorrectly said that the council meeting of the 19 February 2021 resolved to terminate the applicant's contract with the municipality which was simply not the case. The Mayor must have, for some reason, misunderstood the clear contents of the resolution extract.

[19] The applicant lurched on to the letter dated 08 March 2021 from the Mayor and misinterpreted the extract dated 19 February 2021 attached thereto in a clearly misguided attempt to found urgency. In the process the termination letter was completely ignored. It would in any event not have assisted the applicant to make a case for urgency on it at that late stage as he had been aware of it as far back as the 01 December 2020 hence he clearly deliberately avoided it in the papers. The applicant possibly failed to institute urgent proceedings shortly after receiving the termination letter on the advice of his legal representatives as he was already legally represented. That was very unfortunate as the urgency for this application was clearly at the time the termination letter was received and not when the resolution extract of the council meeting of the 19 February 2021 was received on 09 March 2021 which in any event was not a resolution to terminate the contract of employment. At best it was a resolution affirming the one taken on the 21 October 2020.

[20] It must be accepted that misguided as that legal advice was, it was given *bona fide*, as it would make no sense for the applicant's attorneys to have ignored the termination letter when it must have been known to all concerned that it would inevitably result in the non-payment of their client's salary. They nevertheless, on 01 March 2021, wrote a letter to the respondents giving them 30 days to rectify the alleged breach. Thereafter, on the 11 March 2021, long before the 30 day period expired, started urgent consultations for this application which was issued on 12 March 2021. Nothing on the facts before me had happened between the 01 December 2020 when the termination letter was received and the 09 March 2021 when the resolution extract of the meeting of the 19 February 2021 was received to alter the status of the resolution of the 21 October 2020 and the termination letter. If

anything at all, it was the fact that the applicant's February 2021 salary had not been paid. It must have been known to the applicant and his legal representatives that the termination of his employment would soon lead to the non-payment of his salary. It surely could not have come as a surprise.

[21] In *Luna Meubel*[5] Coetzee J dealt with the problems still besetting this division today more than 40 years ago and expressed the following sentiments with which I am in respectful agreement:

> "Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinarily practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

[22] There was every reason to strike this application off the urgent roll with costs as nothing of substance happened between the 01 December 2020 and the 12 March 2021 when these proceedings were instituted on an urgent basis. The reliance on the misreading of the resolution of the 19 February 2021 which came to the attention of the applicant on the 9 March 2021 was misplaced. The third respondent's strange and misleading covering letter which suggested that the resolution to terminate the employment contract was taken on 19 February 2021 when it should have been known to her and the applicant that the resolution to terminate his employment contract was taken on 21 October 2020 were all red herrings. None of that justified the applicant rushing to this court on an urgent basis more than three months after being aware of the termination of his employment contract.

[5] *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA (W.L.D.) 135 at 137 E-G

Judicial discretion when urgency is not established.

[23] What should the court do when an applicant has failed to make a case for urgency? This is a vexed issue which largely depends on the facts and the circumstances of each case. I think that all relevant considerations must be taken into account in the court's judicious exercise of its discretion. It surely cannot be correct to say that lack of urgency must necessarily and almost instinctively result in the matter being struck off the urgent roll. Doing so would not be in the interests of justice which must be paramount in any determination that is made by the court. All the papers had been filed in this matter save for the respondents' heads of argument for which I gave leave to be filed later. I had read all the papers and there was no real impediment or practical reason why the matter could not be heard to a finish. The respondents, despite being rushed to court on as urgent basis, were commendably ready to deal with the matter to a finish.

[24] Faced with a similar situation as I was in this matter Brooks AJ (as he then was) in *Windsor Hotel*[6]*,* expressed himself on some of the practical considerations as follows:

> "[10] The first respondent also warn[ed] against permitting the fact that a complete set of affidavits and accompanying heads of argument have been placed before this Court to cloud the issue whether the applicant's modification of the rules on the grounds of urgency was unacceptable. Caledon Street Restaurants CC v Monica D'Aveira, unreported judgment of Kroon J, ECD Case No. 2656/97, page 10, lines 16-21. The warning is salutary. However, I am of the respectful view that the very practical considerations of factors such as the incurring of unnecessarily duplicated case preparation and presentation procedures, with their concomitant increase in already substantial legal costs, and the undesirable duplication of the requirement of the attention and preparation of more than one

[6] Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd and Others (1820/2013) [2013] ZAECMHC 14 (7 August 2013)

> court within a judicial system that is at times overburdened, must be weighed against any apparent prejudice to a respondent who has been brought to court on a truncated time frame. Indeed, such respondent is equally exposed to the risk of the undesirable duplications identified. Subject, of course, to limitations of capacity beyond the control of all concerned, the legitimate demands of society developing in the urbane after-glow of the initiation of our relatively young constitutional democracy must include an expectation that access to justice will not be impeded unnecessarily by an over-formalistic approach to adjectival considerations surrounding the resolution of disputes amongst its members."

[25] To strike the matter off the roll when the parties are ready and willing to be heard and when the court is ready to hear the matter would unnecessarily delay the delivery of justice in a matter that is otherwise ready but for lack of urgency. All these considerations are within the realm of the court's discretion whose main preoccupation should be the interests of justice. There is no reason why the displeasure of the court cannot, in an appropriate case, be shown through an appropriate costs award against a party that abuses urgency rules and procedures. Courts are the arbiters of justice and court rules are there to enable easy access to justice by providing a facilitation mechanism and not a stumbling block to the speedy resolution of disputes. However, litigants especially applicants must know that courts will not hesitate to strike off the roll a purportedly urgent application where it is clear that urgency rules are being abused.

The termination of the employment contract.

[26] The employment contract which is the main subject of this application was entered into between the applicant and the first respondent on 02 May 2018. There is only one clause thereof which is a bone of contention and about whose interpretation the parties are light years apart. This is clause 5.1 and it reads:

> "5.1 Notwithstanding the date of signature hereof, this contract of employment shall be valid for a period of two years commencing on 1st day of May 2018 and terminating on the last day of April 2023."

[27] The apparent contradiction in the above mentioned provision is summarised very succinctly in the respondents' heads of argument in the following manner: Is the reference to two years an error, or is it the year 2023[7]. It is to the answer to this question that the resolution of the *lis* between the parties depends. Regrettably the respondents have not, either in the papers or in their heads of argument, made any meaningful submissions on how a dispute of this nature should be resolved. They have averred a bare denial of the interpretation contended for by the applicant and maintained that because the contract indicates that it is a two-year contract therefore it is a two-year contract. This overly simplistic approach does not account for the further provision in the same clause that the contract shall terminate on the last day of April 2023, in fact it ignores it.

[28] It is generally incorrect and impermissible to interprete a clause in a document separately from the rest of the provisions of the same document and to the exclusion of everything else. Even worse in this case, it is part of the same sentence that the respondents base their contentions on as if the rest of the same sentence does not exist. This is incorrect for many reasons and I mention a few of them below. Clause 19 of the contract reads:

> "This contract terminates automatically on the date referred to in sub-clause 5.1 unless the parties before the date agree to renew or extend the contract. A renewal or extension of the contract may be on the same or different terms as determined by Council."

[7] My underlining

[29] Whatever one thinks of clause 5.1 and whatever interpretation one gives to the reference to two years therein, that is clearly a reference to the duration of the contract and not a termination date. There is only one termination date which also appears in clause 5.1 and in the same sentence and that is the last day of April 2023. That is not to say that that date must be the date agreed upon as the correct date and that it was not an error to reflect it as such without more. The point I am making is that the termination date as stated cannot simply be ignored in favour of or preference for the duration of two years. What the respondents have not done is to make any averments in the answering affidavit on why the termination date as reflected is incorrect and in fact an error. There are no submissions that it has always been the understanding between the respondents and the applicant that they were entering into a two-year employment contract. No averments are made by the respondents on why the reference to two years in clause 5.1 is correct as against the termination date which is the end of April 2023.

[30] The respondents have not gainsaid in any cogent way the applicant's averments made in the founding affidavit, *inter alia*, that he received his monthly salary in the normal way even in November 2020 on 25 November which he says was five days before he received the termination letter. Even for December 2020 and January 2021 which was long after he had received the termination letter he received his monthly salaries. The respondents do not deal with these averments at all nor do they, anywhere in their answering affidavit, explain the circumstances in which they continued paying the applicant's salary even after they had received and accepted legal advice that the contract of employment of the applicant had expired and had in fact resolved to terminate it. It is important to remember that on 21 October 2020 a council resolution for the termination of the contract was taken. In other words a

council resolution having been taken long after the 30 April 2020 and the termination letter effecting it having been sent to the applicant the salary continued to be paid until and for January 2021. This is not explained at all by the respondents. I find all of this to be inconsistent with the respondents' submission that the correct termination date is the 30 April 2020.

The interpretation of the contract.

[31] On the basis of the respondents' conduct in continuing to pay or allowing the applicant's salary to be paid long after the 30 April 2020 when, according to the respondents the contract expired, even after the October 2020 resolution to terminate it and after the 30 November 2020 when the termination letter was written up until January 2021, the applicant contends that all that conduct supports his case that his contract was for a five year term. He relies on *Comwezi*[8] on his heads of argument. In *Comwezi* Wallis JA said:

> "It was suggested that for us to place reliance on this is impermissible in the light of the exposition of the law in *Natal Joint Municipality Pension Fund v Endumeni Municipality*, supra. However, that is incorrect. In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties. This does not

[8] *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* (759/ 2011) [2012] ZASCA 126 (21 September 2012) para 15.

> mean that, if the parties have implemented their agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning. In that situation their conduct may be relevant to a claim for rectification of the agreement or may found an estoppel, but it does not affect the proper construction of the provision under consideration."

[32] In the heads of argument filed on behalf of the respondents *Comwezi* is completely ignored. There is no submission that it is distinguishable to this matter or that it is somehow inapplicable. In any event what the Supreme Court of Appeal said in *Comwezi* is very much on all fours with the facts in this matter. It can never be permissible for a party to postulate a particular interpretation in complete disregard to what was understood by it and how or why it conducted itself in a particular manner in implementing the contract. In fact its conduct cannot be divorced from its own understanding that it postulates unless there is a plausible explanation for the contrariwise conduct.

[33] In an attempt to try to understand what was the common understanding between the parties especially shortly before or after the contract was concluded I asked during the hearing of this application if a letter of appointment was written to the applicant as neither of the parties referred to it in the papers. It transpired that in fact a letter of appointment had been written to the applicant under the hand of the former Executive Mayor of the first respondent. That letter was handed up to the Court by agreement between the parties. It is dated 29 March 2018 which was just over a month before the contract was concluded. In the letter of appointment the former Executive Mayor wrote:

> "Dear Mr Hlazo

APPOINTMENT AS A MUNICIPAL MANAGER (05 YEAR FIXED-TERM CONTRACT)

I have pleasure in informing you that, following your interview for the above – mentioned post, you were found suitable for appointment on a fixed term performance based contract of employment and that the Council in its meeting of 28th of March 2018 approved your appointment as a municipal manager. Your employment contract will commence on the assumption of duty date and end one year after the expiry of the term of current Council which is 31st August 2022.

You will be reporting to the Honourable Executive Mayor."

[34] There are other matters dealt with in the other paragraphs of the letter which are not relevant for current purposes. At the end the letter is signed by the former Executive Mayor and there is a provision for the applicant to fill in his names and identity number which he did. It is signed by the applicant in the space provided for that purpose in April 2018 although the exact date is illegible. However, that date is of no moment and in any event neither the letter nor its contents are in dispute. In fact both the letter and its contents are common cause hence the unconditional agreement that is should be handed up notwithstanding the fact that it was not annexed or referred to in any of the affidavits.

[35] The only contention made on behalf of the respondents in the heads of argument is that while it does state that the appointment was to terminate one year after the expiry of the current council's term of office being the 31 August 2022 it does not say that it is for a five year period. The difficulty with this submission is, firstly, that it ignores the heading which is immediately before the paragraph under discussion. It is worth quoting the heading itself about which nothing has been said. It says, "**APPOINTMENT AS A MUNICIPAL MANAGER (05 YEAR FIXED-TERM CONTRACT)**". This letter must have been written shortly after the interview even though it is far from clear how long after the interview. It preceded the contract

which was concluded on 02 May 2018 and in its heading it makes it clear that the applicant's employment was on a five year fixed term contract. Secondly, the respondents proffer no explanation for the reference therein to the 31 August 2022, a date that is more than two years after the 30 April 2020 that they contend for.

[36] The contract of employment must surely be read together with the letter of appointment and not in isolation especially where there is an ambiguity. This is important because the former Executive Mayor of the first respondent who signed both the employment contract and the letter of appointment made it clear in the letter of appointment that the contract was for a period of five years. She clearly applied her mind to the contents of the letter and was aware that the intended term of the contract was for a period of five years. This explains why she commendably brought to the attention of the applicant the provisions of section 57(6) of the Municipal Systems Act which are binding to both parties.

[37] I find it bizarre for the respondents to rely on the reference to the duration of the contract being reflected as two years in clause 5.1 of the contract in the circumstances. The reference to the duration of two years was, in my view, an obvious typographical error with the parties having clearly understood from inception that the applicant was being employed on a five year fixed term contract which would not exceed the current council's term of office by more than one year. It is common cause that the current council's term of office will end later this year.

Section 57(6) of the Municipal Systems Act.

[38] Section 57(6) provides that:

> "The employment contract for a municipal manager must –

(a) be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year after the election of the next council of the municipality;
(b) include a provision for cancellation of the contract in the case of non-compliance with the employment contract or, where applicable, the performance agreement;
(c) stipulate the term of the renewal of the employment contract, but only by agreement between the parties;
(d) reflect the values and principles referred to in section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51"

[39] The interpretation of section 57(6) has been the subject of some debate, even controversy for many years from different angles or aspects of it. However, they were laid to rest recently in *Mawonga*[9] in which the Supreme Court of Appeal clarified the legal position as follows:

> "The relevant provisions in s 57(6) may appear to be in conflict: the employment contract is for a fixed term up to a maximum of five years, yet the contract may stipulate the terms of renewal. The high court read these provisions to means that the contract is for a maximum period of five years, but subject to renewal as stipulated in the contract. That resolution of the apparent conflict is unpersuasive. First, the legislature has determined that the contract must be for fixed term that cannot exceed five years. These are cumulative requirements. Second, can s 57(6) be interpreted to permit the parties to an unbounded power of renewal? So for example, if the parties agreed to a renewal that was of indeterminate duration, subject only to termination for breach or retirement, would that fall within the permissible bounds of contractual competence? Such a permissive construction would allow the significance of s 57(6) to lose its limiting force because the contract would de facto be neither of fixed term, nor of five years. Third, if the competence to agree to a renewal is to be read subject to the stipulations of s 57(6)(a), a coherent interpretation can be achieved. That is so because the parties may conclude a fixed term agreement for a period of less than five years, with an option to renew that does not violate the five year maximum. Such an interpretation reconciles s 57(6) (a) and

[9] *Mawonga and Another v Walter Sisulu Municipality and Others* 2021 (1) SA 377 (SCA) at para 24

(c) whereas the contrary position renders s 57 (6)(a) subject to circumvention in ways that would undermine its central purpose."

[40] What this means is that while the contract of employment was agreed to be for a fixed term of five years, it is impermissible for it to exceed the new council's term of office by more than one year. In effect the applicant is not entitled to remain in his job to April 2023. His contract of employment, as a matter of law, cannot endure for longer than one year after the end of this current council's term of office even if the period of five years has not elapsed. This was made clear to the applicant in the letter of appointment by the former Executive Mayor. In light of all of this I find that it was unlawful for the applicant's contract to be terminated before it had run its course on the basis of it having expired on 30 April 2020. This is of cause subject to section 57(6) of the Municipal Systems Act as I have explained above. In the circumstances the contract of employment of the applicant therefore was unlawfully terminated.

The amendment to the notice of motion.

[41] I have already alluded to the confounding approach of ignoring the termination letter which clearly communicated to the applicant that there was a council resolution of the 21 October 2020 which terminated his employment contract. In that way the resolution was treated as if it did not exist which is bizarre at best. The fact of the matter is that the resolution existed and the applicant was told that it existed by the Deputy Executive Mayor in the termination letter. The applicant has had to introduce, through his replying affidavit, an amendment to the notice of motion so as to deal with the council resolution of the 21 October 2020. This, purportedly, on the basis that the said resolution was furnished for the first time to the applicant by being attached to the answering affidavit. The respondents oppose the amendment and

contend that the amendment did not comply with Rule 28 of the Uniform Rules of Court. Rule 28 subrules 1 and 2 read:

> "(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
> (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected."

[42] It might very well be the case that rule 28 was not complied with. However, to the extent that there was non-compliance that non-compliance did not affect the merits of the respondents' case and therefore that submission does not take the matter any further. It has been said on countless occasions in this division and elsewhere that rules are for the court and the court is not for the rules. The reality is that the applicant's employment was unlawfully terminated as I have already found. Contrary to what the applicant initially postulated it is the resolution of the 21 October 2020 and not the resolution of the 19 February 2021 that brought about the said termination of the contract. The amendment to the notice of motion must, in my view, be allowed in the interests of justice. The technical argument that the amendment must be refused and thus the resolution of the 21 October 2020 to remain effective is tantamount to splitting the hairs and does not resolve the dispute between the parties. Pedanticism should not be allowed to stand in the way of arriving at a speedy resolution of the dispute between the parties which, quintessentially, is about whether or not the termination of the contract of employment of the applicant was lawful.

Should the applicant be re-instated?

[43] The respondents have dedicated copious amounts of time in their answering affidavit arguing against the reinstatement of the applicant even if I find that his contract was unlawfully terminated. This is based on the reports of financial mismanagement, corruption and theft of municipal funds amounting to about R168 million allegedly received from various committees of the council, anonymous reports from members of the public and the audit report obtained by the respondents. Indeed the picture painted in the answering affidavit, if established, is egregious and atrocious. If the applicant played any role in that or allowed any of that to happen under his watch, the respondents were and are entitled to take decisive action against the applicant. To that end it is commendable that the respondents suspended him and also served him with disciplinary charges and also went on to lay criminal charges with this country's law enforcement agencies against him.

[44] On the basis of these allegations the respondents argue that there is a breakdown of trust in the relationship between the first respondent and the applicant and therefore reinstatement would not be an appropriate relief. It must be emphasised that the first respondent is an organ of state and not an individual, something that the respondents do not deal with. Even if it was an individual, allegations of the breakdown of trust without substantiation would not suffice. As pointed out in the applicant's letter of employment, he reports to the Executive Mayor and in her absence, to the Deputy Executive Mayor. The respondents' allegations of the breakdown of trust are generalized and lack specificity. For instance, there is no affidavit by the Executive Mayor to whom the applicant reports expressing her views on this trust relationship breakdown. The Deputy Executive Mayor who deposed to the answering affidavit for the respondents is also loudly silent about how the trust relationship breakdown manifested itself after the allegations of financial

mismanagement, corruption and theft of municipal funds came to the fore. The Deputy Executive Mayor has not laid any factual basis for the breakdown of trust even between himself and the applicant or any other relevant official of the respondents. Most importantly, there is no indication of how the working environment would become untenable if the applicant were to be reinstated.

[45] There is little to no basis that has, on the papers before me, been laid down on which I must exercise my discretion against reinstatement. The respondents are at large and are in fact obliged to institute disciplinary processes in which there will be an opportunity for a public hearing for the allegations of financial mismanagement, corruption and theft to be laid bare for all to see. In that disciplinary process the applicant will be given a fair opportunity to explain his conduct or his role in the loss of municipal funds. It is not clear why the respondents avoided a transparent disciplinary process and chose a clearly premature and unlawful termination of the contract route. If there is substance to these serious allegations and I hasten to add that there may very well be substance, it seems to me that the lawful way to establish that is through a fair and transparent disciplinary hearing. This will be in line with yet another constitutional principle of accountability to the public at large about which there can be no debate.

[46] Since June 2020 when the applicant was suspended the disciplinary proceedings would have, no doubt, been concluded by now. The applicant makes it clear in his affidavits that he wants to be subjected to a disciplinary process and that it was at the instance of the respondents that that has not happened. He was served with the charge sheet on the 30 September 2020. It is unclear why the respondents elected to terminate the contract instead of going ahead with a disciplinary hearing which would also have an added benefit of accounting to the public about what

happened to public funds and why service delivery which was intended to be achieved with those funds has been scuppered. If the applicant is responsible it goes without saying that he must account for the loss of public funds. The institutional failures that allowed him to commit such nefarious deeds must be identified and corrected. This surely must be in the interests of the respondents as well instead of the applicant quietly disappearing without accounting for his alleged malfeasance.

[47] In *Haynes*[10] De Villiers AJA, exactly seventy years ago, stated the law which, with respect, is still good law and is still applicable even to date on specific performance. This is even more so if regard is had to the constitutionally entrenched rights of workers who often find themselves in a precarious position, an issue I will touch on below. The learned Acting Judge of Appeal stated the law thus:

> "It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod* interest. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances. As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature. To these may be added examples given by Wessels on Contract (vol 2, sec. 3119) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the degree would produce injustices, or would be inequitable under the circumstances."

[10] *Haynes v King Williams Town Municipality* 1951 (2) SA 371 AD at para 378 F-L

[48] No attempt has been made by the respondents to make factual averments on which this Court may, in the exercise of its discretion, be persuaded that to order specific performance would be inequitable. Courts do not exercise their discretion in a vacuum. It was up to the respondents to gainsay the applicant's averments and to make a case for this Court in the exercise of its discretion, not to order specific performance. This is so because an employee is generally entitled to remain in his job and to be allowed to do it without hindrance in a conducive working environment. Where he has committed serious misdemeanours or malfeasance as it is alleged in the instant matter he must be taken through a disciplinary process. The respondents ought to have done more than merely making a submission that the relationship of trust is broken without any factual basis instead relying on yet to be proved charges of corruption and theft and criminal charges that are hopefully being investigated by the police.

[49] In *Masetlha*[11], Moseneke CJ expressed the following sentiments which are, in my view, instructive:

> "As we have seen earlier the President had the requisite power to make the decision to dismiss the applicant or to amend his term of office so as to end it. I can find no cause to hold that the exercise of that power is not in accordance with the law. This does not however mean that a contract of employment between Mr Masetlha and the government comes to naught. The question is what the legal consequences are of the underlying contract.
>
> Although it is clear that there has been a breakdown in trust, that alone is not a sufficient ground to justify a unilateral termination of a contract of employment. It must however be said that the irretrievable breach of trust will be relevant for purposes of remedy. The ordinary remedies for breach of contract are either reinstatement or full payment of benefits for the remaining period of the contract. In my view, even if the contract of employment were terminated unlawfully, Mr Masetlha

[11] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 CC at para 87-88

would not be entitled to reinstatement as a matter of contract. Reinstatement is a discretionary remedy in employment law which should not be awarded here because of the special relationship of trust that should exist between the head of the Agency and the President."

[50] It is far from clear how the relationship of trust has broken down between the applicant and the Executive Mayor or even the Deputy Executive Mayor. Nothing is said in the answering affidavit about the manifestations of the broken trust relationship and how it would be detrimental to a conducive working environment. It seems to me that if the applicant is reinstated the disciplinary process remains available for the respondents to resume and conclude speedily as the charge sheet has already been prepared and served on the applicant. In fact in the respondents' heads of argument it has been submitted that if the applicant is reinstated he might be suspended again. If that happens it would surely be part of the disciplinary procedures which the respondents are entitled to follow within the framework of the law. What the disciplinary process concludes on these serious allegations of financial mismanagement, corruption and theft is a matter which only that process can determine. It may even result in the contract being terminated as provided for in clause 5.2.

The requirements for a final relief.

[51] I have already concluded that the correct interpretation of clause 5.1 of the contract is the one contended for by the applicant and therefore the contract was unlawfully terminated. It follows that a clear right to the instatement of the applicant to his position as the municipal manager of the first respondent has been established. The respondents have conceded, correctly so that there is a reasonable apprehension of harm. I therefore need not dwell much on these two

requirements. What the respondents also raise is the contentious issue of an alternative remedy which they contend exists in the form of a claim for damages. The respondents have not said much to gainsay what the applicant avers in his affidavits on why a possible claim for damages would not be appropriate.

[52] There is a bigger issue involved which in my view is also a constitutional issue. The starting point in the broader understanding of an employment/employee relationship is that both employers and employees have their rights protected in the Bill of Rights especially if regard is had to sections 22 and 23 of the Constitution both of which are implicated in this case in my respectful opinion. However, there is even a bigger issue provided for in section 2 of the Constitution[12]. Section 2 reads:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled."

[53] The view that I hold is that the conduct of unlawfully terminating an employment contract is one of the species of the conduct proscribed in section 2 of the Constitution. I cannot understand how a conduct proscribed by the Constitution can be allowed to stand save in extremely exceptional circumstances. The other problem with an approach that says that there may be a claim for damages is that it would create a situation in which an employee could lose everything he has acquired, the home, the comfort he enjoyed because of his salary. He can have his children expelled from schools or places in which they are accommodated while schooling. It escapes me how a claim for damages could possibly make good such untold suffering which would be a direct result of an unlawful conduct of the employer which is the unlawful termination of the employment contract in the instant matter.

[12] Constitution of the Republic of South Africa, 1996

[54] I do not understand our constitutional and legislative framework and value system to be countenancing illegality or even loss that is a direct consequence of unlawfulness where it can be prevented. There are rights to dignity to which employees, like all citizens, are entitled to enjoy. The indignity of losing everything and the damage it would cause to the very fabric of the family is unimaginable and where it is preventable it should be prevented. The suggestion that some claim for damages, even if it were to be ultimately successful, could undo such suffering and loss is cold solace especially when the indignity and suffering are caused by unlawful conduct that is easily preventable. The constitutional dispensation which we are all proud of would be meaningless if the rights of those who are weaker in our society such as employees are illegally trampled upon and told to go and claim damages down the line. Even the payment of damages where successful would obviously be at great costs to the fiscus and therefore not be in the interests of anyone. In light of all the above the applicant must succeed in his application. The applicant's submission that the costs of this application must be paid by the Deputy Executive Mayor in his personal capacity is without basis as the Deputy Executive Mayor did not oppose this application on a frolic of his own but did so in compliance with and in furtherance of council resolutions. Those who do their job in carrying out a mandate properly given and who execute it lawfully should not be punished for doing their job. There is nothing in the conduct of the Deputy Executive Mayor deserving of censure through a personal costs order in the execution of his mandate and responsibilities.

[55] In the result the following order shall issue:

1. It is hereby declared that any council resolution terminating the employment agreement which was concluded between the applicant and first respondent on 2 May 2018 is declared to be unlawful and is hereby set aside.

2. It is further declared that the applicant's employment contract which was concluded between the applicant and first respondent on 2 May 2018 still subsists and the applicant is still the municipal manager of the first respondent until one year after the expiry of the current council's term of office or until it is lawfully terminated.

3. The applicant is granted an order of specific performance to be reinstated as the municipal manager of the first respondent in terms of the employment agreement that was concluded on 2 May 2018 with full benefits and responsibilities as the municipal manager.

4. The respondents are ordered to pay the applicant's salary for the month of February 2021 and his subsequent monthly salaries for the months of March 2021 until and for as long as the employment agreement is still in place.

5. The first respondent is ordered to pay the costs of this application such costs to include costs of two counsel.

_____

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearance

Counsel for the Applicant: E. MOKUTU SC with X. STEMELA

Instructed by: MALEMBE MOTAUNG MTEMBU INC. c/o T.L. LUZIPHO ATTORNEYS

MTHATHA

Counsel for the Respondent: N.J. MULLINS SC with L. KROON and O. MAKIWANE

Instructed by: MVUZO NOTYESI INC.

MTHATHA

Date heard: 30 March 2021

Delivered on: 04 May 2021