REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-041425

1) REPORTABLE: NO

2) OF INTEREST TO OTHER JUDGES: NO

3) REVISED.

SIGNATURE

DATE: 16 APRIL 2025

1) REPORTABLE: NO
2) OF INTEREST TO OTHER JUDGES: NO
3) REVISED.

…… **16 APRIL 2025**
SIGNATURE **DATE**

In the matter between:

ALPHEUS LANGWANE MASHABA 1st Applicant

MEMBERS LISTED IN SCHEDULE A 2nd Applicant

And

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading to Caselines. The date and time of hand-down is deemed to be 14:00 on 16 April 2025.

MOJAPELO AJ

INTRODUCTION:

1. During April 2021, the applicants signed fixed term employment contracts with the City of Tshwane Metropolitan Municipality. The applicants seek an order to the effect that the City has breached their employment contract and that they should be declared to be permanent employees of the City and be paid their benefits accordingly. The application is being opposed by the City on the basis that the fixed term employment contracts did not entitle the applicants to permanent employment with the City.

2. The order sought by the applicants is as follows:

> "*1. Condoning the delay in launching this application;*
>
> *2. Declaring that respondent is in breach of the applicant's employment contract;*
>
> *3. Declaring that the employment contracts between the applicants and the respondent are confirmed as permanent employment with effect from the fourth month of their employment;*
>
> *4. That the respondent is ordered and directed to give effect to the declaration of permanency of the applicants' employment;*

5. *Directing and ordering the respondent to pay the applicants as permanent employees from the fourth month of their employment forthwith;*

6. *Directing and ordering the respondent to pay the applicants' benefits from the fourth month of their employment including but not limited to medical aid; provident fund; overtime; holidays and weekends work; risk allowance, bonuses as well as shift and housing allowances and group life;*

7. *Ordering the respondent to pay costs of this application;*

8. *Such further/or alternative relief*."

JURISDICTION:

3. The respondent has raised a point *in limine* that this Court does not have jurisdiction to deal with this matter. The gravamen of the respondent's challenge to the jurisdiction of this Court is that the applicants' primary cause of action is premised on the interpretation and the application of a collective agreement.

4. The respondent submits that in terms of section 24 of the Labour Relations Act 66 of 1995 ("LRA") all disputes over the interpretation and the application of a collective agreement may be referred by any party to the bargaining council with jurisdiction or to the Commission for Conciliation Mediation and Arbitration ("CCMA") which must first arbitrate the dispute if it cannot be resolved by conciliation. The respondent further argues that the dispute between the parties is about benefits, and therefore where there is a dispute between the employer and employee about benefits, the approach to be taken by the aggrieved employee is to refer the dispute to a bargaining council having jurisdiction or to the CCMA to conciliate over the matter, and upon conciliation not resolving the dispute then to refer the dispute for arbitration.

5. The applicants dispute the characterization of their case by the respondent. The applicants insist that this Court has jurisdiction because theirs is a contractual dispute.

6. It is trite that jurisdiction is an issue decided on the pleadings. In an application, the pleadings are constituted by the notice of motion and the supporting affidavits. In the matter of ***Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC)***, the Constitutional Court held at paragraph 75 that:

> "Jurisdiction *is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognizable by the High Court, should thus approach the Labour Court."*

7. On a reading of the notice of motion, it is clear that the applicants in the main are seeking declaratory orders to the effect that the respondent has breached their employment contracts and further that the employment contracts between

the applicants and the respondent be declared to be permanent with effect from the fourth month of their employment.

8. In the founding affidavit, the first applicant explained their case as follows:

> "*5.1 The purpose of this application is to seek an order confirming the permanency of our employment contracts from the date in the notice of motion and ancillary relief."*
>
> *…*
>
> *"6.1 The Court has jurisdiction to entertain the matter as the cause of action arose wholly within the area of the jurisdiction of the above Court and as a result of the contractual dispute that this application implicates."*
>
> *…*
>
> *"7.22 The respondent is in breach of paragraph 8 of the employment contracts over and above the breach of not absorbing us in accordance with the first paragraph of the employment contracts."*
>
> *…*
>
> *"7.23 The respondent is repudiating the contract."*
>
> *…*
>
> *"7.24 In a case of breach, the innocent has got a choice either to accept the repudiation or hold the guilty party to a contract, we hereby elect to hold the respondent to the terms of the contract."*
>
> *…*
>
> *"7.26 As a result of the breach, we do not enjoy the benefit of a medical aid; provident fund; overtime; holidays and weekends work; risk allowance, bonuses as well as shift and housing allowances and group life."*

9. In the replying affidavit, the applicants persist with their contractual dispute argument and state as follows:

> *"3.1 Our case is premised on an employment contract attached to the founding papers which we claim the respondent breached and any interpretation attached to our case by the respondent is unfortunate and is denied."*

10. In their heads of argument, the applicants submit that they seek an order declaring the respondent to be in breach of their employment contracts.

11. Both the LRA and the Basic Conditions of Employment Act 75 of 1997 ("BCEA") expressly recognise that there are certain matters in respect of which both the Labour Court and the High Court enjoy concurrent jurisdiction. Section 157(2) of the LRA provides, in relevant part:

> "*The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—*
>
> *(a) employment and from labour relations;*
>
> *(b) . . .*
>
> *(c) . . . ."*

12. Section 77(3) of the BCEA provides that; "*The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract".*

13. The pleadings make it quite clear that the applicants have elected to base their case on an alleged breach of a contract of employment.

14. I am therefore of the view that this Court has jurisdiction to deal with this matter, and the respondent's preliminary point on jurisdiction is dismissed.

THE DISPUTED EMPLOYMENT CONTRACT:

15. It is alleged that the applicants were working as security guards for various companies that were contracted by the City to protect its properties. The City, at a certain stage, resolved to do away with these security companies and to insource or employ the applicants as security personnel of the City directly.

16. On 25 February 2021, the Council of the City of Tshwane Metropolitan Municipality resolved as follows:

> "*1. That the principle of absorption of the 1519 security officers into permanent positions is subject to the principle of affordability being approved.*
>
> *2. That the criteria and principles to absorb the employees as outlined in this report be adopted.*
>
> *3. That a collective agreement be concluded with the City of Tshwane's recognized trade unions to ensure that the process is supported by the trade unions*."

17. The process of absorption entails that the candidates will be subjected to a verification and a security clearance process, verification of the qualifications of candidates and the validity of their PSIRA registration. And thereafter, legal services will compile appointment letters for the security officers who will be eligible for absorption.

18. The insourcing was part of the Council resolution. The resolution was meant to absorb the applicants and make them permanent employees. The applicants state that as a result of the said insourcing, the applicants and the respondent entered into written employment contracts in which the applicants were appointed as Asset Protection Officers. The said written employment contract is

a fixed term contract which specifically states that they are appointed for a period not exceeding three (3) months.

19. It is alleged on behalf of the applicants that they all entered into a similarly worded employment contracts on or during April 2021. They have attached an employment contract for the first applicant. The applicants rely on the opening paragraph of this fixed term contract of employment, which reads as follows:

> "***FIXED TERM EMPLOYMENT CONTRACT***
> *You are hereby appointed on a fixed term contractual basis (i.e. month-to-month basis) in the position of Asset Protection Officer, in the Metro Police Department, Asset Protection Division, for a period not exceeding three months or until the collective agreement to absorb Asset Property Protection Officers has been made ratified by the national SALGBC – whichever happens first*."

20. It is common cause that there was no collective agreement that was either signed or rectified by the national SALGBC within those three (3) months. Therefore, the three (3) months envisaged by the said contract came first. It is the applicants' case that at the expiry of the said three (3) months, they should have been appointed as permanent employees in terms of the written employment contracts. This application is, therefore, to force the City to comply with the written employment contracts and employ the applicants on a permanent basis.

21. The applicants' main submissions in the founding affidavit can be captured as follows:

> "*7.11. In interpreting the above quoted paragraph, there are two takeaways, one is at the employment contract was designed or meant to absorb us into the permanent structure either after three months or when the Collective agreement was ratified by the national SALGBC whichever came first.*

7.12. We do not know whether the Collective Agreement was ever ratified by the national SALGBC all we know is that the expiry of the three months came first, and we were supposed to have been absorbed as permanent employees after the expiry of this period because it happened first.

7.13. Despite the expiry of the three months period, the respondent continued to treat us as temporary employees for longer than the three months by which this time we should have been absorbed as permanent employees.

7.14. This failure by the respondent to absorb and make us permanent employees is at odds with the council resolution that was taken to do away with labour brokers."

22. The principles of interpretation are now settled. The Court has to take into consideration the triad of text, context, and purpose. The Supreme Court of Appeal in the oft-quoted ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA*** at paragraph 18 stated 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*."

23. The process of interpretation is a unitary exercise, not a mechanical consideration of the text, context and purpose of the instrument under consideration. In the matter of ***University of Johannesburg v Auckland Park Theological Seminary and Another 2021 (6) SA 1 (CC),*** the Constitutional Court held at paragraph 65 that:

> *"This approach to interpretation requires that 'from the outset one considers the context and the language together, with neither predominating over the other'. In Chisuse, although speaking in the context of statutory interpretation, this court held that this 'now settled' approach to interpretation, is a 'unitary' exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose."*

24. The essence of what the interpretative exercise entails was explained by Unterhalter AJA in ***Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA)*** at paragraph 25 as follows:

> *"It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined."*

25. The written employment contract that the applicants seek to enforce in this application is headed, "*fixed term contract of employment*". The period "*fixed*" by the said contract is three (3) months. That will be a period of three (3)

months from May 2021. The said three (3) months would have expired on or during July 2021. This is the event that occurred first in terms of the contract.

26. However, it is the applicants' case that after the expiry of the three (3) months, they should have been appointed permanently. They say this is according to the provision of the contract, mainly the clause that has been referred to hereinabove. There is nowhere in the contract where it states that after a period of three (3) months, the applicants should be appointed on a permanent basis. In fact, the written contract is quite specific and clear as it identifies itself as a fixed term contract for a period not exceeding three (3) months.

27. The written contract clearly fixed the employment contract with the applicants for a period not exceeding three (3) months or until the collective agreement to absorb them has been rectified by the national SALGBC, whichever comes first. Had there been a collective agreement to absorb the applicants as envisaged in the fixed term contract, then the agreement they seek to enforce in these proceedings would have been less than a period of three (3) months. Clearly, the bargaining process that would have resulted in a collective agreement to absorb the applicants was in terms of this written contract given a period of three (3) months. It is common cause that such collective agreement to absorb the applicants was not ratified within the period of three (3) months. Therefore, the fixed period of three (3) months came first. After a period of three (3) months, the written contract that the applicants seek to enforce would have lapsed or expired.

28. There are further provisions in the written contract that clearly point to the temporary nature of this employment contract. Clause 1 of the written agreement specifically informed the applicants that; "*Your employment contract will commence with effect from 01 May 2021 and will be on a month-to-month basis, not exceeding a period of three (3) months*."

29. In clause 16, it is stated that the applicants should not have any legitimate expectation of being appointed into permanent positions when accepting the fixed term contract. There is no doubt from the wording of this written

agreement that the employment relationship between the applicants and the City was fixed for a period of three (3) months or until there was a ratification of a collective agreement to absorb the applicants into permanent employment. The period of three (3) months comes first, therefore, the written contract the applicants are seeking to enforce has lapsed.

30. Contextually, this case revolves around the absorption of the applicants as permanent employees of the City. The document that would have facilitated the absorption of the applicants into the City as permanent employees is clearly spelt out in the disputed contract. That document is identified as the collective agreement to absorb the applicants as Asset Protection Officers. That process would have been started by a collective agreement that was to be ratified by the national SALGBC. It is common cause that such ratification never occurred within the three (3) months that was allocated. The applicants' reliance on the fixed term contract as the basis for claiming permanent employment is therefore misplaced.

31. It appears that the purpose of this three (3) months fixed term employment contract was to give the applicants employment on a temporary basis while the process of absorption into permanent positions was taking place. This process would have been triggered by the conclusion and ratification of a collective agreement by the national SALGBC. What is clear is that this fixed term contract that the applicants seek to enforce in this Court is not the one that would have allowed the applicant to be permanently employed. There was still another process that would have allowed the applicants to be absorbed or permanently employed by the City.

32. The fact that the applicants might still be working for the City currently does not change the fact that the written contract that is sought to be enforced has long expired.

DECLARATORY RELIEF:

33. In any event, this is an application for a declaratory order. The applicants seek declaratory orders to the effect that the respondent is in breach of their employment contracts and, further, that their employment contracts with the city are confirmed as permanent with effect from the fourth month of their employment. A declaratory order is a discretionary remedy. The Supreme Court of Appeal in the matter of **Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service** (728/2022) [2023] ZASCA 144 at paragraph 12 held as follows*;*

> *"Section 21(1)(c) of the* ***Superior Courts Act 10 of 2013*** *provides a statutory basis for the grant of declaratory orders without removing the common law jurisdiction to do so. It is a discretionary remedy. The question whether or not relief should be granted under the section has to be examined in two stages, in the first place, the jurisdictional facts have to be established. When this has been done, the court must decide whether the case is a proper one for the exercise of its discretion. Thus, even if the jurisdictional requirements are met, an Applicant does not have an entitlement to an order. It is for such Applicant to show that the circumstances justify the grant of an order."*

34. In ***Competition Commission of South Africa v Hosken Consolidated Investments Ltd and Another 2019(3) SA 1 (CC)*** at paragraph 80 the Constitutional Court, reaffirmed the two-staged approach for a declaratory order as follows; first, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and second, the Court may then exercise its discretion either to refuse or grant the order sought.

35. In the present matter, the applicants' case falls short of meeting both legs of the test. They have not established an existing, future or contingent right or obligation and have not demonstrated that this is a case in which the court should exercise its discretion in favour of granting the relief sought.

36. I have already found that the written employment agreement that the applicants are relying on has lapsed three months after May 2021. There is, therefore, no existing, future or contingent right or obligation that arises from the lapsed written employment agreement that the applicants seek to rely on.

37. Even if I am wrong in this regard, this is not a case where an exercise of discretion should be excised in favor of the applicants. That is because to do so will be tantamount to drafting a new employment contract between the parties. The written employment contract that is relied on by the applicant does not state that they should be permanently employed after a period of four months. To interpret the contract that way will be tantamount to drafting a new contract for the parties.

38. I therefore conclude that this application should fail.

COSTS:

39. The issue of costs remains the discretion of the Court, the discretion cannot be exercised arbitrarily but judicially on grounds upon which a reasonable person could have come to the conclusion arrived at. The approach to awarding costs is succinctly set out in ***Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC)*** at paragraph 3 as follows:

> "*The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the*

conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation…"

40. Although I find that the application ought to be dismissed, the circumstances of this case dictate that I should not award costs against the applicants. It is quite clear from the papers that the applicants' employment situation has been precarious for some time. They cannot be faulted for making efforts to make their employment situation clearer. However, in this matter, they elected to enforce a written contract that lapsed after a period of three (3) months. Unfortunately, their interpretation of the written contract cannot be sustained. Under the circumstances, it would not be proper to mulct the applicants with costs.

41. I, therefore, make the following order;

    1. The application is dismissed.

    2. Each party to pay its own costs.

_____

MM MOJAPELO

ACTING JUDGE

HIGH COURT GAUTENG DIVISION, PRETORIA

Counsel for the Applicant : Adv. Z Feni

Attorney for the Applicant : Xabendlini Attorneys & Associates

Counsel for the Respondent	:	Adv. K Ramarumo
Attorneys for the Respondent	:	Marivate Attorneys Inc
Date heard	:	03 February 2025
Date of the Judgement	:	16 April 2025