

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Reportable

Case Number: J160/2005

In the matter between:

WILHELMUS JACOBUS NEL

Applicant

and

CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

1st Respondent

JOBURG PROPERTY COMPANY

(PTY) LTD

2nd Respondent

JOHANNESBURG MUNICIPAL

PENSION FUND

3rd Respondent

JUDGMENT

MOKGOATLHENG, J:

INTRODUCTION

[1] The applicant has instituted action seeking an order against the respondents in the following terms:

(a) declaring the applicant's former post as Legal Adviser: Property

Management of the first respondent and/or its predecessors abolished by the transfer of his post and alienation of his functions, duties and responsibilities to the second respondent with effect from 1st July 2000, alternatively on 1st March 2001 upon the transfer of the applicant to the first respondent's Legal Department in accordance with Annexure 7 to the applicant's annexed founding affidavit;

- [2] declaring the post as Legal Adviser: Property management of the first respondent found for the applicant at the beginning of March 2001 non-substantive and/or unsuitable in terms of *Clause 4.14.1(1) and/or (2)* of his Conditions of Service, and declaring that there can under the prevailing circumstances be no “*alternative*” such non-existent post for the applicant in the service of the first respondent.
- [3] Compelling the first respondent to forthwith in terms of *Clause 4.14.3* of the applicant's Conditions of Service formally appoint him in the vacant “*other*” post of Legal Adviser: Town Planning and Tribunal in which he has been unofficially employed since July 2002 and declaring that the applicant shall have the right to within 12 months from the date thereof accept such appointment, alternatively, to retire due to the abolition of his former post, in which event the applicant shall also apart from retirement benefits which may accrue to him be entitled to severance payment from the first respondent of not less than what was

comparatively paid to his former Fourth Reporting Level colleagues in accordance with Annexure 14 to the applicant's annexed founding affidavit.

- [4] Compelling the first and second respondents to jointly and/or severally pay the applicant's costs of suit on the attorney-and-own-client scale as from 25th March 2002.
- [5] In order to consider whether the applicant's post has been abolished or not and whether the post the applicant presently occupies qualifies as an alternative or suitable other post, it is apposite to set out fully the decisive relevant evidence.

FACTUAL BACKGROUND

THE EVIDENCE OF THE PLAINTIFF

- [6] The applicant was appointed on the 1st June 1987 as a grade 13 Professional Officer (legal adviser) in the property administration branch of the first respondent's predecessor, the City of Johannesburg.
- [7] The applicant handled sectional title matters, servitudes, property sales and leases. After 1 year he was promoted to grade 14. He thereafter resigned and worked for Anglo American as a legal adviser in the property and mining rights division.
- [8] On the 1st November 1989 he rejoined the City of Johannesburg as a

grade 17 Chief Professional Officer. The applicant's post was at a grade 6 reporting level. Van Schalkwyk the Assistant City Secretary Property Management resigned. The applicant deputized in the former's position handling property related matters. The applicant was the *de facto* acting Assistant Secretary reporting to Vincent Rouse the Deputy City Secretary.

[9] During 1990 the City of Johannesburg restructured its Legal Department. The applicant was placed in the property section as a D5 senior property manager reporting to Len Holgate, the Director of Property Management. At that stage all the legal advisers reported to Gert Marais the Director Legal Services.

[10] Throughout the 1990's the applicant was in the Property Management Section of the City Secretariat. He was the only person responsible for mining and mineral rights as the City of Johannesburg's property officer.

[11] The fact that the applicant's title was designated as a legal adviser was purely to avoid the title, Property Manager: Property Management. He was not a legal adviser. A legal adviser's scope of activities was wider. He was only performing property related work. He was not involved in litigation, or in giving legal advice.

[12] In 1994 the City of Johannesburg was disestablished. The Greater Johannesburg Transitional Metropolitan Council came into existence

comprising of five sub-structures. It was decided that the three senior legal advisers including the applicant in the Property Management Section, would be retained in the Property Management, Development and Administration section of the Greater Johannesburg Transitional Metropolitan Council.

- [13] After the consolidation of the five municipality sub structure's property departments into a single property section, the applicant no longer dealt with specific erfs and property, but was now performing more regional work, like outfall savers, arterial roads and electrical transmissions.
- [14] The applicant's two property management colleagues, Vincent Rouse and Colin du Preez retired in 1997 and 1998 respectively. The applicant was left as the only Legal Adviser: Property Management. He took over control of the Property Management portfolio.
- [15] At the end of 1999 he did not report to anybody in the Property Management Section, but nominally reported to Puli Moloto, the head of Constitutional and Human Rights and Legal Services. The applicant was the *de facto* head of the Property Management Section.
- [16] In March 2000 the property management and development functions of the first respondent were transferred to the second respondent, that is the City of Johannesburg Property (Pty) Ltd in terms of *Section 197* of the ***Labour Relations Act, 66 of 1995*** "*as a going concern*". This entity

incorporated the various property management departments of the five municipalities substructures into a single unit dealt with by itself. The applicant's files were transferred to the City of Johannesburg Property (Pty) Ltd.

- [17] The applicant did not have work to perform after the files he was working on were transferred. All that was left were files last worked on in 1992. When the *Section 197 Labour Relations Act 66 of 1995* transfer was effected, he was not part the staff transferred to the second respondent.
- [18] In August 2000 the applicant was given Preference Forms to chose whether to be transferred to either the water, sanitation, electricity, roads, parks, cemeteries, waste management utilities or corporate agencies. Because these posts were for general legal advisers and not for a property manager, the applicant did not choose any of these posts.
- [19] In November 2000 he was given other Preference Forms for the proposed new Legal Department. He consulted Ms Nana the acting head of the Town Planning and Tribunal Section. He advised her that he cannot complete these forms because, there was no property management post in her department. He argued that he could not be expected to compete with other legal advisers for positions in the Claims and Litigation, and Town Planning Tribunal Sections because these persons were more experienced in those fields than he was.

- [20] The applicant also discussed his concerns with Puli Moloto. He was told to put his concerns in writing. He did so in a letter dated the 17th November 2000. This letter ended up with Ms Brits acting Executive Director Legal Department. In the letter he warned that he was being prejudiced and rendered redundant. The applicant was stationed in the first respondent's Legal Department, but was not placed in a property management post.
- [21] On the 26th February 2001 the first respondent informed the applicant that *"he would be migrated to the legal department"* with effect from the 1st March 2001.
- [22] The applicant approached Ms Brits and requested her to explain the content of the new post to him. She advised him that the Executive Director had advised her that she had no post for him in the Legal Department. Ms Brits advised the applicant to go to the City of Johannesburg Property (Pty) Ltd.
- [23] Because all his files and functions had been transferred to the City of Johannesburg Property (Pty) Ltd the applicant accepted this suggestion. He packed his belongings and cleared his office, because *"his migration to another post"* was clearly a mistake.
- [24] From March 2001 to August 2001 the applicant attended to unfinalized property files. After

August 2001, he was asked to preside in disciplinary hearings. Ms Brits referred property related matters to him. These matters kept him occupied for the time being.

- [25] In November 2001, Ms Brits advised the applicant that Ms Mckenna, did not want the applicant at the City of Johannesburg Property (Pty) Ltd because he was a difficult person to work with. Ms Mckenna also stated that she had a full compliment of staff, and did not require the applicant's specialist expertise.
- [26] The applicant was presented with a quandary because on the one hand he was advised there was no post available for him in the first respondent's Legal Department, and Ms Mckenna did not want him at the City of Johannesburg Property (Pty) Ltd.
- [27] On the 26th March 2001, Ms Brits advised the applicant that *"it appears that the council would indeed require an in-house property legal adviser, more especially to render advice through the Contract Management Department to Council on reports submitted by the City of Johannesburg Property Company (Pty) Ltd....In the interim, kindly continue with the property matters you have been dealing with thus far"*.
- [28] Ms Brits advised the applicant that despite the establishment of the City of Johannesburg Property (Pty) Ltd, there would still be substantial property work executed by the first respondent, like expropriations which were by statute reserved to the 1st respondent. Because the second respondent needed authority for executing transactions in pursuing its

property administration development functions, and had to contact the 1st respondent's Director Contract Management for authority, the applicant would be the facilitator as a property legal adviser to the first respondent.

[29] The applicant states that nothing came of these promises. The applicant still had to work on his old files. Ms Brits undertook to accommodate him in the new post as legal adviser Property Management. Ms Brits assured him that his present post would almost be the same as the post he previously occupied. Ms Brits said there would be sufficient work in the Legal Department for him to remain there. She told the applicant that his experience and qualifications were ideally suited for his present post.

[30] Although the applicant was promised that he would be the legal facilitator between the City of Johannesburg Property Company (Pty) Ltd and the 1st respondent, this did not happen because this job was executed by Louis Radderfort a colleague who was also a property manager.

[31] In the applicant's view his present post was completely different, and was a new post. When Ms Brits referred matters to him which were strictly speaking, not property related he complied with her instruction.

[32] On 11th July 2002 pursuant a meeting with the Ms Maxhoga the Deputy Director Human Resources, Ms Brits agreed that the applicant be temporarily transferred to the Township Planning and Tribunal Section

headed by Ms Nana. The applicant accepted his present post without prejudice to his rights. The applicant occupied the post without it being either an alternative or another post.

[33] The applicant is presently situated in this temporary post. It took the applicant about one and half years to get acclimatized to his duties and responsibilities because the post was a completely new post. There was no comparison between this post and his post prior to March 2000.

[34] In the Townships Planning and Tribunal Section, legal advisers deal with town planning applications. Prior to March 2000 the applicant was managing the 1st respondent's property portfolio. The only comparative work in his present post which is the property related pertains to matters sent to him by Ms Brits.

[35] Because the functions of the applicant's former property management portfolio were transferred to the City of Johannesburg Property (Pty) Ltd, the applicant contends that his position has been abolished and states that in the context of his conditions of service he no longer performs the functions he performed prior to March 2000 when he was heading the 1st respondent's Property Management Section.

[36] The applicant states that as he was by far the most senior property manager of all the five local municipality substructures, he was

supposed to have been transferred to the City of Johannesburg Property Company (Pty) Ltd as part and parcel of the 1st respondent's structure that was transferred in accordance with the ***Section 197 of the Labour Relations Act 66, of 1995.***

- [37] The applicant denies that he refused to be transferred to the City of Johannesburg Property Company (Pty) Ltd. He states that he was not invited to the meetings where the new structure encapsulating the City Of Johannesburg Property Company (Pty) Ltd was discussed.
- [38] The applicant does not mind that his title be designated as a legal adviser. The decisive question is the content of the post. The applicant as a specialist property manager, expects to perform property related work.
- [39] Before the functions of his pre March 2000 post were transferred to the City of Johannesburg Property Company (Pty) Ltd, he was working on about 500 property files. The job content of this present post only keeps him busy for 10 days in a year compared to his previous post.
- [40] When Ms Brits appointed him to the newly created alternative post, this post was to be reflected on the organo-gram. The applicant maintains that if he was just a legal adviser it would not have been necessary to change the organo-gram to reflect his present post.
- [41] On the 14th January 2002 Ms Brits advised the applicant that there was

still sufficient work to accommodate him in his post as legal adviser property management. But in truth, there was no work which he did except for the old files given to him by the records department.

[42] On the 16th January 2001 the remaining three property files the applicant was dealing with referred to him by the records department, were removed from his office. He thereafter had no files to work on in his office. He requested that he be found another post because, this alternative post he was occupying, was not acceptable as there were no functions attached to it.

[43] Alternatively, the applicant requested that his services be declared redundant and his employment be terminated. He launched proceedings in the Labour Court seeking a declaratory order to that effect, but withdrew the proceedings when the first respondent engaged him in an attempt to resolve the problem.

[44] The first respondent tendered to set in motion the process set out in *Clause 4(14)* of his conditions of service. He accepted the tender. On the 22nd May 2001 the Clause (4) Committee constituted by the first respondent convened the *Clause 4(14)* enquiry.

[45] The Committee adopted the view that the applicant's post was abolished. In his view the Committee had to determine whether he had

been found an alternative post, or whether that alternative post was suitable having regard to his ability, qualifications, and experience.

[46] In the applicant's view *Clause 4(14)* came into effect only if an employee disputes that a post qualifies as an alternative post or whether it is a suitable post having regard to a person's ability, qualifications and experience. The Committee is not appointed unless there is an abolishment of a post. The Committee is appointed to determine whether the post is an alternative post or not or whether or not a post is suitable or not.

[47] The applicant states that the Committee members had different interpretations as to the applicability of the *Clause 4(14)*. The 1st respondent's view was that the applicant's post had not been abolished. The proceedings were postponed *sine die*.

[48] Soon after serving the Notice of Withdrawal of the Labour Court application, the applicant received a letter from the 1st respondent stating that, there was no point in proceeding with the *Clause 4.14* Committee enquiry, because he did not follow internal remedies, there was no necessity for the Committee to consider the matter any further.

[49] The applicant contends that the withdrawal of the Labour Court application was part of the settlement offer obliging the 1st respondent

to constitute the Committee and initiate the *Clause 4.14* process. By abandoning the *Clause 4.14* enquiry the 1st respondent was frustrating his attempts to exercise his rights in terms of his conditions of service.

[50] The applicant agrees that the Committee has no further function because his post with everything attaching to it, was transferred to the second respondent. The applicant states that there could not be an alternative post left for him to still occupy. It was impossible for the 1st respondent to find him an alternative post for the Committee to assess because, the complete property management portfolio, all his duties, functions, and responsibilities had been transferred to the second respondent. There was no post to assess. The Committee could not assess a non existent post.

[51] The applicant states that in a section 197 transfer, retrospective with effect from 1 July 2000 he never really had a choice. Once the Sale Agreement had been concluded, the fact that his name did not appear on the employee transfer list did not mean that he did not form part and parcel of the first respondent's Property Management and Administration business which was alienated to the City of Johannesburg Property Company (Pty) Ltd. The first respondent never had a choice, but to release him to the 2nd respondent. The second respondent or Ms Mckenna never had a choice, they had to accept him. Mckenna's refusal to accept him came down to an unlawful dismissal.

- [52] The applicant had accepted that if he was legally obliged to go to the second respondent he had to go. Nobody wanted to go to the second respondent. He did not have reservations as far as the company was concerned. He had reservations as far as the management of the company was concerned. Mckenna, without any background in property management, or any legal qualification was appointed to head this new company. In his view this was a negative concern to him.
- [53] The applicant had reservations being transferred to this new company, headed by someone who knew nothing about property management. What would happen if this company folded? It was a section 197 of the Labour Relations Act transfer, his services at the first respondent had been terminated.
- [54] The only reason why he never went to the second respondent was because Ms Mckenna had said she did not want him there. That was the *causa causens* of this whole fiasco. If Ms Mckenna had that day said that he must come she has had a job for him, none of this, not even this court case would have happened. He would have been working for the second respondent. He is not the one who refused to go to the second respondent, in fact he accepted that he had to go there.
- [55] He has no desire to be transferred to the second respondent. He accepts that his migration is lawful. He proffered no objection to the Migration Committee. He accepted his migration to

the Legal Services Department.

THE EVIDENCE OF KAREN BRITS

[56] She is the Executive Head of the 1st applicant's Legal Department.

Pursuant to Egoli 2000 Restructuring Process, the 1st respondent established the City of Johannesburg Property (Pty) Ltd in March 2000. The first respondent is the sole share holder thereof.

[57] The property administration and management functions of the 1st respondent were transferred to the second respondent in terms of *Section 197* of the ***Labour Relations Act 66, of 1995***. The outsourcing of the first respondent's property administration and management portfolio necessitated that its staff be transferred to the first respondent.

[58] The applicant was appointed as a Law Adviser: Property Management.

He was one of the persons who were supposed to have been transferred to the second respondent in accordance with the section197 sale of the first respondent's Property Management Portfolio "*as a going concern*".

[59] After the restructuring of the Legal Department and the establishment of the utilities and agencies, legal advisers were given an option to indicate their preference either to be placed in the Claims and Litigation, Town Planning and Tribunal, Committees or in the Specialist Legal Opinion

sections.

[60] The applicant did not elect to be placed in any of these sections. On the 17th November 2000, the applicant addressed a letter to the first applicant in relation to the Preference Form, stating that;

“In the various presently available choices, the word “property” does not appear in a single category,...he would be severely prejudiced if he had to compete with persons who had previous experience in the sections available for choice that, it was not his fault if the new dispensation does not provide for his accommodation”. The applicant was of the view that “his services cannot be utilized within the Legal Services Department”.

[61] Legal advisers including the applicant were given an option either to remain in the 1st respondent’s employment or to join the second respondent’s employment. She was seized with organizing the “migration” of the 1st respondent’s staff within the restructured entity.

[62] The first respondent had a staff compliment of about 27000 employees. The migration of staff was a huge and arduous process. The 1st respondent gave employees and their unions the assurance that 3 years from the inception of the restructuring, the employees jobs were guaranteed. She conveyed the applicant’s concerns about the migration process to Ms Mckenna, the Managing Director of the 2nd respondent who discussed the matter with the applicant. She was not party to the discussion. The outcome of the discussion was that the applicant was

not interested in being transferred to the 2nd respondent, and Ms Mckenna did not want the applicant to be transferred to the 2nd respondent.

[63] On the 1st February 2002 the applicant addressed a letter to her wherein he stated that because the 1st applicant *“was clearly unable to reinstate me in a post reasonably comparable to my former substantive post, it must admitted that my post as legal adviser. Property Management has since (1st October 2000) been abolished and my particular services no longer required.... That any termination of my services take place in terms of (my) conditions of services as existed on the 31st December 2001”*.

[64] On the 1st March 2002 the applicant launched an application in the Labour Court seeking an order declaring that, his former post as legal adviser: property management of the 1st respondent had been abolished by the transfer of his post to the second respondent, that as a consequence of the reorganization of the 1st respondent or its staff he had become redundant.

[65] On the 20th March 2002 the 1st respondent's attorneys pointed out to the applicant that he had neglected to follow internal remedies available

to him in terms of his employment contract concerning the alleged abolishment of his post, that *Clause 4.14* of his conditions of service provides, that in the case where one alleges that one's post has been abolished, a Committee, must be constituted to determine the question whether the post has indeed been abolished, and if so, to provide an alternative post or to allow one to elect to retire on the grounds that one's post was abolished.

[66] She had no previous knowledge how a *Clause 4.14* Committee functioned, but was aware that such a Committee had to make a finding whether the applicant's post was abolished and if so, whether there was a suitable alternative post suitable to the applicant, having regard to his ability, experience and qualifications.

[67] The Committee was constituted. At the inception of its proceedings in June 2002, the chairperson announced that the meeting was convened pursuant to the fact that the applicant's post had been abolished. She objected to this assertion and stated that her understanding of the process was that the Committee had to determine whether the applicant's post was abolished or not.

[68] Her view was that the applicant's post was not abolished, as a consequence the Committee could not consider whether the applicant was occupying a suitable alternative post as from the time he was

migrated to Legal Services or after the establishment of the 2nd respondent on the 30th March 2000.

[69] The applicant according to his job description was primarily a Legal Adviser. The applicant was a specialist property management law adviser.

[70] She addressed a notice to all Legal Advisers informing them that due to the high level design, the Legal and Compliance Department's structure was to be reviewed. Pursuant to such restructuring, the applicant was allocated to the Town Planning and Tribunal section reporting to Ms Nana.

[71] The applicant's new deployment did not mean that his previous post was abolished. The applicant's deployment was purely to facilitate the reality of the 1st respondent's changed structure. The first respondent's view is that legal adviser remains a legal adviser.

[72] She deployed the applicant to the Town Planning and Tribunal Section because during the Clause 4.14 Committee proceedings, the applicant had mentioned that he did not have sufficient work to occupy him.

[73] On the 31st December 2001, the applicant addressed a letter to the first

respondent stating that: *“I am definitely leaving the Council and the only issues that remain are whether:-*

- i) I should take the voluntary severance package for which I qualify;*
- ii) I should go on pension, (and whether I should go on normal pension, take a % lump sum or take a single lump sum);*
- iii) I should claim redundancy; and*
- iv) I should take a transfer to for example to Propcom on the same basis as on which Vic Rothman is leaving”.*

[74] When the applicant agreed to the Clause 4.14 Committee proceedings it an about turn of events. On the 23rd July 2002; She addressed a letter to the applicant confirming that: *“his transfer to the Town Planning and Tribunal Section. The reason for such transfer was that this unit dealt with property development and would suit the applicant’s qualifications and knowledge”.*

[75] The applicant was a highly qualified specialist lawyer who had to familiarize himself with the demands of the unit. She subsequently obtained a report from Ms Nana that the applicant was coping with unit’s demands and was left to his own devices.

[76] In her opinion, the applicant fitted in the Legal Department. It was not necessary to have to effect a change to the organo-gram. The applicant

was employed. The organo-gram did not reflect people, it reflected functions.

- [77] She did not want the applicant as a senior person to report to another person. The applicant reported to her unit until she knew what the position was. In February 2002 she became aware that the applicant did not have enough work to keep him fully occupied.

THE EVIDENCE OF SORAYA NANA

- [78] In November 1995 she was appointed acting Director of Legal Services in the Town Planning and Tribunal Section. She had a discussion with the applicant regarding his transfer to her department. She told the applicant to familiarize himself with the duties and functions of the department. She requested the applicant to comment on various reports on diverse subject matters and to provide legal opinion on property related matters. The applicant attended Tribunal hearings and Township Board meetings as a legal adviser. In some instances when confronted with major issues, she would seek the applicant's opinion.
- [79] A Legal Adviser is obliged to assist in another section but that does not mean that a new post has been created. She can request a legal adviser to assist in committee meetings to offset short staffing problems. She did staff performance appraisals in 2003. The applicant did well in the appraisals and attained 100% score.

[80] The applicant is one of the most senior Legal Advisers. She considers the applicant to be an integral part of her section. There would be huge prejudice to the section and the 1st respondent if she were to lose his services. The applicant did not complain that he is under utilized.

[81] The applicant is a fully fledged Legal Adviser and has become an integral part of her department. The applicant serves on four committees;

(a) The Township Planning Committee, where he is the chairman. The applicant gives legal advice to the committee where in some cases counsel appears. Committee members rely heavily on legal advisers.

(b) The Township Appeal Board hears about 15 appeals a year over town planning issues. The Board has to have a Legal Adviser. It is important that the 1st respondent be represented.

(c) The Soweto Development Community sits once a month. It is a new committee, as it evolves there might be legal issues.

(d) The Environment Planning Committee sits once a month and deals with environmental issues. The 1st respondent will need legal advice in trying to curtail diesel emissions from motorvehicles.

[82] The 1st respondent's Council relies on Legal Advisers. Council official have to be given legal advice. To ensure the legality of resolutions all committees must have legal advisers.

THE APPLICANT'S SUBMISSIONS

[83] The applicant states that since he was not transferred to the second respondent, his substantive post as Legal Adviser: Property Management was abolished retrospectively as from the 1st July 2000 further that as a result of the exclusion of his name from the list of “property employees,” alternatively upon his migration on the 1st March 2000, to the 1st respondent’s Legal Department, the 1st respondent’s property functions were transferred to the second respondent consequently, his former post was effectively abolished.

[84] The applicant states that in March 2001 Ms McKenna the Managing Director of the second respondent unlawfully dismissed him, by refusing to accommodate him in the 2nd respondent’s employ.

[85] The applicant states that on the 26th March 2001, Ms Brits offered him an alternative post as Legal Adviser: Property Management or a new post with entirely different functions and responsibilities in the property management department than he had previously performed.

[86] The applicant contends that he was never employed by the first respondent as a Legal Adviser, but that he was employed as a specialist property manager and states that he obtained his qualifications pursuant to and in accordance with the duties and functions of his particular post.

[87] The applicant contends that compared to what his functions previously entailed, the present post is not comparable to his previous post which he contends was abolished and has consequently triggered Clause 4.14 of his conditions of service.

[88] The applicant argues that since March 2001 when the 1st respondent offered him a post which *“never really existed and is therefore not suitable for him,”* his considered view is that the 1st respondent should have proceeded in accordance with *Clause 4.14.3* of his conditions of service and formally appointed him in the “other” post which he has been occupying for the past 2½ years, with the right to invoke *Clause 4.14.4* within 12 months to either, accept this new post as Legal Adviser: Town Planning and Tribunal alternatively, if he so decided against accepting this post, to retire due to the abolishment of his post.

THE RESPONDENT’S SUBMISSION

[89] The first respondent’s proposition was that once a person had developed expertise in a particular area, that person’s post is not limited by that expertise, the first respondent is entitled to deploy that person in another area where such person would have to learn new things without making his former post redundant.

[90] The first respondent does not dispute the proposition that law advisers

over time, specialize or focus in particular areas. The proposition is that a Law Adviser is a generic role and the responsibilities thereof can change in any direction, as dictated by the needs of an employer.

- [91] It is common cause that the applicant's name was not at the time of the conclusion of the Business Sale Agreement included in Annexure "C" the list of employees transferred to the second respondent Ms Brits states that at that time the first respondent *"did not identify the applicant as an employee eligible to be transferred to the second respondent"*.
- [92] The first respondent contends that the genesis of the dispute arises from this omission, and states that when the applicant was not transferred to the second respondent, he did not contend that he should be transferred, neither did he seek to secure his transfer from the first respondent to the second respondent, that on the contrary, the applicant preferred not to be transferred, and readily accepted his re-deployment within the service of the first respondent.
- [93] The first respondent contends that the applicant's employment has not been terminated, that subsequent to the transfer of its *"Property Management Business"* to the second respondent, it has deployed the applicant within its employ in an appropriate manner having regard to his qualifications, experience and ability.
- [94] The first respondent contends that the *applicant "has for a prolonged period following the business transfer, refused to show any interest or*

initiative in providing legal services in any other field and has adopted the position that he must either be provided with property related work or be dealt with on the basis that his post as legal adviser property management has been abolished”.

[95] The first respondent contends that although, the applicant’s post was formally designated as legal adviser: property management, the applicant as a qualified attorney, may reasonably be expected to competently perform other legal work entrusted to him.

[96] The first respondent states that it has tendered to transfer the applicant to the second respondent and says the applicant refused the offer when it was made clear to him, that he would not be entitled to redundancy benefits as a consequence of such transfer.

THE ANALYSIS AND EVALUATION OF EVIDENCE

[97] It is common cause that Clause 4.14 of the applicant’s conditions of service is a contractually binding obligation on both parties determining their employment relationship.

[98] *Clause 4.14.* provides that an employee whose post has been abolished may be found an alternative post within the service provided such post;

i) *is in the opinion of the Committee referred to in subsection 4.14.2 reasonably suitable for the employee having regard to this ability,*

experience and qualification;

- ii) has at least the same remuneration as the abolished post.*
- iii) in the event of such alternative post not being available another post may be found within the service;*
- iv) when such employee accepts another post referred to in subsection 4.14.3 he may, at any time within twelve months after the date on which his previous post was abolished, elect to retire on the grounds that such post was abolished, ...”*

[99] The applicant accepted his migration effective as from the 1st March 2001 to Legal Services. In his letter of acceptance he stated that: *“It would appear as if the organo-gram will show him as having been deployed (“migrate”) to Legal Services”.*

[100]The applicant states that first respondent was clearly unable to reinstate him in a post reasonably comparable to his former substantive post. He accordingly requested that the first respondent admit that his post as legal adviser: property management, which was transferred to the second respondent had been abolished and his specialist services were no longer required.

[101] *In the same letter the applicant stated that: “I have no desire to be deployed, migrate or seconded to Johannesburg Propcom (Pty) Ltd and I hereby accept my migration on my substantive post to Legal Services with effect from 1st March 2001 as set out in my letter to the Acting*

Municipal Manager dated 26th February 2001. The only problem would appear to be the fact that my substantive post as Legal Adviser: Property Management seems to have been abolished simultaneously with the disappearance of the Property Branch from Corporate Services. ...I reserve my rights to claim redundancy and/or take whatever other steps may be appropriate”.

[102] The first respondent's position was that the applicant's post had not been abolished because his post was that of a law adviser or a legal adviser. The first respondent states that the applicant's previous post has actually continued to exist in its restructured regime, requiring comparable levels of responsibility within the organization and calling upon the applicant to perform those responsibilities, and states that the applicant's specialist services were required.

[103] The first respondent's view is that finding the applicant a suitable alternative post for the purpose of avoiding the retrenchment is a fair labour practice. The first respondent argues that as a matter of the interpretation, *Clause 4.14* of applicant's conditions of service, coincide with its fair labour practices irrespective whether none of the alternative post's functions are the same as the applicant's previous post.

[104] The applicant states that he was prepared to negotiate with the second respondent to accept lesser conditions of service, that if he was not placed at an appropriate level, he could have been made a consultant

as long as he had reasonably the same seniority, functions, conditions of service and benefits as before, he was quite prepared to go to the second respondent's employment.

[105] In terms Clause 4 of the Purchase and Sale Agreement between the City of Johannesburg Metropolitan Municipality and City of Johannesburg Property Company (Pty) Ltd, the latter purchased the Property Management Business excluding the property Portfolio and any rights and obligations pertaining to the Property Portfolio (which shall remain the property and obligation of the (OJ) as a going concern and an income earning activity, with effect from the Effective Date the 1st July 2000, subject to the terms and conditions set out in this Agreement”.

Clause 12 Employees

12.1. The parties agree that the Business

transferred in terms of this Agreement is transferred as a going concern as contemplated in **Section 197(1)(a) read with Section 197(2)(a) of the *Labour Relations Act 66 of 1995 (“the LRA”)*** and consequently the provisions of *Section 197* will operate to transfer the contract of each employee listed in Annexure “C” to the JPC, and the JPC will employ such employee with effect from the Effective Date

*12.2. The JPC accordingly undertakes to take over all the affected Employees of the Business as listed in Annexure “C” in terms of Section 197 of the LRA, on the same terms and conditions, *mutatis mutandis*, as*

existed in the employment contracts of each of the affected Employees as at the Effective Date. The JPC undertakes further that it will recognize the duration of service of each employee, and all other benefits owed by the COJ to the Affected Employees, so that such benefits will be attributed to such Affected Employees.

12.8. The COJ undertakes that it will use commercially reasonable efforts to allow or procure the allowance of the Affected Employees who are transferred to the JPC as provided in this Agreement to continue to enjoy the normal existing benefits relating to medical and, pension, housing, group life insurance and such other benefits as the COJ may legally continue to allow the Affected Employees in terms of any law in force.

[106] On the 8th March 2004 the City Manager addressed an internal memorandum to Ms Brits stating that: *"My office has no problem with the transfer of Mr Nel on the condition that he is transferred with the salary budget, and further that any future increases will be the responsibility of JPC"*.

[107] ***In NBS Boland Bank Ltd v One Berg River Drive CC and Others, Deeb and Another v Absa Bank Ltd, Friedman v Standard Bank of SA Ltd 1999(4) SA 928 (SCA)***, it was held that *"it is a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such discretion must be arbitrio boni viri"*.

[108] *The first respondent has obligation in finding the applicant a suitable alternative post to “act reasonably and to exercise a reasonable discretion in arriving at a reasonable decision”.*

See Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OIC Franchise Division 2004 (5) SA 458 (SCA)

[109] I proceed to determine whether the first respondent acted reasonably and took all reasonable steps to find the applicant a suitable post having regard to his ability, experience and qualifications, that is did the first respondent exercise its discretion *arbitrio boni viri* as regards the applicant.

[110] In a memorandum dated the 7th November 2003, addressed by Ms Brits to the City Manager, after the applicant instituted the initial Labour Court application to be declared redundant, she conceded that the applicant should, with effect from the 1st July 2000, have been transferred to the second respondent in accordance with Business Sale Agreement. The 1st respondent's City Manager endorsed this notion.

[111] It is common cause that the applicant, the first, and second respondents engaged in negotiations with a view of securing the applicant's transfer to the second respondent.

[112] The applicant blames the first second respondent for refusing to transfer him in accordance with *section 197 of the Labour Relations Act*, 66 of 1995 and argues that the first respondent wanted his transfer to be on an entirely different

contract from his conditions of service, in that the latter stipulated that his transfer would not entitle him to invoke Clause 4.14.4 of his conditions of service.

[113] The first and second respondent blame the applicant for the aborted section 197 transfer negotiations, because they argue that he insisted that he would only accept the transfer if the post he was to occupy pursuant to such transfer, was to be regarded as another post entitling him after a year to be declared redundant should he so desire in terms of *Clause 4.14.4* of his conditions of service.

[114] The question is whether ***section 197 of the Labour Relations Act 66 of 1995*** obliges the respondents to negotiate with the applicant in order to obtain his consent regarding such transfer.

[115] ***In the case of Nehawu v University of Cape Town and Others 2002 4 BLLR 311*** it was held that where a business is transferred “*as a going concern*”, the consent of the employee is not required. Consequently, the applicant cannot lawfully object to his transfer to the second respondent, as in terms of *Section 197* of the ***Labour Relations Act, 66 of 1995*** the first respondent was obliged to transfer the applicant to the second respondent, and the latter is obliged to accept the applicant into its employment unless the applicant elected to be retrenched.

[116] The applicant on his own version states that: “*I never since March 2001*

*agreed to be transferred to the Johannesburg Property Company (Pty) Ltd. I had, in fact, developed serious reservations about working where I was obviously not welcomed. I, however, accepted that I may well ex lege have been transferred to JPC with retrospective effect from 1st July 2000 already, that I could possibly under these confusing circumstances be lawfully obliged to go to JPC still and that I was prepared to consider the conditions on which this could perhaps belatedly be arranged. I also assumed that none of us (Mrs Brits, Ms Mckenna and/or myself) may at the end of February 2001 have realized that in terms of **section 197 of the Labour Relations Act 66 of 1995** we never had any choice in the matter that the City was obliged to transfer me to JPC, that JPC was obliged to accept me and that I was obliged to go”.*

[117] The applicant contends that his substantive post with the first respondent as legal adviser Property Management seems to have been abolished “*simultaneously by with the disappearance of the Property Branch from Corporate Services.....Unless a similar Property Section is somehow recreated with the same status as before. “I have no desire to be deployed, migrated or seconded to Johannesburg Propcom (Pty) Ltd, and hereby accept my migration on my substantive post to Legal with effect from 1st March 2001”.*

[118] In my view the applicant’s post although abolished within the first

respondent's service because of business and legal constraints, it has been lawfully transferred in terms of **section 197 of the Labour Relations Act 66 of 1995** to the second respondent. This abolishment is in my view legally distinguishable from *"a conscious abolishment of a post either by closing down a section and declaring a post abolished or redundant as a result of restructuring"*.

[119] A post is abolished if the former duties attaching to it no longer exist. A post has been defined as *"a situation to which certain duties are attached"* per Innes C.J., ***in Union Government (Minister of Justice) v Schrierhout 1925 A.D. 322 at p.333.***

[120] The functions, responsibilities content and substance of the applicant's post as Legal Adviser: Property Management are as described and detailed by himself and need no further adumbration. The question is whether the post to which such duties and obligations were attached became abolished as contended by the applicant or as disputed by the first respondent.

[121] *"Abolish"* is defined in the ***Concise Oxford Dictionary*** as to *"formally put an end to (a practice or institution), that is the customary or expected procedure or way of doing something"*. The Applicant's post would in my view be abolished or become redundant or superfluous if the duties attaching to that post were no longer performed in the service

of the first respondent.

[122] A change in the designation of the incumbent to a post, or the title of the post does not render such post abolished or redundant. The decisive criteria is the job content, the duties, functions and responsibilities attaching to such post.

[123] The question whether the applicant's post has been abolished or not must be sought in the comparison between the duties which attached to the post Legal Adviser: Property Management which the applicant occupied up to the 1st July 2000, effective the date of the Section 197 transfer, and the post he occupied subsequent thereto or from March 2000 after the Property Management files were transferred to the second respondent.

[124] The 1st respondent conceded that the duties performed by the applicant after the property management files were transferred to the 2nd respondent were distinctly not the same as those he performed after the Section 197 transfer albeit that there was some property related work in the post the applicant occupied under Ms Brits and Ms Nana after the transfer of the property management files to the second respondent.

[125] The first respondent's contention is that the applicant is a specialist property Legal Adviser who can be deployed in any section of its Legal

Department, because in its view, a legal adviser is a Legal Adviser. In my view this contention has no merit.

[126] The applicant's post is *sui generis*. The functions and duties the applicant performed for the past eleven years before the alienation of the property management portfolio "*as a going concern*" to the second respondent, evolved because the first respondent owned a property portfolio which needed to be managed and administered.

[127] In my view the property management post was abolished when the 1st respondent transferred in accordance with Section 197 its Property Administration and Management Portfolio "*as a going concern*" to the second respondent with effect from the 1st July 2000. In law the post was transferred to the 2nd respondent.

[128] The objective *indiciae* justify the conclusion that *de jure* the 1st respondent consciously abolished the post Legal Adviser: Property Management with effect from the 1st July 2000 although *de facto* this happened in March 2000 by the transfer of the property related files to the second respondent.

[129] ***In West Rand Bantu Affairs Administration Board v Jacques 1976(4) SA 903(A)*** it was held that; "*where legislative provision created*

rights in favour of an incumbent of a post where such post was declared redundant (abolished) by the relevant authority, a formal declaration of redundancy (abolishment) did not have to eventuate before such rights could exist". It suffices if the objective facts prove that the 1st respondent's conduct, i.e. by selling the property management portfolio "as a going concern", justifies the conclusion that it intended to abolish the post property management from its service.

[130] **Section 197 of the Labour Relations Act, 66 of 1995** provides that:

"Transfer of contract of employment. – (1) In this section and in section 197A –

- (a) "business" includes the whole or a part of any business, trade, undertaking or service; and*
- (b) "transfer" means the transfer of a business by one employer 9"the old employer") to another employer("the new employer") as a going concern.*
- (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-*

- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*
- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;*
- (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or*

in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

(3) (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.

b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.

(4) Section (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied.

(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer”.

[131] The legal position is that the applicant's employment contract was as the

1st July 2000 transferred to the second respondent. Correspondingly the

applicant's post was also transferred. *De jure* effectively as at the 1st July 2000, the applicant became an employee of the second respondent, and legally ceased to be an employee of the first respondent.

[132] The legal position was that the applicant was as at the 1st July 2001 transferred to the second respondent unless he waived his right or requested to be retrenched. The factual reality is the Section 197 settlement negotiations were aborted in June 2004, whereafter the applicant elected not to be transferred to the second respondent.

[133] The factual situation is that the applicant since the 1st July 2000 has continued being in the employ of the first respondent because he elected to waive his right to his employment to the post Legal Adviser Property Management with the second respondent.

[134] *"A waiver is a form of a contract."* **See Roodepoort Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 WLD.** *Before a party can be held to have surrendered his right, he must know his right*" per Greenberg J at 226.

[136] There can be no doubt that the applicant fully appreciated the fact that the second respondent was legally obliged to take him into its employment in accordance with the *section 197 transfer*.

Correspondingly, the applicant fully appreciated that at that juncture, his erstwhile post Legal Adviser Property Management, no longer vested with the first respondent, but that it vested with the second respondent, that the post was consequently abolished within the first respondent's service.

[137] It is trite that a contracting party who has once approbated cannot thereafter reprobate. In this particular matter the applicant waived his statutory guaranteed right to be employed by the second respondent in his transferred post as Legal Adviser Property Management. In my view the applicant cannot be heard to demand his transferred former post from the first respondent, and claim that his erstwhile post has been abolished when he well knows that he has waived his right to that post, and claim that such abolishment entitles him to invoke *Clause 4.14.4* of his conditions of service to the prejudice of the first respondent.

[138] ***In Hlatshwayo v Mare and Deas 1912 AD 242, at 258-9*** De Villiers J A in a case whether a litigant has by his conduct acquiesced in a judgment and thereby lost the right to appeal against it, elucidated the position thus; “.....”*...it would seem that to constitute acquiescence there must be consent either in act or word. A person has the right to re-open the case or to appeal; he voluntarily chooses to do an act which is clearly inconsistent with this right, and he is therefore presumed to have consented to the judgment. Whether then we base the doctrine of acquiescence on the consent which is implied or the choice is*

exercised, or call it a waiver makes no difference. At the bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approve and reprobate”.

[139] Logically the constitution of the *Clause 4.14* Committee to determine whether the applicant’s post Legal Adviser Property Management was abolished or not was an exercise in futility because, the objective reality was that such post was transferred to the second respondent pursuant to the *section 197 Sale Agreement*. Factually the applicant’s property management post was rendered redundant within the 1st respondent’s service and thus abolished as at the 1st July 2000. Any suggestion by the 1st respondent that the post is not abolished has no merit.

[140] The “*situation*” to which the applicant’s duties and obligations were attached was the existence of the property administration and management portfolio. The applicant has since March 2000 being divested of the duties, functions and responsibilities of his erstwhile property management post and, has occupied the various posts allocated to him within the first respondent’s service.

[141] The deployment of the applicant to Ms Nana’s Town Planning and

Tribunal Section, and the requirement and need for the applicant to adjust and familiarize himself with the duties and functions of the section attests to the abolishment of the applicant's previous post.

[142] ***In the case of Plaaslike Oorgaansraad, Bronkhorstspuit v Sanekal 2001(3) SA 9 SCA at 11 para 15*** Olivier A J held that “*Vrywillige diensbeëindiging deur ‘n werknemer, so wil dit my voorkom, kan een van twee implementeringsvorme aanneem: ‘n bedanking deur die werknemer of konsensuele diensbeindiging*”.

[143] In my view the objective facts show that there was a consensual termination of employment by the applicant, the first and second respondent after their *section 197 transfer* negotiations broke down, that the applicant waived his right to his post with the second respondent and the latter accepted such waiver.

[144] What is certain is that the applicant and the first respondent after the 1st July 2000 and after the *section 197* aborted negotiations in June 2004, by conduct tacitly and subsequently expressly retrospectively with effect at least from the 1st July 2000 entered into a new employment contract in respect of a new post with the same *Clause 4.14* conditions of service formerly attaching to the applicant's transferred and or abolished post Legal Adviser Property Management applicable to the new post of the 1st March 2001 offered by the first respondent, and accepted by the

applicant.

[145] The applicant in August 2000 following the Egoli 2000 restructuring process was offered to select positions in the utilities and agencies, three positions in order of preference in the Legal Services Department, and three deputy directorships.

[146] The applicant declined all these offers, citing as the basis of such rejection that the word “*property*” did not feature in the Preference Form, that he would be severely prejudiced, for example, if he were to compete with Edelstein, who had been working in the Claims and Litigation Department for the past 12 years and was the present Acting Manager, or Pretorius who has held the position Manager: Special Legal Opinions and General.

[147] On the 26th February 2001 AV Dlamini the acting Manager expressly formalized the contract of employment by addressing a letter to the applicant in the following terms “*We refer to the transfer of your employment contract, on the same terms and conditions, to the City of Johannesburg Metropolitan Municipality with the announcement of the results of the municipal elections on 6th December 2000.*

As you are aware, the transfer from the City of Johannesburg to the utilities and agencies took place in January 2001 so that the City is now in a position to move into migration, the final phase of the transformation process. It will be recalled that migration refers to the “internal transfer”occur shortly

within the new City of Johannesburg....we are now pleased to confirm that you will be migrated on your substantive post to Legal, to take effect on the 1st March 2001....

As advised, you will continue on the same terms and conditions until they are lawfully changed. You will therefore continue to be paid the salary attaching to your substantive post, and will remain on the same retirement fund and medical aid arrangement”.

[147] The question is whether the new post offered to the applicant on the 1st March 2001 is a suitable post. The applicant has no legal authority to insist to be appointed into a post and designation of his own description after waiving his right not to be transferred in terms of **Section 197 of the Labour Relations Act, 66 Of 1995** to the second respondent.

[148] The applicant cannot lawfully insist that the delineation of the ambit and extent of his functions have to be equivalent to his erstwhile transferred and/or abolished post Legal Adviser: Property Management.

[149] The applicant’s contention that the new post he has occupied from the 1st March 2001 is not an alternative post or a reasonably suitable post as contemplated in the conditions of service attaching to his transferred and/or abolished post of Legal Adviser Property Management, is ill conceived and misconstrues the existing legal position.

[150] The investitive jurisdictional pre-requisites which trigger the *Clause 4.14*

conditions of service formerly attaching to the post Legal Adviser: Property Management are no longer extant because the post Legal Adviser Property Management was transferred to the second respondent in accordance with *section 197* of the Act.

[151] The applicant cannot lawfully invoke the investitive jurisdictional prerequisites pertaining to the abolished post within the 1st respondent's service, because the present post effective from the 1st March 2001 exists and is occupied by the applicant. The applicant cannot in respect of the new post of the 1st March 2001 invoke *Clause 4.14.4* because this post has not been abolished.

[152] The applicant was legally entitled to insist on being transferred to the second respondent on the same terms and conditions of service governing his post Legal Adviser: Property Management with the first respondent.

[153] The applicant instead elected to remain in the first respondent's employment with a view of being employed in a suitable post, having regard to his status, qualifications, ability, and experience as long as such post incorporated his erstwhile conditions of service.

[154] "*Suitable employment*" has been defined as a post to which conditions of employment attaching thereto are "*reasonably equivalent to those under*

the previous employment not the same”.

[155] ***In Stellenbosch Farmer’s Winery (Pty) Ltd v National Union of Spirits and Allied Workers (1992) 13 ILJ 1182 LAC***, defined “suitable alternative employment” as employment which is suitable to the employer and the employee, that the word ‘suitable’ connotes flexibility. It does not mean identical or even similar.....Nor does it connote the concept of equivalent or better’.....the concept of suitable alternative employment’ encompasses permissible deviation from the position originally held”.

[156] The new post offered to the applicant encompasses the same terms and conditions of service as his previous post. The post is graded the same as his previous post, the remuneration, pension and medical aid benefits are the same as his previous post, the reporting level is the same, so is the status of the post having regard to the fact that the applicant has not lost any of his benefits and service period with the first respondent, and applicant has occupied this post for the past 5 years.

[157] The applicant misconceives the legal status of a suitable alternative post by comparing its job content with his previous post Legal Adviser Property Management. The fact of the matter is that the new post the applicant is presently occupying is a distinctly different post within the 1st respondent’s service, and this post is suitable to the applicant’s

ability qualifications and experience.

[158] There is no legal obligation on the first respondent to recreate a post similar in content and functions with the applicant's former Legal Adviser Property Management post.

[159] The applicant by insisting that the first respondent should recreate his previous post, misconstrues the employment relationship. An employer has an unfettered right to create and identify a post as dictated by the requirements of its organization, not the requirements of an employee.

[160] The applicant and the first respondent negotiated the new employment contract on the 1st March 2001 which encapsulates Clause 4.14 conditions of service. The concept suitable post having regard to the applicant's ability, qualifications and experience, in relation to "*an employee means conditions of employment which are reasonably equivalent to those under the previous employment not the same*", and

[161] "*encompasses permissible deviations from the position originally held*".

In my view the first respondent exercised its discretion ***arbitrio boni viri*** in respect of its dealings with the applicant.

[162] Consequently, the applicant's statement of case is dismissed with costs.

Signed at Johannesburg on the June 2008.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

FOR THE APPLICANT: MR THOMPSON,

INSTRUCTED BY: THOMPSON'S ATTORNEYS

FOR THE RESPONDENT: MR G TODD

INSTRUCTED BY: BOWMAN GILFILLAN INC

DATE OF HEARING: 12TH AUGUST 2007

DATE OF DELIVERY OF JUDGMENT: 30TH JUNE 2008

