FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, MTHATHA

JUDGMENT

PARTIES**:** **Lawrence Ndzimeni Mambila**

VS

Nyandeni Local Municipality

1. Case No.: 1274/08
2. Magistrate:
3. High Court: **EASTERN CAPE HIGH COURT, MTHATHA**

DATE HEARD: 11th June 2009

DATE DELIVERED: 06 August 2009

JUDGE(S): Miller J.
LEGAL REPRESENTATIVES –

Appearances:

1. for the Applicant : P.H.S Zilwa
2. for the Respondents D. C Botma

Instructing attorneys:

1. Applicant: Dzingwa & Ass.
2. Respondent: Wikus Van Rensburg Attorneys.

CASE INFORMATION -

1. *Nature of proceedings*: Civil – Enforcement – Contractual Agreement.

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT : MTHATHA

CASE NO. 1274/08

In the matter between:

LAWRENCE NDZIMENI MAMBILA **Applicant**

and

NYANDENI LOCAL MUNICIPALITY **Respondent**

JUDGMENT

MILLER, J.:

[1] The applicant seeks the following relief:

> **2. An order declaring the respondent's repudiation of the agreement dated 05 August 2008 to be unlawful.**
>
> 3. **An order declaring the respondent's calculations of the deduction to the value**

of R1160905.53 to be unlawful and of no legal force and effect.

4. An order directing the respondent within five days of the order being granted to calculate and account for, in consultation with the applicant, the lawful deductions to be made to the monies to be paid to the applicant.

5. **An order directing the respondent to, within five days of the lapse of the time period mentioned in paragraph 3 above, comply with the agreement by paying the monies due to the applicant, less lawful deductions, if any.**

6. An order directing the respondent to pay the costs of the application.

[2] The applicant and the respondent entered into a written contract of employment on 30 November 2007 in terms of which, *inter alia*, the respondent employed the applicant as it's Corporate Services Manager for a period of five years, such period being deemed to have commenced on 01 July 2006 and therefore being due to terminate on 30 June 2011.

[3] During February 2008 the Auditor-General submitted his report on the financial statements of the respondent for the year ended 30 June

2007 to the respondent. Such report revealed a number of deficiencies relating to the respondent's financial statements.

[4] During March 2008 Deloitte and Touche, registered auditors, submitted their report on the review they carried out of the respondent's payroll expenses. Amongst their finding was that certain employees of the respondent at management level had received unauthorised overpayments. They recommended, *inter alia*, that all overpayments be fully quantified and recovered from the employees concerned. Deloitte and Touche also submitted a report to the respondent concerning their investigation of certain anomalies identified by the Auditor-General. In this report they recommended that disciplinary action be taken against certain employees, including the applicant.

[5] The applicant was then suspended and disciplinary proceedings were instituted against him. These proceedings never got off the ground. The applicant, through his attorney, objected to his suspension and the nature of those proceedings on the basis that the applicant's employment contract provided that where disciplinary proceedings are initiated against the applicant such disputes shall be resolved through pre-dismissal arbitration under the auspices of the Commission of Conciliation Mediation and Arbitration. Threats were made to resort to the Court in order to get an order restraining the respondent from proceeding with its disciplinary enquiry.

[6] The respondent then, being loathe to enter into protracted and costly Court proceedings, accepted the advice of its legal consultant to consider a settlement in terms of which the applicant and the respondent would part ways on mutually acceptable terms.

[7] This led to a settlement agreement being entered into between the parties on 05 August 2008. The agreement reads as follows:

"SETTLEMENT AGREEMENT

WHEREAS there is a valid existing employment contract between the parties

WHEREAS the said contract is due to expire on the last day of June 2011

NOW THEREFORE, the parties wish to record the following:-

4. INTRODUCTION

The parties wish to record the provisions of a settlement of all legal disputes between themselves. The agreement is expressly entered into without either party admitting any liability to the other and is concluded for the sole purpose of avoiding the costs generally associated with unnecessary ongoing litigation process.

5. TERMINATION OF DISCIPLINARY ACTIONS

The employer will withdraw the disciplinary action that has been instituted against the employee Mr L. Mambila with immediate effect. The employee, Mr L. Mambila, equally waives away any right to litigate he may have against his employer, Nyandeni Local

Municipality, for causes of action that arose before the conclusion of this contract.

6. SETTLEMENT PAYMENT

The parties have agreed that

3.1 The employment relationship between the parties is irretrievably broken down.

3.2 The employer is intent in not further performing its employment obligations with employee

3.3 For the reason in 3.2 above the employee will tender his resignation on the following conditions:

3.3.1 A sum of R1615531.51 (One Million Six hundred and fifteen thousand five hundred and thirty one rand fifty one cents only) be paid to the employee as the compensation for the breach.

3.3.2 The employee's resignation will take effect automatically immediately upon payment of the lump sum.

3.4 The aforesaid payment excludes payment for leave gratuities, which payment will be paid simultaneously with the payment of the lump sum.

3.5 The said payment shall in effect constitute an *ex gratia* payment, less any amounts owing to the South African Revenue Services ("SARS") if any. This

agreement will also include lawful deductions, if any.

7. **INCOME TAX**

   The employee, Mr L. Mambila, hereby authorises the employer to deduct and pay on his behalf all sums due to SARS in terms of the Income Tax Act, if any, in terms of this agreement.

8. **CONFIDENTIALITY**

   The parties to this agreement shall keep the terms of this agreement confidential and shall not disclose such terms to any third party (including the media), other than with the express written authority of the other party : save where such disclosure is required by law and/or in order to enforce the provisions of this agreement. The parties expressly agree that, should either of them breach confidentiality by disclosing the terms of this settlement agreement, the other party shall, at its election, be entitled to demand that everything done under this settlement agreement be restored and that the parties be placed in the positions that they were prior to the conclusion of this settlement agreement.

9. **FULL AND FINAL SETTLEMENT**

   This agreement is in full and final settlement of all and any claims arising out of the employment relationship between the employer

> **and employee, whether arising out of contract, delict or any statutory provision or otherwise or unlawful act on the part of the employer, for causes of action that arose before the conclusion of this contract. No agreement varying, adding to, deleting from or cancelling this agreement shall be effective unless reduced to writing and signed by or on behalf of the parties."**

[8] The applicant's attorneys then, on 18 August 2008, wrote a letter to the Acting Municipal Manager of the respondent in which they requested advice of any deductions to be made from the agreed settlement amount. The said official of the respondent responded in a letter dated 19 August 2007, saying that the lawful deductions include R587942.00 in respect of PAYE as advised by SARS, R563270.43 in respect of unlawful salary increments dating back to 01 July 2006 and R9693.10 in respect of UIF. He stated in the letter that the deduction in respect of unlawful salary increments is lawful because of a resolution taken by respondent's Council on 30 July 2008. He also warned that if nothing is heard from the applicant by 21 August 2008 the respondent will deem him to have repudiated the settlement agreement before the due date of performance.

[9] The applicant's attorney then, on 21 August 2008, wrote another letter in which it was stated that the applicant is "intent on pursuing the settlement agreement at all costs". A request was also made for a detailed breakdown of the proposed deductions and also for copies of the advice from SARS as well as the Council resolution of 30 July 2008. The respondent then responded by letter dated 22 August 2008, saying that

applicant is familiar with the process of tax deductions and if he disagrees with the amount to be deducted he should provide the respondent with the correct amount and also that the applicant is aware that a Council resolution which was taken on 30 July 2008 exists.

[10] Thereafter further correspondence between the applicant's attorney and the respondent was exchanged. In such correspondence, the applicant denied that he had repudiated an agreement and disputed the correctness of the amounts to be deducted, in particular, the amount relating to tax and continued to request information as to how the amount was arrived at. The respondent did not provide any further information and took the stance that the applicant had repudiated the contract. It informed the applicant's attorney that it accepts the repudiation and that the agreement is formally cancelled and no longer exists. It called upon the applicant to attend an 'internal disciplinary process' on 09 and 10 September 2008.

[11] The applicant did not attend the disciplinary process on 09 September 2009 but, instead, launched these proceedings on that date. The applicant then, on 29 September 2008 wrote a letter to the respondent in which he informed that he, with immediate effect, resigns his employment as the respondent's Manager for Corporate Services.

[12] The applicant, in his founding affidavit, insists that he did not repudiate or breach the agreement. He states that he disagreed with the amounts that the respondent was going to deduct in respect of lawful deductions and was merely calling upon the respondent to account for the lawful deductions in order for them to be agreed upon and settled. He contends that the deductions proposed by the respondent are unlawful because the amount deducted for tax is incorrect and the amount deducted

in respect of his salary increments was arrived at by the respondent unilaterally and without any consultation with him.

[13] The respondent, in its answering affidavit, raised three defences, namely, that the signatory to the agreement lacked the necessary authority for purposes of entering into an agreement binding the respondent, alternatively, that in the event of it being found that the respondent's signatory did have authority, that there was no consensus in respect of the essential terms of the contract between the parties and, further alternatively, in the event of it being found that the agreement was lawful and enforceable, that the agreement had been terminated by the repudiation thereof by the applicant by resigning on 29 September 2008.

[14] With regard to the deductable amount relating to tax, the respondent states that one of it's officials calculated the amount using tax tables after being furnished with information from SARS that the applicant had not submitted tax returns for the past two years.

[15] The applicant in his replying affidavit states that the chairperson of the disciplinary proceedings of 05 August 2008 as well as the applicant asked Mr Sogoni, who was at the time the Acting Municipal Manager of the respondent and who represented the respondent in the agreement, whether he had a mandate to bind the respondent to which Mr Sogoni answered in the affirmative.

In response to the allegation that he had not filed tax returns for the last two years the applicant, in denying such allegation, filed a document issued by SARS which reflects that as at 04 August 2008 the applicant had no outstanding tax obligations.

[16] Mr Botma, who appeared for the respondent, has argued that the agreement is void and not enforceable because Mr Sogoni, the Acting Municipal Manager, did not have the authority to conclude the agreement on behalf of the respondent. In this regard it is argued that in terms of section 60(1)(b) of the Local Government Municipal Systems Act, 32 of 2000, the powers of determination or alteration of the remuneration benefits or other conditions of service of managers directly responsible to the municipal manager may be delegated by a municipal council to an executive committee only and further that, in terms of section 59(2)(b) of that Act, a delegation must be in writing. It was therefore submitted that as it is common cause that the respondent does have an executive committee and because it is not disputed that respondent's council did not delegate the power to conclude a settlement agreement to Mr Sogoni it follows that Mr Sogoni did not have the authority to bind the respondent in the agreement.

[17] While this argument may be correct insofar as it relates to the powers of the municipal council and the executive committee concerning the remuneration benefits and other conditions of service of managers, I do not believe that, in the circumstances of this matter, the defence that Mr Sogoni lacked the necessary authority can succeed. I say so on two grounds. Firstly, I believe that there is merit in the argument of Mr Zilwa, who appeared for the applicant, that the municipal council authorised the acting municipal manager to institute disciplinary proceedings against the applicant and that during such proceedings the acting municipal manager, on the instruction of the mayor, initiated the settlement negotiations. The agreement, as can be seen from its heading, arose out of and was part of parcel of the disciplinary proceedings and was in fact entered into by the

parties as an endeavour to settle those proceedings and avoid litigation concerning the disciplinary process.

[18] Secondly, the applicant, at the time when the agreement was entered into, was on suspension and had been for sometime. He was therefore not in a position to know whether Mr Sogoni had been duly authorised by either the respondent's council or executive committee to conclude the agreement. The evidence that Mr Sogoni informed the chairperson of the disciplinary proceeding is contained in the applicant's replying affidavit. It is, to me, understandable why it was not raised earlier because the respondent's defence of lack of authority was not known to the applicant before the filing of the answering affidavit. The respondent did not apply for leave to file a further affidavit and accordingly such evidence stands uncontradicted. It is also, in my view, probable that the chairperson would have asked that question and I accordingly accept such evidence. The fact that the respondent's representative misled the applicant into thinking that the agreement was *intra vires* binds the respondent. See **Orange Benefit Society vs Central Merchant Bank Ltd 1976(4) SA 659(A) at 674-5** and **Christie : The law of Contract, 5th Edition at page 229.** In all the correspondence between the parties prior to the institution of these proceedings no mention at all was made to the agreement being *ultra vires* and invalid. In these circumstances I conclude that the agreement was valid and binding.

[19] I am also of the view that the respondent's contention that the agreement is unenforceable because there was no consensus in respect of essential terms thereof lacks merit. The wording of the agreement is clear and unambiguous. The fact that there is a dispute about the extent of or

what constitutes a lawful deduction does not render the contract unenforceable or invalid. Such deductions can be objectively ascertained.

[20] I am of the view that the request made by the applicant's attorney in his letter dated 21 August 2008 for a detailed breakdown of the proposed deductions was an entirely reasonable request. The amounts which the respondent wanted to deduct were substantial and were arrived at unilaterally by the respondent without any prior reference or consultation with the applicant or his attorney. The applicant's allegation that the amount deducted for PAYE tax may well be inaccurate. In this regard, the respondent's allegation that the applicant had not submitted tax returns in excess of two years and that SARS could therefore not issue a tax directive in respect of the payment to the applicant is refuted by the SARS printout annexed to the applicant's affidavit which reflects that the applicant was up to date with his tax payments as at 04 August 2008. Further, it is apparent from the tax table annexed to the respondent's answering affidavit that the PAYE tax on R1615531.51 (the agreed settlement amount prior to deductions) is R593222.60 (see also annexure NC 7 to the respondent's answering affidavit) and that the PAYE tax payable on R1052261.11 (the agreed settlement amount less the R563270.43 deduction in respect of unlawful salary increments) is R369914.44. In these circumstances the applicant was, in my opinion, justified in challenging the proposed deduction of R587942.00 in respect of PAYE tax.

[21] The applicant was also not given any details as to how the deduction relating to unlawful salary increments was arrived at. While I am of the opinion that unauthorised salary increments received by the applicant, if any, should be deducted from the agreed settlement amount,

I, again, believe that the applicant's request as to how the amount was arrived at was a reasonable request particularly so when consideration is given to the size of the amount involved and the probable incorrectness of the calculation relating to the deduction for PAYE tax.

[22] The respondent, instead of supplying the requested information to the applicant, took the stance that the applicant was in breach of the agreement for not accepting the correctness of the deductions and expressed its unequivocal intention to be no longer bound by the settlement agreement (see the respondent's letter dated 26 August 2008.)

[23] By doing so, the respondent, in my view, unjustifiably repudiated the agreement. As already stated the applicant's request for details regarding the deductions was entirely reasonable and the applicant had informed the respondent that he was "pursuing the settlement agreement at all costs (see applicant's attorney's letter dated 21 August 2008)".

[24] I am accordingly of the view that it was the respondent and not the applicant who repudiated the settlement agreement. The applicant therefore had the election of accepting or not accepting the respondent's repudiation of the agreement. He elected not to accept the repudiation, the resultant effect being that the repudiation was a nullity and the respondent remained bound by the agreement. See **Novick vs Benjamin 1972(2) SA 842 (AD) at 855**.

[25] I am also of the view that the applicant's resignation from the employment of the respondent on 29 September 2008 did not constitute either a breach or a repudiation of the settlement agreement. In this regard I agree with the submission made by Mr Zilwa, that in order to ascertain

whether the resignation was a repudiation of the settlement agreement one has to look at the material terms of such agreement. These terms include, *inter alia*, that the parties agree that the employment relationship between them is irretrievably broken down, that the respondent is intent in not further performing its employment obligations with the applicant and that the respondent will tender his resignation on condition that he be paid R1615351.51 as compensation for respondent's breach of the employment contract and that applicant's resignation will take effect automatically upon payment of the lump sum.

[26] It is apparent from these terms that the applicant in fact tendered his resignation when he signed the settlement agreement on 05 August 2008. All that remained at that time was for his resignation to automatically take effect upon payment to him of the agreed amount less lawful deductions. His employment with the respondent had, at that stage, effectively come to an end and, as has been submitted by Mr Zilwa, there was no further obligation of performance in terms of the settlement agreement expected of the applicant and he was free to look for alternative employment. In these circumstances I am of the view that his subsequent letter of resignation did neither constitute a breach or repudiation of the settlement agreement nor have the effect of negating the respondent's unlawful repudiation thereof.

[27] I am accordingly of the opinion that the respondent remains bound to perform in terms of the settlement agreement and that the applicant is, subject to slight alterations, entitled to the relief he seeks.

[28] The following order is therefore made:

3. **The respondent's repudiation of the settlement agreement dated 05 August 2008 (the agreement) is declared to be unlawful.**

4. **The respondent's calculation of the deductions to the value of R1160905.53 are set aside.**

5. **The respondent is directed to, within thirty days of the grant of this order, calculate and account for, in consultation with the applicant or his legal representative, the lawful deductions to be made from the agreed amount of R1615531.53.**

6. **The respondent is directed to, within ten days of the lapse of the time period referred to in paragraph 3 hereof, to comply with the agreement by paying the money due to the applicant less the lawful deductions therefrom.**

7. **That the respondent pay the costs of the application.**

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JUDGE OF THE HIGH COURT

HEARD ON : 11 JUNE 2009

DELIVERED ON : 06 AUGUST 2009

COUNSEL FOR THE APPLICANT : P.H.S. Zilwa

INSTRUCTED BY : Dzingwa & Associates

COUNSEL FOR THE RESPONDENT : D. C. Botma

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: Attorneys

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